Federal Court  Cour fédérale

Date: 20210603

Docket: T-1862-17

Citation: 2021 FC 536

Ottawa, Ontario, June 3, 2021

PRESENT: Case Management Judge Mireille Tabib

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION, AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Plaintiffs

and

BOZO JOZEPOVIC

Defendant

ORDER AND REASONS

[1] The motion before the Court is brought in the context of an action commenced by the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness for a declaration, *inter alia*, that the Defendant obtained Canadian citizenship by false representations or fraud or by knowingly concealing material circumstances with respect to his involvement in war crimes or crimes against humanity. Specifically, the Defendant is accused

of the detention and murder of Muslim Bosnians in 1993. The declarations sought would have the effect of revoking the Defendant's citizenship. According to the Defendant, these declarations would also lead to a declaration that he is inadmissible to Canada and expose him to deportation.

[2] Discoveries had been completed, expert reports served and a trial date set when the Defendant's solicitor withdrew. Shortly thereafter, and as the Defendant was requesting an adjournment of the trial, the pandemic struck and forced the adjournment of the trial. The Defendant retained new counsel, whose review of the file led to the current motion.

[3] Between the filing and the hearing of the motion, the parties resolved and narrowed many of the issues. As of the date of the hearing, the only remaining issues on this particular motion were the following:

- Whether the Court should order that the admissibility of certain documents and of certain portions of the Plaintiffs' expert report be determined as a preliminary matter pursuant to Rule 220(1)(b); and

- Whether the Plaintiffs' claims of litigation privilege or public interest immunity in respect of certain documents should be upheld.

I. Preliminary Determination of Questions of Admissibility

[4] This aspect of the motion focuses on 10 documents cited in the Plaintiffs' expert report and on the eight paragraphs of the expert report that discuss these documents. The documents appear to be court decisions, reports of investigation, official notes, witness statements and portions of a prosecutor's files, drawn from the records of the United Nations International Criminal Tribunal for the Former Yugoslavia or the United Nations International Residual Mechanism for Criminal Tribunals ("ICTY"). It is common ground that the Plaintiffs intend to introduce these documents into evidence as court records pursuant to section 23 of the *Canada Evidence Act*, RSC 1985, c. C-5 and not through the testimony of their authors or other witnesses.

[5] The Defendant takes the position that the documents, as certified or proposed to be certified (or authenticated), do not comply with the formal requirements of section 23, because they are not certified under the seal of the tribunal or court itself, but under the seal of the Office of the Prosecutor of the court. Further, the Defendant argues that even if the documents were properly certified, they would still not be admissible as proof of the truth of their content, but only as proof of their existence and that they are true copies of the originals. Because of the alleged formal and substantive inadmissibility of the documents, the Defendant submits that the paragraphs of the expert report in which they are discussed become inadmissible hearsay. In any event, the Defendant argues that the impugned paragraphs of the report constitute mere recitations of facts taken from third-party documents, which improperly cloak conclusions of fact reserved to the trial judge as expert evidence.

[6] To this, the Plaintiffs respond that the Prosecutor's Office of ICTY essentially acts as the registrar of that court, and that its certification is in fact the court's certification. As to whether the documents can stand as evidence of their content, or whether they can support admissible expert opinion even if they could only be taken as proof of their existence, the Plaintiffs state that these are complex matters of admissibility, weight and probative value that are simply not appropriate for determination as a preliminary matter and must be reserved for the trial judge.

[7] The discretion to authorize the preliminary determination of a question of admissibility "should be used with great restraint" (*Cantwell v Canada (Minister of the Environment),* 1990 CarswellNat 1316, 2 W.D.C.P. (2d) 44, at paragraph 4). Such orders should be "confined to general questions of admissibility, rather than the admissibility of evidence where the context of the evidence is required to be assessed." (*Kirkbi AG v Ritvik Holdings Inc / Gestions Ritvik Inc*, [1998] F.C.J. No. 254, at paragraph 18). In addition, such orders ought only to be made when the Court is satisfied that this exceptional step is necessary to ensure the just, least expensive and most expeditious determination of the issues.

[8] The Court is satisfied that the issue of whether the certification of the documents meets the requirements of s 23 of the *Canada Evidence Act* is a general question of admissibility that does not require assessment of the context of the evidence, and is amenable to preliminary determination of admissibility. The Court is also satisfied that the determination of that issue could potentially have a significant impact on the evidence the Defendant may choose to bring at trial. Because much of the evidence originates from the former Yugoslavia, mustering that

evidence may take time and significant resources. It is in the interest of justice that the Defendant have certainty as to whether or not they need to engage in that process as early as possible.

