Federal Court of Appeal | Cour d'appel fédérale

**Date: 20230424**

**Docket: A-91-21**

**Citation: 2023 FCA 36**

**CORAM:** **PELLETIER J.A.**
**WOODS J.A.**
**ROUSSEL J.A.**

**BETWEEN:**

**DR. GÁBOR LUKÁCS**

**Appellant**

**and**

**MINISTER OF CITIZENSHIP AND IMMIGRATION and ATTILA KISS AND ANDREA KISS and LÁSZLÓ SZÉP-SZÖGI, JUDIT SZÉP-SZÖGI, LAURA SZÉP-SZÖGI, LÉNA SZÉP-SZÖGI**

**Respondents**

Heard by online video conference hosted by the Registry on September 13, 2022.

Judgment delivered at Ottawa, Ontario, on February 16, 2023.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: WOODS J.A.
ROUSSEL J.A.

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## AMENDED REASONS FOR JUDGMENT

**PELLETIER J.A.**

I. Introduction

[1] This is an appeal from a decision of the Federal Court, reported at 2021 FC 248, in which the Court enjoined Dr. Gabor Lukács and others, from retaining, disclosing or disseminating

certain confidential information which was inadvertently disclosed. The underlying applications for judicial review (in which the inadvertent disclosure occurred) were brought by the individual respondents because their electronic travel authorizations allowing them to enter Canada (eTAs) were cancelled at the Budapest airport. This prevented them from boarding their flight to Toronto which they planned to visit for two months.

[2] The subject matter of the inadvertent disclosure was information which the Minister wished to protect by means of an order pursuant to section 87 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act). This provision provides that the Minister may, during a judicial review, apply for the non-disclosure of information or other evidence which would otherwise be subject to disclosure. Dr. Lukács came into possession of some of this information and ultimately was one of the persons caught by the order under appeal which limits his ability to make any use of some of this information.

[3] Dr. Lukács complied with the Federal Court order but now appeals on the basis that the order infringes his freedom of expression. Having anchored his appeal in this alleged Charter violation, he seeks to set aside the order on a number of procedural and substantive grounds which will be set out below.

[4] For the reasons which follow, I would dismiss the appeal.

## II. Facts and procedural history

[5] The Federal Court files which underlie this appeal (IMM-2967-19 and IMM-5570-19) have a long history which has been set out in decisions of that Court as matters developed. Some of the facts relating to the Kiss respondents (IMM-2967-19) were set out in the Federal Court's decision dated May 5, 2020 and reported at 2020 FC 584:

> [7] The Kisses had planned to travel to Canada to visit Andrea's sister, Edit, who lives in Toronto. Edit and her family have been accepted as Convention refugees in Canada. Andrea had previously visited Edit in 2017 with an eTA and encountered no issues. She stayed with her sister for almost three months. Andrea's eTA was valid until 2022.
>
> [8] On January 11, 2019, Attila also obtained an eTA to travel to Canada. One week later, the Kisses purchased round-trip tickets to depart from Budapest on April 2, and return on June 3, 2019.
>
> [9] On April 2, 2019, the Kisses arrived at the Air Canada Rouge check-in at Budapest International Airport. The airline had hired personnel from BUD Security Kft [BudSec] to pre-screen passengers' travel documents. A BudSec employee asked the Kisses to produce their documents and answer questions about their intended travel, including the duration of their trip, with whom they would stay, and whether they had a letter of invitation.
>
> [10] The BudSec employee allowed the Kisses to proceed. However, before they could check-in, a different employee of BudSec summoned them for further questioning. The employee also reviewed the Kisses' documents. The employee left to make a telephone call. When she returned, she informed the Kisses that their eTAs were cancelled.
>
> [11] The Kisses questioned the BudSec employee about the reasons for the cancellation of their eTAs. Unbeknownst to the employee, the Kisses recorded the conversation. The BudSec employee identified a number of concerns arising from the Kisses' responses to her questions. The employee also clarified that the decision to cancel the eTAs had been made by an immigration officer, not by her.
>
> [12] On their return home, the Kisses found two e-mail messages from the IRCC dated April 2, 2019 informing them that their eTAs had been cancelled.
>
> [13] On May 10, 2019, the Kisses applied for leave and judicial review of the decision to cancel their eTAs. The Kisses allege that the "Indicators" used to identify Hungarian-Roma travellers or travellers associated with Roma people are

discriminatory. They say that the IRCC's reliance on these "Indicators" has adversely affected a large number of Hungarian nationals and Roma travellers, and they hope to set a precedent to end the practice.

[14] On July 11, 2019, the Minister applied in writing for judgment setting aside the Officer's decision on procedural fairness grounds, and remitting the matter to a different decision-maker for redetermination. The Kisses would be given an opportunity to make additional submissions.

[15] The Kisses opposed the Minister's motion for judgment. In correspondence sent to the Court on July 17, 2019, they asserted that the cancellation of their eTAs was unlawful and the remedies proposed by the Minister were inadequate. The Minister's motion for judgment was dismissed by Justice Elizabeth Heneghan on October 1, 2019.

[16] On October 16, 2019, the Minister served and filed a motion for non-disclosure of excerpts from the Officer's notes, produced under Rule 9 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22.

[17] The excerpts from the Officer's notes that the Minister [sought] to protect [which are not in issue in this appeal] are reproduced in bold text below:

> […] stated purpose of visit is tourism, can identify Niagara Falls and CN Tower **but unable to explain what else they will do for three months** – employed in manual labour, provided letter from employer dated December 2018 indicating employment at that time, **but unable to explain how they can take three months off work – weak ties to home country**, do not own a home or hold a long-term rental lease – travelling with $2000 CAD in cash, **no access to other funds – no checked bags for three-month trip**; stated sister has purchased everything on their behalf – wife previously travelled to Canada for three months for tourism purpose in 2017 **but unable to explain what she did**; first trip for husband – hosts identified as [redacted] and [redacted], **convention refugees who arrived in Canada via irregular means in 2015 and 2016 respectively** [redacted]

[18] The notes that have been disclosed to the Kisses include the following statement:

> Based on these Indicators, [the Officer] determined that on the balance of probabilities, subjects will not comply with conditions

> imposed upon entry to Canada as a temporary resident and will not leave Canada at the end of the period authorized for stay.

