Federal Court  Cour fédérale

Date: 20190705

Dockets: T-1136-16
T-210-18
T-766-18

Citation: 2019 FC 897

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, July 5, 2019

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

DAVID LESSARD-GAUVIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Mr. Lessard-Gauvin is appealing the three orders issued by Madam Prothonotary Tabib on April 10, 2018, in dockets T-1136-16, T-210-18 and T-766-18. In each case, the motions were dismissed, each with costs.

I. Background

[2] Before dealing with the appeal, these proceedings should be put in context. The motion in T-1136-16 is an application for judicial review of a decision rendered by the Public Service Commission of Canada under section 66 of the *Public Service Employment Act*, SC 2003, c 22, ss 12 and 13, dismissing requests for investigation at the preliminary stage. The application for judicial review is dated July 11, 2016, and has been subject to numerous extensions of time. In addition, by order dated May 5, 2017, Justice Martineau consolidated the proceedings with those of court files T-1683-16 and T-1989-16, with the motion in T-1136-16 being treated as the main application. The motion in T-210-18 is an application for judicial review of a decision of the Public Service Commission of Canada made under section 66 of the *Public Service Employment Act*, this time after an investigation. It was filed on February 5, 2018. The motion in T-766-18 is an application for judicial review of a decision rendered by the Canadian Human Rights Commission under subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC, 1985, c H-6. Under this subparagraph, a complaint is dismissed by the Commission if it is satisfied that the investigation of the complaint is not warranted. This time, the application for judicial review is dated April 25, 2018.

[3] These proceedings have made little progress. Indeed, on January 23, 2019, the Attorney General filed motions for security for costs under rules 416 to 418 of the *Federal Courts Rules*, SOR/98-106 [Rules] for all three cases. Similar motions had been filed in the Federal Court of Appeal in two cases on appeal on January 21. Over the years, there have been many disputes before the federal courts in which Mr. Lessard-Gauvin was an applicant. The Attorney General

indicates that costs of more than $6,000 remain unpaid, while Mr. Lessard-Gauvin points out that he wanted to reach an agreement for the payment of costs, but was unsuccessful. We do not know the details of the proposal that he had made. These motions for security for costs have not made any further progress because Mr. Lessard-Gauvin had brought motions in the nature of preliminary motions to the motions for security of costs. These preliminary motions were dealt with by Prothonotary Tabib on April 10, 2019

[4] Mr. Lessard-Gauvin would like certain information that he intends to use to oppose the motions for security for costs to be kept confidential. The applicant also wanted the three applications for judicial review to be combined and another time extension to be granted.

II. Decision under appeal

[5] Despite an appeal that asks 14 questions, there are only two components to the decision under consideration and a new application for an extension of time. Mr. Lessard-Gauvin would like his three files to be joined into a single file under rule 105, and he asks that certain information that he would like kept confidential to be treated in a very special way. This information relates to his financial and health status. It is not necessary for our purposes to describe precisely what the specific measures requested by Mr. Lessard-Gauvin consist of, except to emphasize that the confidentiality requested implies that the respondent's lawyer would have to undertake to not disclose the content of this information, not even to her clients.

[6] With respect to the consolidation of proceedings, Prothonotary Tabib was not satisfied that the judicial reviews in question are part of one administrative continuum. The presence of

similar elements or a relatively common factual framework is not sufficient. Judicial reviews are based on the file before the administrative decision maker, who varies. When the decision maker is the same, different decisions (before or after an investigation) are involved. In fact, such an approach has proved harmful by making matters unnecessarily complex, ultimately delaying the processing of motions. The Court then speaks of a [TRANSLATION] "source of confusion, and a jumble of motions that leads to considerably more burdensome proceedings" (order, p 7 of 13).

[7] In Prothonotary Tabib's view, the applicant should target his procedural grounds, evidence and arguments for each motion by keeping them separate; as a result, the motions for security for costs should also be dealt with independently of each other. This would in no way prevent, according to Prothonotary Tabib, the various applications from being heard together if they are perfected, which does not imply a joint hearing, but rather hearings in sequence. I note that all three applications for judicial review appear to be based on the rejections issued to the applicant, who is trying to join the federal public service. In addition, he chose to challenge two different Public Service Commission requests and a Canadian Human Rights Commission decision. As such, the facts differ, as do the legal issues raised.

