Federal Court  Cour fédérale

Date: 20201222

Docket: T-268-17

Citation: 2020 FC 1183

Ottawa, Ontario, December 22, 2020

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

KRISTIN ERNEST HUTTON

Plaintiff

and

RIA SAYAT, LYNN DUHAMIE also known as STEPHANIE DUHAMIE the former Canadian Charge d'affaires for the Republic of Iraq and THE ATTORNEY GENERAL OF CANADA (on behalf of THE DEPARTMENT OF NATIONAL DEFENCE, CANADIAN SECURITY INTELLIGENCE SERVICE and CANADIAN SECURITY ESTABLISHMENT)

Defendants

ORDER AND REASONS

I. Introduction

[1] On its face, this is an appeal of an Order of a Prothonotary dismissing the Plaintiff's Motion for Further and Better Affidavits of Documents in an action he has filed in the Federal Court. Beneath the surface, the underlying action is an extraordinary farrago of claims in which

the Plaintiff purports to be the target of surveillance by Canada's security agencies, his work associates and friends including two former romantic partners. His efforts to pursue those claims against the named individual defendants are, in this Judge's view, a form of harassment.

[2] The claims against all of the Defendants have no apparent basis in reality and are predicated on delusions. But the courts, community property that exist to serve everyone at public expense, must allow unrestricted access by default, subject to motions to strike brought by the opposing parties, which require that they incur legal costs, or a declaration by the court that the plaintiff or applicant is a vexatious litigant. Motions to strike do not prevent a litigant from filing additional actions or applications for judicial review, which demand the expenditure of further resources.

[3] The ability of the Federal Courts to make a declaration that an individual is a vexatious litigant and should not be permitted to initiate or continue proceedings without leave of the Courts is constrained by the governing legislation, as I will discuss below under the heading Obiter.

[4] This is an appeal under s 51 of the *Federal Courts Rules*, SOR/98-106 [the Rules], of an Order of Prothonotary Aylen dated June 17, 2020. For the reasons that follow, the appeal is dismissed.

II. **Background**

[5] The Plaintiff is, as of the date of writing, a lawyer licensed to practice in Ontario by the Law Society of Ontario. That status is currently the subject of a regulatory proceeding by the Law Society stemming from a complaint filed by a member of the firm representing the Defendant Ria Sayat.

[6] The Plaintiff represented himself on this appeal and is doing so in the several other matters he has initiated in the Federal Court. He initiated the underlying action on his own behalf on February 24, 2017. While he had counsel for a period of time during the proceedings, he chose to represent himself again before the motion under appeal was heard.

[7] In the underlying action, the Plaintiff alleged that Ms. Ria Sayat and Ms. Lynn Duhaime, two of the Plaintiff's former romantic partners, as well as many other friends and colleagues, are servants or agents of the Federal Crown who pursued relationships with him for the purpose of establishing and maintaining cover stories related to intelligence work, to monitor, report upon and manipulate his activities and/or to recruit him. In another action before the Court, in Court file T-2086-19, the Plaintiff has alleged that his own father and several other former romantic partners are part of the conspiracy against him.

[8] Ms. Sayat, a registered nurse licensed in Ontario, dated Mr. Hutton between 2011 and 2014. She denies that she is or was, or ever represented that she was, as the Plaintiff claims, an intelligence officer. The Attorney General of Canada denies that she was ever a servant or agent

of the Federal Crown. Ms. Sayat was the subject of a complaint made by the Plaintiff to the College of Registered Nurses of Ontario related to his claims that she is a spy. The College dismissed the complaint.

[9] Ms. Duhaime, whose name is repeatedly misspelled in the Plaintiff's materials, dated Mr. Hutton for several months from late 2014 until early 2015. Ms. Duhaime was an employee of Global Affairs Canada [GAC] but denies having ever worked for the Canadian Security Intelligence Service (CSIS), the Communications Security Establishment (CSE) or the Department of National Defence. She was a Foreign Service Officer deployed abroad. That fact, and that she was once photographed in the presence of a US military officer, is used by the Plaintiff to support his claim that she is an intelligence officer.