[6] The facts relating to the Szép-Szögi respondents (IMM-5570-19) are sufficiently similar to those of the Kiss respondents that on January 28, 2020 the Federal Court directed that:

> The two applications for judicial review arise in similar circumstances, and the s87 motions involve similar evidence and legal issues. In the interests of efficiency and the conservation of judicial resources, IMM-5570-19 (Szep-Szogi et al v MCI) shall be held in abeyance pending the Court's determination of the s87 motion filed in IMM-2967 (Kiss et al v MCI).

[7] As appears from the preceding paragraph, both the Kiss respondents and the Szép-Szögi respondents launched applications for judicial review of the decisions cancelling their eTAs. In both cases, Dr. Lukács appears on the Federal Court record as a person rendering assistance to the respondents. The address for service given for the individual respondents in their notices of application is the same as the address for service in Dr. Lukács' notice of appeal. In an order dated December 12, 2019, the Federal Court dismissed a motion seeking to authorize Dr. Lukács to represent the individual Kiss respondents.

[8] The Federal Court dealt with the Minister's October 16, 2019 motion (see item 16 in paragraph 5 above) for an order pursuant to section 87 of the Act. The Court's decision was reported as 2020 FC 584. The issue, briefly stated, was that the Minister's contention that disclosure of the "Indicators" would give those wishing to avoid the attention of Canadian officials the means to do so. The Kiss respondents argued that the information the Minister refused to disclose was already in the public domain and therefore could not be injurious to

national security. The Kisses were aware of some of these Indicators as a result of the responses to three responses to inquiries made under the *Access to Information Act*, R.S.C. 1985, c. A-1.

[9] The Federal Court held that it was untenable for the Minister to object to the disclosure of information that was already in the public domain and largely a matter of common sense. In the result, the Federal Court dismissed the Minister's motion for all but one Indicator which was not publicly known and was not a matter of common sense.

[10] That decision was followed by a motion on behalf of the individual respondents for the production of a further and better certified tribunal record. On January 15, 2021, the Federal Court allowed the motion and ordered the Minister to prepare such a record which was to include certain specified types of information. The Court's order provided that the Minister could redact any information that he considered irrelevant, personal or sensitive: Appeal Book at pp. 230-236. These redactions are the source of the difficulties giving rise to this appeal.

[11] On February 5, 2021, a first supplementary tribunal record (the First STR) containing redactions was served on Mr. Perryman, counsel for the individual respondents, who then provided a copy to Dr. Lukács. Dr. Lukács discovered that the redactions were simply black highlighting which, once removed, allowed the underlying text (the Disputed Information) to be read. Dr. Lukács brought this to the attention of Mr. Perryman who, in turn, brought this to the attention of the Court and counsel for the Minister the same day. The latter then emailed the Court's registry, to the attention of the case management judge, asking the Court "to order that the materials served on the Applicants be destroyed and that the third-party to whom counsel

provided them confirm to the Court that he or she has similarly destroyed them": Appeal Book at p. 113.

[12] Late the next day, February 6, 2021, Mr. Perryman also emailed the Registry, to the attention of the case management judge, pointing out that in *Sellathurai v. Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 223, [2012] 2 F.C.R. 243 [*Sellathurai*], this Court held that "the Federal Court does not have jurisdiction to resolve an inadvertent disclosure of purportedly sensitive information by way of motion under s. 87 of the [Act]". Mr. Perryman went on to point out that, in that case, this Court explained that the proper procedure to be followed is for the Minister to file a notice of application seeking injunctive relief pursuant to section 44 of the *Federal Courts Act*, R.S.C. 1985, c. F-7: Appeal Book at p. 114.

[13] Responding to the urgent nature of the communications from counsel, the Federal Court made the following order on February 6, 2021:

> 1. Counsel for the Applicants shall maintain the Disputed Information in a separate, secure folder. No person, including counsel for the Applicants, shall review the Disputed Information contained in the separate, secure folder pending further order or direction of the Court.
>
> 2. Any third party to whom the Disputed Information has been disclosed by counsel for the Applicants shall forthwith destroy the Disputed Information, and counsel for the Applicants shall confirm to the Court that this has been done.
>
> 3. The Disputed Information shall be preserved in its original electronic format and sealed by the Registry pending further direction or order of the Court.
>
> 4. Counsel for the parties shall inform the Registry of their mutual availability for a case management conference in both proceedings during the week of February 8, 2021.

[14] The case management conference referred to in paragraph 4 of the February 6, 2021 order was held on February 8, 2021 and resulted in an order of that date which provided, among other things, that the Minister should prepare and file corrected supplementary tribunal records (the Second STR) and serve and file motions (if any) for further injunctive relief "arising from the allegedly inadvertent disclosure of information that occurred on February 5, 2021": Appeal Book at p. 120.