[9] The question of the purpose for which the documents, if admissible, may be used, and the question of whether the impugned portions of the expert report of the Plaintiffs constitute admissible expert evidence or can stand if the documents are found not to be admissible are, however, questions that can only be answered with due regard to the entire context of the evidence, by the trial judge. The Court is further not convinced that a determination of these questions would have a material impact on the conduct of the trial. The Court therefore declines to exercise its discretion to order the preliminary determination of those additional questions.

II. Litigation Privilege and Public Interest Immunity

[10] The documents over which the Plaintiffs claim privilege fall into two categories:

- Documents created by the RCMP in the course of its investigation, conducted in or around 2008, to determine whether the Defendant was complicit in crimes against humanity or war crimes, consisting mostly of recordings or transcripts and notes of interviews with witnesses, but also of a witness list and investigation report;

- Documents created by the Justice Department in anticipation of this litigation in 2016, consisting of affidavits of witnesses and interpreters.

[11] The Plaintiffs claim both litigation privilege and public interest immunity in respect of all of the documents.

[12] It is trite law that the burden of establishing the existence of privilege or immunity from disclosure rests on the party claiming the privilege or the immunity. It is also not contested that whereas litigation privilege is a class privilege, public interest immunity is not. Litigation privilege will cover all documents that can be shown to have been created for the sole or dominant purpose of real or anticipated litigation, regardless of their nature, content, relevance or probative value. Public interest immunity, on the other hand, requires a demonstration that the evidence originated in confidence, that the confidence was essential to the relationship in which the communication arose and that there is a public interest deserving of protection in avoiding disclosure of that evidence which outweighs the competing interest in disclosure. It involves a case-by-case, and document-by-document balancing of the competing interests, in which the relevance or probative value of the information may be taken into account (*Vancouver Airport Authority v Canada (Commissioner of Competition)*, 2018 FCA 24).

[13] The evidence before the Court is entirely insufficient to meet the Plaintiffs' burden to establish public interest immunity in respect of any document. There is no evidence that any of the witness statements or affidavits were obtained in circumstances where confidence was offered or essential to the relationship in which the communication was given. The documents themselves were not submitted to the Court and it is thus impossible for the Court to engage in the kind of exercise that is necessary to determine whether, given any of the documents'

relevance or probative value, the interests of confidentiality are sufficiently compelling to outweigh the interest of justice in disclosure.

[14] The Court, however, is satisfied that the Plaintiffs have submitted sufficient evidence to support their claim for litigation privilege. The affidavit submitted by the Plaintiffs, even though it is sworn on information and belief rather than on personal information, expressly states that the documents created by the RCMP were created for the sole purpose of investigating whether this Defendant was complicit in crimes against humanity or war crimes, in order to thereafter determine whether the evidence warranted pursuing civil litigation or criminal prosecution against him. The Court does not accept the Defendant's submissions to the effect that the affiant was required to name a specific person or persons at the War Crimes Program at the Department of Justice as her source of information for that statement or that, in the circumstances and despite the provisions of Rule 81(1) of the *Federal Courts Rules*, it was necessary to explain why the primary source of the evidence did not swear the affidavit. The documents at issue, as described in the affidavit of documents, are witness statements taken by members of the RCMP during a discrete timeframe in 2008, of Bosnian witnesses, concerning a single identifiable set of events in Polijani in June 1993, and related documents. The very nature of the documents corroborates the statement of the affiant and is more than sufficient to implicitly support and justify the affiant's belief in the truth of the information provided to her. Had there been any other reasonable or cogent explanation as to how these documents could have come into existence without giving rise to the privilege claimed, the Defendant could have explored same by cross-examining the affiant. They did not do so and the Court is satisfied that the Plaintiffs have met their evidentiary burden to establish that the RCMP investigative documents in this case were

created for the sole purpose of apprehended litigation, and that the claim for litigation privilege has been made out.

[15] The affidavit filed by the Plaintiffs also asserts, on information and belief obtained from counsel at the Justice Department, that the documents created by the Department of Justice in 2016, were created in anticipation of and for the sole purpose of litigation. For the same reasons as above, the Court is satisfied that they are also covered by litigation privilege.

[16] This conclusion however does not end the matter. The Defendant submits that, given the seriousness of the consequences that could be visited on him from the declarations sought, the *Stinchcombe* principles apply in this case and the Plaintiffs' claim to litigation privilege must give way to his right to full and complete disclosure. The Plaintiffs do not contest that the *Stinchcombe* principles, where they apply, have the effect of requiring disclosure of investigative documents that would otherwise be covered by litigation privilege. The Plaintiffs' position is however that citizenship revocation proceedings do not trigger the application of the *Stinchcombe* principles, because, as per *Canada (Citizenship and Immigration) v Obodzinsky*, [2000] FCJ No 1675, they do not engage section 7 of the *Charter*.