[10] The Amended Statement of Claim sets out numerous and varied causes of action relating to alleged deception involving violations of privacy; the violation of various rights protected under the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]; assault; defamation; intrusion upon seclusion; harassment; and economic interference. The Plaintiff initially sought in excess of 20 million dollars in damages and various declarations and other orders. At the outset, he alleged that virtually all of his former law partners, friends and associates were part of the conspiracy against him.

[11] The action was ordered to continue as a specially managed proceeding on May 1, 2017 and initially assigned to a Case Management Judge in Toronto. In July 2017, the Defendants

collectively indicated their intention to bring a Motion to strike out the Statement of Claim. A timetable was fixed for the hearing of the Motion on August 15, 2017. The Plaintiff filed a Fresh as Amended Statement of Claim on September 25, 2017. Following a number of procedural steps and the recusal of the original Case Management Judge as a result of a separate proceeding initiated by the Plaintiff, Prothonotary Mandy Aylen was assigned as Case Management Judge on February 21, 2018. An Amended Statement of Claim was received on March 27, 2018 but was not filed given the pending Motion to Strike.

[12] The Motion to Strike was heard by Prothonotary Aylen on May 30, 2018 and granted in part on June 29, 2018, with costs to be in the cause. She left open the filing of the Amended Statement of Claim received in March 2018 while striking many of the claims originally filed without leave to amend. The Plaintiff appealed that decision. The appeal was heard by Justice Gleeson on November 21, 2018 and dismissed on June 10, 2019. An amended version of the Order was issued on July 11, 2019: *Hutton v Sayat et al*, 2019 FC 799. The Amended Statement of Claim, accepted for filing, maintains numerous and varied causes of action relating to violations of privacy, breach of *Charter* rights, assault, defamation, intrusion upon seclusion, harassment and economic interference. The Plaintiff seeks $5,500,000.00, including punitive damages, together with various declarations and other orders.

[13] On November 29, 2019, the Plaintiff filed a Motion for Further and Better Affidavits of Documents seeking:

A. An order pursuant to Rule 225 for the Defendants, Ria Sayat, Lynn Duhaime and the Crown, to each produce a further and better affidavit of documents,

including itemized and particularized Schedules 2, 3 and 4 in accordance with Rule 223 within 30 days;

B. Further, an order requiring the Defendant, Lynn Duhaime, to produce a sworn affidavit of documents in the face of the Order dated August 8, 2019;

C. Further and in the alternative, an order striking out the Defendants' pleadings pursuant to Rule 227;

D. An order that the disclosure sought by the Plaintiff, as reproduced and requested, as contained in Exhibit BB of the Plaintiff's affidavit in support of this motion, be produced and provided; and

E. Costs.

[14] Exhibit BB to the Plaintiff's affidavit is a list of requested disclosure that counsel for the Plaintiff transmitted to the Defendants in September 2019. Specifically, it provides for the following ten heads of documents, all of which were sought by the Plaintiff on the Motion for Further and Better Affidavits of Documents:

1. **<u>Royal Canadian Mounted Police (RCMP)</u>**

   All documents/records (electronic or otherwise) not provided to the RCMP by Hutton in RCMP File No. 2019-523687.

2. **<u>National Security Intelligence Review Agency (NSIRA)</u>**

   We want the entire NSIRA File No. 07-202A-3 (Hutton's complaint about the activities of the CSE).

   We also want all documents/records (electronic or otherwise) generated or reviewed that relates to or pertains to Executive

Director, Guylaine D. Dansereau's letter dated June 25, 2019 to Hutton.

3. <u>Ralph Goodale and the Office of Public Safety and Emergency Preparedness</u>

All documents/records (electronic or otherwise) generated or reviewed to issue Ralph Goodale's letter to Hutton of June 3, 2019 and his office's subsequent email of June 12, 2019 saying that Hutton's correspondence, "has been forwarded to the Departmental Office as it pertains to a Public Safety issue."

We want the entire file on Hutton in the Departmental Office and the Office of Public Safety and Emergency Preparedness that has been acknowledged by those Departments.

4. <u>The Communications Security Establishment (CSE)</u>

All documents/records (electronic or otherwise) relating to the investigation by the OCSEC that pertains to Executive Director, Guylaine D. Dansereau's letter dated June 25, 2019 to Hutton.