[15] In correspondence dated February 12, 2021, counsel for the Minister advised the Court that in the course of preparing the Second STR, it was discovered that the original tribunal record and the First STR contained additional information which was not redacted but which was nonetheless confidential or personal. In that letter, counsel for the Minister reported that efforts to retrieve the original tribunal record and the First STR, or to obtain its destruction, were unsuccessful. As a result, the letter informally requested that the February 6, 2021 order (see paragraph 13 above) be varied as follows:

> 1. Counsel for the Applicants shall ~~maintain the Disputed information in a separate, secure folder~~ **destroy the tribunal records in both IMM-2967-19 and IMM- 5570-19 ("Tribunal Records"), transmitted on February 5, 2021, including copies provided as exhibits in the public versions of section 87 *IRPA* motion materials served and filed by the Respondents on February 5, 2021, and counsel for the Applicants shall confirm that this has been done**. ~~No person, including counsel for the Applicants, shall review the Disputed Information contained in the separate, secure folder pending further order or direction from the Court.~~
>
> 2. Anyone, including, but not limited to, identified and unidentified third parties, such as Dr. Gábor Lukács, his legal counsel, and Dr. Lukács' father, destroy the Tribunal Records and any copies, notes, summaries, or other products derived from the Tribunal Records in any form.
>
> 3. Dr. Lukács, or counsel for the Applicants identify, with name and contact information, anyone to whom they transmitted the Tribunal Records.

> 4. In addition to the Tribunal Records themselves, all copies, notes, summaries in any form are destroyed.
>
> 5. All persons to whom this order applies, being anyone who has received the Tribunal Records dated February 5, 2021, are prohibited from ever relying on the contents of those Tribunal Records in any way in any proceeding or for any purpose.
>
> Appeal Book at p.124 (emphasis in the original)

[16] On February 15, 2021, the Court directed that a motion should be brought seeking the relief which the Minister had sought informally by means of his letter. That motion was brought on February 17, 2021. Dr. Lukács was named as a third party in the motion. The relief sought in the motion (brought under Rule 369 of the *Federal Courts Rules*, S.O.R./98-106) was not characterized as a variance of the February 6, 2021 order (as suggested in counsel's letter) but claimed new relief as set out below:

> a. A permanent injunction restraining the use, dissemination and publication of sensitive information inadvertently transmitted by the Respondent in error on February 5, 2021;
>
> b. A mandatory injunction requiring the Applicants, the Applicant's counsel, Gabor Lukács and any third persons to whom they [*sic*] or any other recipients of the information to destroy the information referred to in paragraph a including any and all printouts, copies, notes or summaries of the information that may have been made by them and to confirm to the Respondent that they have done so;
>
> c. A mandatory injunction requiring the identification of any individuals to whom Applicants, Gabor Lukács and any third persons to whom they or any other recipients of the information may have further transmitted the information; and
>
> d. Such other relief that this Honourable Court deems just.

[17] Dr. Lukács responded to the motion by means of a letter to the Registry which was obviously destined to be read by the Court. In this letter, Dr. Lukács raised a number of objections to the Minister's motion, some substantive and some procedural. Since those

objections form the basis of Dr. Lukács' appeal, they will be identified and dealt with in the course of dealing with the merits of the appeal.

[18] On March 4, 2021, the Minister filed a further motion seeking an amendment to his February 17, 2021 motion. In his motion, the Minister sought to have Dr. Lukács removed as a third party pending an order of the Court adding him as a third party for the limited purpose of responding to the motion for injunctive relief: Appeal Book at p. 173. On March 14, 2021, Dr. Lukács filed a motion record in which he set out the many objections he had to the Minister's motion. The Federal Court dealt with both of the Minister's motions and issued its decision, 2021 FC 248, the subject of this appeal, on March 22, 2021 (the Decision).

## III. The decision under appeal

[19] After setting out the facts, the Court identified the issues as whether the Minister's motion for injunctive relief should be amended or granted.

[20] On the issue of the amendment, the Court noted the Minister's concession that he had improperly named Dr. Lukács as a third party, an error which the Minister sought to correct by having Dr. Lukács added as a third party by order of the Court. For his part, Dr. Lukács objected to being named as a third party on the ground that the *Federal Courts Rules*, did not contemplate third parties in an application for judicial review. The Court was of the view that a person did not have to be named a party in order to be bound by injunctive remedies. In the result, the Court allowed the amendment to remove Dr. Lukács from the style of cause in the motions for

injunctive relief (i.e. the February 17, 2021 and the March 4, 2021 motions) but gave him limited standing to challenge the motion for injunctive relief, since he was named in that motion.

[21] The Court began its consideration of whether the motions for injunctive relief ought to be granted by reviewing the Court's jurisdiction in light of *Sellathurai*. In the Court's view, it had plenary jurisdiction to grant injunctive relief arising from the inadvertent disclosure of confidential documents in legal proceedings, jurisdiction whose source was section 44 of the *Federal Courts Act*, which provides as follows:

| | |
|---|---|
| 44 In addition to any other relief that the Federal Court of Appeal or the Federal Court may grant or award, a *mandamus*, an injunction or an order for specific performance may be granted or a receiver appointed by that court in all cases in which it appears to the court to be just or convenient to do so. The order may be made either unconditionally or on any terms and conditions that the court considers just. | 44 Indépendamment de toute autre forme de réparation qu'elle peut accorder, la Cour d'appel fédérale ou la Cour fédérale peut, dans tous les cas où il lui paraît juste ou opportun de le faire, décerner un *mandamus*, une injonction ou une ordonnance d'exécution intégrale, ou nommer un séquestre, soit sans condition, soit selon les modalités qu'elle juge équitables. |

[22] The Federal Court went on to say that this jurisdiction did not depend directly or indirectly upon section 87 of the Act nor did it depend upon whether there was a pending application for judicial review. Citing *Sellathurai*, the Court declared that the proper procedure was for a notice of application to be filed seeking injunctive relief. On the other hand, the Court held, as in *Sellathurai*, that the failure to follow that procedure was not fatal since the Minister had filed a notice of motion seeking injunctive relief. The Court went on to say that this way of proceeding did not deprive the Court of jurisdiction, provided that the grounds of the motion were fully disclosed and that no one was prejudiced.

[23] The Court noted that Dr. Lukács was aware that the redacted information in the original certified tribunal record and in the First STR had been inadvertently disclosed. However, he objected to the fact that the Minister's motion was not supported by affidavit evidence that set out the injury resulting from the inadvertent disclosure and the public dissemination of the redacted information. The Court observed that all of the information in issue was the subject of motions for non-disclosure pursuant to section 87 of the Act.

