Federal Court of Appeal  Cour d'appel fédérale

**Date: 20180112**

**Docket: A-116-17**

**Citation: 2018 FCA 7**

**CORAM:** **WEBB J.A.**
**BOIVIN J.A.**
**GLEASON J.A.**

**BETWEEN:**

**SHIYUAN SHEN**

**Appellant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Ottawa, Ontario, on November 1, 2017.

Judgment delivered at Ottawa, Ontario, on January 12, 2018.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: WEBB J.A.
GLEASON J.A.

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## REASONS FOR JUDGMENT

**BOIVIN J.A.**

I. Introduction

[1] The Appellant appeals from an Order by Fothergill J. of the Federal Court dated March 23, 2017 [2017 FC 118] allowing the Respondent Attorney General of Canada's (the Crown) application, under section 38 of the *Canada Evidence Act*, R.S.C., 1985, c. C-5 (the

CEA), to withhold disclosure of portions of two documents on the grounds that disclosure would be injurious to international relations.

[2] The two documents at issue in this appeal are authored by the Canada Border Services Agency (CBSA), and relate to an inadmissibility assessment conducted in respect of an officer with the Chinese Public Security Bureau (the Chinese PSB). The Appellant contends that he requires access to the unredacted portions of the two CBSA documents because they are relevant to his application for refugee status in Canada, as well as to his on-going claims against the Crown before the Refugee Protection Division of the Immigration and Refugee Board of Canada (the RPD) based on allegations of breach of the duty of candour and abuse of process. It is noteworthy that, after the hearing before this Court, the Appellant brought to this Court's attention a decision rendered by the RPD on October 31, 2017, wherein the RPD found that the Crown's conduct had in fact amounted to an abuse of process and ruled that much of the evidence that the Crown sought to tender from China (including the testimony of the PSB officer) was inadmissible (RPD Decision October 31, 2017, File No. VB1-00704 (paras. 5 and 18). This decision would render the present appeal largely moot as the issues in question were resolved in favour of the Appellant. However, the Crown filed an application for leave and judicial review of that decision on November 30, 2017 (IMM-5127-17)) which is still pending. Accordingly, notwithstanding the RPD's October 31, 2017 decision, it is still relevant for this Court to review Fothergill J.'s Order with respect to the Crown's section 38 application.

[3] For the reasons set out below, I would dismiss the appeal, but, in light of the conduct of the Crown in these matters, would not make any award of costs.

## II. Factual background and procedural history

[4] The procedural lead-up to this appeal is rather lengthy and roundabout. The following chronological list of events is meant to provide an overview to better situate the Appellant's proceedings leading to this appeal.

[5] The Appellant is a citizen of China. He left China over 15 years ago on February 3, 2002 and arrived in the United States on or about February 22, 2002 (Appeal Book, Vol. 1, Tab 5, Exhibit F, p. 220 at para. 10). Shortly after his departure from China, on April 3, 2002, the Chinese authorities issued an arrest warrant for his alleged involvement in contract fraud (Appeal Book, Vol. 1, Tab 5, Exhibit A, p. 41 at para. 4). Five years later, on May 26, 2007, the Appellant entered Canada. When he applied for permanent residence thereafter – at an unknown date – he was arrested.

[6] On March 9, 2011, the Appellant applied for refugee status in Canada. His application was denied by the RPD on May 6, 2013. The RPD's denial was made pursuant to article 1F(*b*) of the *United Nations Convention Relating to the Status of Refugees, July 28, 1951*, [1969] Can. T.S. No. 6, due to his alleged past involvement in a serious non-political crime in China (Appeal Book, Vol. 1, Tab. 5, Exhibit F, pp. 218-249).

[7] The Appellant sought judicial review of the RPD's decision denying his application for refugee status claiming that the Crown had not provided him with full disclosure. The Crown

conceded that there had been insufficient disclosure of information to the Appellant and consented to the application for judicial review for a new hearing before the RPD.

