Federal Court  Cour fédérale

Date: 20200630

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

Citation: 2020 FC 730

[ENGLISH TRANSLATION]

Montréal, Quebec, June 30, 2020

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN**:**

DAVID LESSARD-GAUVIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Court has before it an appeal brought by the applicant, David Lessard-Gauvin, pursuant to section 51 of the *Federal Courts Rules*, SOR/98-106 [Rules], against three Orders made on November 12, 2019, by Prothonotary Tabib [Prothonotary] in files T-1136-16,

T-210-18 and T-766-18 [Orders]. In her Orders, the Prothonotary, as case management judge for the three files, granted the motions for security for costs filed by the Attorney General of Canada [AGC] pursuant to rules 416 to 418 [Motions for Security]. With the exception of the amount of costs awarded, the Prothonotary's Orders are identical in all three cases.

[2] Pursuant to the three decisions, the Prothonotary ordered Mr. Lessard-Gauvin to post security for costs in the amounts of $10,872.76 in file T-1136-16 and $4,712.75 in each of files T-210-18 and T-766-18. She also prohibited Mr. Lessard-Gauvin from taking any further steps in the actions, other than appealing the Orders, until such time as the security for costs had been paid. At the same time, she suspended the proceedings in each file until the security had been posted.

[3] In his appeal, Mr. Lessard-Gauvin, representing himself, submits that the Prothonotary committed a long list of errors of law and of mixed fact and law, and breaches of procedural fairness in her Orders. Mr. Lessard-Gauvin argues that the Prothonotary erred in particular by disregarding the new facts that he wanted to put forward with respect to his recent loss of employment; by refusing to rule on his constitutional arguments as a result of an incorrect application of the doctrines of issue estoppel and *stare decisis*; by misinterpreting the conditions under rule 417 for denying security for costs; by exercising her discretion under rule 416 in an unreasonable manner; and by adopting a rigid and formalistic approach to the proceedings, which proved unfair to him.

[4] The only issue is whether, in granting the AGC's Motions for Security, the Prothonotary committed one or more errors justifying the Court's intervention.

[5] For the reasons that follow, Mr. Lessard-Gauvin's appeal will be dismissed because he has not demonstrated an error of law or a palpable and overriding error of fact or mixed fact and law in the Prothonotary's Orders. Moreover, I am not satisfied that there has been a breach of the rules of procedural fairness here that would justify the Court's intervention.

II. Background

A. *Facts*

[6] The factual background leading to the Motions for Security is part of a complex tangle of remedies sought and proceedings brought by Mr. Lessard-Gauvin against the AGC over the last few years. The elements relevant to this appeal can be summarized as follows.

[7] File T-1136-16 involves an application for judicial review brought by Mr. Lessard-Gauvin against a decision of the Public Service Commission of Canada made under section 66 of the *Public Service Employment Act*, SC 2003, c 22, dismissing requests for investigation at the preliminary stage. That application for judicial review is dated July 11, 2016, and has been subject to numerous extensions of time. By order dated May 5, 2017, the Court consolidated those proceedings with the proceedings in two other files initiated by Mr. Lessard-Gauvin and involving the same parties (T-1683-16 and T-1989-16), with the application in file T-1136-16 being treated as the main application.

[8] File T-210-18 involves an application for judicial review challenging another decision by the Public Service Commission of Canada, again made under section 66 of the *Public Service Employment Act*, but this time, following an investigation. That application was filed by Mr. Lessard-Gauvin on February 5, 2018.

[9] File T-766-18, meanwhile, is an application for judicial review of a decision of the Canadian Human Rights Commission pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC 1985, c H-6. In that decision, the Commission dismissed a complaint by Mr. Lessard-Gauvin, stating that an inquiry into the complaint was not warranted. That application for judicial review is dated April 25, 2018. These three applications for judicial review appear to be in response to rejections experienced by Mr. Lessard-Gauvin in his efforts to join the federal public service.

[10] As Justice Roy noted in his decision on an appeal filed by Mr. Lessard-Gauvin against another order of the Prothonotary in the same three cases (*Lessard-Gauvin v Canada (Attorney General)*, [*LG Roy*]), each of these files has been the subject of a great many procedural steps, such that even though they date back to 2016 and 2018, none has yet reached the stage of a hearing on the merits.

[11] These three applications, it should be noted, are not the first in which Mr. Lessard-Gauvin and the AGC have crossed swords. They follow numerous court cases between the same parties that were instituted by Mr. Lessard-Gauvin between the years 2015 and 2017. For the purposes of this appeal, it is sufficient to note that, following several unfavourable

decisions rendered against Mr. Lessard-Gauvin in these earlier court cases, costs had already been awarded in favour of the AGC on more than one occasion.

[12] Against this backdrop, in January 2019, the AGC filed his Motions for Security for costs before this Court in files T-1136-16, T-210-18 and T-766-18. Also in January 2019, the AGC filed similar motions before the Federal Court of Appeal [FCA] in related files A-312-18 and A-313-18. The AGC states in his motion records that at the time the five Motions for Security were filed, Mr. Lessard-Gauvin already owed the AGC approximately $6,156 in unpaid costs.

[13] The AGC's Motions for Security progressed slowly, and on November 12, 2019, the Prothonotary issued her three Orders granting them. Those Orders are the subject of this appeal.

B. ***Procedural history***

[14] It is worth taking a moment to reflect on the cumbersome and laborious procedural history that has punctuated the proceedings for the Motions for Security underlying the appeal now before the Court. Rather than respond to the Motions for Security within the prescribed time limits, in February 2019, Mr. Lessard-Gauvin began filing one preliminary and interlocutory motion after another against the AGC's motions.

[15] Accordingly, in February and March 2019, Mr. Lessard-Gauvin filed motions for an order of confidentiality in each of the five files pending before the Court and the FCA. These motions related to financial and medical documents that he wished to submit in response to the AGC's Motions for Security [Motions for Confidentiality]. The Motions for Confidentiality

include a variety of other requests, including for extensions of time and consolidation of proceedings.

[16] On April 10, 2019, the Prothonotary dismissed Mr. Lessard-Gauvin's Motion for Confidentiality, with costs, and then granted him a 15-day extension to April 29, 2019, to file his motion records in response to the Motions for Security before this Court. Similarly, on April 29, 2019, Justice Pelletier of the FCA dismissed Mr. Lessard-Gauvin's Motions for Confidentiality in both FCA files, again with costs, giving Mr. Lessard-Gauvin until May 15, 2019, to file his motion records in response to the Motions for Security in the FCA.

[17] On May 2, 2019, Mr. Lessard-Gauvin filed new motions before the FCA in files A-312-18 and A-313-18, this time to seek directions with a view to challenging the constitutionality of rule 417, and to request that the actions be conducted as specially managed proceedings, that a dispute resolution conference be held, and that he be granted an extension of time [Motions for Directions].

[18] A week later, on May 9, 2019, Mr. Lessard-Gauvin brought a third round of motions in files A-312-18 and A-313-18, this time seeking to quash the April 29, 2019, orders dismissing his Motions for Confidentiality [Motions to Quash].

[19] In late May 2019, Mr. Lessard-Gauvin filed a new round of five motions before this Court and the FCA to stay the Motions for Security and lift the stays in the three files in this

Court (T-1136-16, T-210-18 and T-766-18) and in the two FCA files (A-312-18 and A-313-18) [Motions to Stay].

[20] On July 5, 2019, in *LG Roy*, Justice Roy of this Court dismissed Mr. Lessard-Gauvin's appeal against the Prothonotary's April 10, 2019, decision on the Motions for Confidentiality, all with costs. A few days later, on July 17, 2019, the Prothonotary also dismissed Mr. Lessard-Gauvin's Motions to Stay, with costs in each of the three files. On this occasion, the Prothonotary ordered Mr. Lessard-Gauvin to file his motion record in response to the Motions for Security on or before August 19, 2019.

[21] On July 29, 2019, in three decisions issued simultaneously in files A-312-18 and A-313-18, Justice Boivin of the FCA dismissed Mr. Lessard-Gauvin's Motions to Stay, Motions for Directions and Motions to Quash, all with costs against Mr. Lessard-Gauvin. In his orders on the Motions for Directions, Justice Boivin imposed a peremptory time limit of August 2, 2019, for Mr. Lessard-Gauvin to respond to the Motions for Security that were before the FCA.

[22] On August 2 and 19, 2019, the dates prescribed by the FCA and the Prothonotary respectively, Mr. Lessard-Gauvin filed with the FCA and this Court his motion record in response to the Motions for Security, which he entitled [TRANSLATION] "respondent's partial record". The responses and written submissions filed by Mr. Lessard-Gauvin were identical in all five files. Mr. Lessard-Gauvin raised the same arguments in response to the five Motions for Security, before both this Court and the FCA, including the constitutional invalidity and unenforceability of the security for costs regime under the Rules.