[17] The difficulty with the Plaintiffs' position is that it is premised on the assumption that the *Stinchcombe* principles only arise in cases that engage section 7 of the *Charter*. That premise is incorrect, as amply demonstrated by the analysis of the Federal Court of Appeal in *Sheriff v Canada (Attorney General)*, 2006 FCA 139. In that case, the Federal Court of Appeal held that while the Supreme Court of Canada had commented, in the case of *May v Ferndale Institution*,

[2005] 3 SCR 809 that the *Stinchcombe* principles do not apply in the administrative context, exceptions to that rule exist, where the requirement for increased disclosure is justified by the significant consequences for the accused person:

> 29 While the Court is unequivocal in stating that "[t]he Stinchcombe principles do not apply in the administrative context", it clearly is not referring to a licensing review hearing, where a loss of livelihood and damage to professional reputation are at stake. In contrast, in the present appeal, the innocence, i.e. the reputation of the Trustees, is under review. Accordingly, I would classify a review of a trustee in bankruptcy's license by the OSB as an exception to the rule established in May.
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> 30 It must be noted that this Court has on a number of occasions refused requests for disclosure of all documents related to an investigation (see *CIBA-Geigy Canada Ltd., Re,* 1994 CarswellNat 1796 (Fed. C.A.); *D & B Co. of Canada Ltd. v. Canada (Director of Investigation & Research)* (1994), 176 N.R. 62 (Fed. C.A.).) However, these cases can be easily distinguished from the case on appeal because of the nature of the action. While both *CIBA-Geigy Canada Ltd., Re* and *D & B Co. of Canada Ltd.* involve potential economic hardship for the appellant companies, neither case involves the individual's right to work or professional reputation. The interests of the appellants in these cases do not parallel those of the accused in a criminal proceeding; therefore, a lower level of disclosure was appropriate.
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> 31 In contrast, our Courts have repeatedly recognized a higher standard of procedure for professional discipline bodies when the right to continue in one's profession or employment is at stake (see *Kane v. University of British Columbia,* [1980] 1 S.C.R. 1105 (S.C.C.) at page 1113; Brown and Evans, *Judicial Review of Administrative Action in Canada* (Canvasback Publishing: Toronto, 1998) at pages 9-57 and 9-58). This higher standard of disclosure exists regardless of whether the provincial jurisdiction recognizes the application of section 7 of the Charter in these cases.
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> 32 The requirement for increased disclosure is justified by the significant consequences for the professional person's career and status in the community. Some Courts have noted that a finding of professional misconduct may be more serious than a criminal conviction (see *Howe v. Institute of Chartered Accountants (Ontario)* (1994), 19 O.R. (3d) 483 (Ont. C.A.) per Laskin J.A. in

> dissent at pages 495-496; *Emerson v. Law Society of Upper Canada* (1984), 44 O.R. (2d) 729 (Ont. H.C.), at page 744).
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> 33 The scope of disclosure in professional hearings continues to be expanded by provincial courts, which have applied the *Stinchcombe* principles in cases where the administrative body might terminate or restrict the right to practice or seriously impact on a professional reputation (see *Hammami v. College of Physicians & Surgeons (British Columbia)* (1997), 47 Admin. L.R. (2d) 30 (B.C. S.C.) at paragraph 75; *Milner v. Registered Nurses' Assn. (British Columbia)* (1999), 71 B.C.L.R. (3d) 372 (B.C. S.C. [In Chambers]).) In *Stinchcombe,* the Supreme Court of Canada held that there is a general duty on Crown prosecutors to disclose all evidence that may assist the accused, even if the prosecution did not plan to adduce it. <u>While these principles originally only applied in the criminal law context, the similarities between a criminal prosecution and a disciplinary hearing are such that the objectives are, in my analysis, the same, i.e. the search for truth and finding the correct result.</u>
>
> (emphasis added)

