

Federal Court



Cour fédérale

Date: 20240408

Docket: 24-T-5

Citation: 2024 FC 537

Toronto, Ontario, April 8, 2024

PRESENT: Madam Justice Go

BETWEEN:

TAYLOR MURPHY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

(Public Version with Redactions of Confidential Version issued April 8, 2024)

I. Overview

[1] Mr. Taylor Murphy [Applicant] is a veteran. He is seeking to challenge an assessment of Veterans Affairs Canada [VAC] of his entitlement for certain benefits under the Rehabilitation Services and Vocational Assistance Program.

[2] On January 17, 2024, the Applicant filed a motion in writing requesting:

- a) an extension of time to file an application for judicial review under Rule 8(2) of the *Federal Court Rules*, SOR/98-106 [*Rules*], and
- b) a confidentiality order to redact any identifying information in his tentative judicial review application and to seal the entire Motion Record per Rule 151 of the *Rules*.

[3] The Respondent does not oppose the Applicant's extension request but submits that an order covering the full contents of both the Applicant and the Respondent's Motion Records is not warranted in the circumstances. The Respondent proposes an alternative order to redact contents in the motion records that contain information relating to the Applicant's military unit or the nature of his military service. The Respondent further submits that the order sought in respect of the proposed application is unlikely necessary.

[4] For the reasons set out below:

- a. I grant the Applicant's extension request.
- b. I issue a confidentiality order to redact the Applicant's date of birth, address, telephone number and the Applicant's military service number in the motion records and in the proposed judicial review application.
- c. I decline to seal the motion records in their entirety, but instead order a redaction of certain paragraphs and contents in the Applicant's Motion Record and in the Respondent's Motion Record covering certain specific information about the Applicant's military record, his health record and personal background information.
- d. As the Applicant has yet to file his judicial review application, and it is unclear whether any of the Applicant's medical and military records would be disclosed as part of the application, I decline to issue a blanket confidentiality order for documents that have not

yet been filed. The Applicant is free to seek a further confidentiality order when he files his proposed judicial review application.

- e. Finally, I issue an order to keep the recording of the motion hearing held on March 5, 2023 confidential.

II. Issues

[5] There are three main issues before me:

- a. Whether the Applicant's request for an extension of time to file an application for judicial review should be granted;
- b. Whether the motion should be sealed in its entirety; and
- c. What, if any, information in the Applicant's proposed judicial review application should the Court allow redacted?

[6] As I am satisfied that the Applicant meets the test for extension of time, and given the Respondent does not oppose the Applicant's extension request, I will focus my analysis on the confidentiality orders requested by the Applicant.

III. Analysis

A. *Jurisprudence governing the issuance of a confidentiality order*

[7] To succeed on this motion, the Applicant would need to meet a very high bar to overcome the long-held and highly valued open court principle: *SNN v Canada (Citizenship and Immigration)*, 2022 FC 1189 at para 4; *Desjardins v Canada (Attorney General)*, 2020 FCA 123 at para 85; *Canada (Commissioner of Competition) v Google Canada Corporation*, 2023 FC 1038 [*Google Canada*] at para 41; *Sierra Club of Canada v Canada (Minister of Finance)*, 2002

SCC 41 [*Sierra Club*] at para 52; and *Sherman Estate v Donovan*, 2021 SCC 25 [*Sherman Estate*] at paras 1-2, 30, 39.

[8] Under Rule 151 of the *Rules*, the Applicant needs to satisfy the Court that, notwithstanding the public interest in open and accessible court proceedings, a confidentiality order would protect against a serious risk of harm. The risk in question must be grounded in the evidence: *Canada (Commissioner of Competition) v Rogers Communication Inc.*, 2024 FC 239 at para 10.

[9] The test for Rule 151 was established in *Sierra Club* and recently reformulated by the Supreme Court of Canada [SCC] in *Sherman Estate* at para 38. In order to obtain a confidentiality order, the Applicant must meet the following tripartite test:

- a. Court openness poses a serious risk to an important public interest;
- b. The order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- c. As a matter of proportionality, the benefits of the order outweigh its negative effects.

[10] The parties disagree on how this test should apply to the case at hand.

B. *Should the motion be sealed in its entirety?*

[11] In the Notice of Motion, the Applicant seeks an order for confidentiality based on one ground only, namely, “to protect the national interest by treating this Motion Record in its entirety, including this Notice of Motion and all attachments, as confidential, and through the redaction of all sensitive military information, including any reference to [REDACTED]”

██████████ on this and all future materials filed with the Court, pursuant to Rule 151 of the [Rules].”

[12] However, during the hearing, the Applicant, who is self-represented, cited other reasons for seeking the confidentiality order. The Applicant submitted that it would be a breach of his privacy interest and an affront to his personal dignity to disclose certain medical information and personal experiences.