[23] And then on August 9 and 19, 2019, Mr. Lessard-Gauvin filed a new round of preliminary motions before the FCA and this Court, this time to stay deliberations in the five Motions for Security, obtain an extension of time to file a supplementary record in response to the Motions for Security, and schedule a hearing on the Motions for Security [Motions Regarding Deliberations and Time Limits]. One purpose of these Motions Regarding Deliberations and Time Limits was to obtain leave to file a financial expert report that Mr. Lessard-Gauvin considers necessary to support his constitutional argument.

[24] On August 29, 2019, Justice Nadon of the FCA dismissed the Motions Regarding Deliberations and Time Limits in A-312-18 and A-313-18, again with costs.

[25] On September 24, 2019, the Prothonotary also dismissed the Motions Regarding Deliberations and Time Limits in all three cases before this Court, again with costs against Mr. Lessard-Gauvin. The Prothonotary then decided, among other things, that she would rule on the scheduling of a hearing after receiving the AGC's reply to Mr. Lessard-Gauvin's partial response to the Motions for Security.

[26] On October 17, 2019, Justice Nadon of the FCA rendered his decision on the merits of the AGC's Motions for Security in files A-312-18 and A-313-18. In two short two-page orders, Justice Nadon allowed the Motions for Security and ordered Mr. Lessard-Gauvin to post security for costs in the amount of $4,471.00 in each of the two cases, at the same time rejecting the various arguments raised by Mr. Lessard-Gauvin.

[27] On October 22, 2019, Mr. Lessard-Gauvin filed new motion records in all three cases before this Court, this time seeking leave to present new facts pertaining to his termination of employment and his ineligibility for Employment Insurance, as well as an extension of time to serve a motion to appeal the September 24, 2019, decision of the Prothonotary dismissing his Motions Regarding Deliberations and Time Limits [Motion for New Facts].

[28] On November 12, 2019, it was the Prothonotary's turn to render her decision on the merits of the AGC's Motions for Security in files T-1136-16, T-210-18 and T-766-18. Like the FCA, the Prothonotary granted the AGC's motions and ordered Mr. Lessard-Gauvin to post security for costs in the amounts of $10,872.76, $4,712.75 and $4,712.75 respectively in these files.

[29] One noteworthy fact emerges from this procedural history. Since the January 2019 filing of the Motions for Security that are the subject of the appeal now before the Court, Mr. Lessard-Gauvin has suffered setbacks in *all* of his preliminary and interlocutory motions before the Court and the FCA. On each occasion, he was ordered to pay costs, in addition to those that had originally led the AGC to file his Motions for Security.

[30] Thus, in addition to Justice Nadon's two orders granting the AGC's Motions for Security on October 17, 2019, the FCA has issued a total of 10 orders, dismissing in turn the Motions for Confidentiality, the Motions for Directions, the Motions to Quash, the Motions to Stay and the Motions Regarding Deliberations and Time Limits that Mr. Lessard-Gauvin has successively filed since January 2019 in files A-312-18 and A-313-18. Meanwhile, between January 2019 and

the issuance of the Prothonotary's Orders in November 2019, this Court issued 12 orders, dismissing the Motions for Confidentiality (including the appeal of the Prothonotary's decisions), the Motions to Stay and the Motions Regarding Deliberations and Time Limits filed by Mr. Lessard-Gauvin in files T-1136-16, T-210-18 and T-766-18, each time with new costs. All in all, over a period of only a few months, more than 20 preliminary orders were made by this Court and the FCA, denying the various procedural remedies sought by Mr. Lessard-Gauvin in the Motions for Security he is opposing, all resulting in additional orders for costs being made against him.

[31] I cannot help but note that at as a result of these multiple motions and proceedings, all of which were unsuccessful, Mr. Lessard-Gauvin has thus accumulated unfavourable decisions and added a multitude of orders to pay costs to an already lengthy list.

C. *Prothonotary's Orders*

[32] It was in this rather exceptional context that the Prothonotary issued her Orders dated November 12, 2019. In approximately 10 pages of detailed reasons, the Prothonotary first stated that she had considered and dealt with the Motions for Security in files T-1136-16, T-210-18 and T-766-18 jointly, as Mr. Lessard-Gauvin wished, while issuing a separate order for each file.

[33] With respect to Mr. Lessard-Gauvin's request for a hearing, the Prothonotary declined to exercise her discretion to hold one, given the voluminous written submissions received from Mr. Lessard-Gauvin in his partial response and the fact that the constitutional issue had been settled by the FCA decisions rendered a few weeks earlier on October 17, 2019.

[34] The Prothonotary then dealt with Mr. Lessard-Gauvin's motion to extend the time to appeal her September 24, 2019, order dismissing his Motions Regarding Deliberations and Time Limits. The Prothonotary noted that an appeal, even if properly filed, does not stay the execution of the judgment being appealed, and said motion would therefore not affect her ability to rule on the Motions for Security. The Prothonotary concluded that it was not appropriate for the Court to exercise its discretion to suspend its deliberations on the Motions for Security.

[35] On the constitutional issue, the Prothonotary noted that in response to the five Motions for Security, Mr. Lessard-Gauvin had raised, before both this Court and the FCA, the same arguments of constitutional invalidity and unenforceability of the security for costs regime under the Rules. She also noted that in Justice Nadon's orders dated October 17, 2019, the FCA had granted the Motions for Security in files A-312-18 and A-313-18, [TRANSLATION] "thereby dismissing the constitutional arguments raised by" Mr. Lessard-Gauvin. Invoking both issue estoppel and *stare decisis*, the Prothonotary pointed out that the Court was therefore not required to consider the constitutional validity or enforceability of the security for costs regime under the Rules, as this issue had already been decided.

[36] The Prothonotary then turned her analysis to rules 416 and 417 and decided to grant the Motions for Security. The Prothonotary first determined that the criteria under rule 416(1)(f) had indeed been met, in view of Mr. Lessard-Gauvin's admissions of unpaid costs already awarded to the AGC in other proceedings.

[37] The Prothonotary next examined the application of rule 417, which allows the Court to refuse an application for security for costs "if a plaintiff demonstrates impecuniosity and the Court is of the opinion that the case has merit". With respect to the first test for impecuniosity, the Prothonotary noted Mr. Lessard-Gauvin's admission, in his written submissions, that [TRANSLATION] "he is not 'truly' impecunious within the meaning of the Rules but would still have to sacrifice reasonable expenses for basic needs in order to pay the security for costs". This admission, she stated, settled the issue of impecuniosity. The Prothonotary went on to observe that Mr. Lessard-Gauvin did not in any way address the merits of his claims in his respondent's record. Relying on *Sauve v Canada*, 2014 FC 119 [*Sauve*], the Prothonotary noted that the test for merit in rule 417 refers to a matter that is "deserving or worthy of consideration" in the sense that the case raises a serious issue to be tried, and that this is "a higher threshold than the threshold of 'plain and obvious that the claim discloses no reasonable cause of action,' which is applied in motions to strike". She added that the burden was on Mr. Lessard-Gauvin to convince the Court that his case has sufficient merit that he should be relieved from the obligation to post security for costs, and that [TRANSLATION] "the applicant's failure to make such demonstration is, equally and on its own, fatal to the application of rule 417".

[38] The remainder of the Prothonotary's decision deals with the exercise of her discretion under rule 416 to determine whether, in the circumstances, she should order Mr. Lessard-Gauvin to provide the security for costs requested by the AGC. In her analysis, the Prothonotary reviewed Mr. Lessard-Gauvin's claims with respect to the absence of serious harm to the AGC, the AGC's bad faith in refusing to accept payment of costs in instalments and the lateness of the

Motions for Security, and came to the conclusion that it was appropriate in the circumstances to order the payment of security for costs in each of the three cases.

[39] Finally, with respect to the amount of security to be paid and the terms and conditions thereof, the Prothonotary found that the amounts claimed by the AGC were justified and that payment of the security in instalments would not be appropriate, considering Mr. Lessard-Gauvin's lack of restraint in repeatedly bringing new proceedings against the Motions for Security, which resulted in him incurring new orders to pay costs. However, the Prothonotary agreed to allow Mr. Lessard-Gauvin more flexibility in the time limit for the payment of security, conditional on each file remaining suspended until the security had been paid.

[40] The Prothonotary therefore granted the AGC's Motions for Security, with costs set at $750.00 for the three files.

D. *Standard of intervention*

[41] The language of rules 416 and 417 expressly provides that a Prothonotary's decision on the merits of a motion for security for costs is discretionary in nature (*Swist v MEG Energy Corp.*, 2016 FCA 283 at para 15).