[18] It is plain from these statements that the application of the *Stinchcombe* principles is not limited to criminal proceedings or proceedings in which section 7 of the *Charter* applies. It is further apparent from the reasoning of the Federal Court of Appeal that the determining factor as to whether or not the *Stinchcombe* standard of disclosure applies is not to be found in arbitrary characterization of the proceedings as “criminal”, “administrative” or “professional disciplinary”, but on the seriousness of the consequences of the proceedings on the personal rights, reputation, career and status in the community of the accused. It is unarguable that the consequences of the declarations sought by the Plaintiffs in this matter are grave indeed. While they may not engage the Defendant’s section 7 rights, the accusations against him are far more serious than any of the acts of professional misconduct alleged against the accused in *Sheriff, Law Society of Upper Canada v Savone,* 2016 ONSC 3378, *Re Pope* 2011 IIROC 23 and *Howe v Institute of Chartered Accountants of Ontario,* [1994] O.J. No 1803, and in which it was held

that the *Stinchcombe* principles were triggered. The consequences of being declared a war criminal or of having committed crimes against humanity would, in and of themselves, be devastating to anyone's personal reputation and standing in the community. The loss of Canadian citizenship is far more consequential to a person's ability to work and pursue a career in Canada than the loss of a professional accreditation. To the extent, the declarations sought are a prelude to potential deportation proceedings, the consequences are even closer to those of criminal proceedings than to disciplinary proceedings. The Court cannot see how the reasoning of the Federal Court of Appeal in *Sheriff* would not apply in the present circumstances.

[19] The Court is satisfied that heightened disclosure requirements apply in this case, which take precedence over the Plaintiffs' claim of litigation privilege over the investigative documents created by the RCMP. With respect to the documents created by the Justice Department, the Court considers that, having been created directly by counsel and much closer in time to the start of the litigation herein, they properly form part of counsel's brief, and are only subject to disclosure if they contain exculpatory statements, and only to that extent. That determination is one that is to be made by the Plaintiffs' counsel, as officers of the Court, and not by the Court.

[20] The Plaintiffs requested that, if the Court came to the conclusion that any of the documents at issue had to be disclosed, it should impose on the Defendant an obligation to keep the documents in confidence and not to file them publicly or disclose them to any third party until the Plaintiffs could have a reasonable opportunity to bring a motion for a confidentiality order in respect of all or part of the documents. The Defendant did not object to such a measure being imposed.

III. Costs

[21] The Defendant submits that he should be entitled to his costs of this motion, in any event of the cause and regardless of success on those parts of the motion that remained at issue at the hearing, because he was forced to bring this motion in order to prompt the Plaintiffs to review their blanket claim of privilege and immunity in respect of extensive portions of their affidavit of documents. The Court is not persuaded that those portions of the motion on which the parties reached agreement could not have been resolved in the absence of this motion. As to those portions of the motion that were argued, success is clearly divided. As a result, the Court is satisfied that costs should be in the cause.

ORDER

THIS COURT ORDERS that:

1. The issue of whether the documents filed as Exhibit "C" to the affidavit of My Ngoc Thai, filed as part of the Defendant's motion record, are admissible in evidence pursuant to section 23 of the *Canada Evidence Act* if they bear the certification that appears as exhibit "A" of the affidavit of Karen Mendonca, filed as part of the Plaintiffs' responding motion record, shall be determined as a preliminary issue pursuant to Rule 220(1)(b) of the *Federal Courts Rules*.

2. The determination of admissibility shall be made on the basis of evidence to be filed by the Plaintiffs, by way of affidavit, to support their position that the certification meets the requirement of section 23 of the *Canada Evidence Act*, any responding affidavit that may be filed by the Defendant, and the transcript of any cross-examination on such affidavits. The Plaintiffs shall serve their affidavit(s) on the Defendant no later than 14 days from the date of this order. The Defendant may serve responding affidavits on the Plaintiffs no later than seven days from the date of service of the Plaintiffs' affidavit(s). Cross-examinations on affidavits, if any, shall be conducted no later than seven days following service of the Defendant's affidavits.

3. The Defendant shall serve and file a motion record containing all evidence constituted in accordance with the preceding paragraph, together with written representations as to why the documents may not be admissible pursuant to section 23, no later than seven days following the expiry of the delays for cross-examination.

4. The Plaintiffs shall serve and file written representations in response no later than five days following service of the Defendant's motion record.

5. Oral argument on the determination shall take place at the earliest available date after July 19, 2021, by videoconference on the Zoom platform, for a duration not exceeding two hours.

6. The Plaintiffs shall disclose to the Defendant the documents that were authored by the RCMP and are listed in Schedule 2 of their affidavit of documents dated March 26, 2021.

7. The Defendant shall not file into Court or disclose to any third party the documents disclosed pursuant to paragraph 6 of this Order until the determination of any motion for a confidentiality order which the Plaintiffs may have served and filed within 10 days of the date of this Order.

8. Cost of this motion shall be in the cause.

"Mireille Tabib"

Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1862-17
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