[8] The Court also does not accept the applicant's request to keep confidential certain personal information that he would like to include in his file in response to the application for security of costs.

[9] Dealing first of all with financial information, Mr. Lessard-Gauvin argued his vulnerability to the risks of identity theft, fraud or financial extortion. The Court accepts the

Attorney General's argument that the only risk would be related to bank account numbers, personal identification numbers, credit or debit card numbers, or other similar information. However, this type of information could be redacted, the respondent tells us. Prothonotary Tabib notes that the financial information is likely being presented to allow the applicant to avoid having to give security for costs because he claims to be impecunious within the meaning of rule 417, which would not make the applicant attractive to an alleged scammer.

[10] As for the medical information, the applicant thought he could rely on rule 252(3) to benefit from automatic confidentiality. This is not the case. Indeed, the rule is in the context of disclosing evidence where there are confidentiality undertakings: the confidentiality obligation that exists when disclosure takes place is lifted when the information takes on the status of "evidence". In this regard, there is no rule that this type of evidence can be filed in confidence. Confidentiality must be demonstrated. To do so, the conditions set out in the case law must be met (*Sierra Club of Canada v Canada (Minister of Finance*), 2002 SCC 41, [2002] 2 SCR 522) [*Sierra Club*].

[11] The first condition is that the information to be protected must be of a confidential nature and must have always been treated as such. This confidentiality has not been demonstrated in this case. The decision under appeal states on page 11 of 13:

> [TRANSLATION]
>
> However, the applicant has already publicly disclosed, in the judicial review leading to *Lessard-Gauvin v Attorney General of Canada*, 2018 FC 809, the details of a medical condition from which he suffers, and which are partially described in the reasons for judgment.

> In his communications with the Court, the applicant regularly reports his health problems, the medications he is taking, and the impact of these on his concentration, energy level, sleep quality, mood and ability to manage anxiety. The applicant does not explain how the medical reports, diagnoses and other personal information that he would attach to his affidavit go beyond the information he has already publicly disclosed.

[12] Finally, the prothonotary notes that Mr. Lessard-Gauvin would like to be informed of any deficiencies in his evidence or in the proceedings, relying on rule 60. The Court disposes of the question by stating that the applicant is aware of the requirements in *Sierra Club*. The Court cannot interfere in the choices made by a litigant, citing *Lessard-Gauvin v Canada (Attorney General*), 2014 FC 739, and *Lessard-Gauvin v Canada (Attorney General*), 2016 FC 418.

III. The standard of review

[13] An appeal from a decision of a prothonotary to a judge of the Federal Court is permitted by rule 51. Since *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 FCR 331, there is no longer any doubt that the standard of review in these matters is the same one used in civil cases (*Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235). Therefore, the standard of correctness will be applied to questions of law, and the standard of palpable and overriding error will be applied to questions of fact.

[14] With respect to the legal issues that must obviously be identified, it is well established that the standard implies that there is no deference to the decision maker. This is not the case for decisions of fact (or mixed fact and law) where the error must be palpable and overriding. This is a heavy burden. The Supreme Court of Canada endorsed the statements of the Federal Court of

Appeal and the Court of Appeal of Quebec, which sought to further articulate what this standard is all about. The following can be found in *Benhaim v St-Germain*, [2016] 2 SCR 352:

> [38] It is equally useful to recall what is meant by "palpable and overriding error". Stratas J.A. described the deferential standard as follows in *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31, at para. 46:
>
> > Palpable and overriding error is a highly deferential standard of review . . . . "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.
>
> [39] Or, as Morisette J.A. put it in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77 (CanLII) [TRANSLATION] "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions."

[15] In other words, to succeed, Mr. Lessard-Gauvin must satisfy the Court on appeal that there is an obvious error that directly affects the outcome of the case; a needle in the haystack will not be sufficient where the degree of deference is high.

