

CANADA / JUDGMENT

Nisga'a Lisims Government v. Cardinal

2020 BCSC 1053

COURT

Supreme Court of British Columbia

DECIDED

15 July 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1053 Nisga'a Lisims Government v. Cardinal IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Nisga'a Lisims Government v. Cardinal, 2020 BCSC 1053 Date: 20200715 Docket: S195784 Registry: Vancouver Between: Nisga'a Lisims Government and Nisga'a Nation as represented by Nisga'a Lisims Government Plaintiffs And: Andre Cardinal Defendant These reasons were edited for publication purposes only on August 13, 2020, pursuant to an order of the Court of Appeal of British Columbia dated July 28, 2020. Before: The Honourable Mr. Justice G.C. Weatherill Reasons for Judgment Counsel for the Plaintiff, appearing via telephone: D.F. Sutherland, Q.C. Counsel for the Defendant: No appearance at this hearing Counsel for the Canadian Broadcasting Corporation, appearing via telephone: F. Muttalib Written Submissions received from the Canadian Broadcasting Corporation: July 8, 2020 Place and Date of Hearing: Vancouver, B.C. July 10, 2020 Place and Date of Judgment: Vancouver, B.C. July 15, 2020

Introduction

- [1] Nisga's Lisims Government ("NLG") claims damages in this action for defamation, breach of trust and breach of privacy. It arises out of actions taken by the defendant, Andre Cardinal, who at all material times was NLG's information technology manager, in obtaining and distributing certain information concerning NLG's business activities. NLG considers much of that information to be confidential and potentially harmful to its business interests.
- [2] On May 17, 2019, NLG obtained an ex parte injunction restraining the defendant from further dissemination of the information.
- [3] The issue for determination on this application is whether and to what extent a partial sealing order/redaction order previously issued by Mr. Justice Affleck of this Court (that will be indexed as 2019 BCSC 1570 upon release) should be maintained over three affidavits that were sworn in this proceeding on behalf of NLG.

background

- [4] On May 22, 2019, NLG's chief financial officer, Terry Holt, swore his second affidavit ("Holt Affidavit No. 2") and, on May 23, 2019, NLG filed an application for a sealing order in respect of Holt Affidavit No. 2.
- [5] On May 28, 2019, the Canadian Broadcasting Corporation ("CBC") published a report entitled "[w]histleblower gagged as allegations against Nisga'a government spark investigation".
- [6] On June 7, 2019, Mr. Holt swore a further affidavit in this proceeding ("Holt Affidavit No. 3"). On June 11, 2019, Nausheen Rayani, an articulated student employed by counsel for NLG swore an affidavit in this proceeding ("Rayani Affidavit No. 3"). NLG's application for a sealing order was expanded to include Holt Affidavit No. 3 and Rayani Affidavit No. 3.
- [7] On July 24, 2019, counsel for NLG and CBC appeared before Affleck J. of this court in respect of NLG's sealing order application but there was insufficient time available to complete the hearing. Mr. Justice Affleck issued a temporary sealing order pending the completion and final determination of the application. The hearing completed before Affleck J. on August 13, 2019.
- [8] On September 17, 2019, Affleck J. issued his reasons for judgment. He concluded that NLG had not demonstrated that the sealing order was necessary, or that continued confidentiality over the affidavits outweighed the deleterious effects of compromising the open court principle that is fundamental to the administration of justice in Canada. He wrote:
- [16] It bears repetition that the open court principle is fundamental to the administration of justice in Canada. A substantial burden rests on an applicant who seeks an order to depart from that principle. Frequently evidence before this Court involves embarrassment including reputational damage for litigants and others. On a daily basis there are multiple occasions in which confidential information is publicly disclosed in the courts. As I mentioned NLG does not suggest embarrassment is the basis for a sealing order but does submit that disclosure of confidences of the type found in the email ought to be prevented. I do not agree.
- [9] However, Affleck J. went on to state:
- [17] I do accept, however, that there may be means to limit the disclosure of confidential information while also honouring the open court principle. One means would be to permit limited redactions. I invite NLG and CBC to discuss how that might be managed. It is my view, however, that any redactions must be limited. The fact that the email has already been disclosed to numerous persons strongly militates against substantial redactions. I also invite NLG and CBC to consider if redactions to the affidavit of Nausheen Rayani can be agreed.