[42] Since the FCA decision in *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira*], there is no longer any doubt that the standard of intervention on appeals of discretionary orders by prothonotaries is the standard enunciated by

the Supreme Court of Canada (SCC) in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*]. As such, on questions of law and questions of mixed fact and law where there are extricable questions of law, prothonotaries' orders are reviewed for correctness. This standard implies that there is no deference to prothonotaries on these questions. On all other questions, particularly questions of fact or mixed fact and law and inferences of fact, the Court may only interfere if the Prothonotary made a "palpable and overriding error" (*Housen* at paras 19–37; *Maximova v Canada (Attorney General)*, 2017 FCA 230 [*Maximova*] at para 4; *Hospira* at paras 27, 64–66, 79). The parties do not challenge this.

[43] The FCA has repeatedly declared that the "palpable and overriding error" standard is a "highly deferential standard" (*Figueroa v Canada (Public Safety and Emergency Preparedness)*, 2019 FCA 12 at para 3; *Montana v Canada (National Revenue)*, 2017 FCA 194 at para 3; *1395804 Ontario Ltd (Blacklock's Reporter) v Canada (Attorney General)*, 2017 FCA 185 at para 3; *NOV Downhole Eurasia Limited v TLL Oilfield Consulting Ltd*, 2017 FCA 32 at para 7; *Revcon Oilfield Constructors Incorporated v Canada (National Revenue)*, 2017 FCA 22 at para 2). This is a heavy burden for an applicant to meet. As Justice Stratas metaphorically stated in *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 [*Mahjoub*] and in *Canada v South Yukon Forest Corporation*, 2012 FCA 165 [*South Yukon*], in order to meet this standard "it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall" (*Mahjoub* at para 61; *South Yukon* at para 46), cited with approval by the SCC in *Benhaim v St-Germain*, 2016 SCC 48 [*Benhaim*] at para 38).

[44] Describing what "palpable" and "overriding" mean, Justice Stratas further wrote in *Mahjoub*, at paragraphs 62 to 64:

> [62] "Palpable" means an error that is obvious. Many things can qualify as "palpable." Examples include obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received in accordance with the doctrine of judicial notice, findings based on improper inferences or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence.
>
> [63] But even if an error is palpable, the judgment below does not necessarily fall. The error must also be overriding.
>
> [64] "Overriding" means an error that affects the outcome of the case. It may be that a particular fact should not have been found because there is no evidence to support it. If this palpably wrong fact is excluded but the outcome stands without it, the error is not "overriding." The judgment of the first-instance court remains in place.

[45] The FCA has also described a palpable and overriding error as an error that is obvious, plainly seen and apparent, the effect of which is to vitiate the integrity of the reasons (*Madison Pacific Properties Inc. v Canada*, 2019 FCA 19 at para 26; *Maximova* at para 5). In *Groupe Maison Candiac Inc. v Canada (Attorney General)*, 2017 FCA 216 [*Candiac*], the FCA further noted that the threshold of palpable and overriding error is particularly difficult to meet where, as in this case, the discretionary decision under review by the Court is procedural in nature (*Candiac* at para 50; see also *Curtis v Canada (Canadian Human Rights Commission*), 2019 FC 1498 at paras 14-17, and *Boily v Canada*, 2019 FC 323 at paras 16-22).

[46] The SCC recently echoed these principles in *Salomon v Matte-Thompson*, 2019 SCC 14 [*Salomon*]: "Where the deferential standard of palpable and overriding error applies, an appellate court can intervene only if there is an obvious error in the trial decision that is determinative of

the outcome of the case" (*Salomon* at para 33, citing *Benhaim v St-Germain*, 2016 SCC 48 at para 38). The SCC also referred to another metaphor used by the Quebec Court of Appeal in *J.G. c Nadeau*, 2016 QCCA 167, at paragraph 77, where the Court stated that [TRANSLATION] "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye". In other words, in order to succeed in arguing errors of fact or mixed fact and law as he does, Mr. Lessard-Gauvin must persuade the Court of an obvious error that directly affects the outcome of the Orders; the needle in the haystack or a few branches swaying in the tree will not suffice where the degree of deference is high.

[47] Mr. Lessard-Gauvin's appeal also criticizes the Prothonotary for errors that he characterizes as breaches of the principles of procedural fairness. Although *Hospira* did not deal directly with the applicable test in these situations, the case law does establish that the test to be applied to such errors is the same as that applicable to errors of law, and that no deference is owed to prothonotaries on questions of procedural fairness (*Housen* at paras 8–9; *G.D. Searle & Co. v Novopharm Limited*, 2007 FCA 173 at para 34). For example, in *Badawy v Canada (Justice)*, [*Badawy*], the Court considered whether there had been a breach of procedural fairness because a hearing had been held by videoconference, and concluded that procedural fairness issues are subject to the "standard of correctness" (*Badawy* at para 13, citing *Canadian Pacific Railway Company Limited v Canada (Attorney General)*, 2018 FCA 69 [*CPR*] at para 34). Similarly, the Court has held that an appeal arguing a breach of natural and fundamental justice or a reasonable apprehension of bias involves issues that are reviewable on a standard of correctness (*Forefront Placement Ltd. v Canada (Employment and Social Development)*, 2018

FC 692 at para 41, citing *Pembina County Water Resource District v Manitoba (Government)*, 2017 FCA 92 at para 35 and *Coombs v Canada (Attorney General)*, 2014 FCA 222 at para 12).

[48] I would add the following, however. Issues of procedural fairness and the duty to act fairly are not concerned with the merits or content of a decision rendered, but rather the process followed. Procedural fairness has two components: the right to be heard and the opportunity to respond to the evidence that must be rebutted; and the right to a fair and impartial hearing before an independent tribunal (*Re Therrien*, 2001 SCC 35 at para 82). It is well established that the requirements of the duty of procedural fairness are "eminently variable", inherently flexible and context-specific (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 21; *CPR* at para 40). They do "not reside in a set of enacted rules" (*Green v Law Society of Manitoba*, 2017 SCC 20 at para 53). On these questions of procedural fairness, the Court's role is therefore to determine, having regard for both the specific context and all the circumstances, whether the procedure followed by the decision maker was fair and just (*Perez v Hull*, 2019 FCA 238 at para 18; *CPR* at para 54).

[49] Finally, as Justice Roy reminded Mr. Lessard-Gauvin in *LG Roy*, I would stress that there are no "varying standards of review" and that "[s]tandards based on procedural fairness in administrative law or the consideration of [TRANSLATION] 'constitutional principles and fundamental rights' have nothing to do with the application of known principles to the issues at stake here", namely those governing appeals from decisions of prothonotaries (*LG Roy* at para 16).

III. Analysis

[50] In support of his appeal, Mr. Lessard-Gauvin provided in his partial respondent's motion record and at the hearing before this Court a long list of errors allegedly committed by the Prothonotary. Although Mr. Lessard-Gauvin organized his complaints differently, they can be grouped under four main themes: (1) failure to consider his Motion for New Facts; (2) the treatment of the conditions under rule 417 and the exercise of discretion under rule 416; (3) the constitutional issue relating to the security for costs regime; and (4) the general approach of the Prothonotary in the Orders. I will deal with them in that order.

[51] After carefully reviewing the Prothonotary's Orders, reading the records and analyzing the written and oral submissions of the parties, I conclude that Mr. Lessard-Gauvin has not demonstrated that the Orders contain an error of law, a palpable and overriding error of fact or mixed fact and law, or a breach of the principles of procedural fairness that would justify the Court's intervention.

A. *Issue of new facts*

[52] Mr. Lessard-Gauvin first claims that the Prothonotary ignored his motion, duly served and filed on October 22, 2019, to present new facts relating to his termination of employment on September 30, 2019, and his ineligibility for Employment Insurance benefits following this loss of employment (due to insufficient hours worked). Mr. Lessard-Gauvin submits that these facts were relevant and even crucial to his defence of undue hardship or impecuniosity in respect of the Motions for Security. He argues that these facts change the situation with respect to the

application of rule 417. Mr. Lessard-Gauvin argues that by ignoring and implicitly discounted these new facts, the Prothonotary committed a fatal error of procedural fairness, thereby vitiating her Orders. He argues that the Court must therefore decide *de novo* his defence of impecuniosity under rule 417.

[53] I disagree with Mr. Lessard-Gauvin's submissions. I am of the opinion that, for the following reasons, the Prothonotary did not commit an error justifying the intervention of this Court in not considering the Motion for New Facts in the circumstances of this case. Moreover, even if there had been a breach of procedural fairness involving Mr. Lessard-Gauvin's defence of impecuniosity, this would not have changed the finding with regard to rule 417 because the Prothonotary correctly concluded that the second part of this provision was not satisfied and that this alone was [TRANSLATION] "fatal to the application of rule 417". Finally, even if I were to find that there had been an error and ruled *de novo* on the defence of leniency advanced by Mr. Lessard-Gauvin in light of his Motion for New Facts, as he wishes, I would come to the same conclusion as the Prothonotary on Mr. Lessard-Gauvin's failure to meet the requirements of the first part of rule 417.