[16] Contrary to what the applicant claimed, there are no varying standards of review. Standards based on procedural fairness in administrative law or the consideration of [TRANSLATION] "constitutional principles and fundamental rights" have nothing to do with the application of known principles to the issues at stake here. The applicant has the burden of establishing a palpable and overriding error committed by the prothonotary. He should not expect the Court of Appeal to make its own assessment of what has been presented, as if it were

a *de novo* hearing. Mr. Lessard-Gauvin did not in any way satisfy his burden to demonstrate this kind of error in this case.

IV. Analysis

[17] In his memorandum of fact and law, the applicant addressed in passing the matter to be debated with respect to the imposition of security for costs. It was not useful because it was premature. He sought to make the imposition of security for costs a matter of access to justice by relying heavily on *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 SCR 31 [*Trial Lawyers*]. At this stage, it is far from clear that this decision is of much assistance since the case dealt with a system of hearing fees that "may bar litigants with legitimate claims from the courts" (para 41). Costs, or legal costs, are obviously of a completely different nature.

[18] In fact, at the hearing, he announced that he wanted to challenge the constitutionality of rule 417, which gives the Court the power to refuse to order the provision of security for costs if the person is impecunious and the Court is of the opinion that the case has merit. It seems that Mr. Lessard-Gauvin is against the use of the word "indigence", a word that is not found in the English version of rule 417, which uses the word "impecuniosity" instead. In any event, *Trial Lawyers* deals with access to justice, which is jeopardized by hearing fees allowing access to the British Columbia court. However, hearing costs differ from costs, as the Court notes:

> [63] Most fundamentally, unlike cost awards, the imposition of the hearing fees at issue are not dependent on efficiency or the merit of one's claim. The hearing fees imposed by this scheme escalate to $800 per day after 10 days of trial — the highest price tag in the country — without any relationship to the efficiency of

> the proceeding. These hearing fees do not promote efficient use of court time; at best they promote *less* use of court time.
>
> [Emphasis in original.]

[19] Also, the Supreme Court did not conclude that the hearing costs themselves are unconstitutional since the province may impose them under its power to administer justice under subsection 92(14) of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 (para 23). Rather, it is when these costs are excessive that they conflict with the fundamental jurisdiction of the superior courts protected by section 96 of the *Constitution Act, 1867*. The Court concluded that the text of subsection 20-5(1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, could not be interpreted as proposed by the Attorney General of British Columbia, who wanted the exemption to apply also to persons of modest means, rendering them unable to pay these costs without sacrificing reasonable expenses. In the Supreme Court's view, the words "indigent" and "impoverished" must be given their ordinary meaning. Referring to a study by an economist, "it is awkward to use these terms to describe a middle class family's inability to pay a fee that amounts to a month's net salary" (para 59).

[20] In any event, the announcement of an intention to challenge the constitutionality of a provision does not articulate the challenge itself. Moreover, Mr. Lessard-Gauvin has not yet determined the procedural vehicle to be used if he decides to challenge only the curative proviso of the Rules, as he seems to have stated at the hearing. He suggested aloud that this could be done in his response to the motion for security for costs or by way of a declaratory judgment. In reply, he instead suggested summary judgment and summary trial (rules 213 et seq.) or summary

judgment. In addition, there appears to be uncertainty about access to economic evidence that could be based on the evidence referred to by the Supreme Court in *Trial Lawyers*.

A. *Extension of time*

[21] As a result, if Mr. Lessard-Gauvin is seeking an extension of time, it is premature because little is known about his intentions. In fact, it is not clear that the application made during the hearing is an appeal from Prothonotary Tabib's decision. Indeed, she had concluded that conditions 11 and 18 in the extension of time limits were not contested and were granted. These were the two extension findings that were before the Court at that time and read as follows:

> [TRANSLATION]
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> 11. Extend the time limit for serving and filing the public and non-public versions of the applicant's response record on such terms as the Court may consider appropriate;
>
> . . .
>
> 18. Extend the time limit for serving and filing the applicant's record to at least 20 days from the date of the decision on this application.

[22] In the end, either the question raised by Mr. Lessard-Gauvin is not valid before this Court, because he has already won his case for what he had requested, or it is premature in that the constitutional question has not materialized, making it premature. Thus, the possibility of an extension cannot be the subject of an order at this stage.