[13] Both parties refer to the *Sherman Estate* test to support their position. I will consider the Applicant’s submission dealing with his military services first, followed by the Applicant’s privacy interest covering his other medical and personal information.

i. Military service

[14] The Applicant argues he has met the *Sherman Estate* test to warrant a full sealing of the motion records.

[15] The Applicant submits it is in the public’s interest to safeguard the military information described in his motion record, because it is in the public’s interest that the Canadian Armed Forces is able to fulfill its mandate and protect Canadian interests by ensuring sensitive information is protected. Therefore, the unauthorized disclosure of sensitive information goes against the public interest as it would hinder the Canadian Armed Forces from fulfilling its mandate. The Applicant further submits the order is necessary to protect his identity and personal safety, and the interest of his colleagues and national security.

[16] The Respondent reminds the Court that a confidentiality order is an extraordinary measure and that it must exercise care and restraint if departing from the presumption of an open court. The Respondent submits the confidentiality order the Applicant seeks does not meet the *Sherman Estate* test and the Applicant has not demonstrated that he or others would be at risk of harm. The Respondent submits the SCC has held that a mere assertion of grave physical harm is not sufficient to show a serious risk to an important interest, and that the Applicant's evidence must be grounded in the evidence, citing *Google Canada* at para 69.

[17] The Respondent acknowledges that explicit reference to the Applicant's previous service as contained in certain paragraphs in the Applicant's Motion Record could have the potential to pose a serious risk of physical harm to the Applicant. The Respondent submits, however, that an order covering the full contents of both motion records is not necessary, overly broad, and would not reflect the principle of minimal impairment that is the objective of the second requirement of the *Sherman Estate* test.

[18] Having reviewed the materials before me, and applying the *Sherman Estate* test, I agree with the Respondent that the sealing of the two motion records is not warranted to prevent the disclosure of sensitive military information.

[19] However, I agree with the Applicant that disclosing specific aspects of the Applicant's military service, along with the Applicant's date of birth, address, telephone number and other identifying information about the Applicant's military record poses a risk to the Applicant's

personal safety, and that the protection of such information is an important public interest, as per the first prong of the *Sherman Estate* test.

[20] Nevertheless, I do not find it necessary to seal the two motion records in their entirety to prevent the risk of harm to the Applicant, or the national interest, when redactions of relevant contents of the records will suffice.

[21] As confirmed in *Sherman Estate*, the SCC - and for that matter all the courts in Canada - has been “resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression” and that “it represents a central feature of a liberal democracy:” *Sherman Estate* at para 1. It is only under “exceptional circumstances” where competing interests justify a restriction on the open court principle, and even then, the applicant must “show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects:” *Sherman Estate* at para 3.

[22] In this case, the sensitive military information that the Applicant seeks to protect from disclosure is not so integrated into the motion records as to render it impossible to isolate. Even taking into account the Applicant’s argument that, when viewed in aggregate, the military files could lead to the disclosure of different military personnel and their deployment, such concerns can be sufficiently addressed through redactions. Applying the *Sherman Estate* test, to protect the Applicant’s personal safety and the safety of his military colleagues, an order sealing the

motion records completely is not consistent with the objective of the second requirement of the test, nor is it proportionate under the third prong.

[23] The Respondent has helpfully proposed specific paragraphs in the Applicant's Motion Record to be redacted. These are paragraphs 8, 9, 10 and 11 of the Applicant's Notice of Motion; paragraphs 4 and 5 of the Applicant's Affidavit; and paragraphs 13, 14, 15, 19, 22, 23, and 25 of the Applicant's Reply.

[24] The Respondent also proposed the following paragraphs and contents in their motion record to be redacted: the signing authorities on pages 22, 24, 27, 29 and 30 in Exhibit B of the Affidavit of Ashley Butterworth [Butterworth Affidavit].

[25] I agree with the Respondent's proposal. I also order the redaction of para 2 on page 1 of the Notice of Motion, paras 17 and 24 of the Applicant's Reply, and signing authorities on page 25 in Exhibit B of the Butterworth Affidavit.