All documents/records (electronic or otherwise) that pertains to Hutton's Judicial Review bearing Federal Court File No. T-1143-19.

All documents/records (electronic or otherwise) in the possession or control of the Intelligence Commissioner that pertains to or related to Federal Court File No. T-268-17.

5. <u>Federal Databanks</u>

The Crown to search and produce all documents/records (electronic or otherwise) contained in the below Federal Databanks for Gary W. Gibbs, Peter Mitchell, Michelle Gibbs, Charlotte Freeman-Shaw, Chris Ritchie, Shannon Fitzpatrick, Elke Jessen, Lynn Duhamie , Ria Sayat, Monte Taylor, Ryan Litzen, Bob Ryan Scott, Bob Ryan Scott's mother, Ryes Jenkins, Robert Hutton, Kristin Hutton:

(i) DND PPU 834 (National Defence Security Bank)

(ii) SIS PPE 815 (CSIS Employment Security Bank)

(iii) PCO PPE 801 (Privy Council Security Bank)

(iv) RCMP PPU 065 (RCMP Security and Screening Bank)

(v) PSU 905 (Network Monitoring Log)

(vi) PSE 901 (Employment Personnel Record)

(vii) PSE 917 (Identification Cards and Access Badges)

(viii) PSE 914 (Parking)

If the prefix for the specific database has changed or is incorrect – to search the correct or newly identified database for those areas/departments.

6. CSIS

The Crown to search for "DataSets" (as defined in the National Defence Act, 2019) in CSIS for Gary W. Gibbs, Peter Mitchell, Michelle Gibbs, Charlotte Freeman-Shaw, Chris Ritchie, Shannon Fitzpatrick, Elke Jessen, Lynn Duhamie, Ria Sayat, Monte Taylor, Ryan Littzen, Bob Ryan Scott, Bob Ryan Scott's mother, Ryes Jenkins, Robert Hutton and Kristin Hutton.

The Crown to make specific "queries" (as defined in the National Defence Act, 2019) in CSIS for Gary W. Gibbs, Peter Mitchell, Michelle Gibbs, Charlotte Freeman-Shaw, Chris Ritchie, Shannon Fitzpatrick, Elke Jessen, Lynn Duhamie, Ria Sayat, Monte Taylor, Ryan Littzen, Bob Ryan Scott, Bob Ryan Scott's mother, Ryes Jenkins, Robert Hutton and Kristin Hutton.

We also want all documents/records in the possession or control of the Intelligence Commissioner that pertain to or is related to Federal Court File No. T-268-17.

7. Security of Canada Information Sharing Act

We want searches conducted of all the Security Departments (CSIS, CSE, DND, RCMP, Privy Council) for any documentation or information (electronic or otherwise) pertaining to Federal Court File No. T-268-17 that has been disclosed/shared and received by individual departments or agencies.

8. Ria Sayat

Birth certificate, all elementary and high-school yearbooks, university yearbooks and photographs at university, letter written by Sayat dated February 13, 2019 in CNO complaint

where Hutton says she is a servant of the Crown, old and new family pictures with both brothers and parents, recent family photos at new condominium in Nova Scotia, all photographs on the "Ria Lynn" Facebook page, all correspondence relating to her two applications and rejections from medical school, her psychiatric records, and digital photographs with Cynthia Sayat, all photographs of trip to the Caribbean with Chris Ritchie, all photographs with Shannon Fitzpatrick, Lynn Duhamie, Gary W. Gibbs, Peter Mitchell.

9. Rear Admiral Bishop (Chief of Defence Intelligence – CF)

All documents (electronic or otherwise) in the possession or control of the Chief of Defence Intelligence for the Canadian Forces pertaining to Gary W. Gibbs, Peter Mitchell, Michelle Gibbs, Charlotte Freeman-Shaw, Chris Ritchie, Shannon Fitzpatrick, Elke Jessen, Lynn Duhamie, Ria Dayat, Monte Taylor, Ryan Littzen, Bob Ryan Scott, Bob Ryan Scott's mother, Ryes Jenkins, Robert Hutton, Kristin Hutton and Federal Court File No. T-268-17.

