Federal Court of Appeal  Cour d'appel fédérale

Date: 20200717

Docket: A-316-18

Citation: 2020 FCA 123

[ENGLISH TRANSLATION]

CORAM: **NADON J.A.**
RENNIE J.A.
RIVOALEN J.A.

BETWEEN:

GENEVIÈVE DESJARDINS

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

THE PUBLIC SECTOR INTEGRITY COMMISSIONER

Third Party

Heard at Ottawa, Ontario, on November 14, 2019.

Judgment delivered at Ottawa, Ontario, on July 17, 2020.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: RENNIE J.A.
RIVOALEN J.A.

Federal Court of Appeal | Cour d'appel fédérale

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Intervener

REASONS FOR JUDGMENT

NADON J.A.

I. Introduction

[1] This is an appeal from a decision of Justice Grammond (the Judge) of the Federal Court dated September 20, 2018 (2018 FC 938) allowing an appeal from a decision rendered by Prothonotary Tabib (the Prothonotary) on April 27, 2018 (T-1308-18).

[2] More specifically, the Judge held that the Prothonotary had erred in dismissing a motion filed by the Public Sector Integrity Commissioner of Canada (the Commissioner) pursuant to Rule 151 of the *Federal Courts Rules*, SOR/98-106 (the Rules) for a confidentiality order with respect to certain aspects of the supplementary certified record, the filing of which was ordered by the Prothonotary on January 25, 2018.

[3] For the reasons that follow, I find that the Judge was wrong to intervene and, therefore, I would restore the order made by the Prothonotary.

II. Facts and proceedings

[4] In March 2014, the appellant became vice-president of communications and public affairs for the Canadian Food Inspection Agency (the Agency).

[5] On February 5, 2015, employees filed two psychological harassment complaints against the appellant with the Agency's human resources branch. The next day, a former employee of the Agency filed a similar complaint against the appellant.

[6] On October 27, 2015, pursuant to the *Public Servants Disclosure Protection Act*, S.C. 2005 c. 46 (the Act), one or more people sent the Commissioner a disclosure of alleged wrongdoings by the appellant. After a preliminary review of the disclosure, the Commissioner decided, on January 26, 2016, to conduct an investigation and he notified the appellant of the investigation by way of a letter dated February 12, 2016.

[7] During the investigation conducted by the Commissioner, 31 witnesses were interviewed, including the person(s) who made the disclosure and the appellant.

[8] On July 25, 2017, the appellant received a letter from the Commissioner dated July 24, 2017, informing her that there had been a finding of wrongdoing. More specifically, the Commissioner had found that the appellant had committed wrongdoings within the meaning of the Act, in particular that her interactions with her employees had been unacceptable, that she had deliberately and frequently been rude and disrespectful to them, and that her behaviour had had a negative impact on the well-being of a number of her employees.

[9] On August 22, 2017, the appellant filed an application for judicial review of the Commissioner's decision. The appellant claimed that the disclosure of wrongdoings against her (file PSIC-2015-D-0173) was untrue and resulted from the bad faith of the persons who made the

disclosure. She also claimed that there was a reasonable apprehension of bias on the part of the Commissioner because of certain public statements allegedly made by the Commissioner. She also stated that the Commissioner's investigator had shown obvious bias during the investigation and had been incompetent in the performance of his duties.

[10] In her application for judicial review, the appellant, pursuant to Rule 317 of the Rules, requested a copy of all of the documents and information in the Commissioner's possession that were the subject of the investigation and the decision. The appellant supported her request with a list of the specific information and documents that she wanted to obtain.

[11] On October 2, 2017, the Commissioner sent the appellant a copy of the documents and information upon which he had based his decision of July 24, 2017 (the certified record). Not satisfied with the contents of the certified record, the appellant, on October 13, 2017, requested the entire investigation file from the Commissioner.

[12] Following that request, the Commissioner filed an objection pursuant to Rule 318(2) with respect to the appellant's request for material.

[13] On January 25, 2018, the Prothonotary made an order in respect of the objection filed by the Commissioner. Specifically, the Prothonotary found that the Commissioner's objection was ill-founded in regard to certain documents and, therefore, she made the following order:

[TRANSLATION]

THE COURT ORDERS that:

1. The Commissioner's objections to providing the following documents are dismissed, and the Commissioner will provide the Court and the applicant with a supplementary certified record responding to those requests within 20 days of the date of this order.

    (a) The list of all of the witnesses who participated in the investigation (category 6).

    (b) Transcripts of all witness interviews (category 7).

    (c) The documents identified in paragraphs 20(a) to (f) of the Commissioner's written submissions dated November 10, 2017 (category 8, in part).

    (d) The recordings and discussion notes relating to the investigation between the Commissioner, members of his staff and his investigators and the complainants, as well as all of the witnesses who were interviewed, except for internal communications over which solicitor-client privilege is claimed, in which case the certificate will describe the document and state the facts giving rise to the privilege claimed (category 9).

    (e) Complete copy of Tim Connor's employee file consulted by the Commissioner (category 11, in part).

    (f) Copy of all of the emails and/or electronic or paper communications between the witnesses or the complainants in the Commissioner's possession (category 12).

    [Emphasis added.]

[14] By order of February 16, 2018, the Prothonotary extended the Commissioner's deadline for sending the supplementary certified record to March 7, 2018, and advised the Commissioner that any motion for a confidentiality order had to be served and filed no later than March 7, 2018.

[15] On March 9, 2018, the Commissioner requested that the Court issue a confidentiality order in accordance with the terms of a draft confidentiality order attached to the motion relating to the use, disclosure and dissemination of certain confidential material and information in the certified record, transmitted on October 2, 2017, pursuant to Rule 318, and the supplementary certified record dated March 7, 2018, transmitted following the order made by the Prothonotary on January 25, 2018.