[26] As an additional measure of caution, I order the entire Personnel Record of the Applicant at Exhibit A of the Affidavit of Chanelle Bisson [Bisson Affidavit] of the Respondent's Motion Record be redacted.

ii. Medical and other personal information

[27] As noted above, the Applicant raised the issue of privacy and personal dignity for the first time at the hearing. Quoting extensively from *Sherman Estate*, the *Canadian Charter of Rights*

and Freedoms, Part I of the Constitution Act, 1982, enacted as Schedule B to the Canada Act 1982, 1982 c 11 (UK), and legislation protecting individuals' health information, the Applicant argued that the Court should seal his medical information and other personal information. Below are the highlights of the Applicant's arguments:

- a. The SCC recognizes the important public interest in privacy is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity, and that the disclosure of highly sensitive information is an affront to personal dignity: *Sherman Estate* at para 85;
- b. The Court should exercise discretion to protect personal interests and individuals' private life in order to maintain the public interest of human dignity, and consider the impact on public trust if the court refuses to protect the details of one's private life when such details are not central to the proceeding in question;
- c. The potential for private information to be made part of the public record would prevent the Applicant from bringing an application and thus denying the Applicant access to justice;
- d. [REDACTED]
[REDACTED]
- e. In order to receive medical care, the Applicant is required to disclose his medical information to VAC, with an expectation that such information will be kept private; and
- f. The content of the Applicant's medical record is not directly relevant to the assessment of the Applicant's eligibility for vocational benefits. The motion is brought to ensure that should the Applicant's medical documents become necessary to adjudicate his eligibility, there will be safeguards in place to protect such documents from public disclosure.

[28] Similar to the Applicant's military record, the Respondent's position is that proportionality calls for the redaction of specific health information as opposed to sealing the entire motion records.

[29] As a starting point, I note that simply because the information is about an individual's private life does not automatically exempt it from the general rule of disclosure in an open court system.

[30] Writing for the Court in *Sherman Estate*, Justice Kasirer stressed that to allow for public scrutiny, the open court principle "can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption" of open court: *Sherman Estate* at para 2.

[31] However, the SCC in *Sherman Estate* recognized that there is public interest in protecting an individuals' dignity, such that the dissemination of such information "may result in an affront to a person's dignity:" *Sherman Estate* at para 33. Such information, as contemplated by Justice Kasirer, would be that which "reveals something intimate and personal about the individual, their lifestyle or their experiences," like stigmatizing medical information or work, one's sexual orientation, or subjection to sexual assault or harassment: *Sherman Estate* at para 77.

[32] Applying the above dicta to the case at hand, and considering the Applicant's status as a veteran and his career prospects, I find the disclosure of the following details of the Applicant's

private life and medical information will pose a risk to the Applicant's dignity. An order is thus necessary to prevent such risk: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[33] However, the Applicant has not demonstrated that the disclosure of his other medical information will constitute an affront to his dignity. Indeed, other than his [REDACTED], the Applicant makes no submission on how his dignity would be harmed by the disclosure of such conditions as irritable bowel syndrome and musculoskeletal injuries.

[34] As such, I agree with the Respondent that an order covering all of the Applicant's medical information is inconsistent with the principle of minimum impairment under the second prong of the test.

iii. Conclusion on the Applicant's request to seal the motion records

[35] In conclusion, in the public interest of protecting the Applicant's personal safety and dignity, I order the redactions of certain information about the Applicant's military record, specific information about the Applicant's personal life [REDACTED]

[REDACTED]

[REDACTED], and one of the Applicant's medical condition, [REDACTED]. The Applicant's request to seal the two motion records in their entirety is denied.

[36] Normally, parties seeking a confidentiality order are required to file their own redacted version of the record at the time when they bring a motion to that effect. Considering the Applicant is self-represented, and in the interest of facilitating the process, I direct the Respondent to make the redactions in accordance with my order.

C. *What, if any, information in the Applicant's proposed judicial review application should the Court allow redacted?*

[37] The Applicant is also seeking a confidentiality order to redact identifying information from the proposed judicial review application including the Applicant's name, address, telephone number, military service number, and medical and personnel history.

[38] The Applicant submits a confidentiality order would ensure his personal safety as it would safeguard sensitive operational information, protect the physical safety of Canada's military personnel, and guarantee the proposed judicial review application can be safely adjudicated. The Applicant submits the sensitive information is not necessary for a public purpose and its publication would negatively effect the public interest of safeguarding sensitive military information, the physical safety of military personnel, and promoting the safe participation of Canadians in judicial proceedings.

[39] The Applicant also explains that his service in the Canadian Armed Forces involved him being privy to "secret official information" and its unauthorized disclosure would be a violation of the *Security of Information Act* (R.S.C., 1985, c. O-5). The Applicant reiterates that his proposed judicial review relates to his entitlement of vocational rehabilitation benefits pursuant

to section 8 of the *Veterans Well-being Act* (S.C. 2005, c. 21), which would require revealing military medical records and personnel records. The Applicant fears the disclosure of such information may inadvertently lead to the revelation of his military unit and nature of his military service. The Applicant submits the disclosure of this information will place him at serious risk of harm, it will place his colleagues at serious risk of harm, and it would be detrimental to national security.

[40] Further, the Applicant submits that the judicial process would be rendered ineffective if Canadians are unable to participate in the judicial process due to fears of the unauthorized disclosure of sensitive, protected material. This goes against the public interest, as it is in the public interest that all Canadians are able to participate in the judicial process.