B. *Consolidation of proceedings*

[23] With respect to the appeals on the consolidation of proceedings and the confidentiality of certain information to be used in response to the Crown's request that Mr. Lessard-Gauvin provide security for costs, the applicant did not identify a question of law and explain how the prothonotary had erred. Instead, the applicant mentions rule 60, which reads as follows:

60 At any time before judgment is given in a proceeding, the Court may draw the attention of a party to any gap in the proof of its case or to any non-compliance with these Rules and permit the party to remedy it on such conditions as the Court considers just.	60 La Cour peut, à tout moment avant de rendre jugement dans une instance, signaler à une partie les lacunes que comporte sa preuve ou les règles qui n'ont pas été observées, le cas échéant, et lui permettre d'y remédier selon les modalités qu'elle juge équitables.

If I understand what the applicant believes he is entitled to receive, it is advice on how to conduct his case. This is not the purpose of rule 60, nor is guidance possible without the Court losing its neutrality and absolute impartiality (*Olumide v Canada*, 2016 FCA 287, at paras 15 to 17). Recently, the Court of Appeal confirmed that it is not its role to provide legal or tactical advice to litigants (*SNC-Lavalin Group Inc. v Canada (Public Prosecution Service of Canada)*, 2019 FCA 108, at para 9). In any event, no such deficiency that the prothonotary could have remedied under rule 60 is even identified.

[24] Again, it was not entirely clear what Mr. Lessard-Gauvin's grievance is. Prothonotary Tabib's decision noted that the request for leave to consolidate files T-1136-16, T-210-8 and T-766-18 for the sole purpose of being processed by a single decision maker was not contested and that it was therefore granted. But this is not about consolidating the three files into one. The prothonotary decided to examine the consolidation of the three files into one.

[25] This decision applying rule 105 is a discretionary one. The rule speaks of a consolidation of proceedings, heard together or heard one immediately after the other. It appears that the appeal concerns the consolidation of proceedings on the merits of the dispute since the conclusion that the files are to be handled by a single decision maker is supported. In this matter, it is up to the applicant, Mr. Lessard-Gauvin, to satisfy the decision maker that the identical nature of the questions of law and fact, the identical nature of the causes of action, the overlap of evidence and the possibility that one case may resolve the others, lead to a conclusion that the proper administration of justice is better served by consolidation.

[26] However, the prothonotary concludes that the proceedings are sufficiently related. She also notes Mr. Lessard-Gauvin's tendency to [TRANSLATION] "include in a single motion record different remedies for different applications that are not consolidated, unnecessarily complicates and unduly delays the disposition of the motions" (order, page 7 of 13). For the Court, this is [TRANSLATION] "a source of confusion and an intermingling of proceedings" (order, page 7 of 13).

[27] Mr. Lessard-Gauvin had to demonstrate that this decision constitutes a palpable and overriding error. Nothing of the sort has been demonstrated, whereas the applicant must explain how the questions of fact and law in these proceedings are sufficiently related to each other to justify a consolidation on the merits of these three motions. It is a burden that he has not fulfilled by not demonstrating a palpable or overriding error.

C. *Confidentiality*

[28] The confidentiality of certain information should be considered in two stages. First, the confidentiality of the financial information that Mr. Lessard-Gauvin may wish to use (he is obviously not required to do so) in his challenge to the motion for security for costs, and perhaps even use rule 417 to demonstrate his indigence ("impecuniosity"). Secondly, the confidentiality of certain medical information. But before considering these two types of information, it is important to remember the test that an applicant must meet to have certain information be treated as confidential and used as evidence.