[16] Specifically, the Commissioner sought a confidentiality order to keep a limited amount of the information in his investigation file confidential. The order sought by the Commissioner included three versions of the certified record and the supplementary certified record:

(a) a complete, unredacted and fully confidential version for the Court and for counsel for the parties (the confidential version for the Court and counsel for the parties); and

(b) a redacted version for filing in the public record of the Court (public version). This public version would not include the names of the witnesses or the persons who made the disclosure or any information that could identify them, the audio recordings of the witness interviews, the investigators' handwritten notes, an Agency employee's file, as well as an audio recording of a conversation between the investigator and the appellant's first counsel;

(c) a partially redacted version for the parties (confidential version for the parties). This version would include all of the elements of the file, with the exception of the audio recordings of the interviews and the names of the persons who made the disclosure as well as any information that could identify them.

[17] By her order of April 27, 2018, except with regard to certain privileged documents and personal information in an Agency employee's file, the redaction of which the appellant did not object to, the Prothonotary dismissed the Commissioner's confidentiality motion.

[18] On May 8, 2018, pursuant to Rule 51, the Commissioner appealed the Prothonotary's order.

[19] On September 20, 2018, the Judge reversed the Prothonotary's order and made the order sought by the Commissioner, except with regard to the disclosure to the appellant of the audio recordings of the witness interviews, subject to redaction of any information that could reveal to the appellant the identity of the persons who made the disclosure.

III. The Prothonotary's decision of April 27, 2018

[20] On page 2 of her reasons, the Prothonotary described the nature of the issues raised by the Commissioner's confidentiality motion. In particular, she explained that the order sought by the Commissioner involves two levels of confidentiality.

[21] First, the order sought would prevent public disclosure of any information that could reveal the identity of the persons who made the disclosure and the witnesses who participated in the investigation, as well as the personal opinions provided by those witnesses during the investigation. Also, the personal data in an Agency employee's file would not be disclosed.

[22] Second, the order sought would not allow the identity of the person(s) who made the disclosure to be disclosed to the parties. Finally, counsel for the parties and the Court would have access to the complete, unredacted file.

[23] The Prothonotary began her analysis by stating that the principle of [TRANSLATION] "open and accessible court proceedings is one of the foundations of a democratic society." (Reasons of the Prothonotary, p. 3). According to the Prothonotary, it follows that a confidentiality order should not be issued unless the Court is satisfied that the order is necessary to prevent a serious risk to an important interest and that the order's salutary effects outweigh its deleterious effects.

[24] The Prothonotary also stated that the burden of establishing that there is a real and substantial risk to an important interest rests with the moving party. She also stated that, according to the Commissioner, the important public interest in this case is the protection of the persons who made the disclosure and the witnesses against possible reprisals and Parliament's will to encourage public servants to report wrongdoings within the public service.

[25] The Prothonotary was of the view that the interest advanced by the Commissioner is an important public interest but added that it is necessary to show that publishing the information for which the Commissioner sought a confidentiality order [TRANSLATION] "represents a real and substantial risk to that interest." (Reasons of the Prothonotary, p. 4).

[26] According to the Prothonotary, the Commissioner failed to demonstrate that publishing the information in question represented a real and substantial risk to the interest that the Commissioner wanted to protect. The Prothonotary's reasons for this finding are as follows.

[27] The first ground raised by the Prothonotary in support of her conclusion is that despite the fact that the application for judicial review filed by the appellant identified two of the persons who made the disclosure and a number of witnesses, there is no evidence that those persons had suffered reprisals or were at risk of suffering reprisals. In addition, according to the Prothonotary, any risk of reprisals would necessarily be directed at the persons who made the disclosure by the appellant herself. According to the Prothonotary, this finding and the fact that the Commissioner did not object to the appellant receiving the list of all of the witnesses interviewed during the investigation were such that disclosing that list to the public would not put those people at risk.

[28] The Prothonotary ended her comments on her first ground by asserting that [TRANSLATION] "neither the evidence nor the application of reason or logic supports the finding that there is a serious risk of reprisals in this case requiring that the public's or the applicant's access to the identity of the witnesses or the persons who made the disclosure be restricted." (Reasons of the Prothonotary, p. 5).

[29] As a second ground, the Prothonotary indicated that the Commissioner failed to demonstrate, to the satisfaction of the Court, how publicly disclosing the identity of the persons

who made the disclosure or the witnesses could have a deterrent effect on disclosure in general and on potential witnesses. At page 5 of her reasons, the Prothonotary stated the following:

> [TRANSLATION]
>
> . . . The risk of such a deterrent effect is even more difficult to understand when the identity of the persons who made the disclosure or the witnesses is revealed at the judicial review stage, when the Commissioner's investigation is done, the complaints have been found to be justified and the report has been made public, and in circumstances where two of the persons who made the disclosure and several witnesses have already been publicly identified during the proceedings.

[30] Consequently, the Prothonotary found that the confidentiality order sought by the Commissioner was not justified in the circumstances.

[31] Before concluding her reasons, the Prothonotary pointed out that the Commissioner's argument was essentially based on sections 11, 22 and 44 of the Act, which require chief executives in the public service, the Commissioner, and every person acting under the direction of the Commissioner, to protect the identity of persons making disclosures and witnesses of wrongdoings. According to the Prothonotary, it was important to note that the obligation of confidentiality required by those provisions is subject to exceptions arising from the operation of any other Act of Parliament and the rules of law that are in force. Therefore, in her view, it would be wrong to say that persons who make a disclosure and witnesses could have a reasonable expectation that their identity would remain confidential [TRANSLATION] "outside the scope of the Commissioner's investigation." (Reasons of the Prothonotary, p. 6).

[32] According to the Prothonotary, Parliament did not see fit to extend the obligation of confidentiality to the Federal Court when it exercises its judicial review powers as it did for information subject to the *Access to Information Act*, R.S.C. 1985, c. A-1, section 47 and the *Privacy Act*, R.S.C. 1985, c. P-21, section 46, in the course of reviews under those Acts.

[33] For these reasons, the Prothonotary dismissed the Commissioner's motion with costs.

IV. The Judge's decision dated September 20, 2018

[34] The Judge found that the Prothonotary erred in dismissing the Commissioner's motion for a confidentiality order. According to the Judge, the motion should have been granted. In particular, he found that the Prothonotary made two errors in concluding as she did.