[8] Thereafter, the Crown nonetheless refused to provide the Appellant with certain documents. As a result, the Appellant sought and obtained an Order on September 15, 2014 from Beaudry J. of the Federal Court (*Shen v. Canada (The Minister of Citizenship and Immigration),* docket no. IMM-3740-13) directing the Crown:

> … to provide to the Applicant [Appellant] full disclosure of all materials relating to the Applicant [Appellant]'s matter which are in the Respondent [Crown]'s possession, in particular full disclosure of all documents received from the Public Security Bureau in China relating to the charges against the Applicant [Appellant].
>
> (Appeal Book, Vol. 1, Tab 5, Exhibit H, p. 265)

[9] Following this Order, the Crown disclosed to the Appellant the evidence it had obtained from the Chinese PSB – over 1,000 pages of documents. Reviewing this evidence, the Appellant found that much of it was relevant to his case and some was exculpatory towards him. Moreover, he was of the view that the evidence – particularly a statement made by the Appellant's sister – was likely obtained through the use of torture by the Chinese PSB. At this stage of the proceedings, the Crown had not yet disclosed to the Appellant the two CBSA documents at issue in this appeal, nor was the Appellant made aware of their existence.

[10] Following the disclosure by the Crown of the new evidence, the Appellant brought two motions before the RPD. The first motion sought to exclude all of the evidence that the Crown had obtained from the Chinese PSB on the basis that it was derived from torture. The second motion sought to stay the Crown's intervention in the Appellant's application for refugee status

on the basis that the Crown's failure to provide timely and full disclosure amounted to a breach of its duty of candour and to an abuse of process.

[11] The RPD dismissed both of these motions. With respect to the requested exclusion of the evidence from the Chinese PSB, the RPD found that the Appellant had raised a presumption that the evidence was derived from torture, but concluded that the Crown had successfully rebutted that presumption through the evidence of a Chinese PSB officer, whom it called to testify. With respect to staying the intervention of the Crown in the Appellant's application for refugee status, the RPD did not accept that "the [Crown]'s failure to disclose all of the documents … tainted the process to such a degree that it amounts to the clearest of cases" warranting a stay (2015 CanLII 107868 (C.A. I.R.B.) at para. 25). The Appellant then sought judicial review of the RPD's disposal of these motions before the Federal Court.

[12] On January 21, 2016, Fothergill J. of the Federal Court, the same Judge who rendered the decision that is the subject of this appeal, concluded that the Appellant's application for judicial review should be allowed in part (*Shen v. Canada (The Minister of Citizenship and Immigration)*, 2016 FC 70 [2016 FC 70]). He declined to intervene in respect of the RPD's decision denying the requested exclusion of the Chinese PSB's evidence allegedly derived from torture on the basis that such an exclusion would be premature (2016 FC 70 at paras. 23-24). However, Fothergill J. found that it was necessary to inquire into whether the Crown breached its duty of candour toward the Appellant, as well as into whether an abuse of process had occurred. Fothergill J. thus remitted the matter back for redetermination to the same member of the RPD

who was directed to hear questions relating to the Crown's duty of candour and abuse of process, and to determine the appropriate remedy, if necessary.

[13] On October 28, 2016, days prior to the hearing on redetermination before the RPD, the Crown disclosed the two CBSA documents at issue in this appeal to counsel for the Appellant (Appeal Book, Vol. 2, Tab 5, Exhibit N, pp. 482-511). The first document consists of an inadmissibility assessment conducted by the CBSA in respect of the officer with the Chinese PSB. The second document is a note to file with respect to the same matter. Both documents contained redactions. The Crown informed the Appellant's counsel that it would remove a certain number of redactions provided he agreed to certain confidentiality conditions. The less redacted version of the two documents would also be shared with the RPD and the Federal Court Judge, but would not be shared with the Appellant himself. Their use would be limited to the proceedings relating to the Appellant's application for refugee status. The Appellant's counsel agreed to these conditions, and hence received the less redacted version of the two CBSA documents leaving only small redacted portions. On November 16, 2016, the Crown brought an application before the Federal Court, pursuant to section 38 of the CEA, for an order to maintain the confidentiality of the small redacted portions of the two CBSA documents on the grounds that their disclosure would be injurious to international relations.

[14] In the meantime, given the new disclosure of the two CBSA documents at issue in this appeal, the Appellant's motion for abuse of process had been adjourned by the RPD.

[15] Given this new turn of events, the Appellant brought a motion before Fothergill J. of the Federal Court pursuant to Rule 399(2) of the *Federal Courts Rules*, S.O.R./98-106 for reconsideration and variance of his above-described Judgment dated January 21, 2016 (2016 FC 70). The Appellant argued that the Crown's failure to disclose the two CBSA documents – which had been authored by the CBSA in 2012 – or even their existence, was a clear breach of its duty of candour and amounted to an abuse of process.