10. <u>Lynne Duhamie</u>

Birth certificate, all elementary and high school yearbooks, university yearbooks, all photographs with Gary W. Gibbs, Shannon Fitzpatrick, Bob Scott Ryan, Ria Sayat.

[15] On April 21, 2020, the Plaintiff sought to amend his notice of motion to add, as additional grounds, various paragraphs related to reviews conducted by CSIS and CSE. He also requested that the Court permit him to amend his notice of motion to seek the following additional relief:

(v) Further and in the alternative, an Order that William Hall and Ria Sayat be cross-examined on their sworn Affidavit of Documents pursuant to Rule 227 of the Federal Courts Rules;

(vi) An Order pursuant to Rule 220 of the Federal Courts Rules to determine the question of whether the Defendants or any of them are or were legally permitted to lie, misdirect or fabricate documents in T-268-17 (or for any statements made to the Plaintiff) and for the disclosure of all directives or documentation

> that provide this authority as granted by either the Canadian Security Intelligence Review Agency Act, R.S.C. 1985, Ministerial Directive or internal policy.

[16] The motion was heard on June 9, 2020.

III. **Decision under Appeal**

[17] By Order dated June 17, 2020, Prothonotary Aylen dismissed the Plaintiff's Motion for Further and Better Affidavits of Documents.

[18] Applying the test on a motion to compel a further and better affidavit of documents set out in *Apotex Inc v Sanofi-Aventis*, 2010 FC 77 at para 11 to every production sought by the Plaintiff in Exhibit BB, Prothonotary Aylen found that the Plaintiff either failed to show the existence of the further documents, the relevance of the documents to the issues raised in the action or the opposing party's possession of the further documents.

[19] Among other deficiencies, the Prothonotary found, the Plaintiff improperly attempted to expand upon the relief sought in his affidavit and written representations or to expand the list of productions sought in his cost submissions. Prothonotary Aylen considered only the productions sought in Exhibit BB and refused to expand the list to the additional productions that the Plaintiff requested in his written representations and cost submissions.

[20] With regards to the Further and Better Affidavit of Documents sought from the Defendants with particularized Schedules 2, 3, and 4, Prothonotary Aylen held that the Plaintiff

failed to demonstrate how Ms. Sayat's Schedules were insufficiently particularized and failed to provide a clear rationale as to why further particularized Schedules 2, 3 and 4 should be provided by the Crown Defendants. The Plaintiff was seeking strict compliance with Rule 223. However, Prothonotary Aylen noted that insisting on strict compliance in the absence of a legitimate underlying concern is not an efficient use of resources and lacks proportionality. As a result, Prothonotary Aylen dismissed the Plaintiff's request for further particularized Schedules 2, 3 and 4.

[21] With regards to the Plaintiff's request for a separate affidavit of documents from Ms. Duhaime, Prothonotary Aylen was not satisfied that the Plaintiff had raised any concerns that would warrant the production of separate affidavits of documents. She concluded that production of separate affidavits of documents for the sake of strict compliance with Rule 223 would not be an efficient use of resources. Prothonotary Aylen exercised her discretion, pursuant to Rule 55, to dispense with the requirement of a separate affidavit of documents from Ms. Duhaime and declined to grant the relief requested. She imposed costs in favour of the Defendants to be payable forthwith.

[22] In this appeal, the Plaintiff seeks to overturn the Prothonotary's Order.

IV. **Issue**

[23] The central issue in this case is whether Prothonotary Aylen erred in dismissing the Plaintiff's Motion for Further and Better Affidavits of Documents.

[24] A procedural issue was raised at the outset of the hearing relating to the inclusion in the Plaintiff's Amended Motion Record of the Certified Tribunal Record of Court File T-1143-19.