[24] The Court went on to point out that, pursuant to sections 83 and 87 of the Act, it is under a positive obligation to preserve the confidentiality of the information if, in its opinion, its disclosure would be injurious to national security or endanger the safety of any person. The result is that unless and until such time as the Court determines that the disclosure of the information would not be injurious, it must ensure that it remains confidential.

[25] The Court rejected Dr. Lukács' request that the motions not be decided pursuant to Rule 369 and that an oral hearing be held so that he could present oral argument because, in its view, the matters raised by the motions were not legally and factually complex. In the Court's view, it was apparent that the information which the Minister sought to protect by way of its section 87 motion was inadvertently disclosed. It was equally apparent to the Court that injunctive relief was necessary to protect the integrity of its process and its capacity to discharge its statutory function under section 87 of the Act.

[26] In the result, the Court allowed the Minister's motion and granted the following injunctive relief:

> 4. The Applicants and any other person who is, or has been, in unauthorized possession of information that is currently the subject of the motions brought in these proceedings pursuant to s 87 of *Immigration and Refugee Protection Act*, SC 2001, c 27 [Disputed Information], are permanently enjoined from using, disseminating or publishing the Disputed Information pending further order of this Court.
>
> 5. The Applicants and any other person who is, or has been, in unauthorized possession of the Disputed Information shall forthwith destroy the Disputed Information, whether in electronic or paper form, as well as any notes or summaries of the Disputed Information that may have been made.
>
> 6. Any person who is, or has been, in unauthorized possession of the Disputed Information, and who becomes aware of this Order, shall forthwith communicate this Order to every other person with whom he or she has shared the Disputed Information.
>
> 7. The Disputed Information shall continue to be preserved in its original electronic format and sealed by the Registry pending further direction or order of the Court.

Paragraphs 4, 5, and 6 of this order are the subject of this appeal.

## IV. Statement of Issues

[27] In his memorandum of fact and law, Dr. Lukács raises a number of issues which can be summarized as follows:

A. The court lacked jurisdiction to grant injunctive relief because it did not have before it an originating document pleading a cause of action which entitled the Minister to the relief claimed.

B. The court lacked jurisdiction because permanent injunctive relief is not available on a motion but only after a final determination of rights.

C. The court erred in law by granting permanent injunctive relief without applying any legal test for the granting of permanent injunctive relief and by granting mandatory injunctive relief against a non-party.

D. The court denied Dr. Lukács procedural fairness by depriving him of the opportunity to respond to the merits of the amended injunction motion.

E. The court made a palpable and overriding error in failing to recognize the public character of the facts sought to be protected by the respondent.

[28] Since a number of Dr. Lukács' arguments turn on the fact that the order permanently enjoins certain behaviour, it will be useful to first determine whether this is a proper characterization of the order. Once that is done, then the next issue, logically speaking, is whether the procedural and substantive requirements for making such an order were met. The next issue is whether Dr. Lukács was denied procedural fairness. The final issue is whether Dr. Lukács' freedom of expression has been infringed.

[29] As a result, the issues can be restated as follows:

A. Are paragraphs 4, 5, and 6 of the Court's order in the nature of permanent injunctive relief?

B. Were the procedural and substantive requirements for making the order under appeal met?

C. Was Dr. Lukács denied procedural fairness?

D. Was Dr. Lukács' freedom of expression infringed, contrary to the Charter?

## V. Analysis

[30] This appeal arises from a discretionary decision of the Federal Court and as such, the standard of review is that set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: see *Imperial Manufacturing Group Inc. v. Decor Grates Incorporated*, 2015 FCA 100, [2016] 1 F.C.R. 246 at para. 29; *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331 at para. 72. As a result, we can intervene if the Federal Court made an error of law, or a palpable and overriding error of fact or mixed fact and law, save for an extricable error of law in which case the correctness standard applies.

### A. *Are paragraphs 4, 5, and 6 of the Court's order in the nature of permanent injunctive relief?*

[31] It is to be noted that the Minister's motion requested a "permanent injunction restraining the use, dissemination and publication" of the inadvertently transmitted information and a "mandatory injunction" directing certain persons, including Dr. Lukács, to destroy the information in their hands and to bring the terms of the order to others. Paragraph 4 of the order under appeal provides that certain persons are "permanently enjoined" from using, disseminating or publishing the information in issue.

[32] On the other hand, paragraph 4 of the same order concludes with words "pending further order of [the] Court". This suggests that the order is in fact interlocutory in the sense it is one made pending a final determination of the issues. Given this ambiguity, the nature of the order will have to be determined by reference to its terms and effect.

[33] An interlocutory injunction is a remedy designed to preserve the *status quo* or to prevent imminent harm pending the outcome of proceedings: *Ahousaht First Nation v. Canada (Fisheries, Oceans and Coast Guard)*, 2019 FC 1116 [*Ahousaht*] at para. 68. It follows from this that a direction that an order remains in effect "pending further order of the Court" is a significant indicator that the order is intended to be interlocutory. In this case, the Minister requested injunctive relief in the context of the pending motion under section 87 of the Act seeking to protect the information in question on national security grounds: Decision at para. 3. These are the proceedings which are referred to in paragraph 4 of the order itself.

[34] In granting the requested relief, the Federal Court noted that the injunctive relief which the Minister was seeking was necessary "to preserve the integrity of the Court's process, and its capacity to discharge its statutory functions under s 87 of [the Act]": Decision at para. 36. A permanent order would have pre-judged the outcome of the section 87 motion and rendered it moot.

[35] As a result, notwithstanding the use of the phrase "permanently enjoined" I am satisfied that paragraph 4 of the Federal Court's order is interlocutory in nature and not permanent. On the other hand, paragraphs 5 and 6 lack the phrase "pending further order of the Court". Does this make paragraphs 5 and 6 permanent rather than interlocutory in nature?