[16] On January 30, 2017, Fothergill J. issued an Order with reasons declining to reconsider and vary his judgment (*Shen v. Canada (Minister of Citizenship and Immigration)*, 2017 FC 115 [2017 FC 115]). He stated that even if the Crown's failure to disclose the two CBSA documents had been known at the time of the earlier application, the outcome would have been the same: remit the matter to the RPD for a new inquiry into whether the Crown breached its duty of candour or whether an abuse of process had occurred. Nonetheless, the Court noted that "[t]he Crown's explanation for its refusal to disclose the [two] CBSA documents to Mr. Shen [the Appellant] until late 2016 is far from satisfactory" (2017 FC 115 at para. 30). Hence, he awarded costs to the Appellant (2017 FC 115 at paras. 35-36).

[17] Regarding the Crown's application dated November 16, 2016 pursuant to section 38 of CEA, Fothergill J. (hereafter referred to as the Judge) issued an Order maintaining the confidentiality of the redacted portions of the two CBSA documents and issued confidential reasons on January 30, 2017. The Judge then provided the Crown with an opportunity to determine whether any portion of his reasons should be redacted and, following an *ex parte*

hearing on March 7, 2017, the Judge issued public partially redacted reasons on March 23, 2017 (2017 FC 118). It is this Order from which the Appellant appeals.

## III. The Judge's Order

[18] In assessing the Crown's application under section 38 of CEA, the Judge applied the test developed by this Court in *Ribic v. Canada (Attorney General)*, 2003 FCA 246, [2005] 1 F.C.R. 33 [*Ribic*] to the facts of this case. This required the Judge to address the three following questions:

1. Is the redacted information relevant to the Appellant's claim for refugee protection, or his arguments with respect to the duty of candour or abuse of process?
2. Would disclosure of the redacted information be injurious to international relations?
3. If the answer to question 2 is yes, then does the public interest weigh in favour of maintaining confidentiality or ordering public disclosure?

[19] With respect to the first question, the Crown had conceded that the redacted information was "potentially relevant" to the Appellant's arguments that it had breached its duty of candour and engaged in an abuse of process and that the evidence it relied upon may have been derived from torture (2017 FC 118 at para. 5). On that basis, the Judge found that the first branch of the *Ribic* test was met.

[20] The Judge then turned to the second question – *i.e.* second branch of the *Ribic* test. In this regard, the Appellant submitted two Canadian decisions – *Han v. Canada (Minister of Citizenship and Immigration*), 2006 FC 432, 147 A.C.W.S. (3d) 1029 [*Han*]; and *Yuan v.*

*Canada (Public Safety and Emergency Preparedness)*, 2015 CanLII 97787 (C.A.I.R.B.) [*Yuan*] – which dealt with the admissibility into Canada of Chinese PSB officials. The Appellant claimed that, to the extent the redactions at issue included similar statements to those contained in the *Han* and *Yuan* decisions, there was little likelihood of injury to international relations from their disclosure.

[21] The Crown responded to this point in a closed *ex parte* hearing and Mr. David Hartman, a senior official with Global Affairs Canada, provided an *ex parte* affidavit as well as oral testimony in the closed *ex parte* hearing. Although the Judge's public reasons contain redactions with respect to Mr. Hartman's affidavit and testimony, they mention that Mr. Hartman was "unaware of any expression of concern by China" regarding (i) the *Han* and *Yuan* decisions; or (ii) the public versions (*i.e.*, redacted) of the two CBSA documents disclosed in the ongoing proceedings (2017 FC 118 at para. 11). The Judge also observed that "[t]he Crown's assessment of the injury to international relations that would result from disclosure of the protected information contained in the two CBSA documents is entitled to deference", but that the Crown was nonetheless required to provide some factual basis for its claim that injury to international relations would occur (2017 FC 118 at para. 6).

[22] In assessing Mr. Hartman's testimony, the Judge found him to be a "credible and capable witness" (2017 FC 118 at para. 13). The Judge further remarked that Mr. Hartman's oral testimony was a "significant expansion" on his affidavits (both public and *ex parte*) and that, although some of his evidence regarding the injury to international relations was "speculative", it was nonetheless owed deference since it related to the "conduct of foreign affairs" (2017 FC 118

at paras. 12-13). Ultimately, the Judge acknowledged Mr. Hartman's "undoubted expertise" and found that he had provided "concrete examples" of the injury that would result from disclosure (2017 FC 118 at para. 14). This satisfied the Judge that the second branch of the *Ribic* test was met.