[29] It seems only fitting to start with the *Federal Courts Rules*. Rules 151 and 152 apply. I will read them out:

Filing of Confidential Material	Dépôt de documents confidentiels
Motion for order of confidentiality	**Requête en confidentialité**
151 (1) On motion, the Court may order that material to be filed shall be treated as confidential.	**151 (1)** La Cour peut, sur requête, ordonner que des documents ou éléments matériels qui seront déposés soient considérés comme confidentiels.
Demonstrated need for confidentiality	**Circonstances justifiant la confidentialité**
(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as	**(2)** Avant de rendre une ordonnance en application du paragraphe (1), la Cour doit être convaincue de la nécessité

confidential, notwithstanding the public interest in open and accessible court proceedings.	de considérer les documents ou éléments matériels comme confidentiels, étant donné l'intérêt du public à la publicité des débats judiciaires.
Marking of confidential material	**Identification des documents confidentiels**
152 (1) Where the material is required by law to be treated confidentially or where the Court orders that material be treated confidentially, a party who files the material shall separate and clearly mark it as confidential, identifying the legislative provision or the Court order under which it is required to be treated as confidential.	**152 (1)** Dans le cas où un document ou un élément matériel doit, en vertu d'une règle de droit, être considéré comme confidentiel ou dans le cas où la Cour ordonne de le considérer ainsi, la personne qui dépose le document ou l'élément matériel le fait séparément et désigne celui-ci clairement comme document ou élément matériel confidentiel, avec mention de la règle de droit ou de l'ordonnance pertinente.
Access to confidential material	**Accès**
(2) Unless otherwise ordered by the Court,	**(2)** Sauf ordonnance contraire de la Cour :
(a) only a solicitor of record, or a solicitor assisting in the proceeding, who is not a party is entitled to have access to confidential material;	**a)** seuls un avocat inscrit au dossier et un avocat participant à l'instance qui ne sont pas des parties peuvent avoir accès à un document ou à un élément matériel confidentiel;
(b) confidential material shall be given to a solicitor of record for a party only if the solicitor gives a written undertaking to the Court that he or she will	**b)** un document ou élément matériel confidentiel ne peut être remis à l'avocat inscrit au dossier que s'il s'engage par écrit auprès de la Cour :
(i) not disclose its content	**(i)** à ne pas divulguer son

except to solicitors assisting in the proceeding or to the Court in the course of argument,

contenu, sauf aux avocats participant à l'instance ou à la Cour pendant son argumentation,

(ii) not permit it to be reproduced in whole or in part, and

(ii) à ne pas permettre qu'il soit entièrement ou partiellement reproduit,

(iii) destroy the material and any notes on its content and file a certificate of their destruction or deliver the material and notes as ordered by the Court, when the material and notes are no longer required for the proceeding or the solicitor ceases to be solicitor of record;

(iii) à détruire le document ou l'élément matériel et les notes sur son contenu et à déposer un certificat de destruction, ou à les acheminer à l'endroit ordonné par la Cour, lorsqu'ils ne seront plus requis aux fins de l'instance ou lorsqu'il cessera d'agir à titre d'avocat inscrit au dossier;

(c) only one copy of any confidential material shall be given to the solicitor of record for each party; and

c) une seule reproduction d'un document ou d'un élément matériel confidentiel est remise à l'avocat inscrit au dossier de chaque partie;

(d) no confidential material or any information derived therefrom shall be disclosed to the public.

d) aucun document ou élément matériel confidentiel et aucun renseignement provenant de celui-ci ne peuvent être communiqués au public.

Order to continue

Durée d'effet de l'ordonnance

(3) An order made under subsection (1) continues in effect until the Court orders otherwise, including for the duration of any appeal of the proceeding and after final judgment.

(3) L'ordonnance rendue en vertu du paragraphe (1) demeure en vigueur jusqu'à ce que la Cour en ordonne autrement, y compris pendant la durée de l'appel et après le jugement final.

[Emphasis added.]

[30] As can be seen, the test to be met is provided for in rule 151. This test was further articulated in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522 [*Sierra Club*], which states the following at paragraph 53:

> 53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:
>
> A confidentiality order under Rule 151 should only be granted when:
>
> 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;
>
> 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.

Someone may have a legitimate desire to keep their personal affairs private. However, this is not sufficient for a confidentiality order to be granted. As the Supreme Court stated at the very start of *Sierra Club*, "[o]ne of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution" (para 1). This transparency is reflected in the openness of judicial proceedings. The Court stressed the following in paragraph 52 of *Sierra Club*:

> 52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the Charter: *New Brunswick, supra,* at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the

> administration of justice that justice is done and is seen to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice", guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, at para. 22.
>
> [Emphasis in original.]