[36] *Ahousaht*, cited above, throws some light on this question:

> An interlocutory injunctive relief is a preservative remedy essentially aimed at maintaining the *status quo* pending the hearing of an action or application on the

> merits. No matter whether the interlocutory injunction sought is prohibitive or mandatory, this defining feature of interlocutory injunctive relief remains.
>
> *Ahousaht* at para. 68 (emphasis added)

[37] I understand this passage to mean that both prohibitive and mandatory injunctions can be granted on an interlocutory basis. The object of the order is to restore the confidentiality of the disputed information and thus restore the *status quo* prior to its inadvertent disclosure, until its status can be resolved in the pending section 87 motion. Should the Court decide that the Minister is not entitled to an order pursuant to section 87, then Dr. Lukács and the other persons who come within the terms of the order will be able to access and use that information. The same will be true for others to whose attention the terms of the order will have been brought or with whom the information will have been shared.

[38] In the end, the question is what is the nature and effect of the order. Given the pending section 87 motion, I am of the view that the order was an attempt to maintain the confidentiality of the inadvertently disclosed information pending the resolution of the section 87 motion and thus was interlocutory in nature. This is the case for paragraph 4 of the order as well as paragraphs 5 and 6 even though they lack the explicit qualification that they apply until there is a further order of the Court. The explicit qualification which appears in paragraph 4 must be implied in paragraphs 5 and 6 so as to advance the objective of preserving the confidentiality of the information until a judicial determination as to its status is completed. Any other interpretation would pre-empt the section 87 motion and prevent the Court from fulfilling its statutory duty.

B. *Were the procedural and substantive requirements for making the order under appeal met?*

[39] Dr. Lukács argues that the Federal Court did not have the jurisdiction to make any order at all because it did not have before it an originating document seeking relief under section 44 of the *Federal Courts Act*. Dr. Lukács relies upon two paragraphs of this Court's decision in *Sellathurai* in support of his argument:

> [39] Because the Federal Court's jurisdiction was not based directly or indirectly upon section 87 of the Act, it possessed jurisdiction whether or not any related application for judicial review happened to be pending before the Federal Court. Irrespective of whether related proceedings were already in existence, in my view the proper procedure to be followed was that followed by the applicant in *Liberty Net*. What is now known as a notice of application should have been filed seeking injunctive relief, and the application should have been supported by appropriate affidavit evidence.
>
> [40] In the present case, the Minister moved by way of notice of motion filed within the pending application for judicial review of the decision of the Immigration Division. In my view, this was not fatal to the present application. The notice of motion fully disclosed the grounds relied upon by the Minister and referred to section 44 of the *Federal Courts Act*. The motion was supported by appropriate affidavit evidence. The failure to comply with the *Federal Courts Rules* does not render a proceeding, or a step in the proceeding, void (Rule 56).

[40] Dr. Lukács' position is that while *Sellathurai* held that injunctive relief for inadvertent disclosure should be sought by way of notice of application, the Supreme Court's decision in *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, [2018] 1 S.C.R. 196 [*CBC*] reinforced that requirement: injunctive relief must be sought by means of an originating document. After *CBC*, the absence of an originating document pleading a cause of action is fatal: Dr. Lukács' memorandum of fact and law at para. 67.

[41] *CBC* was a case in which the Crown attempted to graft injunctive relief upon a motion seeking a finding of criminal contempt against the CBC for refusing to remove from its website information identifying the victim of a crime, information that was posted before the publication

ban was issued. In its analysis, the Supreme Court focused on the relationship between an injunction and a cause of action. Using the *Alberta Rules of Court,* Alta. Reg. 124/2010 as an example, it noted the requirement that an originating document contain both "'[a] claim and the basis for it' and 'the remedy sought'" and concluded that an injunction "is generally a remedy ancillary to a cause of action": *CBC* at para. 24. The Supreme Court went on to say "[a]n injunction is not a cause of action, in the sense of containing its own authorizing force. It is, I repeat, a remedy": *CBC* at para. 25.

[42] Dr. Lukács relies upon *CBC* to drive home the necessity of proceeding by way of notice of application when seeking injunctive relief pursuant to section 44 of the *Federal Courts Act*, whether or not a motion for relief under section 87 is pending, as set out in *Sellathurai*. In order to deal with this argument, it is necessary to understand the unusual facts of that case.

[43] Mr. Sellathurai was the subject of an admissibility hearing on the basis that there were reasonable grounds to believe that he was a member of the Liberation Tigers of Tamil Eelam (the LTTE) which was alleged to be a terrorist organization. The Immigration Division of the Immigration and Refugee Board (the Immigration Division) found that Mr. Sellathurai was a member of the LTTE and adjourned to a later date the determination as to whether the LTTE was a terrorist organization. Meanwhile, Mr. Sellathurai applied for a ministerial exemption under subsection 34(2) of the Act [since repealed, 2013, c.16, s.13], arguing that his presence in Canada would not be detrimental to the national interest. The Immigration Division adjourned its hearing on the status of the LTTE a number of times at Mr. Sellathurai's request while the request for a ministerial exemption was pending. Eventually, however, it refused to grant further

adjournments. Mr. Sellathurai made an application for judicial review of the decision refusing a further adjournment.

[44] In the course of processing Mr. Sellathurai's application for a ministerial exemption, a disclosure package was sent to Mr. Sellathurai and his counsel which inadvertently contained three documents for which national security privilege was subsequently claimed. The documents in issue were on Canadian Security Intelligence Service letterhead and were stamped "SECRET".