(1) Motion for New Facts

[54] In her Orders, the Prothonotary dealt only briefly with the first criterion of rule 417 relating to impecuniosity, merely noting Mr. Lessard-Gauvin's admission in his written submissions that he is not [TRANSLATION] "truly" impecunious within the meaning of the Rules but that he would still have to make sacrifices in order to be able to provide the security for costs requested by the AGC. The Prothonotary, it is true, did not deal directly with the arguments put

forward by Mr. Lessard-Gauvin in his Motion for New Facts with respect to his termination of employment and his ineligibility for Employment Insurance benefits.

[55] However, this motion must be viewed in the context of the procedural history of the Motions for Security. The Motion for New Facts was filed by Mr. Lessard-Gauvin on October 22, 2019. As of that date, an order had already been issued by the Prothonotary on July 17, 2019, imposing a peremptory time limit of August 19, 2019, for Mr. Lessard-Gauvin to file his response to the Motions for Security. Mr. Lessard-Gauvin did in fact do so by the prescribed date. In addition, the Prothonotary had issued another order, this one dated September 24, 2019, among other things dismissing Mr. Lessard-Gauvin's request to file a [TRANSLATION] "supplementary response" (in relation to a financial expert report on the issue of costs). In that order dated September 24, 2019, the Prothonotary denied Mr. Lessard-Gauvin's request to file a supplementary response given that his respondent's motion record and the AGC's reply had already been filed. The Prothonotary also viewed Mr. Lessard-Gauvin's request as being tantamount to a motion for extension of time to complete the service and filing of his respondent's motion record, whereas the order of July 17, 2019, had already set a peremptory time limit of August 19, 2019.

[56] In the circumstances, and considering these two orders already made by the Prothonotary setting a peremptory time limit and denying an initial request to file a supplementary response, I am not satisfied that the failure to consider the Motion for New Facts, filed at the eleventh hour of deliberations on the Motions for Security, constitutes a breach of the rules of procedural fairness, or that the procedure followed by the Prothonotary in arriving at her Orders was not fair

and just. Mr. Lessard-Gauvin's motion was clearly untimely; it ignored two previous Orders, and Mr. Lessard-Gauvin had been given an opportunity to be heard on the issue of impecuniosity in the context of his submissions in his partial respondent's motion record.

[57] I further note that on January 7, 2020, Prothonotary Steele denied Mr. Lessard-Gauvin's motion for an extension of time to appeal the Prothonotary's September 24, 2019 order and to submit new facts. Contrary to Mr. Lessard-Gauvin's contention, Prothonotary Steele did not, by this decision, refer the question of admitting new facts to the judge hearing this appeal. Rather, she decided that the issue of new facts as to the impecuniosity alleged by Mr. Lessard-Gauvin had been rendered [TRANSLATION] "moot" by the Orders granting the Motions for Security.

(2) Rule 417 not satisfied in any event

[58] Furthermore, even if I were to agree that the refusal to consider the new facts advanced by Mr. Lessard-Gauvin did in fact undermine procedural fairness in his defence of impecuniosity, this would not justify the Court's intervention in this matter because those new facts would not have changed the Prothonotary's finding on rule 417. Indeed, the Prothonotary correctly concluded that the second part of this provision was not satisfied and that this alone was [TRANSLATION] "fatal to the application of rule 417".

[59] It is useful at this point to reproduce the text of rule 417, which reads as follows:

417 The Court may refuse to order that security for costs be given under any of paragraphs 416(1)(a) to (g) if a plaintiff demonstrates	**417** La Cour peut refuser d'ordonner la fourniture d'un cautionnement pour les dépens dans les situations visées aux alinéas 416(1)a) à g) si le demandeur fait la preuve de son

impecuniosity and the Court is of the opinion that the case has merit.	indigence et si elle est convaincue du bien-fondé de la cause.

[60] There was no dispute that under this rule, the Court had to be satisfied that Mr. Lessard-Gauvin had demonstrated both his impecuniosity and the merits of his application for judicial review at the source of each file. This is a conjunctive test, and even if Mr. Lessard-Gauvin had been able to present new facts regarding his impecuniosity, he could not have relied on rule 417 because he did not demonstrate the merits of his applications for judicial review. As detailed later in this judgment, I am of the view that the Prothonotary's conclusions in this regard were correct and that she did not commit a palpable and overriding error or an error of law. Also, the new facts relied upon by Mr. Lessard-Gauvin would not have changed the Prothonotary's findings in any way because Mr. Lessard-Gauvin did not satisfy the second part of rule 417. The lack of merit in the application is fatal to Mr. Lessard-Gauvin's position on rule 417 and is sufficient to validate the Prothonotary's decision on this aspect of her Orders.

[61] Thus, even if I were to agree that the Prothonotary made an error of procedural fairness in disregarding Mr. Lessard-Gauvin's new facts, the Prothonotary's error would be inconsequential. I recognize that breaches of procedural fairness ordinarily render a decision invalid and would normally require the Court hearing an appeal of the Prothonotary's Orders to rule *de novo* on this issue of new facts. However, even where an error has resulted in a breach of procedural fairness, such a breach may be ignored where the outcome of a case is legally inevitable (*Canada (Attorney General) v McBain*, 2017 FCA 204 at para 10, citing *Mobil Oil Canada Ltd. v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 at pp 227–28). Here, given the Prothonotary's conclusions on the second element of rule 417, the outcome in this case

was inevitable, and it is certain that the Prothonotary would have arrived at the same result on the application of rule 417, regardless of any breaches of procedural fairness that may have occurred in the treatment of evidence of new facts. Contrary to Mr. Lessard-Gauvin's assertions, these new facts do not change the situation with respect to rule 417.

(3) Alleged new facts insufficient

[62] In addition, and in the alternative, even if I were to agree that there had been an error of procedural fairness and I were to rule *de novo* on the defence of leniency advanced by Mr. Lessard-Gauvin in light of his Motion for New Facts, I would nevertheless reach the same conclusion as the Prothonotary on Mr. Lessard-Gauvin's failure to meet the requirements of the first part of rule 417. Indeed, the new facts relied upon by Mr. Lessard-Gauvin, namely the evidence of his loss of employment and ineligibility for Employment Insurance benefits, would not have been sufficient to convince me that Mr. Lessard-Gauvin had proven his state of impecuniosity.

[63] I agree with the AGC that the new facts alleged by Mr. Lessard-Gauvin would not have enabled the Court to rule in his favour on rule 417 or on the Motions for Security. Being unemployed is not, in and of itself, an argument to establish impecuniosity under rule 417, and the Court has already recognized that the burden of proof in this regard is significantly higher (*Timm v Canada (Attorney General)*, 2017 FC 563 [*Timm FC*] at paras 24, 25, 55; *Coombs v Canada*, 2008 FC 837 [*Coombs*] at para 11).

[64] Mr. Lessard-Gauvin had to prove his impecuniosity on the balance of probabilities (*Timm* at para 49; *Heli Tech Services (Canada) Ltd v Weyerhaeuser Company Limited*, 2006 FC 1169 [*Heli Tech Services*] at para 2). With respect to evidence, "a high standard is expected", and "full and frank disclosure is required" (*Heli Tech Services* at para 8; see also *Chaudhry v Canada (Attorney General)*, 2009 FCA 237 at para 10). As in *Coombs*, I am not satisfied that Mr. Lessard-Gauvin has demonstrated his impecuniosity robustly enough.

[65] As the FCA stated in *Sauve v Canada*, 2012 FCA 287 [*Sauve*], "[m]aterial evidence must be submitted to sustain a claim of impecuniosity, including complete and clear financial information presented in a comprehensible format" (*Sauve* at para 10). The mere assertion that a party cannot afford to provide security for costs is insufficient to give effect to rule 417. Documents such as "[t]ax returns, bank statements, lists of assets and (where possible) financial statements should be submitted" (*Sauve* at para 10). Similarly, evidence of "the impracticability of borrowing from a third party to satisfy the security order" or lack of access to "family and community resources" should also be provided (*Sauve* at para 10). No material issue should be left unanswered.

[66] As such, an applicant who alleging that he or she has no source of income other than Canada Pension and Old Age Security, who provides an affidavit to that effect but does not attach a document confirming the balance of his or her bank accounts or other financial data, will not have demonstrated impecuniosity (*Coombs* at para 11). The Court will also hold at fault an applicant who provides insufficient evidence that he or she cannot borrow money from family members (*Timm FC* at para 51). In *Mapara v Canada (Attorney General)*, 2016 FCA 305

[*Mapara*], the FCA also noted the lack of details as to why the appellant's family members could no longer assist him. In sum, a finding of impecuniosity must be "based on the assessment of the overall financial situation of the applicant or the plaintiff" (*Mapara* at para 12).