A confidentiality order implies an infringement of freedom of expression. In the context of *Sierra Club*, this led the Court to state that "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" (para 54).

[31] Mr. Lessard-Gauvin's request to keep the financial information would like to use confidential was denied. He refers to the risks of identity theft, fraud, swindling or financial extortion. However, it is agreed that if Mr. Lessard-Gauvin submitted documents in which the bank account numbers, personal identification, and debit and credit card numbers (and other such information) were redacted, this would be acceptable. This is a reasonable solution. It would not be justified to reply to the applicant that he only has to refrain from producing such evidence when he would like to assert his impecuniosity in defence against the motion for security for costs. The Court stated in *Sierra Club* that "preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial" (para 50). What is important in this case, for the purposes of the motions for security for costs, is the statement of assets and liabilities, with sources of income and expenses. If the applicant was correct that even this kind of information could not be brought to light, it would exclude the kind of information that is routinely presented before the courts or quasi-judicial tribunals. In fact, the request to keep the type of financial information confidential, even though it will be permitted to withhold account

and credit (or debit) card numbers, is based solely on the applicant's desire to keep his or her personal affairs private, which is no different from the vast majority of litigants.

[32] Prothonotary Tabib concluded that redacting only certain information was sufficient. Mr. Lessard-Gauvin has not discharged his burden of demonstrating a palpable and overriding error, nor has he established an error of law.

[33] The issue of confidentiality of medical information seems more difficult to me because, if I understand what the applicant has argued, he may want to use a recent diagnosis that reveals information about his health situation that he would not have known about before. Note that Prothonotary Tabib had rejected the request for confidentiality since Mr. Lessard-Gauvin had already made public the details of his health situation. The first condition for obtaining a confidentiality order will be the confidentiality (apart from inadvertent disclosure: *Abou-Elmaati v Canada (Attorney General)*, 2010 ONSC 2055) with which the information has always been treated. However, the prothonotary was also careful to note that [TRANSLATION] "the applicant does not explain how the medical reports, diagnoses and other personal information he would like to attach to his affidavit go beyond the information he has already publicly disclosed" (order, p 11 of 13).

[34] This Court finds itself in the same situation since, when asked at the hearing about the nature of this "new" information, the applicant preferred not to respond for fear of losing the confidentiality claimed. He has not made any request. It is not for the applicant to decide that his information not already made public, if any, is confidential. Since confidentiality is virtually

incompatible with the openness of court proceedings, which is inextricably linked to the freedom of expression under the *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11*, it will be up to the court to decide. But it was impossible for the prothonotary to make a decision in the absence of personal information that allegedly goes beyond the information already in the public domain if she does not know what it is. This is equally impossible for this Court, given the current state of the record.

[35] Mr. Lessard-Gauvin tried to argue that he did not have the burden of proof, seeking support from *A.B. v Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 SCR 567 [*Bragg Communications*]. He wanted to claim "objectively discernable harm" (para 9). I do not see how this notion would be useful in this case in the absence of any indication of the nature of the information that is claimed to be harmful.

[36] It is important to recognize that the objectively discernable harm results from a factual situation that was exposed by the person who wants the information, or evidence, not to be disclosed to the general public. A statement that information about the health situation would be put into evidence is not sufficient to assess whether there is any harm that could be objectively discernible. It is certainly possible that such information may be harmful and that it is appropriate that it should not be disclosed in proceedings open to the public. But the existence of the prejudice cannot be deduced without the decision maker knowing what information is involved; this makes the exercise impossible. Unless all health information is automatically protected from public disclosure, this proposal cannot hold. However, I am not aware of any

such rule. I would like to add that there will be health situations where it will be easier than others to infer harm.