[45] After communicating with counsel to ensure that the documents were securely stored, the Minister made a motion for injunctive relief compelling the return of the documents. At paragraph 27 of its reasons in *Sellathurai* (2010 FC 1082), the Federal Court found that the application for judicial review and the motion for injunctive relief were related in that the documents disclosed in the course of the ministerial review "would have relevance to the judicial review application". It also found that the claim of national security privilege was made out and granted the injunctive relief.

[46] On appeal, this Court found that the application for judicial review and the motion for the return of the documents were unrelated because the issue of the ministerial exemption was not connected to the refusal to grant an adjournment and, in any event, there was no evidence that the documents were before the Immigration Division when it made its decision. This Court found that neither section 38 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, nor section 87 of the Act gave the Court jurisdiction to recover the inadvertently disclosed documents. In

particular, the Court (at paragraph 24) found that section 87 authorized the Court to prevent disclosure but it did not apply "as a mechanism" to retrieve information after disclosure.

[47] This Court then considered the Supreme Court's decision in *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1998 CanLII 818 (SCC), [1998] 1 S.C.R. 626, and found that the combination of the Court's plenary jurisdiction over immigration matters and section 44 of the *Federal Courts Act*, gave the Court jurisdiction to issue the injunctive relief to recover the documents. It also found that the proper procedure was by way of an application for judicial review seeking relief under section 44 of the *Federal Courts Act*.

[48] Section 87 of the Act provides as follows:

| | |
|---|---|
| 87 The Minister may, during a judicial review, apply for the non-disclosure of information or other evidence. Section 83 — other than the obligations to appoint a special advocate and to provide a summary — applies in respect of the proceeding and in respect of any appeal of a decision made in the proceeding, with any necessary modifications. | 87 Le ministre peut, dans le cadre d'un contrôle judiciaire, demander l'interdiction de la divulgation de renseignements et autres éléments de preuve. L'article 83 s'applique à l'instance et à tout appel de toute décision rendue au cours de l'instance, avec les adaptations nécessaires, sauf quant à l'obligation de nommer un avocat spécial et de fournir un résumé. |

(Emphasis added)

[49] The material words are "during a judicial review" "dans le cadre d'un contrôle judiciaire". Section 87 gives the Minister the right to apply for non-disclosure of information which would otherwise have to be disclosed in a judicial review. While the use of the indefinite article "a judicial review" suggests that a section 87 motion could be brought in any judicial review, this is inconsistent with the objective of that provision which is to protect confidential

information which would otherwise have to be disclosed in the course of a specific judicial review. In *Sellathurai*, the only pending judicial review was the application made by Mr. Sellathurai challenging the Immigration Division's refusal to grant him a further adjournment. This Court was not satisfied that the inadvertently disclosed documents were material to the question of Mr. Sellathurai's request for an adjournment and that they would have been subject to disclosure in the course of that judicial review.

[50] If there was no pending judicial review to which a section 87 motion was material, there could be no legitimate request for interlocutory relief pending the disposition of that motion.

[51] The material distinction between this case and *Sellathurai* is that in that case, there was no pending judicial review to which a section 87 motion was material whereas in this case there is. To that extent, this Court's opinion in *Sellathurai* that section 87 did not authorize the recovery of inadvertently disclosed confidential documents was correct in light of the facts of the case before it. You cannot, in the course of one proceeding, recover, by injunction, documents inadvertently disclosed in another proceeding.

[52] It is true that, on a purely textual interpretation, section 87 does not authorize injunctive relief compelling the return of documents which have been inadvertently disclosed. But context must also be considered, and in this case, context includes the principle that where Parliament grants a remedy, it must have intended that the court/tribunal have the necessary powers to make the remedy effective. Thus, in a case where Parliament had conferred a right of appeal, this Court found that it must have the power to stay execution of an order under appeal so as to effectively

exercise its appellate jurisdiction: see *N.B. Electric Power Comm. v. Maritime Electric Co. Ltd*., 1985 CanLII 5533 (FCA), [1985] 2 FC 13 at pp. 26-28. This principle has been construed in subsequent jurisprudence to mean that where Parliament confers a mandate on a statutory body, it must be taken to have also conferred the powers necessary for the fulfillment of that mandate:

> The mandate of this Court is to determine and apply the intention of the legislature (*Bell ExpressVu*, at para. 62) without crossing the line between judicial interpretation and legislative drafting (see *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 26; *Bristol-Myers Squibb Co*., at para. 174). That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature …
>
> *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 (CanLII), [2006] 1 S.C.R. 140 at 51. See also *R. v. 974649 Ontario Inc*., 2001 SCC 81 (CanLII), [2001] 3 S.C.R. 575 at 70, *R. v. Cunningham*, 2010 SCC 10 (CanLII), [2010] 1 S.C.R. 331 at 19

[53] The implied power in issue in these proceedings is the power to protect confidential information contained in inadvertently disclosed documents by ordering the return or the destruction of the documents as well as by enjoining the dissemination or publication of the documents or of the confidential information which they contain. Confidential information, in this context, is information whose disclosure the Minister claims would be injurious to national security or endanger the safety of any person. For ease of reference, this will be referred to as the Implied Power.

[54] Is it necessary to the Court's exercise of its statutory mandate that it be found to have the Implied Power? In my view, it is. Section 87 requires the Court, at the request of the Minister made during a judicial review, to decide if information which would otherwise be subject to

disclosure can be exempted from disclosure because it would be injurious to national security or endanger the safety of any person. Without the Implied Power, the Court would be deprived of the ability to fulfill its mandate in any case in which documents containing confidential information were inadvertently disclosed before the Court could assess the claim for non-disclosure.

[55] It is important to distinguish between the existence of the Implied Power and the exercise of the discretion to invoke it. In the normal course, a Court would not make an order which could not be enforced or which had been overtaken by events, that is where the information has been disseminated to the point that an order under section 87 would have no practical effect. But the fact that there would be circumstances in which the Implied Power would not be useful is not a reason to doubt its availability in cases where it would be.