[23] As for the third question, *i.e.* the third branch of the *Ribic* test, the Judge recalled that "the vast majority of the information contained in the two CBSA documents has been disclosed to Mr. Shen [the Appellant] without redactions. Less-redacted versions of both documents have been disclosed, subject to an undertaking of confidentiality" (2017 FC 118 at para. 15). As such, the Appellant's counsel was made aware of the conclusion of the CBSA's inadmissibility assessment, and there was "[n]o further factual basis for the [Canadian] officials' opinions in the protected portions of the two CBSA documents" (2017 FC 118 at para. 16).

[24] In engaging in the public interest balancing test and assessing whether the public interest weighed in favour of maintaining confidentiality or ordering public disclosure, the Judge identified the following relevant factors at paragraph 18 of his reasons:

- the extent of the anticipated injury;
- the importance of the underlying proceedings;
- the relevance or usefulness of the information; and
- the availability of the information through other means.

[25] The Judge found that in this instance the public interest favoured the protection of the redacted information (2017 FC 118 at para. 18). The Judge recalled that the redactions at issue related to observations made by the CBSA, and would be of little use to the Appellant. He also noted that without the redacted portions of the two CBSA documents, the Appellant was still

"well-positioned" to advance his arguments with respect to the possibility that the evidence relied on by the Crown to oppose the Appellant's refugee claim may have been derived from torture, as well as with respect to the Crown's abuse of process or breach of duty of candour (2017 FC 118 at para. 19).

## IV. Issues

[26] The issues in this appeal are as follows: Did the Judge err in his application of the *Ribic* test when he found that (i) the disclosure of the withheld information would be injurious to international relations; and (ii) the public interest, on balance, favoured non-disclosure.

## V. Analysis

### A. *Standard of Review*

[27] The Judge's application of the *Ribic* test in the present matter involved questions of mixed fact and law. His conclusions are therefore reviewable only for palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

### B. *Did the Judge err in finding that disclosure of the withheld information would be injurious to international relations?*

[28] The Appellant challenges the Judge's conclusion that disclosing the withheld information would be injurious to international relations. In this regard, he argues that the Judge erred in defining the threshold for non-disclosure and failed to consider the fact that the information at issue was already in the public domain. Yet, the Judge was careful to note in his reasons that he

would not “blindly endorse” the Crown’s applications for non-disclosure (2017 FC 118 at para. 6.) Although the Judge was precluded from providing further details in his public reasons, he had the benefit of hearing and assessing Mr. Hartman’s testimony and found that (i) he was a credible witness with “undoubted expertise”; and (ii) he had provided “concrete examples of the harm that would result if the protected information were disclosed”. As such, the Judge carefully weighed the evidence and properly deferred to Mr. Hartman’s expertise in the area of Chinese-Canadian relations for the purpose of drawing the conclusion that international relations would be adversely affected by disclosure.

[29] The Appellant also submits that the Crown was required to provide a factual basis to show that injury to international relations would result (not merely could result) from disclosure of the redacted information, and that the Judge failed to hold the Crown to this requirement (Appellant’s Memorandum of Fact and Law at para. 65). However, the Judge did not, as the Appellant suggests, misunderstand the threshold for non-disclosure as requiring the mere possibility of harm. The Judge’s repeated use of the word “would” at paragraph 14 of his reasons is sufficient to reject the Appellant’s argument. Indeed, the Judge’s reasons demonstrate that he was satisfied that injury to international relations was likely to occur should the redacted information be disclosed.

[30] Furthermore, the Appellant contends that the redacted information at issue is already in the public domain and that there is accordingly no possibility of injury by virtue of its disclosure. It should be recalled that the Judge found that “[t]he remaining protected portions of the two CBSA documents consist of observations by CBSA officials” (2017 FC 118 at para. 16).

According to the Appellant, these observations are similar to the statements contained in the *Han* and *Yuan* decisions and, as such, are already in the public domain. Even if the redacted portions did contain, as the Appellant suggests, expressions similar to those in the *Han* and *Yuan* decisions provided by him, that does not necessarily mean that the specific observations redacted in the two CBSA documents are already in the public domain.

[31] It follows that the Appellant has not demonstrated that the Judge committed any palpable and overriding error in finding that disclosure of the redacted portions of the two CBSA documents would likely cause injury to international relations. The Appellant's challenge in this regard must therefore be dismissed.