[35] First, although the Judge was of the opinion that the Prothonotary properly understood the principles regarding open courts and confidentiality orders, he was of the view that the Prothonotary imposed on the Commissioner a greater burden of proof than that set out by the Supreme Court of Canada in *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567 [*Bragg*]. Specifically, the Judge stated that he disagreed with the Prothonotary, who, relying on the Supreme Court's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R 522 [*Sierra Club*], stated that the party seeking a confidentiality order must [TRANSLATION] "establish a real and substantial risk, well grounded in the evidence, that poses a serious threat to the interest in question" (Reasons of the Prothonotary, p. 3, citing paragraph 54 of *Sierra Club*).

[36] According to the Judge, the Prothonotary failed to consider the Supreme Court's decision in *Bragg*, where the Court stated the following at paragraphs 15 and 16:

> [15] The *amicus curiae* pointed to the absence of evidence of harm from the girl about her own emotional vulnerability. But, while evidence of a direct, harmful consequence to an individual applicant is relevant, courts may also conclude that there is objectively discernable harm.
>
> [16] This Court found objective harm, for example, in upholding the constitutionality of Quebec's *Rules of Practice* that limited the media's ability to film, take photographs, and conduct interviews in relation to legal proceedings (in *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 19), and in prohibiting the media from broadcasting a video exhibit (in *Canadian Broadcasting Corp. v. The Queen*, [2011] 1 S.C.R. 65). In the former, Deschamps J. held (at para. 56) that the *Dagenais/Mentuck* test requires neither more nor less than the one from *R. v. Oakes*, [1986] 1 S.C.R. 103. In other words, absent scientific or empirical evidence of the necessity of restricting access, the court can find harm by applying reason and logic: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 72; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 91.

[37] Relying on *Bragg*, the Judge stated that it was "not always necessary to provide evidence in support of a motion for a confidentiality order." (Reasons of the Judge, para. 10). More particularly, the Judge found that the Prothonotary had erred by requiring the Commissioner to demonstrate the deleterious effects of public disclosure of the identity of the persons who made the disclosure and the witnesses. According to the Judge, in this case, the harm is "objectively discernable" based on "the analysis of the legislative scheme in question and [based on] Parliament's purpose . . ." (Reasons of the Judge, para. 11). In other words, in light of the Act and its purposes, disclosure would threaten or compromise the public interest pursued by Parliament.

[38] Second, the Judge addressed the Prothonotary's interpretation of the Act whereby the Act "does not, in any way, guarantee confidentiality to persons making disclosures or witnesses where an investigation is the subject of an application for judicial review before this Court." (Reasons of the Judge, para. 14).

[39] After having reviewed the relevant provisions of the Act, the Judge found that there could be no doubt that Parliament considered the confidentiality of disclosures and testimony as essential for the purposes of the Act. At paragraph 24 of his reasons, the Judge stated the following:

> To summarize, the purpose, scheme and wording of the Act, combined with a dose of "reason and logic," show that Parliament considered that the public disclosure of whistleblowers' identity would risk thwarting the purposes of the Act, particularly the purpose of ensuring effective disclosure procedures. In my view, nothing more is required to demonstrate the need for a confidentiality order.
>
> [Emphasis added.]

[40] For these reasons, the Judge found that the Commissioner had demonstrated that the order sought was necessary to ensure the anonymity of the witnesses and the persons who made the disclosure. With the exception of a part of the proposed order aimed at preventing the appellant from having access to the audio recordings of the witness interviews, the Judge stated that he agreed with the order sought, which, in his view, was a minimal infringement on the principle of open and accessible court proceedings and procedural fairness.

V. The appellant's arguments

[41] The appellant challenges the Judge's decision for the following reasons.

[42] First, the appellant states that the assurances and protections found in the Act are not absolute and that they, given the allegations in the application for judicial review and the nature of the case [TRANSLATION] "may yield to the duties of natural justice and procedural fairness" (Memorandum of Fact and Law of the appellant, para. 58).

[43] The appellant adds that because she no longer holds the same position within the public service of Canada, she has no power to take reprisals against the witnesses and the persons who made the disclosure. The risk of harm to the witnesses and the persons who made the disclosure is, for all intents and purposes, non-existent.

[44] According to the appellant, the confidentiality order, if upheld, will prevent the public from understanding the issues in her case and from passing judgment on the relevant facts. She adds that publication of the names of the witnesses and the persons who made the disclosure is of particular importance because publication will induce the witnesses and the persons who made the disclosure to tell the truth. In support of this argument, the appellant stated the following at paragraph 61 of her memorandum of fact and law:

> [TRANSLATION]
>
> Considering the facts of this case, this is a substantial argument. The applicant claims, using plausible and consistent arguments, that the complaints against her are untrue and were completely fabricated by a group of employees dissatisfied

> with changes proposed by the applicant. The changes included the applicant's proposed plan to change the linguistic profile of certain positions, to change the overtime policies and to require that a formal budget be submitted for spending allocated funds. The persons who made the disclosure and the witnesses, who remain anonymous, are entirely insulated from public scrutiny and the judicial process. They can therefore continue their crusade against the applicant without fear.

[45] Also, according to the appellant, the anonymity of the witnesses and the persons who made the disclosure will negatively affect her ability to mount a full defence. According to her, the identity of the witnesses and the persons who made the disclosure is crucial because that information will allow her to demonstrate the bias of the investigator and the Commissioner, an issue that she raised in her application for judicial review.

[46] Finally, relying on the Supreme Court's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 1999 CanLII 699 (SCC), at paragraphs 23 to 28, the appellant argues that the Judge erred in his interpretation of the Act and failed to consider the scope of her right to procedural fairness and the principles of natural justice. According to the appellant, protecting the confidentiality of the identity of the witnesses and the persons who made the disclosure remains subject to procedural fairness and the rules of natural justice.

VI. Legislation

[47] The relevant provisions of the applicable legislation are as follows:

***Federal Court Rules*, SOR/98-106**	***Règles des Cours fédérales*, DORS/98-106**
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(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

151(1) La Cour peut, sur requête, ordonner que des documents ou éléments matériels qui seront déposés soient considérés comme confidentiels.