[37] In *Bragg Communications*, a 15-year-old girl was being defamed through cyber-bullying on Facebook and tried to identify her "attacker". She had successfully identified the internet service provider and sought a court order to disclose the identity of the owner of the internet address. The teenager wanted this research to be done anonymously for her. The issue was for the teenager to meet "the onus of showing that there was real and substantial harm to her which justified restricting access to the media" (para 7) which contradicted requests for anonymity (and also a publication ban). *Bragg Communications* does not, strictly speaking, reverse any burden of proof as it is always up to an applicant to prove the constituent elements of a claim. Rather, the emotional vulnerability of a 15-year-old can be established by relevant evidence, or the Court may conclude that there is objectively discernible harm in that the Court can "find harm by applying reason and logic" (paras 15-16). But we deduce harm from facts. What was complained about in *Bragg Communications* was that the harm, based on facts, had not been established.

[38] The Supreme Court noted that our law recognizes the inherent vulnerability of children based on their age (para 17). It is therefore logical to infer that cyberbullying can cause harm to children based on their age (para 18). It can also be assumed that the type of information will be important. To do so, the Court relied on a study in Nova Scotia and other sources (paras 20 et seq.). The Court therefore found that:

> [27] If we value the right of children to protect themselves from bullying, cyber or otherwise, <u>if common sense and the evidence persuade us that young victims of sexualized bullying are particularly vulnerable to the harms of revictimization upon</u>

> publication, and if we accept that the right to protection will disappear for most children without the further protection of anonymity, we are compellingly drawn in this case to allowing A.B.'s anonymous legal pursuit of the identity of her cyberbully.
>
> [Emphasis added.]

[39] Thus, I am of the opinion that the Court is merely allowing the establishment of direct adverse consequences by deducing them through logic and reason, but the initial burden remains with the applicant. The way to discharge the burden is different since it allows direct proof, as well as logic and reason.

[40] But this decision is of little use to the applicant if the content of the personal information is not disclosed, possibly filed under confidential seal, to the person who will have to apply the *Sierra Club* test. That information was not disclosed to the prothonotary, or to this Court. As was the case in *Bragg Communications*, where the identity of a child, who had already been victimized by the cyberbullying she was seeking to report, was discussed, how can we apply logic and reason to see this as objectively discernible harm if we do not know with some precision what information to keep confidential? An applicant must put forward the facts from which the objectively discernible harm can be inferred through logic and reason.

[41] Mr. Lessard-Gauvin had the burden of establishing an error, which he did not do. He simply argues that just because exhibits A, B, C and D are in the public domain does not mean that exhibits E and F are also in the public domain. We can only agree. But that is not the point. Without information on exhibits E and F, I do not see a way to find that they meet the *Sierra Club* test by establishing harm. The harm can then be compared to the harm associated with

denying public scrutiny of the judicial process (*Sierra Club*, para 52). The refusal to provide, or negligence in not providing, this essential information means that the prothonotary's decision does not constitute an error that might be either palpable or overriding. The applicant seems to want to rest on the assumption that all medical information is automatically subject to a confidentiality order so that public access to court proceedings will always be limited. To my knowledge, this is not a recognized assumption in our law. Just think of all medical malpractice cases or liability actions where injuries have been sustained. In my opinion, a balancing exercise must take place, and confidential disclosure to the decision maker is required. It is possible that the nature of medical information may, by logic and reason, be sufficient to establish harm. But the decision maker must be made aware beforehand.

[42] The applicant relied on an order dated February 20, 2019, from Prothonotary Steele in file T-766-18. The prothonotary issued a confidentiality order with respect to medical expert reports made on January 5, 2018, and February 15, 2018. Mr. Lessard-Gauvin submitted that the [TRANSLATION] "horizontal stare decisis" principle should have been respected. It is difficult to see how this could have been the case. First, it is not known whether these are the same reports as those that could be discussed in this case. More importantly, the motion was granted upon consent. Finally, Prothonotary Steele provided that [TRANSLATION] "except for the applicant's personal and medical information contained in the Confidential Documents, all other facts and circumstances relating to this proceeding will be made public in order to permit a full and transparent determination of the issues in dispute and the merits of the application for judicial review" (order, p 3 of 7).