C. *Did the Judge err in finding that the public interest, on balance, favoured non-disclosure?*

[32] The Appellant challenges the Judge's conclusion regarding the public interest in not disclosing the redacted information at issue. On this point, the Appellant contends that the Judge unduly minimized the importance of the redacted information, failed to consider the broader public interest in disclosure, and also failed to consider the possibility of alternative disclosure to the Appellant's counsel only.

[33] Firstly, the Appellant contends that there are two competing public interests at issue in the present case: (i) the need to protect confidential information; and (ii) the need to hold the Crown accountable to the public for misconduct (Appellant's Memorandum of Fact and Law at para. 80). On the basis of the Crown's misconduct in this case, this Court, argues the Appellant,

should not permit the Crown to rely on international relations to "cloak itself" from criticism or accountability and the balance should therefore weigh heavily in favour of disclosure (Appellant's Memorandum of Fact and Law at para. 85).

[34] The Appellant's contentions are misplaced. In the circumstances, the need to hold the Crown accountable to the public for misconduct is not a factor that ought to be weighed in favour of disclosure. Rather, the need to protect confidential information needs to be balanced with the benefit it may bring to the Appellant in his underlying proceedings for refugee status. Indeed, as noted earlier, the Judge identified the four factors which he considered the most relevant in this case, namely: the extent of the anticipated injury; the importance of the underlying proceedings; the relevance or usefulness of the information; and the availability of the information through other means (2017 FC 118 at para. 18).

[35] In so doing, the Judge focused mainly on the relevance or usefulness of the redacted information to the Appellant. This focus was entirely appropriate since the other factors had already been assessed in other portions of the Judge's reasons. The Judge had accepted that an injury to international relations would occur. Likewise, it was not in dispute that the underlying proceedings were important to the Appellant. Finally, the vast majority of the information had been disclosed to the Appellant, as it was only the CBSA's observations that remained protected.

[36] With respect to the relevance or usefulness of the remaining redacted information, I agree with the Appellant that the appropriate inquiry is not whether the Appellant was well-positioned to advance his arguments without the redacted information but rather the degree to which such

information was relevant to the Appellant's case before the RPD. When fairly read, the Judge's reasons demonstrate that he considered the latter issue and concluded that the redacted information was of limited relevance because it would be of limited benefit to the Appellant. It is true that the Appellant is unable to see the information and make his own determination. But the reality is that the Appellant has access to the bulk of the information contained in the two CBSA documents, and furthermore, the Appellant's counsel has knowledge of the CBSA's conclusion with respect to the inadmissibility assessment of the Chinese PSB officer. With all this information available to the Appellant and his counsel, it was open to the Judge to conclude that the relevance of the redacted information did not outweigh the public interest in maintaining its secrecy due to the impact of disclosure on international relations.

[37] Furthermore, upon review of the evidence, I agree with the Crown's emphasis that the vast majority of the information in the two CBSA documents consists of excerpts from publicly available reports of government bodies and non-governmental organizations. The remaining undisclosed information consists of "brief observations and conclusions … based exclusively on the unredacted information" (Respondent's Memorandum of Fact and Law at para. 36). This further illustrates that the Judge did not err in concluding that it would be of limited relevance or usefulness to the Appellant.

[38] Finally, regarding the Appellant's contention that the Judge did not consider the appropriateness of limited disclosure, namely disclosure of the entire documents to the Appellant's counsel only, the following passage from the Judge's reasons demonstrates that he turned his mind to that possibility:

> The protected information contained in the two CBSA documents provides little, if any, additional evidence of the matters that [the Appellant] wishes to establish before either the RPD or this Court [Federal Court]. It was apparent during the public hearing of this application that, even without access to the protected information, [the Appellant]'s counsel are well-positioned to advance their argument regarding the risk that the evidence relied on by the Crown to oppose [the Appellant]'s refugee claim was derived from torture. They are also well-positioned to advance their argument regarding the Crown's alleged breaches of the duty of candour and abuse of process, both before the RPD and before this Court [Federal Court].
>
> (2017 FC 118 at para. 19)

[39] On the basis of the record before him, the Judge did not commit any palpable and overriding error in finding that the public interest, on balance, favoured maintaining non-disclosure of the redacted portions of the two CBSA documents.

## VI. Conclusion

[40] For these reasons, the appeal should be dismissed without costs.

"Richard Boivin"
J.A.

"I agree
Wyman W. Webb J.A."

"I agree
Mary J.L. Gleason J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-116-17 |
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| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
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| **CONCURRED IN BY:** | WEBB J.A.<br>GLEASON J.A. |
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