151(2) Avant de rendre une ordonnance en application du paragraphe (1), la Cour doit être convaincue de la nécessité de considérer les documents ou éléments matériels comme confidentiels, étant donné l'intérêt du public à la publicité des débats judiciaires.

***Public Servants Disclosure Protection Act*, S.C. 2005, c. 46**

***Loi sur la protection des fonctionnaires divulgateurs d'actes répréhensibles*, L.C. 2005, ch. 46**

Preamble

Préambule

Recognizing that

Attendu :

the federal public administration is an important national institution and is part of the essential framework of Canadian parliamentary democracy;

que l'administration publique fédérale est une institution nationale essentielle au fonctionnement de la démocratie parlementaire canadienne;

it is in the public interest to maintain and enhance public confidence in the integrity of public servants;

qu'il est dans l'intérêt public de maintenir et d'accroître la confiance du public dans l'intégrité des fonctionnaires;

confidence in public institutions can be enhanced by establishing effective procedures for the disclosure of wrongdoings and for protecting public servants who disclose wrongdoings, and by establishing a code of conduct for the public sector;

que la confiance dans les institutions publiques ne peut que profiter de la création de mécanismes efficaces de divulgation des actes répréhensibles et de protection des fonctionnaires divulgateurs, et de l'adoption d'un code de conduite du secteur public;

public servants owe a duty of loyalty to their employer and enjoy the right to freedom of expression as guaranteed by the *Canadian Charter of Rights and Freedoms* and that this Act strives to achieve an appropriate

que les fonctionnaires ont un devoir de loyauté envers leur employeur et bénéficient de la liberté d'expression garantie par la *Charte canadienne des droits et libertés* et que la présente loi

balance between those two important principles;

the Government of Canada commits to establishing a Charter of Values of Public Service setting out the values that should guide public servants in their work and professional conduct;

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

. . .

Duty of chief executives

11(1) Each chief executive must

(a) subject to paragraph (c) and any other Act of Parliament and to the principles of procedural fairness and natural justice, protect the identity of persons involved in the disclosure process, including that of persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings;

(b) establish procedures to ensure the confidentiality of information collected in relation to disclosures of wrongdoings; and

(c) if wrongdoing is found as a result of a disclosure made under section 12, promptly provide public access to information that

(i) describes the wrongdoing, including information that could

vise à atteindre l'équilibre entre ce devoir et cette liberté;

que le gouvernement du Canada s'engage à adopter une charte des valeurs du service public énonçant les valeurs qui guident les fonctionnaires dans leur conduite et leurs activités professionnelles,

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

. . .

Obligations de l'administrateur général

11(1) L'administrateur général veille à ce que :

a) sous réserve de l'alinéa c) et de toute autre loi fédérale applicable, de l'équité procédurale et de la justice naturelle, l'identité des personnes en cause dans le cadre d'une divulgation soit protégée, notamment celle du divulgateur, des témoins et de l'auteur présumé de l'acte répréhensible;

b) des mécanismes visant à assurer la protection de l'information recueillie relativement à une divulgation soient mis en place;

c) dans les cas où il est conclu par suite d'une divulgation faite au titre de l'article 12 qu'un acte répréhensible a été commis, soit mise promptement à la disposition du public de l'information faisant état :

(i) de l'acte répréhensible, y compris l'identité de son auteur si

identify the person found to have committed it if it is necessary to identify the person to adequately describe the wrongdoing, and

(ii) sets out the recommendations, if any, set out in any report made to the chief executive in relation to the wrongdoing and the corrective action, if any, taken by the chief executive in relation to the wrongdoing or the reasons why no corrective action was taken.

la divulgation de celle-ci est nécessaire pour en faire état adéquatement,

(ii) des recommandations contenues, le cas échéant, dans tout rapport qui lui a été remis et des mesures correctives prises par lui-même ou des motifs invoqués pour ne pas en prendre.

Exception

11(2) Nothing in paragraph (1)(c) requires a chief executive to provide public access to information the disclosure of which is subject to any restriction created by or under any Act of Parliament.

Exception

11(2) L'alinéa (1)c) n'oblige pas l'administrateur général de mettre à la disposition du public de l'information dont la communication est restreinte sous le régime d'une loi fédérale.

. . .

. . .

Duties

22 The duties of the Commissioner under this Act are to

Attributions

22 Le commissaire exerce aux termes de la présente loi les attributions suivantes :

. . .

. . .

(e) subject to any other Act of Parliament, protect, to the extent possible in accordance with the law, the identity of persons involved in the disclosure process, including that of persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings;

e) sous réserve de toute autre loi fédérale applicable, veiller, dans toute la mesure du possible et en conformité avec les règles de droit en vigueur, à ce que l'identité des personnes mises en cause par une divulgation ou une enquête soit protégée, notamment celle du divulgateur, des témoins et de l'auteur présumé de l'acte répréhensible;

. . .

. . .

Confidentiality

44 Unless the disclosure is required by law or permitted by this Act, the Commissioner and every person acting on behalf of or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their duties under this Act.

. . .

***Access to Information Act*, R.S.C. 1985, c. A-1**

. . .

Court to take precautions against disclosing

47(1) In any proceedings before the Court arising from an application under section 41 or 44, the Court shall take every reasonable precaution, including, when appropriate, receiving representations *ex parte* and conducting hearings *in camera*, to avoid the disclosure by the Court or any person of

(a) any information or other material on the basis of which the head of a government institution would be authorized to refuse to disclose a part of a record requested under this Part; or

(b) any information as to whether a record exists where the head of a government institution, in refusing to disclose the record under this Part, does not indicate whether it exists.

Secret

44 Sauf si la communication est faite en exécution d'une obligation légale ou est autorisée par la présente loi, le commissaire et les personnes agissant en son nom ou sous son autorité sont tenus au secret en ce qui concerne les renseignements dont ils prennent connaissance dans l'exercice des attributions que leur confère la présente loi.

. . .

***Loi sur l'accès à l'information*, L.R.C. (1985), ch. A-1**

. . .