[67] Here, I am of the view that even with the allegations and documents contained in his Motion for New Facts, Mr. Lessard-Gauvin has not proven his impecuniosity to the standard required by the case law. Even taking into account his loss of employment and ineligibility for Employment Insurance benefits, Mr. Lessard-Gauvin has not submitted any material evidence to support his allegations of impecuniosity. His income and financial records were redacted, making it impossible to determine his true financial situation, and no persuasive evidence was submitted regarding his inability to borrow money or access other financial resources. As was the case in *Timm FC*, I must note that the evidence filed by Mr. Lessard-Gauvin before the Prothonotary was laconic, with no information on his assets, annual income, overall financial situation or ability to borrow or access financing. The new facts alleged by Mr. Lessard-Gauvin did nothing to fill in all these gaps in the evidence.

[68] The burden was on Mr. Lessard-Gauvin to prove his impecuniosity with clear and convincing evidence sufficient to meet the balance of probabilities test, and he failed to do so. For all of these reasons, I therefore find no error in the Orders on the issue of new facts that could lead the Court to disturb the conclusions of the Prothonotary allowing the AGC's Motions for Security.

B. ***Application of rules 416 and 417***

[69] In his appeal, Mr. Lessard-Gauvin also attacks the Prothonotary's application of rule 417, which sets out the grounds for refusing security, and the exercise of her discretion under rule 416. In this regard, Mr. Lessard-Gauvin alleges by turns an error of procedural fairness, an error of law and an error of mixed fact and law.

[70] First, Mr. Lessard-Gauvin criticizes the Prothonotary for focusing on his failure to address the merits of his applications for judicial review [TRANSLATION] "in his respondent's record". Mr. Lessard-Gauvin contends that the Prothonotary should also have considered the records he filed in the three proceedings, using them to fill in any gaps in the evidence of the merits of his applications found in his respondent's motion record in the Motions for Security. He argues that by requiring proof of the merits in the respondent's motion record [TRANSLATION] "and nowhere else", the Prothonotary applied the procedure in a manner contrary to rules 3 and 60. According to Mr. Lessard-Gauvin, the [TRANSLATION] "merits" of the case may be proven other than merely through what an applicant demonstrates in the respondent's record.

[71] Mr. Lessard-Gauvin then submits that the Prothonotary committed an error of law in her application of the second criterion of rule 417, that of the merits of the application. Relying on *Leuthold v Canadian Broadcasting Corporation*, 2013 FCA 95 [*Leuthold*], Mr. Lessard-Gauvin argues that it is sufficient that his appeal not be [TRANSLATION] "without merit," and that the Prothonotary could not apply a higher test than the one used for motions to strike.

[72] Finally, Mr. Lessard-Gauvin argues that the Prothonotary improperly exercised her discretion under rule 416 by giving disproportionate weight to the AGC's right to claim costs versus his right of access to justice, thereby committing an error of mixed fact and law. He submits that, unlike the right to claim costs, his right of access to justice is a fundamental right. He also criticizes the Orders for what he describes as an accusation that came out of nowhere, namely the Prothonotary's statement that [TRANSLATION] "in the actions brought by Mr. Lessard-Gauvin, the filing of a motion for a hearing is not a guarantee of the imminent conclusion of a proceeding".

[73] Here again, the arguments put forward by Mr. Lessard-Gauvin are not persuasive. Whether it be her interpretation and application of rule 417 or the exercise of her discretion under rule 416, I am of the opinion that the Prothonotary did not commit any error requiring the intervention of this Court. Again, Mr. Lessard-Gauvin has not shown that the Prothonotary made an error of law or a palpable and overriding error in her Orders, or that she breached her duty to act fairly.

(1) Respondent's record

[74] On the question of the reference made by the Prothonotary to the [TRANSLATION] "respondent's record" in her discussion of the application of rule 417, I can only note that Mr. Lessard-Gauvin is trying to make the Orders to say what they simply do not. There is no issue of procedural fairness at stake here. There is only Mr. Lessard-Gauvin's truncated and erroneous reading of the Orders.

[75] The relevant portion of the Orders, at pages 5 and 6 of the Prothonotary's reasons, should be reproduced in its entirety. It reads as follows:

> [TRANSLATION]
>
> It should also be noted that the applicant does not address the issue of the merits of his applications in any way in his respondent's record. As noted by this Court in paragraph 41 of *Sauve v Canada (Attorney General)*, 2014 FC 119, the test for merit in rule 417 is defined as a case that is "worthy of consideration" in the sense that the case raises a serious issue to be tried. This is a higher threshold than the threshold of whether it is plain and obvious that the claim discloses no reasonable cause of action, which is applicable in motions to strike. Moreover, the burden is on the applicant to satisfy the Court that his case has sufficient merit that he should be relieved from the obligation to post security for costs. The applicant's failure to make such demonstration is, equally and on its own, fatal to the application of rule 417.

[76] Contrary to Mr. Lessard-Gauvin's assertion, at no time did the Prothonotary say or suggest that she required [TRANSLATION] "a demonstration of the merits in the respondent's record and nowhere else", as Mr. Lessard-Gauvin proclaims in his submissions. In my view, when looking at the text of the decision, nothing in the Prothonotary's words indicates or implies that she disregarded the existence of Mr. Lessard-Gauvin's motion records or the other elements that were before her, including the AGC's reply. A decision maker is presumed to have read and considered the entire case submitted to him or her, and the failure to expressly refer to certain elements does not mean that they were left out or disregarded. On the contrary, the reference in the conclusion to the Prothonotary's analysis to the [TRANSLATION] "applicant's failure to make such demonstration" clearly indicates that she is relying not only on Mr. Lessard-Gauvin's respondent's motion record, but on his general failure to persuade the Court of the merits of his application. In sum, the reading proposed by Mr. Lessard-Gauvin simply does not hold water and does not do justice to the Prothonotary's words.

[77] I should add that, in both his written and oral submissions, Mr. Lessard-Gauvin did not refer to any evidence or analysis that would otherwise have supported his claims as to the merits of his applications relating to the Motions for Security. I therefore see nothing in the Prothonotary's Orders that could amount to an error of procedural fairness in her application of rule 417.

(2) Issue of merits of application

[78] Second, Mr. Lessard-Gauvin claims that the Prothonotary erred in law in her application of the second criterion of rule 417, namely the merits of the case. Although Mr. Lessard-Gauvin speaks of an error of law, this is in fact a question of mixed fact and law because he attacks the Prothonotary's interpretation and application of the second part of rule 417 to his situation. This issue is reviewable against the standard of palpable and overriding error. As this is an appeal from a discretionary decision of the Prothonotary, it is not for me to decide whether or not Mr. Lessard-Gauvin's application for judicial review in files T-1136-16, T-210-68 and T-766-18 has merit, but rather to determine whether the Prothonotary's conclusions in this regard are vitiated by a palpable and overriding error. That is not the case.

[79] In her Orders, the Prothonotary relied heavily on the decision of Chief Justice Crampton in *Sauve*. In that case, the Court established that the term "merit" in rule 417 had been defined to mean a case "deserving or worthy of consideration" (*Lavigne v Canada (Human Rights Commission)*, 2010 FC 1038 at paras 19–20). Chief Justice Crampton went on to say that this meant that the case must raise "a serious issue to be tried", which is "a higher threshold than the threshold of 'plain and obvious that [the application] discloses no reasonable cause of action,'

which is applied in motions to strike" (*Sauve* at para 41). Justice Crampton went on to state that "a higher threshold is appropriate in considering whether a case has merit, as contemplated by Rule 417, because of the purpose of that Rule, namely, to provide the Court with the jurisdiction to refuse to order that security for costs be given, in circumstances where such an order may otherwise have been issued" (*Sauve* at para 41). The Chief Justice added that under rule 417, the burden is on the applicant to prove that the cause of action has sufficient merit. This is exactly the analysis that the Prothonotary conducted in her Orders, finding that Mr. Lessard-Gauvin had not satisfied the Court that his case had sufficient merit to relieve him from the obligation to post security for costs. In so doing, the Prothonotary not only did not commit a palpable and reasonable error, but in fact adopted an eminently correct interpretation and application of the second criterion in rule 417. No error in law occurred here.

[80] Moreover, this interpretation of the merits of the application is recognized in the case law. For example, in *Early Recovered Resources Inc. v Gulf Log Salvage Co-Operative*, 2001 FCT 524, the Court stated at para 30 that in order to allow an impecunious applicant to proceed without posting security for costs, the applicant must establish that his or her case is "almost certain not to fail", a standard described as "rather high". In a similar vein, in *Timm FC*, the Court determined that since Mr. Timm had made only general arguments to the effect that he was nearly certain that his application would not fail, the Court could not conclude that the Prothonotary made a palpable and overriding error in determining that Mr. Timm had not proven the merits of his application for judicial review (*Timm FC* at para 62).

[81] Although he argues that the test [TRANSLATION] "should be the same as that for motions to strike", Mr. Lessard-Gauvin was not able to submit a single precedent supporting his claims or contradicting the *Sauve* findings to the contrary. Other than his own wish and assertion, Mr. Lessard-Gauvin's position is not based on any authority.