[41] The Applicant submits redacting only sensitive information and allowing the proposed judicial review application to proceed as a public proceeding is the minimum reasonable measure in the present circumstances.

[42] While I agree to redact the Applicant's name, date of birth, address, telephone number and military service number in the proposed judicial review application – for the same reason as I have noted with respect to my order to redact such information from the motion records – I must decline to extend my order to any other information at this point.

[43] As the Respondent submits, many aspects of the Applicant's proposed judicial review application remain unclear, which hinders the Court's ability to ascertain the necessity of a confidentiality order.

[44] In their motion record, the Respondent provides the Court with a number of forms and documents relating to the Applicant's benefits applications with VAC that may be part of the proposed judicial review's adjudication. The Respondent proffers these documents to demonstrate that the information in them does not rise to the level of "sensitive information" or details relating to the form and nature of the Applicant's military service such that its disclosure would pose a serious risk of harm to the Applicant or others. In reviewing these application packages, I agree with the Respondent that by and large, the materials they provide do not contain any sensitive military or personal information.

[45] Moreover, as the Applicant appears to suggest, his proposed judicial review application aims at challenging a policy decision of the VAC to enter into agreements with private insurance providers to deliver certain vocational services which results in a reduction of the maximum amount of benefits that would otherwise be made available to a veteran under the VAC's own plan. It is unclear to me, at this point, whether the Applicant would need to file any of his military and/or medical records in order launch such a challenge.

[46] If ultimately it proves necessary for either of the parties to file any sensitive information with the Court to adjudicate the matter, the Applicant is free to bring another motion to have such information redacted. Indeed, in light of my decision with respect to the Applicant's

motion, I would hope that the parties would come to some agreement as this matter proceeds, to protect the same type of information that I order redacted.

D. *Conclusion*

[47] For the above noted reasons, the motion under Rule 151 is granted in part on the terms set out below.

[48] Neither party requested costs of the motion.

ORDER in 24-T-5

THIS COURT ORDERS that:

1. The Applicant's extension request is granted. The Applicant has 30 days from the date of this order to file his application for judicial review.
2. The Applicant's date of birth, address, telephone number and military service number in the motion records and in the proposed judicial review application shall be redacted and shall be treated as confidential under Rules 151 and 152 of the *Rules*.
3. The following contents in the Applicant's Motion Record and in the Respondent's Motion Record covering certain specific information about the Applicant's military record, his health record and personal background information shall be redacted and shall be treated as confidential:
 - a. Portion of paragraph 2 on page 1 of the Applicant's Notice of Motion, paragraphs 8, 9, 10 and 11 under "Confidentiality," and para 29 under "Extension of time to file application for judicial review" of the Applicant's Notice of Motion; paragraphs 4 and 5 of the Applicant's Affidavit; and paragraphs 13, 14, 15, 17, 19, 22, 23, 24 and 25 of the Applicant's Reply.
 - b. The signing authorities on pages 22, 24, 25, 27, 29 and 30 in Exhibit B of the Butterworth Affidavit, and entry record dated 2023-07-18 on page 72, Exhibit H of the Butterworth Affidavit.
 - c. The entire Personnel Record of the Applicant at Exhibit A of the Bisson Affidavit of the Respondent's Motion Record;
 - d. [REDACTED] and medical information about the Applicant's medical condition, [REDACTED], found on pages 21, 23-28, 30, 34-35, 37-38, 71-74, 79 of the Respondent's Motion Record, Exhibit B of the Bisson Affidavit; para 15, sub para (b), and (j), and footnotes 16 and 43 of the Respondent's memorandum.

4. The recording of the motion hearing held on March 5, 2023 shall be treated as confidential; and
5. The Respondent shall make the ordered redactions to the motion records and provide a copy of the same to the Applicant and the Court for comments within 15 days of the date of this order.
6. The Applicant shall have 15 days from the date of receiving the redactions to provide comments.
7. The Registry shall publish a redacted version of this order after all the appropriate redactions to the motion records have been approved by the Court.

"Avvy Yao-Yao Go"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: 24-T-5

STYLE OF CAUSE: TAYLOR MURPHY v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: HELD VIA VIDEOCONFERENCE

DATE OF HEARING: MARCH 5, 2024

ORDER AND REASONS: GO J.

CONFIDENTIAL ORDER AND REASONS: APRIL 8, 2024

ORDER AND REASONS (PUBLIC VERSION) ISSUED: JUNE 12, 2024

APPEARANCES:

Taylor Murphy

FOR THE APPLICANT
(ON THEIR OWN BEHALF)

Heather Kennedy

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada
Ottawa, Ontario

FOR THE RESPONDENT