Précautions à prendre contre la divulgation

47(1) Dans les procédures découlant des recours prévus aux articles 41 et 44, la Cour prend toutes les précautions possibles, notamment, si c'est indiqué, par la tenue d'audiences à huis clos et l'audition d'arguments en l'absence d'une partie, pour éviter que ne soient divulgués de par son propre fait ou celui de quiconque :

a) des renseignements qui, par leur nature, justifient, en vertu de la présente partie, un refus de communication totale ou partielle d'un document;

b) des renseignements faisant état de l'existence d'un document que le responsable d'une institution fédérale a refusé de communiquer sans indiquer s'il existait ou non.

Disclosure of offence authorized

47(2) The Court may disclose to the appropriate authority information relating to the commission of an offence against a law of Canada or a province by a director, an officer or an employee of a government institution if, in the Court's opinion, there is evidence of such an offence.

. . .

***Privacy Act*, R.S.C. 1985, c. P-21**

Court to take precautions against disclosing

46(1) In any proceedings before the Court arising from an application under section 41, 42 or 43, the Court shall take every reasonable precaution, including, when appropriate, receiving representations *ex parte* and conducting hearings *in camera*, to avoid the disclosure by the Court or any person of

(a) any information or other material that the head of a government institution would be authorized to refuse to disclose if it were requested under subsection 12(1) or contained in a record requested under the *Access to Information Act*; or

(b) any information as to whether personal information exists where the head of a government institution, in refusing to disclose the personal information under this

Autorisation de dénoncer des infractions

47(2) Si, à son avis, il existe des éléments de preuve touchant la perpétration d'une infraction fédérale ou provinciale par un administrateur, un dirigeant ou un employé d'une institution fédérale, la Cour peut faire part à l'autorité compétente des renseignements qu'elle détient à cet égard.

. . .

***Loi sur la protection des renseignements personnels*, L.R.C. (1985), ch. P-21**

Précautions à prendre contre la divulgation

46(1) À l'occasion des procédures relatives aux recours prévus aux articles 41, 42 ou 43, la Cour prend toutes les précautions possibles, notamment, si c'est indiqué, par la tenue d'audiences à huis clos et l'audition d'arguments en l'absence d'une partie, pour éviter que ne soient divulgués de par son propre fait ou celui de quiconque :

a) des renseignements qui justifient un refus de communication de renseignements personnels demandés en vertu du paragraphe 12(1) ou de renseignements contenus dans un document demandé sous le régime de la *Loi sur l'accès à l'information*;

b) des renseignements faisant état de l'existence de renseignements personnels que le responsable d'une institution fédérale a refusé de

Act, does not indicate whether it exists.	communiquer sans indiquer s'ils existaient ou non.
Disclosure of offence authorized	**Autorisation de dénoncer des infractions**
46(2) The Court may disclose to the appropriate authority information relating to the commission of an offence against a law of Canada or a province by a director, an officer or an employee of a government institution if, in the Court's opinion, there is evidence of such an offence.	**46(2)** Si, à son avis, il existe des éléments de preuve touchant la perpétration d'une infraction fédérale ou provinciale par un administrateur, un dirigeant ou un employé d'une institution fédérale, la Cour peut faire part à l'autorité compétente des renseignements qu'elle détient à cet égard.

VII. Issues

[48] The only issue in this case is whether the Judge committed an error of law or a palpable and overriding error in allowing the appeal from the Prothonotary's decision.

VIII. Analysis

[49] There is no dispute between the parties regarding the applicable standards of review in this case. In *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331, this Court found that the discretionary decisions of prothonotaries and judges of the Federal Court were subject to the standards set out by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, that is, the standard of correctness for questions of law and questions of mixed fact and law, where there is an extricable question of law, and the standard of palpable and overriding error for questions of fact and questions of mixed fact and law raising no question of law.

[50] As I indicated at the beginning of my reasons, I am of the opinion that the Judge was wrong to intervene. Before I explain why I reached this conclusion, it is helpful to review the principles applicable to orders of confidentiality that may be made pursuant to Rule 151 of the Rules. Rule 151 stipulates that the Court may make such an order, notwithstanding the public interest in open and accessible court proceedings, if it is satisfied that the material in question should be treated as confidential.

[51] I will therefore focus primarily on two Supreme Court of Canada decisions: *Sierra Club* and *Bragg*.

[52] In *Sierra Club*, the Supreme Court had to decide whether the Federal Court and this Court had erred in refusing to issue a confidentiality order in respect of commercial documents that contained, according to the appellant (Atomic Energy of Canada Limited), confidential information. At paragraph 35 of his reasons for the Court, Justice Iacobucci stated the issues as follows:

> A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under Rule 151 of the *Federal Court Rules, 1998*?
>
> B. Should the confidentiality order be granted in this case?

[53] After providing a summary of the reasons of the Federal Court and of this Court in support of those decisions to refuse to issue the confidentiality order, Justice Iacobucci, relying on *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, 1996 CanLII 184 (SCC), para. 23 [*New Brunswick*], stated that, in his opinion, because the link

between openness in judicial proceedings and freedom of expression has been firmly established in our law, the order sought by the appellant to limit public access to confidential documents would clearly infringe the guarantee found in paragraph 2(b) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[54] Justice Iacobucci went on to state that the analytical approach to the exercise of discretion under Rule 151 must echo the principles laid out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 1994 CanLII 39 (SCC) [*Dagenais*] and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442 [*Mentuck*] and must be tailored to the rights and interests engaged in the case.

[55] After reviewing the principles laid out in *Dagenais*, *New Brunswick* and *Mentuck*, Justice Iacobucci stated, at paragraph 53 of his reasons, that a confidentiality order issued 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; and
>
> (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.

[56] Also, at paragraph 54 of his reasons, Justice Iacobucci stated, as he did at paragraph 34 of his reasons in *Mentuck*, that the first branch of the test contained several important elements, including that the risk in question had to be a serious one or, as stated by Chief Justice Lamer at

page 878 of *Dagenais*, the risk had to be "real and substantial", that the risk in question had to be well grounded in the evidence, and that the risk had to, in that case, pose a serious threat to the appellant's commercial interest relating to the objective of preserving contractual obligations of confidentiality in respect of confidential documents. It should be noted that in *Sierra Club*, the appellant claimed that the disclosure sought would cause irreparable harm to its commercial interests.

