



## PRACTICE

### CONFIDENTIALITY ORDERS

Appeal from Federal Court decision (2018 FC 938) allowing appeal from decision by Prothonotary dismissing motion filed by Public Sector Integrity Commissioner of Canada (Commissioner) pursuant to *Federal Courts Rules*, SOR/98-106 (Rules), r. 151 for confidentiality order with respect to certain aspects of supplementary certified record, filing of which ordered by Prothonotary — Appellant became vice-president of communications and public affairs for Canadian Food Inspection Agency in 2014 — Employees filed two psychological harassment complaints against appellant — Commissioner found appellant had committed wrongdoings within meaning of Act — In application for judicial review, pursuant to r. 317, appellant requested copy of all documents and information in Commissioner's possession subject of investigation and decision — Commissioner filed objection pursuant to r. 318(2) — Prothonotary found confidentiality order sought by Commissioner not justified in circumstances — According to Federal Court, Prothonotary failed to consider Supreme Court's decision in *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567 — Federal Court finding Prothonotary had erred by requiring Commissioner to demonstrate deleterious effects of public disclosure of identity of persons who made disclosure, witnesses — Federal Court finding no doubt Parliament considered confidentiality of disclosures and testimony as essential for purposes of *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46 (Act) — Federal Court also finding Commissioner had demonstrated order sought necessary to ensure anonymity of witnesses, persons who made disclosure — Whether Federal Court erred in allowing appeal from Prothonotary's decision — Given principles stated by Supreme Court in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, *Bragg*, no doubt Federal Court erred — Federal Court justifying intervention on ground Prothonotary imposed excessively onerous burden of proof on Commissioner — Federal Court establishing as absolute principle prohibition to disclose names of persons who make disclosure, witnesses — Federal Court misunderstanding principles laid down by Supreme Court, more particularly, principles set out in *Bragg*, in reaching conclusion — Clear in *Bragg* Supreme Court not calling into question principles set out in previous decisions, including *Sierra Club*, according to which harm resulting from disclosure must be "well grounded in the evidence" — Supreme Court did not focus on burden of proof on person seeking confidentiality order; instead considered quality, nature of evidence to put forward to obtain order — Exercise of discretion under r. 151 requiring judge to analyze all relevant facts, circumstances showing potential harm to important interest applicant seeking to protect, make appropriate order — Federal Court not making any attempt to exercise discretion — Federal Court concluding serious harm without any evidence to support finding — Federal Court confusing important interest, that is, protecting persons who make disclosure, witnesses, with serious risk of harm that could result from disclosing identity — Fact that Parliament stating in Act that necessary to establish disclosure, protection procedures not leading to conclusion that in all cases where person made disclosure public not entitled to know identity of persons who made disclosure, witnesses — Federal Court having to consider whether there was or could be serious risk of harm to persons who made disclosure, witnesses if identities made public — Federal Court failing to consider issue because finding existence of Act sufficient to find serious risk of harm — Federal Court subordinating its exercise of discretion to what it considered to be purpose of Act — In doing so, Federal Court's analytical approach converting discretionary power set out in r. 151 into non-discretionary power — This was not Parliament's intention in enacting Act — Consideration of r. 151, principles set forth by Supreme Court required in any confidentiality order decision — Appeal allowed.

DESJARDINS V. CANADA (ATTORNEY GENERAL) (A-316-18, 2020 FCA 123, Nadon J.A., reasons for judgment dated July 17, 2020, 37 pp.)