[56] As a result, I am of the view that, in conferring on the Federal Court the mandate found in sections 83 and 87 of the Act, Parliament must be taken to have also granted it the Implied Power.

[57] To summarize, this Court came to the conclusion it did in *Sellathurai* because of the facts of that case. In particular, its conclusion as to the effect of section 87 was, in my view, a function of the absence of any link between the application for judicial review of a denial of an adjournment and a possible section 87 motion arising from an application for a ministerial exemption; two unrelated proceedings. This case is different because of the existence of a related judicial review and my conclusion as to the existence of the Implied Power.

[58] As a result, in a case whose facts resemble those in *Sellathurai*, the Minister should proceed by way of notice of application seeking an injunction pursuant to section 44 of the *Federal Courts Act*. In a case whose facts satisfy the requirements set out in section 87 as they do here, then the Minister can proceed by notice of motion, relying on the grant of jurisdiction in section 87 and the Implied Power that enables the Court to fulfill its mandate.

[59] Dr. Lukács' argument that the Federal Court lacked jurisdiction because it did not have before it an originating document pleading a cause of action must therefore fail.

[60] Dr. Lukács advanced a number of other arguments against the Federal Court's order. To the extent that those arguments turned on the fact that the order was apparently a permanent order, they fail. For example, Dr. Lukács argued that a permanent injunction could not be granted until after the evidence had been heard and a final determination of right had been made. That proposition is correct but it does not apply to this case as the order in question was an interlocutory order. *Ahousaht*, cited earlier in these reasons is authority for the proposition that both mandatory and prohibitive injunctions can be granted on an interlocutory basis.

[61] Dr. Lukács also argued that a mandatory order could not be made against a non-party. Since he and others were not parties to the motion for injunctive relief, Dr. Lukács argues that the Court had no jurisdiction to make a mandatory order against them. This argument is without merit. Equitable relief in the form of an injunction may be issued against non-parties where it appears to the court to be just or convenient that the order should be made (*Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, [2017] 1 S.C.R. 824 at para. 28).

[62] As for the question as to whether Dr. Lukács was heard on the motion for injunctive relief, at paragraph 19 of the Decision the Federal Court refers to the fact that he filed a responding motion record on March 15, 2021. However, the excerpts from the recorded entries on File No. IMM-2697-19 (found at pp. 356-357 of the Appeal Book) show that the responding motion record filed on March 15, 2021 was in relation to Document 84 which was the Minister's motion to remove Dr. Lukács as a party. When Dr. Lukács brought this to the Court's attention the day after the Decision was released, it replied by way of a Direction which indicated that Dr. Lukács addressed the merits of the motion for injunctive relief in his motion record dated March 15, 2021 and in his letters to the Court. It is apparent from this that while Dr. Lukács may not have had the opportunity to file his written submissions, he did express his views in his March 15, 2021 motion record and in the letters he sent the Court prior to the hearing. As a result, while Dr. Lukács' participation in the debate on injunctive relief may not have been as full throated as he would have liked, it cannot be said that he was not heard.

[63] Dr. Lukács also argued that the Federal Court ought not to have granted the motion for injunctive relief since the material filed in support of that motion was defective. Dr. Lukács made that argument in relation to the test for a permanent injunction which, as pointed out earlier, is not the order which the Federal Court made. However, based on the elements which Dr. Lukács identified in his memorandum of fact and law, and in the interests of fairness, it is useful to address the criteria which the Federal Court implicitly applied to the order it made, criteria which were set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311 [*RJR-MacDonald*]. Those criteria are (1) the applicants must show that they have a serious question to be tried, (neither frivolous nor vexatious) (2) the

applicants must show that they will suffer irreparable harm, not compensable in damages, if the injunction is not granted and (3) the balance of convenience must favour the applicants.

[64] Dr. Lukács is correct that the Federal Court's analysis does not reflect the *RJR-MacDonald* analysis, which suggests that the Minister's claim was not cast in those terms. Nonetheless, the Federal Court's reasons touch upon each of the elements of the test. At paragraphs 33-34 of its decision, the Federal Court identifies the onus on it to safeguard the confidentiality of the information with respect to which a section 87 motion is made. The question of whether an injunction should be issued to safeguard the confidentiality of that information would satisfy the criterion of a serious question to be tried. At paragraph 36, the Federal Court refers to the necessity for injunctive relief, that is, "to preserve the integrity of the Court's process, and its capacity to discharge its statutory functions under s 87 of [the Act]". This would satisfy the criterion of irreparable harm: see *A.G. Canada v. Fishing Vessel Owners' Association of B.C.*, 1985 CanLII 5505 (FCA), [1985] 61 N.R. 128 at p. 795 where the following appears:

> [T]he judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.
>
> See also *Northwood Inc. v. Forest Practices Board*, 2000 BCCA 7 at paras. 9-10

[65] While the element of balance of convenience was not referred to, it is apparent that in the circumstances of a section 87 motion, the balance of convenience favours maintaining confidentiality until the section 87 motion can be heard.

[66] So, while the Federal Court did not structure its analysis following the approach found in *RJR-MacDonald*, its treatment of the issues demonstrates that the injunction was granted consistently with that approach.

C. *Was Dr. Lukács denied procedural fairness?*

[67] Dr. Lukács argues that he was denied procedural fairness because he was not allowed to debate the merits of the section 87 motion as part of the motion for injunctive relief. As noted earlier, Dr. Lukács was granted limited standing to oppose the motion for injunctive relief. His argument on procedural fairness goes to the subject matter which he was not able to address.