[57] Given the conclusion of the motions judge, not contradicted by this Court on appeal from his decision, that the information contained in the documents in question was clearly of a confidential nature and would be of interest to the appellant's competitors, Justice Iacobucci concluded that the appellant sought the confidentiality order to prevent a serious risk to an important commercial interest.

[58] As a result, Justice Iacobucci was of the opinion that the first branch of the test had been satisfied. In other words, there was an important interest to protect and the evidence supported the appellant's position that disclosure would result in substantial harm to that interest.

[59] Subsequently, with regard to the second branch of the test, Justice Iacobucci concluded that the salutary effects of the order sought outweighed its deleterious effects on the principle of open and accessible court proceedings and the right to freedom of expression.

[60] Before turning to *Bragg*, the other important decision of the Supreme Court for the purposes of this appeal, I would like to note some of the comments made by Justice Iacobucci in

Mentuck, where he again wrote for the Court. In *Mentuck*, it should be noted, the Court had to decide whether to allow the public, in the context of criminal proceedings, to be made aware of undercover investigative techniques used by the police. Ultimately, the court refused to make a confidentiality order to that effect. Furthermore, at paragraph 38 of his reasons, Justice Iacobucci stated that a trial judge must, even when no one has come forward to defend the public's right to freedom of expression, take account of that interest and carefully consider the evidence before him. Justice Iacobucci stated the following:

> In some cases, however, most notably when there is no party or intervener present to argue the interests of the press and the public to free expression, the trial judge must take account of these interests without the benefit of argument. The consideration of unrepresented interests must not be taken lightly, especially where *Charter*-protected rights such as freedom of expression are at stake. It is just as true in the case of common law as it is of statutory discretion that, as La Forest J. noted, "[t]he burden of displacing the general rule of openness lies on the party making the application": *New Brunswick*, *supra*, at para. 71; *Dagenais*, *supra*, at p. 875. Likewise, to again quote La Forest J. (at paras. 72-73):
>
> > There must be a sufficient evidentiary basis from which the trial judge may assess the application and upon which he or she may exercise his or her discretion judicially. . . .
> >
> > A sufficient evidentiary basis permits a reviewing court to determine whether the evidence is capable of supporting the decision.
>
> In cases where the right of the public to free expression is at stake, however, and no party comes forward to press for that right, the judge must consider not only the evidence before him, but also the demands of that fundamental right. The absence of evidence <u>opposed</u> to the granting of a ban, that is, should not be taken as mitigating the importance of the right to free expression in applying the test.
>
> [Emphasis in original.]

[61] In addition, at paragraph 39 of his reasons, Justice Iacobucci stated that a confidentiality order should not be issued unless the Court has before it strong evidence of the harm that would result from disclosure. Justice Iacobucci stated the following:

> It is precisely because the presumption that courts should be open and reporting of their proceedings should be uncensored is so strong and so highly valued in our society that the judge must have a convincing evidentiary basis for issuing a ban. Effective investigation and evidence gathering, while important in its own right, should not be regarded as weakening the strong presumptive public interest, which may go unargued by counsel more frequently as the number of applications for publication bans increases, in a transparent court system and in generally unrestricted speech on matters of such public importance as the administration of justice.
>
> [Emphasis added.]

[62] In *Bragg*, the appellant, a 15-year-old girl, discovered that someone had posted a Facebook profile using her picture, a slightly modified version of her name and other particulars identifying her. The picture was accompanied by unflattering commentary about her appearance along with sexually explicit references. The appellant therefore sought an order allowing her to proceed anonymously and requested a publication ban on the content of the Facebook profile.

[63] The trial court denied her request for anonymity and the publication ban because there was insufficient evidence of specific harm to the girl. On appeal, the Court of Appeal upheld the trial decision on the ground that the appellant had not discharged the onus of showing that there was a real and substantial harm to her which justified restricting the access requested by the media.

[64] The Supreme Court allowed the appeal in part, finding that the appellant was entitled to proceed anonymously. However, the Court found that there was no reason to impose a publication ban on the content of the Facebook profile which, in its view, did not contain any identifying information.

[65] The reasons of the Court for that conclusion are as follows.

[66] The main argument submitted by the *amicus curiae*, who appeared before the Court to advance the position of the media that opposed the order sought by the appellant, was that the appellant had not provided any evidence of specific harm to her. The *amicus curiae* claimed that the appellant had not provided evidence of harm about her own emotional vulnerability. In other words, according to the *amicus curiae*, given the total absence of evidence that the appellant would suffer harm if her name and the information in the Facebook profile were disclosed, the Court had to dismiss her application.

[67] Justice Abella, writing for the Court, rejected those arguments. After reiterating, as Justice Iacobucci did in *Sierra Club*, the importance of the open court principle, she addressed the question of whether privacy and the protection of children from cyberbullying constituted interests that were sufficiently compelling to justify restricting such access.

[68] According to Justice Abella, in order to be successful, the appellant had to show that the protection of that interest warranted restrictions on freedom of the press and open courts.

Justice Abella also indicated that the appellant's interests in that case were tied both to her age and to the nature of the victimization she sought protection from.

[69] Justice Abella then explained why, in her view, the Court should order that the appellant be allowed to proceed anonymously. First, she indicated that young people's privacy is protected by the *Criminal Code*, R.S.C. 1985, c. C-46 (section 486), the *Youth Criminal Justice Act*, S.C. 2002, c. 1 (section 110) and child welfare legislation and that this protection is based on age and not the sensitivity of a particular child. It followed that there is no need for a child, such as the appellant, to demonstrate, in a case such as her own, that "she personally conforms to this legal paradigm." (*Bragg*, para. 17). In other words, according to Justice Abella, the child's vulnerability was attributable to her age, not her temperament.

[70] These comments led Justice Abella to state that it was logical to infer that children may suffer harm through cyberbullying. In support of this statement, Justice Abella referred to the Report of the Nova Scotia Task Force on Bullying and Cyberbullying entitled *Respectful and Responsible Relationships: There's No App for That: The Report of the Nova Scotia Task Force on Bullying and Cyberbullying* (2012) (the Report). According to the Report, cyberbullying can be particularly harmful because the content can be spread widely and its harmful consequences can be extensive, including loss of self-esteem, anxiety, fear and school drop-outs.