[82] The FCA decision in *Leuthold*, to which Mr. Lessard-Gauvin refers in his submissions, is not of much help to him. In that case, the FCA refused security for costs, taking the view that on the facts before it, the appeal in question was not "without merit" (*Leuthold* at para 8). However, the FCA also used the opportunity to state that under rule 417, the appellant had to prove that her case had merit (*Leuthold* at para 4). At no time did the FCA rule or even suggest that the rule 417 test could or should be equated to the test for motions to strike.

[83] I would add in closing that it should be borne in mind that rule 417 is discretionary in nature. Even if the applicant is impecunious and the Court is satisfied that the case has merit, the Court is not obligated to refuse to order security for costs. Rule 417 provides only that the Court *may* decide not to order security for costs where both of those conditions are met. In this case, the Prothonotary found that the second condition had not been met, so she did not have to decide whether to exercise her discretion under rule 417.

[84] For all these reasons, I find that the Prothonotary did not commit any errors of law or any palpable and overriding errors of fact, or of mixed fact and law, in finding that the second criterion of rule 417 had not been met.

(3) Exercise of discretion

[85] Following on his complaints about the Prothonotary's conclusions respecting rule 417, Mr. Lessard-Gauvin accuses her of unreasonably exercising her discretion under rule 416. He characterizes this as an error of mixed fact and law. Mr. Lessard-Gauvin believes that the Prothonotary placed too much emphasis on the AGC's [TRANSLATION] "right to claim costs", at the expense of his right of access to justice. Mr. Lessard-Gauvin also appears to be particularly offended by what he considers to be an unfair and ill-founded accusation against him in the Prothonotary's discussion of the lateness of the Motions for Security.

[86] Once again, I disagree with Mr. Lessard-Gauvin's arguments.

[87] Rule 416 accords judges and prothonotaries discretion with respect to security for costs. It reads in part as follows:

416 (1) Where, on the motion of a defendant, it appears to the Court that:	**416 (1)** Lorsque, par suite d'une requête du défendeur, il paraît évident à la Cour que l'une des situations visées aux alinéas a) à h) existe, elle peut ordonner au demandeur de fournir le cautionnement pour les dépens qui pourraient être adjugés au défendeur :
. . .	[...]
(f) the defendant has an order against the plaintiff for costs in the same or another proceeding that remain unpaid in whole or in part,	f) le défendeur a obtenu une ordonnance contre le demandeur pour les dépens afférents à la même instance ou à une autre instance et ces dépens demeurent impayés en totalité ou en partie;
. . .	[...]

> the Court may order the plaintiff to give security for the defendant's costs.

[88] In her analysis, the Prothonotary reviewed the various grounds put forward by Mr. Lessard-Gauvin that might be relevant to the exercise of her discretion under rule 416. Thus, the Prothonotary first reviewed in detail the claims that the AGC would not be seriously harmed if no security for costs was posted, and rejected them with reasons. The Prothonotary then considered Mr. Lessard-Gauvin's contention that the AGC was acting in bad faith by refusing to accept payment for costs in instalments. In the absence of evidence that the AGC acted unreasonably in refusing Mr. Lessard-Gauvin's offers, and considering that the evidence is silent on the terms of the offers he had allegedly made, the Prothonotary concluded that Mr. Lessard-Gauvin had simply not demonstrated that there had been any bad faith. Finally, the Prothonotary established that the Motions for Security were in no way late in files T-210-18 and T-766-18, having been initiated before Mr. Lessard-Gauvin's record was filed. As for file T-1136-16, the Prothonotary noted the numerous unsuccessful preliminary motions filed by Mr. Lessard-Gauvin, which slowed things down and led to new orders for costs against him. In view of Mr. Lessard-Gauvin's manoeuvres to delay the determination of the Motions for Security, the Prothonotary was of the view that Mr. Lessard-Gauvin could not complain about their lateness.

[89] In light of all these circumstances, the Prothonotary concluded that it was appropriate for her to exercise her discretion in favour of the payment of security for costs requested by the AGC. These findings call for deference and restraint. Nothing in the generalities submitted by Mr. Lessard-Gauvin offers even the remotest demonstration that the Prothonotary might have

made a palpable and overriding error in the exercise of her discretion. The reality is that Mr. Lessard-Gauvin would have liked the Prothonotary to have weighed the evidence before her differently, in a way that would have been more favourable to him. This is a far cry from an obvious and apparent error, from findings made without any evidence or based on improper inferences or complete or near-complete disregard of evidence. Mr. Lessard-Gauvin did not in any way meet his burden and demonstrate a palpable and overriding error in this case. This is not a situation where the whole tree is swaying, or there is a beam in the eye.

C. *Constitutional arguments*

[90] Mr. Lessard-Gauvin argues that when she rejected the constitutional arguments he raised, the Prothonotary made two errors in applying the doctrines of issue estoppel and *stare decisis* to determine that the issue had been settled by the FCA in Justice Nadon's orders of October 17, 2019. He maintains that in deciding as she did, the Prothonotary violated his right to be heard, breached the rules of procedural fairness, and erred in law.

[91] First, Mr. Lessard-Gauvin submits that the Prothonotary could not *proprio motu* rely on the doctrines of issue estoppel and *stare decisis* without first notifying the parties. According to Mr. Lessard-Gauvin, the Prothonotary should have authorized a hearing on the Motions for Security or, at the very least, have asked the parties for oral or written submissions regarding the application of the two doctrines. Mr. Lessard-Gauvin claims that in acting as she did, the Prothonotary breached the rules of procedural fairness.

[92] Further, at the substantive level, Mr. Lessard-Gauvin maintains that the Prothonotary erred in law by treating the doctrines of issue estoppel and *stare decisis* as being of automatic, absolute or rigid application. Referring to the two-step analysis for issue estoppel established by the SCC in *Danyluk v Ainsworth Technologies Inc*., 2001 SCC 44 [*Danyluk*], Mr. Lessard-Gauvin maintains that the Prothonotary completely ignored the second step of the analysis and that, in applying the first, she could not fall back on the FCA's poorly reasoned decisions of October 17, 2019, to claim that the FCA had decided the constitutional question. Mr. Lessard-Gauvin submits that the uncertainty surrounding the scope of the FCA's decision and the absence of reasons on the constitutional issue were sufficient to abandon the doctrines of issue estoppel and *stare decisis* (*Canada (Attorney General) v Confédération des syndicats nationaux*, 2014 SCC 49 [*CSN*] at paras 24, 27). In Mr. Lessard-Gauvin's opinion, the FCA's orders did not provide a complete, certain and final solution to the constitutional dispute.

[93] Again, I disagree with Mr. Lessard-Gauvin's arguments and find that he has not discharged his burden of proving the existence of an error of law or a breach of procedural fairness.

(4) Issue of *proprio motu*

[94] With respect to the alleged error of procedural fairness, Mr. Lessard-Gauvin appears to suggest that the Prothonotary should have informed him in advance of the legal grounds on which she was basing her decision to reject his constitutional arguments. If I understand Mr. Lessard-Gauvin's argument correctly, he believes that before rendering a decision, the Court should advise the parties of the legal reasoning it intends to follow in a particular ruling, so that

the parties may have an opportunity to respond to it. To my knowledge, this is not a recognized presumption in our law. The rules of procedural fairness do not include the right to receive advance notice of the decision that will be made by a decision maker. Moreover, at the hearing before this Court, Mr. Lessard-Gauvin was unable to refer the Court to any precedent or authority in support of his assertion.

[95] This is not a situation in which the Prothonotary relied on extrinsic facts or evidence without the knowledge of the parties, or on a new decision to which the parties did not have access. The Prothonotary relied on two fundamental doctrines that are well established in the common law and designed to ensure finality and legal stability, namely, issue estoppel and *stare decisis*. Ignorance of the law is no excuse, and courts are not required to inform the parties in advance of the statutory provisions or recognized common law principles that prevail in a case and upon which they will base their decisions and legal analysis. These are elements that the Court may review and consider on its own initiative. Moreover, in the case of Mr. Lessard-Gauvin, the Prothonotary applied the two well-established common law doctrines to the two orders of Justice Nadon, with which Mr. Lessard-Gauvin and the AGC were obviously familiar because they were both parties.

[96] Mr. Lessard-Gauvin's argument that procedural fairness was violated here has no merit. The extent of the duty of procedural fairness is contextual, and in this case, the Prothonotary relied on orders of the FCA that Mr. Lessard-Gauvin could not claim to be unaware of. The Prothonotary was under no obligation to provide Mr. Lessard-Gauvin with advance notice of her intention to apply the doctrines of issue estoppel and *stare decisis* in the circumstances. The *audi*

alteram partem rule means that a party is entitled to be heard and to have adequate notice of the case to be met and an opportunity to respond to it. This rule was clearly respected by the Prothonotary in this case, and Mr. Lessard-Gauvin's contention that he should have been advised of the legal analysis that the Prothonotary intended to conduct in her Orders seeks to give the duty of procedural fairness a scope that it does not have.