V. **Relevant Legislation**

[25] The following legislative provisions of the *Federal Courts Rules*, SOR/98-106 are relevant to this appeal:

Discretionary powers	**Pouvoir discrétionnaire**
47 (1) Unless otherwise provided by these Rules, if these Rules grant a discretionary power to the Court, a judge or prothonotary has jurisdiction to exercise that power on his or her own initiative or on motion.	**47 (1)** Sauf disposition contraire des présentes règles, le juge et le protonotaire ont compétence pour exercer, sur requête ou de leur propre initiative, tout pouvoir discrétionnaire conféré à la Cour par celles-ci.
Exercise of powers on motion	**Pouvoirs exercés sur requête**
(2) Where these Rules provide that powers of the Court are to be exercised on motion, they may be exercised only on the bringing of a motion.	**(2)** Dans les cas où les présentes règles prévoient l'exercice d'un pouvoir discrétionnaire sur requête, la Cour ne peut exercer ce pouvoir que sur requête.
Prothonotaries	**Protonotaires**
50 (1) A prothonotary may hear, and make any necessary orders relating to, any motion under these Rules other than a motion	**50 (1)** Le protonotaire peut entendre toute requête présentée en vertu des présentes règles — à l'exception des requêtes suivantes — et rendre les ordonnances nécessaires s'y rapportant :
[…]	[…]
(g) to stay, set aside or vary an order of a judge, other than an	**g)** une requête pour annuler ou modifier l'ordonnance d'un juge ou pour y surseoir, sauf

order made under paragraph 385(a), (b) or (c);

[…]

Appeal

51 (1) An order of a prothonotary may be appealed by a motion to a judge of the Federal Court.

Varying rule and dispensing with compliance

55 In special circumstances, in a proceeding, the Court may vary a rule or dispense with compliance with a rule.

Effect of non-compliance

56 Non-compliance with any of these Rules does not render a proceeding, a step in a proceeding or an order void, but instead constitutes an irregularity, which may be addressed under rules 58 to 60.

Motion to attack irregularity

58 (1) A party may by motion challenge any step taken by another party for non-compliance with these Rules.

Content of affidavits

81 (1) Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's

celle rendue aux termes des alinéas 385a), b) ou c);

[…]

Appel

51 (1) L'ordonnance du protonotaire peut être portée en appel par voie de requête présentée à un juge de la Cour fédérale.

Modification de règles et exemption d'application

55 Dans des circonstances spéciales, la Cour peut, dans une instance, modifier une règle ou exempter une partie ou une personne de son application.

Effet de l'inobservation

56 L'inobservation d'une disposition des présentes règles n'entache pas de nullité l'instance, une mesure prise dans l'instance ou l'ordonnance en cause. Elle constitue une irrégularité régie par les règles 58 à 60.

Requête en contestation d'irrégularités

58 (1) Une partie peut, par requête, contester toute mesure prise par une autre partie en invoquant l'inobservation d'une disposition des présentes règles.

Contenu

81 (1) Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête – autre qu'une requête en jugement sommaire ou en procès

belief, with the grounds for it, may be included.

sommaire – auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.

Affidavits on belief

(2) Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts.

Poids de l'affidavit

(2) Lorsqu'un affidavit contient des déclarations fondées sur ce que croit le déclarant, le fait de ne pas offrir le témoignage de personnes ayant une connaissance personnelle des faits substantiels peut donner lieu à des conclusions défavorables.

Admissions

183 In a defence or subsequent pleading, a party shall

(a) admit every allegation of material fact in the pleadings of every adverse party that is not disputed;

(b) where it is intended to prove a version of facts that differs from that relied on by an adverse party, plead that version of the facts; and

(c) plead any matter or fact that

(i) might defeat a claim or defence of an adverse party, or

(ii) might take an adverse party by surprise if it were not pleaded.

Admission des faits

183 Une partie est tenue, dans sa défense ou tout acte de procédure ultérieur :

a) d'admettre, parmi les faits substantiels allégués dans l'acte de procédure d'une partie adverse, ceux qu'elle ne conteste pas;

b) de présenter sa version des faits, si elle entend prouver une version des faits différente de celle d'une partie adverse;

c) de plaider toute question ou tout fait qui, selon le cas :

(i) pourrait entraîner le rejet d'une cause d'action ou d'un moyen de défense d'une partie adverse,

(ii) pourrait prendre une partie adverse par surprise, s'il n'était pas plaidé.

Time for service of affidavit of documents

Délai de signification de l'affidavit de documents

223 (1) Every party shall serve an affidavit of documents on every other party within 30 days after the close of pleadings.