[71] Justice Abella also explained that in addition to the psychological harm of cyberbullying, it results in inevitable harm to the children concerned—and the administration of justice—if they

decline or refuse to take steps to protect themselves because of the risk of harm from public disclosure of their identity.

[72] Relying again on the Report, Justice Abella concluded that, absent a grant of anonymity, children such as the appellant would be inclined to not pursue legal action.

[73] At paragraph 25 of her reasons, Justice Abella stated that it does not take much of an analytical leap to conclude that the likelihood of a child using legal means to protect himself or herself will be enhanced if he or she can proceed anonymously. Justice Abella also stated that studies have shown that allowing the names of child victims and/or other identifying information to appear in the media can exacerbate trauma, discourage future disclosures, and inhibit cooperation with authorities.

[74] Finally, Justice Abella indicated that the identity of victims, like the appellant, was relatively unimportant for the purposes of justice and, therefore, the harm to press freedom and the open courts principle was minimal.

[75] As a result, Justice Abella found that an order protecting the appellant's name was completely warranted and necessary. In light of that order, she saw no need for a publication ban on the information in the Facebook profile that did not contain any information identifying the appellant.

[76] In my view, given the principles stated by the Supreme Court in *Sierra Club* and *Bragg*, as well as in *Dagenais* and *Mentuck*, there can be no doubt that the Judge erred in concluding as he did. I will explain.

[77] As I indicated earlier, the Judge justified his intervention on the ground that the Prothonotary had imposed an excessively onerous burden of proof on the Commissioner. In other words, according to the Judge, the Prothonotary erred in relying on paragraph 54 of *Sierra Club* when she should have applied the principles set out in *Bragg*.

[78] Those comments led the Judge to state "that it was not always necessary to provide evidence in support of a motion for a confidentiality order" and that harm could be "objectively" discernable. (Reasons of the Judge, paras. 10–11). On the basis of that reasoning, the Judge stated that it was open to him to consider objective elements that did not require evidence in the conventional sense, including facts of which the Court could take judicial notice, which were derived from an analysis of the legislative scheme in question and from Parliament's objective in enacting the legislation.

[79] This led the Judge to say, at paragraph 13 of his reasons, that the Prothonotary had erred by requiring the Commissioner to show that public disclosure of the identity of the persons who made the disclosure and the witnesses would result in prejudice to the interest that he sought to defend. According to the Judge, "[m]ultiple provisions of the Act assume the existence of" the deleterious effects of disclosure. (Reasons of the Judge, para. 13.)

[80] Subsequently, as I indicated at paragraph [39] of these reasons, the Judge found, after having analyzed the relevant provisions of the Act, that Parliament, by reason of the wording of the Act, was of the opinion that "the public disclosure of whistleblowers' identity would risk thwarting the purposes of the Act" (Reasons of the Judge, para. 24).

[81] In my opinion, as the appellant noted at paragraph 82 of her memorandum of fact and law, the Judge established as an absolute principle that disclosing the names of persons who make a disclosure and witnesses must always be prohibited. The Judge erred in law in reaching that conclusion. He misunderstood the principles laid down by the Supreme Court and, more particularly, those set out in *Bragg*.

[82] First, a careful reading of *Bragg* does not support the Judge's statement, at paragraph 10 of his reasons, that "the Supreme Court stated [in Bragg] that it was not always necessary to provide evidence in support of a motion for a confidentiality order." In other words, it seems clear to me that in *Bragg* the Supreme Court did not call into question the principles set out in *Dagenais*, *Mentuck* and *Sierra Club*, according to which the harm that could result from disclosure must be "well grounded in the evidence" (*Sierra Club*, para. 54) or, as Justice Iacobucci stated at paragraph 39 of his reasons in *Mentuck*, the evidence in support of the serious risk of harm must be "convincing".

[83] In my opinion, in *Bragg*, the Supreme Court did not focus on the burden of proof on the person seeking a confidentiality order. Instead, it considered the quality or nature of the evidence that must be put forward in order to obtain the order. It is from this perspective from which the

words of Justice Abella must be understood, that is, when she spoke of "objectively discernible" harm (*Bragg*, para. 15) and when she stated that, in certain circumstances, the Court can "find harm by applying reason and logic" (*Bragg*, para. 16).

[84] As stated in my brief summary of the Supreme Court's reasons in *Bragg*, that case involved a vulnerable person who was the victim of cyberbullying and, even in such a situation, "reason and logic" had to be applied to enable the Court to find that there was a serious and imminent risk of harm. I hasten to add that there was strong evidence before the Court in *Bragg* supporting Justice Abella's conclusions regarding the harm that could result from disclosure of the appellant's name, including that the Report and various studies had shown that allowing the names of child victims and other identifying information to appear in the media can exacerbate trauma, discourage future disclosures, and inhibit cooperation with authorities. In my view, the Judge's analysis of the Act demonstrates the existence of an important interest under the first branch of the analytical test set out in *Sierra Club*, but that analysis does not really address the harm that may be caused by disclosure in this case.

[85] I am of the opinion that the exercise of discretion under Rule 151 requires that a judge analyze all of the relevant facts and all of the circumstances that may show whether or not there is harm to the important interest sought to be protected and thus make the appropriate order. In particular, the exercise of discretion under Rule 151 requires that a court hearing a motion for an order of confidentiality weigh all of the relevant factors, including the objectives and particular provisions of the legislative or regulatory scheme, the public interest at stake in the case, the constitutional rights at issue (privacy, freedom of expression, the open court principle) as well as

the information that is already public. In this case, the current situation and current places of employment of the witnesses and the persons who made the disclosure, whether or not they have a relationship with the appellant, any other risk factors, the filing of affidavits stating concerns and, conversely, any evidence which tends to show the absence of risk (*i.e.*, if the names of the persons who made the disclosure and the witnesses have already been widely known for a long time and they have not suffered any reprisals to date, etc.) are all elements that the Judge had to analyze before finding that there was a serious risk of harm.