(5) Issue estoppel and stare decisis

[97] With respect to the Prothonotary's application of the doctrines of issue estoppel and *stare decisis*, I find no palpable and overriding error or error of law in her analysis.

[98] The principle of issue estoppel, or *res judicata*, applies when a person attempts to relitigate a particular matter (whether a question of law, fact or mixed fact and law) that was determined in a prior proceeding to which that person (or that person's privy) was a party. *Stare decisis*, or the doctrine of binding precedent, on the other hand, means that a lower court is bound by the findings of law made by a higher court to which its decisions may be appealed, directly or indirectly, and the lower court must then follow the applicable case law on a given point. The *stare decisis* argument is less stringent than *res judicata* since it requires only a similar or analogous factual framework (*CSN* at para 26).

[99] I reiterate here that in his two orders dated October 17, 2019, Justice Nadon granted the AGC's Motions for Security. Those orders are final and have not been appealed to the SCC. As noted above, Mr. Lessard-Gauvin made written submissions and arguments in his five partial respondent's motion records filed in the two proceedings before the FCA and in the three

proceedings before this Court that were in all respects strictly identical in all five cases covered by the Motions for Security. In particular, they included the same grounds for constitutional invalidity and unenforceability of the security for costs regime under the Rules. In the reasons for his two orders, Justice Nadon specifically referred to [TRANSLATION] "[Mr. Lessard-Gauvin's] respondent's record in the motion of the Attorney General of Canada filed on August 2, 2019, including his written submissions alleging, inter alia, that the security for costs regime found in rules 415 to 418 of the Federal Courts Rules, SOR/98-106, is unconstitutional", as well as to the AGC's reply, prior to allowing the AGC's Motions for Security in the operative part of his Orders.

[100] Although his reasons are brief and succinct, there is no doubt that in his orders dated October 17, 2019, Justice Nadon took into account the representations made by Mr. Lessard-Gauvin in his respondent's record regarding the alleged unconstitutionality of the security for costs regime, which repeat word for word those he made in the three files in this appeal. In allowing the AGC's Motions for Security in their entirety, the FCA therefore clearly rejected all of Mr. Lessard-Gauvin's arguments, including those of a constitutional nature. It was against this factual background that the Prothonotary determined in her Orders that the issue of the constitutional validity or enforceability of the security for costs regime did not require examination, considering the principles of both issue estoppel and *stare decisis*. These were identical issues between the same parties, with a decision rendered on a particular point by the FCA, and the Prothonotary correctly decided that to avoid the possibility of conflicting decisions, she had no choice but to conclude that she was bound by the decisions of the FCA with respect to the constitutional arguments advanced by Mr. Lessard-Gauvin.

[101] Issue estoppel, or preclusion arising out of an issue already decided, is one of the two components of *res judicata*, the other being cause of action estoppel. The preconditions to the operation of issue estoppel are well known. They require (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to that judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies (*Danyluk* at para 33; *Tuccaro v Canada*, 2014 FCA 184 [*Tuccaro*] at para 14). In *Danyluk*, the SCC noted that "estoppel extends to the material facts and the conclusions of law or of mixed fact and law . . . that were necessarily (even if not explicitly) determined in the earlier proceedings" [emphasis added] (*Danyluk* at para 24). The principle of estoppel thus prevents new litigation on the same issue between the same parties, even if the issue arises in the context of a different cause of action. There is no doubt that those conditions were met here.

[102] It is true that there are two steps to the test for applying issue estoppel. First, the Court must be satisfied that the three conditions described above for triggering application of the doctrine have been met. If so, the Court must then consider whether it should exercise its discretion to refuse to apply the doctrine of issue estoppel (*Timm v Canada*, 2014 FCA 8 [*Timm FCA*] at paras 22–23). Thus, even if the Court concludes that the doctrine's three conditions have been met, it may nevertheless refuse to apply issue estoppel "in order to ensure that principles of fairness are adhered to", and the Court's discretion at this second step of the analysis "must be exercised with regard to the particular circumstances of each case" (*Timm FCA* at para 24, citing *Danyluk* at para 67).

[103] Mr. Lessard-Gauvin alleges that the Prothonotary exceeded the second step of the process. With respect, this claim does not stand up to analysis and is without merit. In fact, Mr. Lessard-Gauvin misunderstands the scope of this second step. In the circumstances, it is clear that, being satisfied that the three preconditions for issue estoppel had been met, the Prothonotary implicitly declined to exercise her discretion not to apply the doctrine. Here, the Prothonotary clearly considered that the second step had been taken, and I am satisfied that she validly exercised her discretion and applied the doctrine of issue estoppel. Although she did not formulate her conclusion with express reference to this second step, it is tacitly apparent from her decision that she believed that this second step had been met. This flows logically from her conclusion that the situation was one in which issue estoppel applied.

[104] For its part, *stare decisis* (or binding precedent) refers to the "principle that a lower court is bound by particular findings of law made by a higher court to which decisions of that lower court could be appealed, directly or indirectly" (*R v Comeau*, at para 26; *Tuccaro* at para 18). This is a fundamental aspect of our legal system. Adherence to case law and clearly established legal rules supports the virtues of consistency and predictability, two key principles underlying the rule of law. Obviously, lower courts are entitled to determine which cases are binding based on the specific and distinguishing characteristics of the factual context of the case at bar. However, lower courts are not entitled to refuse to follow the decision of a superior court on the basis that they believe it was incorrectly rendered.

[105] The SCC has frequently stated that courts and administrative tribunals may depart from the principle of *stare decisis* only in highly exceptional circumstances. In *Carter v Canada*

(Attorney General), 2015 SCC 5 [*Carter*], the SCC summarized these special circumstances in the following terms: "Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in circumstances or evidence that 'fundamentally shifts the parameters of the debate'" (*Carter* at para 44, citing (*Canada (Attorney General) v Bedford*, 2013 SCC 73 [*Bedford*] at para 42). These exceptions did not apply here, and the Prothonotary could only consider herself bound by the FCA's determination that Mr. Lessard-Gauvin's constitutional arguments were unfounded.

[106] Having analyzed Mr. Lessard-Gauvin's arguments, I see here no reason to conclude that the Prothonotary erred in applying the doctrines of issue estoppel and *stare decisis* in this case. These doctrines apply with respect to a finding or decision of a court of appeal that rejects a party's argument, even if the decision does not provide elaborate reasons in support of the finding or decision. Indeed, Mr. Lessard-Gauvin did not cite any precedent to suggest that the brevity of the reasons would have the effect of limiting application of either of these doctrines, and the Court is unaware of any such precedent. It is clear from Justice Nadon's orders that he was aware of Mr. Lessard-Gauvin's constitutional arguments; indeed, he expressly referred to them in his reasons. In allowing the AGC's Motions for Security in their entirety, the FCA clearly rejected all of Mr. Lessard-Gauvin's arguments, including those of a constitutional nature, and the Prothonotary was therefore correct in using both the principles of issue estoppel and *stare decisis* to avoid rendering decisions that could conflict with the orders made by the FCA on October 17, 2019.

[107] For all these reasons, I find no error of law or palpable or overriding error in the Prothonotary's analysis and findings in this regard. On the contrary, the Prothonotary was amply justified in applying the principles of issue estoppel and *stare decisis* in the circumstances.

[108] I would add a short comment on the *CSN* decision to which Mr. Lessard-Gauvin refers in support of his position (*CSN* at paras 24, 27). With respect, Mr. Lessard-Gauvin misunderstands the scope of the two excerpts he quotes. It is true that in this decision, the SCC states that "the doctrine of stare decisis is no longer completely inflexible" and "the precedential value of a judgment may be questioned 'if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate'" (*CSN* at para 24, citing *Bedford* at para 42). That said, the SCC is merely referring to the well-established exception in *Bedford* and *Carter*, without calling into question the fundamental principle that precedents must always be respected by lower courts when they provide a complete, certain and final solution to the issue being decided. Mr. Lessard-Gauvin did not make any arguments showing that his situation could fit into the narrow window of exception opened by *Bedford*. I have no hesitation in saying that by his orders of October 17, 2019, Justice Nadon provided a complete, certain and final solution to the constitutional arguments before the FCA.

D. ***Prothonotary's comments and formalistic approach***

[109] Mr. Lessard-Gauvin argues that the Prothonotary's final error was a more general error of mixed fact and law committed when she groundlessly accused him of scheming to delay the determination of the Motions for Security in these and previous cases, and stated that he must

suffer the consequences. He contends that his various motions relating to the Motions for Security were not without merit and were not intended to delay anything. In fact, according to Mr. Lessard-Gauvin, the Prothonotary erroneously applied the procedure in a formalistic and rigid manner, to the detriment of his rights.