[…]

Bundle of documents

(4) A party may treat a bundle of documents as a single document for the purposes of an affidavit of documents if

(a) the documents are all of the same nature; and

(b) the bundle is described in sufficient detail to enable another party to clearly ascertain its contents.

Order for disclosure

225 On motion, the Court may order a party to disclose in an affidavit of documents all relevant documents that are in the possession, power or control of

(a) where the party is an individual, any corporation that is controlled directly or indirectly by the party; or

(b) where the party is a corporation,

(i) any corporation that is controlled directly or indirectly by the party,

223 (1) Chaque partie signifie un affidavit de documents aux autres parties dans les 30 jours suivant la clôture des actes de procédure.

[…]

Liasse de documents

(4) Aux fins de l'établissement de l'affidavit de documents, une partie peut répertorier une liasse de documents comme un seul document si :

a) d'une part, les documents sont tous de même nature;

b) d'autre part, la description de la liasse est suffisamment détaillée pour qu'une autre partie puisse avoir une idée juste de son contenu.

Ordonnance de divulgation

225 La Cour peut, sur requête, ordonner à une partie de divulguer dans l'affidavit de documents l'existence de tout document pertinent qui est en la possession, sous l'autorité ou sous la garde de l'une ou l'autre des personnes suivantes :

a) si la partie est un particulier, toute personne morale qui est contrôlée directement ou indirectement par la partie;

b) si la partie est une personne morale :

(i) toute personne morale qui est contrôlée directement ou

	indirectement par la partie,
(ii) any corporation or individual that directly or indirectly controls the party, or	**(ii)** toute personne morale ou tout particulier qui contrôle directement ou indirectement la partie,
(iii) any corporation that is controlled directly or indirectly by a person who also directly or indirectly controls the party.	**(iii)** toute personne morale qui est contrôlée directement ou indirectement par une personne qui contrôle aussi la partie, directement ou indirectement.
Sanctions	**Sanctions**
227 On motion, where the Court is satisfied that an affidavit of documents is inaccurate or deficient, the Court may inspect any document that may be relevant and may order that	**227** La Cour peut, sur requête, si elle est convaincue qu'un affidavit de documents est inexact ou insuffisant, examiner tout document susceptible d'être pertinent et ordonner :
(a) the deponent of the affidavit be cross-examined;	**a)** que l'auteur de l'affidavit soit contre-interrogé;
(b) an accurate or complete affidavit be served and filed;	**b)** qu'un affidavit exact ou complet soit signifié et déposé;
(c) all or part of the pleadings of the party on behalf of whom the affidavit was made be struck out; or	**c)** que les actes de procédure de la partie pour le compte de laquelle l'affidavit a été établi soient radiés en totalité ou en partie;
(d) that the party on behalf of whom the affidavit was made pay costs.	**d)** que la partie pour le compte de laquelle l'affidavit a été établi paie les dépens.
Evidence on motion	**Preuve**
363 A party to a motion shall set out in an affidavit any facts to be relied	**363** Une partie présente sa preuve par affidavit, relatant tous les faits sur lesquels elle fonde sa requête

on by that party in the motion that do not appear on the Court file.	qui ne figurent pas au dossier de la Cour.

VI. **Standard of Review**

[26] As stated by the Federal Court of Appeal in *Hospira Healthcare Corp v Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira Healthcare*], the standard of review on an appeal of a discretionary decision of a Prothonotary is correctness for questions of law, and palpable and overriding error for questions of fact and questions of mixed fact and law for which there are no extricable questions of law: *Housen v Nikolaisen*, 2002 SCC 33 at paras 8, 10, 36, 83 [*Housen*].

[27] As confirmed by the Federal Court of Appeal in *Rodney Brass v Papequash*, 2019 FCA 245, palpable and overriding error is a high and difficult standard to meet. This was explained by the Court in *Canada v South Yukon Forest Corporation*, 2012 FCA 165 at para 46:

> "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[28] Additionally, on a Rule 51 appeal, motions judges should bear in mind that the case managing prothonotary is very familiar with the particular circumstances and issues of the matter. As a result, intervention should not come lightly. Discretionary decisions by case management judges as to the efficient use of party and judicial resources deserve deference. This does not mean, however, that errors, factual or legal, should go undetected: *Hospira Healthcare* at para 103.