[86] With respect, the Judge did not make any attempt to exercise his discretion in this case. Rather, after having analyzed the provisions of the Act that he considered relevant, he found that not only was there an important interest to protect, but also that disclosure would cause a serious harm. He concluded that there was a serious harm without any evidence to support his finding. I note that the only evidence before the Judge was the solemn declaration of Raynald Lampron, Director of Operations for the Office of the Public Sector Integrity Commissioner of Canada, dated March 9, 2018, filed in support of the Commissioner's motion pursuant to Rule 151. Mr. Lampron stated the following at paragraph 18 of his affidavit:

> [TRANSLATION]
>
> I hold it to be true that transmitting the certified record and the supplementary certified record without protecting confidential information would have the effect of lifting the veil on the identity of all of the people involved in the investigation, as well as the verbatim of all of the testimony heard. Public disclosure of confidential information would set a precedent that would discourage anyone else who wanted to disclose a wrongdoing or provide testimony in that regard. I believe that such a situation would run counter to Parliament's expressed will to encourage the disclosure of wrongdoings in the public service and to protect persons who make a disclosure who have had the courage to come forward and witnesses who participated in an investigation. Therefore, providing the certified

> record and the supplementary certified record without protecting confidential information would shatter the protective measures set out in the Act.

[87] In my opinion, Mr. Lampron's statement at paragraph 18 of his solemn declaration in no way constitutes [TRANSLATION] "well grounded" or convincing evidence pursuant to the reasons of Justice Iacobucci at paragraph 39 of *Mentuck*. Rather, that statement is a general allegation. At paragraph 9 of *Toronto Star Newspaper Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, the Supreme Court stated the following about this type of statement:

> Even then, however, a party seeking to limit public access to legal proceedings must rely on more than a generalized assertion that publicity could compromise investigative efficacy. If such a generalized assertion were sufficient to support a sealing order, the presumption would favour secrecy rather than openness, a plainly unacceptable result.

[88] In coming to the conclusion that he did, under the first branch of the test, the Judge had to be satisfied that disclosure could cause serious harm to the interest in respect of which the Commissioner was seeking the confidentiality order. As I noted earlier, the Judge's finding, if well understood, means that it will prove difficult, if not impossible, for any party, regardless of the circumstances, to have a court dismiss a motion for a confidentiality order concerning the names of persons who made a disclosure and witnesses involved in an investigation by the Commissioner. For all intents and purposes, the Judge's reasoning amounts to reversing the requirement of the burden of proof that will fall, *de facto*, on the party requesting the dismissal of the motion for a confidentiality order and rendering the making of confidentiality orders practically systematic.

[89] Without saying so, the Judge concluded that there is an analogy between persons who make a disclosure and witnesses and victims of sexual assault. In *Bragg*, I reiterate, the finding by the Supreme Court of objective harm by applying logic and reason does not temper or replace the heavy burden on those who wish to prevent the public from having access to the information in question. Rather, it supplements it exceptionally, in particular cases, according to the specific facts and circumstances of the case. It is important to note again that *Bragg* concerned a vulnerable person who was a victim of cyberbullying and that, even in that situation, logic and reason had to be applied to lead to the conclusion that there was a risk of serious harm.

[90] In my opinion, the Judge confused an important interest, that is, protecting persons who make a disclosure and witnesses, with a serious risk of harm that could result from disclosing their identity. In other words, the fact that Parliament stated in the Act that in order to maintain public confidence in the integrity of the public service it was necessary to establish disclosure and protection procedures does not lead to the conclusion that in all cases where a person made a disclosure the public will not be entitled to know the identity of the persons who made the disclosure and the witnesses. It follows from that observation that Parliament did not take into account Rule 151, which stipulates, as I indicated above, that the Court, before making a confidentiality order, "must be satisfied that the material should be treated as confidential".

[91] Consequently, given the strong presumption that courts should be open and that reporting of their proceedings should be uncensored, the Judge had to consider whether, in the case before him, there was or could be a serious risk of harm to the persons who made the disclosure and the witnesses if their identities were made public. In my opinion, the Judge failed to consider this

issue because he found that the existence of the Act was sufficient in order to find that there was a serious risk of harm.

[92] I note, and it is important to note this, that nothing in the Act has the effect of rendering peremptory the issuance of a confidentiality order with respect to the names of persons who make a disclosure and witnesses. As the Prothonotary pointed out at page 6 of her reasons, [TRANSLATION] "Parliament did not see fit to extend the obligation of confidentiality to the Federal Court when it exercises its judicial review powers as it did for information subject to the *Access to Information Act*, R.S.C. 1985, c. A-1, section 47 and the *Privacy Act*, R.S.C. 1985, c. P-21, section 46, in the course of reviews under those Acts."

[93] In my view, the Judge subordinated the exercise of his discretion to what he considered to be the purpose of the Act. In doing so, his analytical approach converted the discretionary power set out in Rule 151 into a non-discretionary power. There can be no doubt that this was not Parliament's intention in enacting the Act. For example, paragraph 11(1)(a) of the Act provides that subject to "any other Act of Parliament and to the principles of procedural fairness and natural justice", the identity of persons involved in the disclosure process will be protected. Section 22 of the Act also provides that the Commissioner will protect, to the extent possible, the identity of persons making disclosures and witnesses, "subject to any other Act of Parliament". In other words, Rule 151 and the principles set forth by the Supreme Court in *Dagenais*, *Mentuck* and *Sierra Club* must be considered in any confidentiality order decision. Therefore, the need to demonstrate a serious harm remains.

[94] In conclusion, I am satisfied that the Judge was required to, before making a confidentiality order, inquire into the harm that could result from public disclosure of the identity of the persons who made the disclosure and the witnesses who participated in the Commissioner's investigation. In view of the fact that there is no real evidence in the record to support a finding of harm, the Judge erred in reaching the conclusion that he did.

IX. Conclusion

[95] For these reasons, I would allow the appeal with costs, I would set aside the Judge's decision and, rendering the judgment that the Judge should have rendered, I would dismiss the Commissioner's appeal under Rule 51 of the Rules with costs.

"M. Nadon"

J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
Marianne Rivoalen J.A."

Certified true translation
Janine Anderson, Revisor

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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