[43] I also note the April 29, 2019 orders rendered by Justice Pelletier of the Federal Court of Appeal in cases A-312-18 and A-313-18, where the Crown brought motions for security for costs. In both cases, a direction from Justice De Montigny required [TRANSLATION] "a complete record including his affidavit and representations, clearly identifying the portions for which he is seeking a confidentiality order and the reasons for that request" (order, p 2 of 4). Justice De Montigny had provided that the Registry and the respondent (the Attorney General) [TRANSLATION] "will treat the documents and information identified as confidential by the appellant in accordance with rule 152 until the Court has disposed of this motion". Justice Pelletier notes in his order that a 191-page motion record was filed on March 28, in response to the direction, that Mr. Lessard-Gauvin [TRANSLATION] "mostly confined himself to general comments that do not allow the Court to decide on the merits of the application for a confidentiality order as to the information specific to the applicant" (order, p 3 of 4). As a result, the motions were dismissed, with costs.

[44] Essentially, this is the situation that was presented to Prothonotary Tabib, who was, at best, in the dark about new medical or personal information that would not have been publicly disclosed already if the argument had been made in a clear manner. There is no alternative but to dismiss the applicant's appeal.

[45] Nevertheless, the balancing required under rule 151(2) was not done in the absence of medical information that the applicant describes as new and that has not been disclosed.

V. Conclusion

[46] The appeal of Prothonotary Tabib's decision being concluded, the motions for security for costs must succeed. The decision under appeal provided as follows:

> [TRANSLATION]
>
> - Files T-1136-16, T-210-18 and T-766-18 are consolidated for consideration and determination;
>
> - The time limits for filing the applicant's response records relating to motions for security for costs were extended to 15 days from the date of the order. Although the prothonotary's order was not stayed, no such response record was submitted by Mr. Lessard-Gauvin;
>
> - The time limit for service and filing of the applicant's record in T-210-18 is extended to 20 days from the date of this order.

These deadlines have expired.

[47] On May 14, Prothonotary Tabib issued an order suspending the time limits. Upon reading the order, there is concern that the motions for security for costs had to be disposed of before Mr. Lessard-Gauvin's judicial review applications are heard. I have reproduced the operative part of the May 14, 2019 order below:

> [TRANSLATION]
>
> THIS COURT ORDERS THAT:
>
> 1. In addition to in respect of the appeal from the decision rendered on April 10, 2019, and the filing of a reply in the event

> that the applicant is allowed to file a response to the motion for security for costs despite the expiry of the time limits provided for in the order dated April 10, 2019, the time limits for the respondent to complete any action in these cases are suspended until the motion for security for costs is determined.
>
> 2. Any request to schedule hearing on the merits in these cases is suspended until otherwise ordered or directed by the Court.
>
> 3. However, the deadlines for the completion of the next steps to be taken by the applicant in these cases continue to run.

[48] It will be up to Prothonotary Tabib to set the deadlines for the next steps, especially since Mr. Lessard-Gauvin has announced his intention to challenge the constitutionality of rule 417.

[49] Finally, since there was an appeal in all three cases (T-1136-16, T-210-18 and T-766-18), these three appeals are dismissed with costs in each. Furthermore, as noted at the hearing, it would not be appropriate to record costs without taking into account that there is likely to be some duplication, given the nature of the appeal. In any case, counsel for the Attorney General did not disagree.

JUDGMENT in T-1136-16, T-210-18 and T-766-18

THIS COURT ORDERS that:

1. The appeals in T-1136-16, T-210-18 and T-766-18 of the decisions rendered on April 10, 2019 are dismissed. A copy of this judgment and reasons will be filed in each of the files;

2. Costs are awarded to the Attorney General of Canada for each case appealed;

3. The three dockets are returned to Prothonotary Tabib for further action, including setting new deadlines.

"Yvan Roy"
Judge

Certified true translation
This 12th day of August, 2019.
Michael Palles, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-1136-16, T-210-18, T-766-18
STYLE OF CAUSE:	DAVID LESSARD-GAUVIN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HEARING HELD VIA TELECONFERENCE BETWEEN MONTRÉAL, QUEBEC, QUÉBEC, QUEBEC AND OTTAWA, ONTARIO
DATE OF HEARING:	MAY 28, 2019
JUDGMENT AND REASONS:	ROY J.
DATED:	JULY 5, 2019

APPEARANCES:

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Marilou Bordeleau	FOR THE RESPONDENT

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