[68] Dr. Lukács' procedural fairness argument is essentially that since he was a target of the motion for injunctive relief, he ought to have been allowed to debate the merits of the Minister's section 87 claim in order to show that the Minister would not in fact suffer irreparable harm if the information was not protected. Implicit in this is a claim that he should have had access to the information which was the object of the section 87 motion. When a section 87 motion is made in the course of an application for judicial review, the applicant(s) have only limited participation rights in the section 87 proceedings. The reason for this is obvious. If the applicants to the judicial review were full participants in the section 87 proceedings, they would be pointless since the applicants would then be in possession of the information which the Minister was seeking to withhold from them. As a result, section 87 proceedings involve the Minister's representative and a designated judge. If the judge believes that he/she would benefit from the assistance of a special advocate, he/she may appoint one: see sections 83 and 87 of the Act.

[69] Dr. Lukács' argument runs counter to this scheme. Dr. Lukács, as a stranger to the underlying litigation, can have no greater rights in the matter than the applicants themselves. It may be that Dr. Lukács simply wished to argue the merits of the confidentiality of the information which he had already seen. Even if that were so, it would still run counter to the scheme of the Act. Determinations under section 87 may involve consideration of confidential affidavits and the hearing of evidence *in camera* and in the absence of the applicants. The participation of an individual who had knowledge of some, but not all, of the protected information would open the door to the cross examination of affiants and witnesses which might elicit further confidential information. This would complicate the proceedings unnecessarily and would risk exposing information whose release might otherwise be found to be injurious to national security.

[70] Subsequent to making the order under appeal, the Federal Court released its decision in *Kiss v. Canada (Citizenship and Immigration*), 2022 FC 373 [*Kiss*], in which it decided the section 87 motion that was pending when the Decision was rendered. The Court found that some of the "indicators" which the Minister wished to protect would, in fact, be injurious to national security: *Kiss* at para. 6. At the same time, the Federal Court found that the Minister had failed to show that a certain number of these "indicators" "are not in the public domain, or that they are neither obvious nor matters of common sense". Accordingly, the Court refused to protect them from disclosure: *Kiss* at para. 7.

[71] As a result of the decision in *Kiss*, Dr. Lukács will be able to use the information in his hands that the Federal Court found was not injurious to national security. On the other hand, he

will continue to be enjoined, by inference, from using any information whose release was found to be injurious to national security. I say "by inference" because while the portions of information which are not injurious to national security are identified in Annex B of the reasons in *Kiss*, those which are injurious are not. As a result, Dr. Lukács and anyone else who was subject to the order set out at paragraph 26 of these reasons continue to be enjoined from using any information which is not identified in Annex B.

D. *Was Dr. Lukács' freedom of expression infringed, contrary to the Charter?*

[72] As mentioned earlier, Dr. Lukács has anchored his appeal in an alleged infringement of his freedom of expression. It is noteworthy that the issue of freedom of expression was not dealt with in the Federal Court's reasons, which supports the inference that the matter was not raised before that Court. In addition, the Minister did not engage with this issue in any way in its memorandum of fact and law. As a result, we find ourselves in the presence of a Charter argument which lacks an evidentiary basis and which is raised for the first time on appeal. The result is that while these proceedings are adversarial, they are not adversarial on this issue.

[73] The jurisprudence is clear that, absent special circumstances, appellate courts will not consider Charter arguments which are made for the first time on appeal: see *MacKay v. Manitoba*, 1989 CanLII 26 (SCC), [1989] 2 S.C.R. 357 at p. 361, *Guindon v. Canada*, 2015 SCC 41 (CanLII), [2015] 3 S.C.R. 3 at para. 19. This is so for a number of reasons. The first is that a Charter argument can only be made on a proper evidentiary foundation, which generally will not be the case if a matter is raised for the first time on appeal: *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016 at para. 25, *Coote v. Lawyers' Professional*

*Indemnity Company (Lawpro)*, 2014 FCA 98, [2014] 459 N.R. 174 at para. 8, *Canada (Public Safety and Emergency Preparedness) v. J.P.*, 2013 FCA 262, [2014] 4 F.C.R. 371 at para. 101. A corollary of this proposition is that when a Charter argument is raised for the first time on appeal, the Crown is deprived of the opportunity to lead evidence of justification pursuant to section 1 of the Charter: *Lougheed v. Canada*, 2013 FCA 138 at para. 20.

[74] A further reason for an appellate court to decline to hear a Charter argument which is made for the first time on appeal is that the Court will be deprived of the benefit of the trial judge's (or tribunal's) reasoning and analysis of the arguments: *Harkat v. Canada (Citizenship and Immigration)*, 2012 FCA 122, [2012] 3 F.C.R. 635 at para. 148.

[75] For these reasons, I do not propose to deal with Dr. Lukács' claim that his Charter rights have been infringed.

## VI. Conclusion

[76] For the reasons set out above, I would dismiss this appeal without costs as none were sought by the respondent, the Minister of Citizenship and Immigration.

[77] Before leaving this matter, it may be useful to clarify the present status of the order under appeal. As a result of my conclusion that the order was interlocutory, pending the outcome of the section 87 motion, the fact that the section 87 motion has been heard and decided means that the order under appeal is spent. Dr. Lukács' rights and obligations and those of any other person

subject to the interlocutory order set out in paragraph 26 of these reasons are now defined by the order made in *Kiss*, as described in paragraph 71 above.

"J.D. Denis Pelletier"
J.A.

"I agree.
Judith Woods J.A."

"I agree.
Sylvie E. Roussel J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-91-21 |
| **STYLE OF CAUSE:** | DR. GÁBOR LUKÁCS v. MINISTER OF CITIZENSHIP AND IMMIGRATION et al. |
| **PLACE OF HEARING:** | BY ONLINE VIDEO CONFERENCE |
| **DATE OF HEARING:** | SEPTEMBER 13, 2022 |
| **REASONS FOR JUDGMENT BY:** | PELLETIER J.A. |
| **CONCURRED IN BY:** | WOODS J.A.<br>ROUSSEL J.A. |
| **DATED:** | FEBRUARY 16, 2023<br>AMENDED APRIL 24, 2023 |

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