- [10] Mr. Justice Affleck determined that entry of the formal order reflecting his decision would not be entered until the parties had an opportunity to make further submissions or reach agreement on any limited redactions that might be made. He also issued a publication ban regarding the arguments made and evidence presented in respect of the application " until further order of the court or relaxation of the interim seal".
- [11] On October 16, 2019, NLG filed an appeal of Affleck J.'s decision.
- [12] On October 24, 2019, after further submissions from counsel, Affleck J. ordered that the sealed material shall be shared with the Managing Editor of CBC and its counsel but that it could not be disseminated pending further order of the court.
- [13] Mr. Justice Affleck retired as a justice of this court in November 2019.
- [14] NLG and CBC have been engaged in negotiations regarding the limited redactions contemplated in Affleck J.'s 2019 reasons for judgment but have been unable to reach an agreement. The parties remain at an impasse.
- [15] Before me, counsel for NLG advised that he no longer maintains that portions of Rayani Affidavit No. 3 should be redacted but only that portions of Holt Affidavit No. 2 and Holt Affidavit No. 3 need to be. Counsel for CBC submits that there should be no redactions made to either of the Holt affidavits.
- [16] That dispute is now before me for determination. Submissions of Counsel
- [17] Mr. Sutherland, counsel for NLG, submits that the portions of the Holt affidavits he proposes be redacted consist of . He submits that there is a significant and overriding public interest in ensuring that employers generally, and NLG in particular, can maintain confidentiality over .
- [18] In his submission, Mr. Sutherland submits that the fact that the information is false does not lessen the importance of ensuring that its disclosure is prevented. He further submits that the potential for serious risk of harm to NLG's important commercial and societal interests in this case is heightened by the fact that the information sought to be sealed was amassed by an employee who, by virtue of his status and position within NLG, would be seen as having a high degree of credibility.
- [19] I have reviewed and have had the benefit of counsel's submissions regarding the portions of each of the Holt affidavits that NLG proposes be redacted. Despite the admonition by Affleck J. that "any redactions must be limited" the plaintiff's proposed redactions are anything but limited. They are, by any measure, substantial.
- [20] Mr. Sutherland submits that the redactions are justified as falling into one or more of the following categories:
- a) ;

b) ;

c) ; and

d) .

- [21] Mr. Sutherland submits that the circumstances in this case are distinguishable from those in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at paras. 53-57 [*Sierra Club*], *Royal Bank of Canada v. Westech Appraisal Services Inc.*, 2017 BCSC 773, because the parties opposing the sealing order were separate entities from the party seeking it. He points out that, where, as here, the proponent of the sealing order is an employer concerned with protecting the confidentiality of with the protection afforded by the injunction restraining further dissemination of that information, denying the sealing order will have the effect of negating the injunction.
- [22] Mr. Sutherland relies on the decision of this court in *Duhamel v. Financial Institutions Commission*, 2018 BCSC 601. In that case, a member of a credit union challenged their provincially regulated credit union's application to become federally regulated. The Financial Institutions Commission ("FICOM") sought a sealing order permitting it to file a redacted copy of a "Decision Record" which, it submitted, was highly confidential in nature. The court accepted that the information in the Decision Record was commercially and competitively sensitive, proprietary to the credit union, and that it contained financial and risk analysis information regarding other credit unions, the credit union system in British Columbia, and its regulation by FICOM. The court concluded that the *Sierra Club* test had been met by the applicant and that there was no reasonable alternative to the sealing order.
- [23] In this case, Affleck J. has already ruled that the *Sierra Club* test has not been met by NLG and that limited redactions to the impugned documents may be available as a reasonable alternative measure to preserve NLG's interests. I do not find the FICOM decision helpful to NLG.
- [24] Counsel for CBC submits that none of the proposed redactions are justified under the test for a sealing order articulated by the Supreme Court of Canada in *Sierra Club*. He submits that, to the extent the information is claimed by NLG to be confidential, there is no cogent evidence to support the bald assertion by Mr. Holt of such confidentiality. In most, if not all, instances, there is no evidence as to the source of the impugned information, or even a suggestion that it was shared in confidence or originated from confidential information.
- [25] Moreover, to the extent that the information can be said to engage an important commercial interest, that interest is a private interest limited to NLG rather than one that can be expressed in terms of a public interest in confidentiality, which is precisely the ruling made by Affleck J. He points out that many of the proposed redactions comprise nothing more than repetition of rumours, speculation and guesswork, which Mr. Holt deposes are false. Finally, he submits that the mere fact that some of the information may be defamatory or embarrassing to the NLG or certain of its officers or employees is insufficient to warrant a

sealing order (see as well *Ritter v. Hoag*, 2003 ABQB 88 at paras. 55-60). Decision

- [26] I am not persuaded that any of the redactions proposed by NLG warrant a sealing order. They relate to NLG's interests rather than any public interest. NLG has not shown that the redactions are a necessary and justified departure from the open court principle. No cogent evidence has been presented to demonstrate the true confidential nature of the information. Rather NLG's evidence of harm is speculative, general and lacking in specifics. It is the kind of commercial private commercial interest that was expressly excluded from the scope of protection in *Sierra Club* (see para. 55).
- [27] I agree with the submissions of CBC in their entirety. The proposed redactions do not meet the *Sierra Club* test. NLG has not demonstrated that the salutary effects will outweigh the public interest in the open court principle. They have not met their burden to prove that the information is confidential, or that any harm apart from embarrassment will flow from the release of this information. Mr. Justice Affleck has already found that there is no information in the email that is subject to solicitor-client privilege.
- [28] I am ordering that the sealing order granted on July 24, 2019 be lifted.
- [29] I am also ordering that the publication ban issued on September 17, 2019 is rescinded.
- [30] Mr. Justice Affleck's September 17, 2019 reasons for judgment may now be released to the public.
- [31] Finally, the orders I have made in this decision are stayed until the earlier of:
- a) an order of the Court of Appeal staying these orders pending the decision of the Court of Appeal on the plaintiff's appeal of Mr. Justice Affleck's order dated September 17, 2019, or
 - b) July 31, 2020. "G.C. Weatherill J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/10/2020BCSC1053.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/nisga-a-lisims-government-v-cardinal-2020>

Prepared on 28 October 2026 · Esheria