[110] I do not agree.

[111] In the section of her reasons dealing with the amounts of security to be posted and Mr. Lessard-Gauvin's motions to reduce the amounts or make the terms of payment more flexible, the Prothonotary mentions that the Court [TRANSLATION] "also has the discretion to take into account an applicant's financial difficulties by fixing both the amount and the time within which the security must be posted". However, the Prothonotary added that she was [TRANSLATION] "not inclined to adjust the amount of the security downwards due to the financial difficulties" of Mr. Lessard-Gauvin and indicated that Mr. Lessard-Gauvin had [TRANSLATION] "shown no restraint with regard to the procedural means he uses, and ignored the principles of proportionality". It is in this context that she noted that Mr. Lessard-Gauvin [TRANSLATION] "could very well have terminated his cases more expeditiously and with fewer cost awards if he had conducted these proceedings in a proportionate and reasonable manner" and that he [TRANSLATION] "must live with the consequences of the choices he has made".

[112] In light of the procedural history described in detail above, and of all of the decisions unfavourable to Mr. Lessard-Gauvin rendered in unison by both this Court and the FCA at every stage of these Motions for Security, I have no doubt that the Prothonotary was correct in her

comments regarding Mr. Lessard-Gauvin's lack of restraint and the fact that he could have avoided the panoply of cost awards that now further undermine his financial position. Whatever Mr. Lessard-Gauvin may say or believe, both this Court and the FCA have consistently found that each and every attempt he has made in his multiple procedural motions in relation to the Motions for Security has been without merit and has indeed resulted in unnecessary delay.

[113] Once again, Mr. Lessard-Gauvin has demonstrated no obvious and apparent error on the part of the Prothonotary. Mr. Lessard-Gauvin's criticism of the Prothonotary in this case is far from constituting a palpable and reasonable error that would justify the Court's intervention. On the contrary, I see no error of any kind in the Prothonotary's assessment of the situation.

[114] I cannot help but note that this approach by Mr. Lessard-Gauvin with regard to the Motions for Security is not new, and has unfortunately coloured many of his actions before the Court and the FCA over the years. Moreover, as the AGC argued in his submissions, this Court has already observed on several occasions the abusive and dilatory nature of the numerous proceedings initiated by Mr. Lessard-Gauvin, his stubbornness in repeating pointless challenges and refusing to recognize the principle of finality of judgment, his propensity to repeat the same claims despite rejections, and his failure to comply with the Rules, which he is eager to invoke when he believes them to be in his favour (see for example *Lessard-Gauvin v Canada (Attorney General)*, 2014 FC 739; *Lessard-Gauvin v Canada (Attorney General)*, 2016 FC 418; *Lessard-Gauvin v Canada (Attorney General)*, 2018 FC 808; *Lessard-Gauvin v Canada (Attorney General)*, 2019 FC 979; *Lessard-Gauvin v Canada (Attorney General)*, T-1136-18, T-210-18

and T-766-18, July 17, 2019). It is regrettable to see how Mr. Lessard-Gauvin persists in seeking to perpetuate this spiral of actions, which only aggravates the heavy cost burden he is facing.

E. ***Rule 60 and post-hearing letter***

[115] Two other subsidiary issues raised by Mr. Lessard-Gauvin in his appeal warrant my brief attention.

[116] The first concerns rule 60. As he now does in all of the appeals and proceedings he brings before this Court and the FCA, Mr. Lessard-Gauvin is invoking rule 60, apparently to suggest that the Court has some duty or obligation to inform him of any gaps in his evidence or in his appeal proceedings. I note that all of Mr. Lessard-Gauvin's motion records now contain this reference to rule 60 in the form of an epilogue, with which he has made a practice of closing his written submissions.

[117] As the FCA noted in *Lessard-Gauvin v Canada (Attorney General)*, 2019 FCA 223, it is difficult to be certain what type of information Mr. Lessard-Gauvin is seeking when he refers to this provision. I point out that rule 60 provides that "[a]t any time before judgment is given in a proceeding, the Court may draw the attention of a party to any gap in the proof of its case or to any non-compliance with these Rules and permit the party to remedy it on such conditions as the Court considers just". Mr. Lessard-Gauvin appears to argue that rule 60 creates some sort of obligation on the part of the Court to point out any way in which his record is incomplete or insufficient in terms of content or evidence. As Justice Roy commented before me (*LG Roy* at

para 23), Mr. Lessard-Gauvin appears to read this rule as entitling him to receive advice on how to conduct his case.

[118] Nothing could be further from the truth, and that is not the purpose of rule 60. It is well established that it is not the role of the courts to provide legal or tactical advice to litigants (*SNC-Lavalin Group Inc. v Canada (Public Prosecution Service of Canada)*, 2019 FCA 108 at para 9). Rather, rules 56 to 60 set out the consequences of a party's failure to comply with the Rules, and articulate a series of actions that *may* be taken by a party, or the Court, in such situations. The point of these rules is to ensure that procedural irregularities can be rectified without necessarily resulting in the dismissal of a proceeding. Rule 60 is therefore not a tool available to parties, even those who are self-represented, to obtain free legal advice from the Court or to ask the Court to do work that the parties themselves have failed to do.

[119] If such was Mr. Lessard-Gauvin's intention behind his reference to rule 60, it is manifestly unfounded and without merit.

[120] The second observation relates to a letter that Mr. Lessard-Gauvin sent to the Court in January 2020, a few days after the end of the hearing of his appeal on the Motions for Security. In that letter, Mr. Lessard-Gauvin complained about one of the conclusions contained in the Prothonotary's Orders, which blocked his right to appeal interlocutory decisions. In particular, Mr. Lessard-Gauvin expressed his desire to appeal the January 7, 2020, decision of Prothonotary Steele dismissing his Motion for New Facts, and requested that the conclusion in the Orders prohibiting him from [TRANSLATION] "taking any further action . . . other than to

appeal this order until such time as security has been posted" be amended so that the exception would also include [TRANSLATION] "any other order related to the security for costs".

[121] I will not comment on the inappropriateness of raising this objection by way of a letter after the appeal hearing had ended. That said, in view of the foregoing reasons and my conclusion that there is no error of law, fact and law or procedural fairness in the Orders that would justify the Court's intervention, I will dismiss Mr. Lessard-Gauvin's request. As mentioned above, the Motion for New Facts would not in any way have changed the outcome of the Prothonotary's Orders, and there is no reason to permit the belated amendment desired by Mr. Lessard-Gauvin. As Prothonotary Steele observed in rejecting Mr. Lessard-Gauvin's request to file a supplementary record alleging new facts, the effect of the Prothonotary's Orders was to render this application by Mr. Lessard-Gauvin [TRANSLATION] "moot." Indeed, in these reasons on the appeal of the Prothonotary's Orders, I have addressed (and rejected) the arguments raised by Mr. Lessard-Gauvin on this issue of new facts.

[122] The issues of [TRANSLATION] "relevant new facts", the [TRANSLATION] "financial expert report" and the constitutional grounds that Mr. Lessard-Gauvin was still seeking to put on the table through the request contained in his letter have already been decided by the Court and/or the FCA, and I see no reason to amend the Prothonotary's Orders to allow Mr. Lessard-Gauvin to reintroduce them.

IV. Conclusion

[123] For all the above reasons, Mr. Lessard-Gauvin's appeal is dismissed. The Prothonotary did not commit any reviewable error in granting the AGC's Motions for Security.

[124] After considering all the circumstances of this case and the factors set out in rule 400(3), and in the exercise of my discretion, I am of the view that the AGC is entitled to costs on this appeal, as was the case in all of the unsuccessful preliminary proceedings brought by Mr. Lessard-Gauvin before this Court and before the FCA with regard to the Motions for Security. I fix these costs in the total amount of $1,250. As the Prothonotary also ordered, this amount need only be paid once for the three files, T-1136-16, T-210-18 and T-766-18, but payment may be required in the first of the three files to be concluded.

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

THIS COURT'S JUDGMENT is as follows:

1. The motions of applicant David Lessard-Gauvin on appeal from the Orders of Prothonotary Tabib dated November 12, 2019, in files T-1136-16, T-210-18 and T-766-18 are dismissed. A copy of this judgment and reasons will be placed in each of the files.

2. Costs of $1,250 are awarded to the respondent, the Attorney General of Canada, for all the files under appeal.

"Denis Gascon"
Judge

Certified true translation

Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-1136-16, T-210-18 AND T-766-18
STYLE OF CAUSE:	DAVID LESSARD-GAUVIN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	QUÉBEC, QUEBEC
DATE OF HEARING:	JANUARY 6, 2020
JUDGMENT AND REASONS:	GASCON J.
DATED:	JUNE 30, 2020

APPEARANCES:

David Lessard-Gauvin	ON HIS OWN BEHALF
Marilou Bordeleau	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT