Federal Court Cour fédérale

Date: 20180329

Docket: T-705-13

Citation: 2018 FC 355

Montréal, Québec, March 29, 2018

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

MEDIATUBE CORP. AND NORTHVU INC.

Plaintiffs

and

BELL CANADA

Defendant

ORDER AND REASONS

I. OVERVIEW

[1] NorthVu Inc. (NorthVu) and MediaTube Corp. (MediaTube) are owner and licensee, respectively, of Canadian Patent No. 2,339,477. In 2013, they commenced an action against Bell Canada (Bell) for infringement of that patent. The action concerned Bell's Internet Protocol Television services called FibeTV and FibreOP TV. The trial took place in September and October of 2016 before me.

[2] During trial, Bell asked that certain documents and testimony be treated as confidential. Some documents contained detailed information about Bell's network design, including locations of key pieces of equipment and interconnections between them. In the absence of objection from MediaTube or NorthVu, and because I was satisfied that the documents in question were confidential, I agreed that they should be treated as confidential. However, I was not asked to, and did not, issue any formal order to that effect. Also, the specific documents and testimony that Bell considered confidential were not exhaustively identified during the trial.

[3] It is also notable that the courtroom remained open to the public throughout the trial. There was never a request to exclude the public. Bell submits that there was never a need to close the courtroom to members of the public because none was present when any confidential information was discussed. MediaTube notes that there is no evidence to support this submission.

[4] After trial, in an exchange with the Court, Bell identified the trial exhibits and trial transcripts that it felt should be treated as confidential. Neither MediaTube nor NorthVu objected at that time. These documents were excluded from the public record. Bell has since modified its assertions of confidentiality in response to MediaTube's motion.

[5] On January 4, 2017, I issued a decision dismissing the action. MediaTube commenced an appeal of my decision on February 3, 2017.

[6] On December 29, 2017, shortly after its present counsel was retained, MediaTube objected for the first time to the confidential treatment of the exhibits and transcripts in issue. On January 29, 2018, MediaTube filed a notice of motion seeking (i) a declaration that these exhibits and transcripts are part of the public domain, and (ii) an Order that they be made available to the public. This decision concerns that motion.

[7] The Federal Court of Appeal has since indicated that the hearing of the appeal of my January 4, 2017 decision will not be scheduled until after a decision has been rendered on the present motion.

II. MEDIATUBE'S POSITION

[8] MediaTube cites the principle that hearings of the Federal Court are generally open to the public, and that certain requirements must be met before any exception to this general principle may be permitted. Consent alone is not sufficient. MediaTube argues that Bell never tendered any evidence justifying the confidential treatment of the exhibits and transcripts in issue.

[9] MediaTube also notes that that the entirety of the trial was open to the public, and argues that it was too late on January 3, 2017, for Bell to assert confidentiality in respect of trial testimony that had already been heard in open court. MediaTube also notes that the Protective Order of Prothonotary Martha Milczynski dated October 2, 2014, to which Bell referred in requesting confidential treatment of documents at trial, does not address documents filed with the Court and does not permit transcripts to be marked confidential.

[10] MediaTube cites the decision of the Supreme Court of Canada (SCC) in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 [*Sierra Club*], which provides criteria for confidential treatment of documents in Court. At paras 53-57, the SCC stated:

> 53 … [T]he test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:
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> A confidentiality order under Rule 151 should only be granted when:
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> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
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> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.
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> 54 … I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question.
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> 55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35, at

> para. 10, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness" (emphasis added).
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> 56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest". It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly and Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (F.C.T.D.), at p. 439.
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> 57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.
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> [Emphasis in original.]

III. BELL'S POSITION

[11] In response to MediaTube's motion, Bell asserts (i) that issues of confidentiality were addressed at trial as and when they arose, (ii) that MediaTube never opposed confidential treatment of documents and testimony, and (iii) that I accepted that said documents and testimony should be treated as confidential. Bell argues that my rulings on confidentiality during trial were never appealed and are no longer subject to review. Bell argues that, even in the absence of a distinct Confidentiality Order, such rulings are *res judicata* and that I am *functus officio* in respect of such rulings.

[12] Bell also asserts that, though no member of the public was ever excluded from the Court during the trial, there is no evidence that any member of the public was ever present during the

trial to see or hear the documents and testimony in question. Bell argues that there was never a need to exclude anyone from the courtroom during the trial.

[13] Finally, Bell argues that, because of MediaTube's prior failure to object to the confidential treatment of the documents and testimony in question, it is estopped from making such an objection now.

IV. ANALYSIS

[14] It is undisputed that all of the documents and testimony in issue concern details of Bell's networks, including two documents entitled "How-it-Works", experts reports that refer to the How-it-Works documents, and transcripts of testimony of experts and fact witnesses discussing the How-it-Works documents and Bell's networks more generally. MediaTube's argument relates to all of the exhibits and transcripts in respect of which Bell maintains its claim of confidentiality. MediaTube does not assert that, while some of the documents are indeed confidential, others are not. Accordingly, this analysis is addressed to all of the documents and testimony in issue.

[15] Bell raised the issue of confidentiality several times during the trial. At one point, Bell's counsel indicated that the expert reports of Dr. Ramakrishnan and Dr. Eldering refer to confidential information about Bell's network, and asked that they be treated as confidential. I agreed. Immediately thereafter, Bell's counsel indicated that it would need the same confidential treatment in respect of the transcripts of the testimony of Bell's fact witnesses who would discuss Bell's network. Though the transcript of this exchange with Bell's counsel does not

indicate any response on my part, it is reasonable to conclude that I felt that the same confidential treatment should be given to these witnesses' testimony.

[16] At another stage of the trial, Bell's counsel indicated that the expert reports of Dr. Jones referred to Bell's network and the location and orientation of its equipment, and asked that they be treated as confidential. I agreed.

[17] Bell's expert Dr. Houh also submitted an expert report that discussed details of Bell's network. Though there was no discussion on the trial transcript of the confidentiality of this report, it was marked as confidential. This is understandable given the confidential treatment that was given to other documents that discussed such information.

[18] I agree with Bell's argument that the issue of the confidentiality of the documents and testimony in question has already been decided and is not subject to reconsideration by me. The issue of confidentiality was raised at trial; MediaTube was present but elected not to respond or object; I considered Bell's request for confidential treatment of information about Bell's network; and, I agreed that such information should indeed be treated as confidential. The information in question was understood throughout the trial to be confidential.

[19] Though no formal evidence was submitted on the issue of confidentiality, and no formal motion was made for a Confidentiality Order, it was clear to me from the documents and testimony at trial that some of the details about Bell's networks are confidential and sensitive. I

said as much in my decision on the merits of the trial: *MediaTube Corp v Bell Canada*, 2017 FC 6 at para 183.

[20] The fact that no formal Confidentiality Order was issued does not render null my rulings on confidentiality, and does not impede the application of the principle of *res judicata*: *Noade v Blood Tribe,* 2001 FCT 802 at para 24. In addition, I am concerned about potential negative effects on the efficient conduct of trials in the future if I were to give weight now to Bell's failure to make a formal motion, supported by formal evidence, for a formal Confidentiality Order. Such a motion may indeed be advisable in many cases. However, as I have indicated, I am satisfied that, in this case, the issue of confidentiality was duly raised, considered and decided at trial. The issuance of the order sought by MediaTube, and the consequent loss of confidentiality of Bell's information, would likely prompt future litigants with information that all parties agree is confidential to devote unnecessary resources to obtain formal Confidentiality Orders. In my view, provided that the requirements for a Confidentiality Order are respected, the need for a formal order at trial should be left to the trial judge.

[21] To the extent that I have discretion to revisit this issue, I am not inclined to change my view. I remain of the view that the information in question is sensitive and confidential. MediaTube argues that, even if details about Bell's networks are confidential, it is not of the kind contemplated for a Confidentiality Order as discussed in *Sierra Club*. MediaTube emphasizes the requirement that Bell establish that it has an important commercial interest in the confidentiality of the information in question, and that this interest cannot merely be specific to the party

requesting the order. The interest must be one which can be expressed in terms of a public interest in confidentiality.

[22] Here, I am satisfied that, where a party that finds itself involved in litigation (especially as a defendant in an action that is without merit) and is compelled by the rules of discovery to divulge sensitive and confidential information, there is a strong public interest in that party being able to maintain the confidentiality of that information. Otherwise, no confidential information is safe. I am satisfied that the salutary effects of maintaining the confidentiality of the information in question in the present motion, outweigh its deleterious effects on the right to free expression, including the public interest in open and accessible court proceedings.

[23] It is common ground between the parties that there is no evidence as to whether members of the public (those not subject to the Protective Order) ever had access to the confidential information in question, either by being present in the courtroom during the trial or otherwise. I do not recall the presence of such members of the public while confidential information was discussed at trial, and I find it unlikely that such a situation would have gone unnoticed and unchallenged by Bell's counsel. Despite the absence of direct evidence on the point, I am of the view that it is more likely than not that no member of the public has ever had access to the documents and testimony that MediaTube seeks to have unsealed.

[24] As with the issue of Bell's failure to request a formal Confidentiality Order, I am concerned about potential negative effects on the efficient conduct of trials in the future if I were to give weight now to Bell's failure to request that the courtroom be formally closed during

discussion of confidential information during trial. Requiring a party to take this step when it has no practical effect would impede the efficient conduct of trial. As with the issue of the Confidentiality Order, I am of the view that closing the courtroom as a means of ensuring the maintenance of confidentiality in documents or testimony at trial is a step that can be left to discretion of the trial judge.

[25] For the foregoing reasons, I conclude that the present motion should be dismissed.

V. COSTS

[26] In my view, this motion was prompted by MediaTube's unwarranted change of view as to the confidentiality of the information in question. It did not object to confidential treatment of this information either during the trial (in September and October 2016), or when Bell suggested redactions to my decision on the merits (in December 2016), or when Bell identified the documents and testimony that it felt should be treated as confidential (in January 2017).

[27] It even arguably acknowledged the confidentiality of these documents in April 2017 by requesting an Order from the Federal Court of Appeal concerning the filing of confidential documents, including as part of the appeal book. MediaTube now asserts that this request was apparently inadvertent, but it does not support this assertion with any evidence, and it does not adequately explain how such an explicit request could be inadvertent. I do not accept that this request was inadvertent.

[28] MediaTube did not cite any new information that it has obtained, nor did it otherwise explain its change of mind.

[29] In view of the foregoing, I order that MediaTube pay Bell's costs of this motion in the amount of $3,000, payable forthwith.

ORDER in T-705-13

THIS COURT ORDERS that:

1. The motion is dismissed; and

2. MediaTube shall pay Bell's costs of this motion in the amount of $3,000 forthwith.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-705-13
STYLE OF CAUSE:	MEDIATUBE CORP. AND NORTHVU INC. v BELL CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
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ORDER AND REASONS:	LOCKE J.
DATED:	MARCH 29, 2018

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