VII. **Analysis**

A. *Preliminary objection to the Plaintiff's Amended Motion Record*

[29] As noted above, the Defendants objected to the inclusion at Tab 15 of the Plaintiff's Amended Motion Record, of the Certified Tribunal Record (CTR) of File T-1143-19. That file is one of the six other proceedings initiated by the Plaintiff in the Federal Court and concerns an Application for Judicial Review relating to the National Security Intelligence Review Agency. The Defendants argued that the CTR was not properly before Prothonotary Aylen because the Plaintiff's request to amend his motion record to include it was denied by Prothonotary Aylen in her decision dated May 5, 2020. As such, the Defendants argued that this document is inadmissible and has been improperly placed before the Court. The Plaintiff disputed that Prothonotary Aylen had excluded the CTR.

[30] At the outset of the hearing, I heard arguments from the Parties and ruled orally that the CTR of File T-1143-19 was inadmissible on this appeal. It was not before Prothonotary Aylen when she determined the motion under appeal and, in any event, had no relevance to this proceeding. The matters at issue in that proceeding involve third parties who have been struck from this action and are within the jurisdiction of the reviewing judge in that application.

B. *Did Prothonotary Aylen err in dismissing the Plaintiff's Motion for Further and Better Affidavits of Document?*

[31] In this case, Prothonotary Aylen had been responsible for managing the case for over two years. Her extensive reasons set out in 132 paragraphs and 52 pages

demonstrate a comprehensive grasp of the facts and issues in the underlying action. Her overview of the relevant legal principles at paras 38-50 of her decision demonstrates a thorough understanding of the law.

[32] On a motion to compel a further and better affidavit of documents, the burden is on the moving party to show that (i) further documents likely exist; (ii) that these documents might reasonably be supposed to contain information which might directly or indirectly enable the moving party to advance its own case or to damage the case of its adversary, or which might fairly lead the moving party to a train of inquiry that could have either of these consequences; and (iii) that the opposing party has them in its power, possession or control or is aware that they are in some other third party's power, possession or control (see *Apotex Inc v Sanofi-Aventis*, 2010 FC 77 at para 11; *Sibomana v Canada*, 2018 FC 43 at paras 34-35).

[33] With respect to the requirement on the moving party to demonstrate that further documents likely exist, the moving party must have some persuasive evidence that documents are available and have not been produced, rather than mere speculation, intuition or guesswork: *Havana House Cigar & Tobacco Merchants Ltd et al v Naeini* (1998), 80 CPR (3d) 132 at para 19. The Defendants were under no obligation to provide their own evidence to be considered by the Court in contrast to that of the Plaintiff. The burden was on him to make his case.

[34] I agree with the Defendants that the Plaintiff's evidence was self-serving, irrelevant, wholly speculative and of no probative value. As such, he failed to meet his burden and no responding affidavits were required.

[35] The primary consideration on the scope of discovery is relevance. Relevance is to be determined by reference to the issues of fact, which separate the parties, as defined by the pleadings: *Khadr v Canada*, 2010 FC 564 at para 11. To determine whether a document sought is relevant, the Court must consider the "train of inquiry test" – namely, whether it is reasonable to suppose that the document sought may directly or indirectly enable the party requiring production to advance his own case or to damage the case of his adversary, or which might fairly lead him to a train of inquiry that could have either of these consequences: see *Novopharm Ltd v Eli Lilly Canada Inc*, 2008 FCA 287 at para 61 (FCA) [*Novopharm*]; *Rhodia UK Ltd v Jarvis Imports*, 2005 FC 1628 at para 6; *Khadr v Canada*, 2010 FC 564 at paras 9-11.

[36] The moving party has the burden of establishing that it is reasonably likely that disclosure of a document will lead to useable information, which may ultimately, directly or indirectly, advance its own case or undermine another party's. An outside chance that a document will lead to useable information will not suffice: *Novopharm* at paras 61-64. The "train of inquiry" test does not permit fishing expeditions: *Novopharm*, paras 61-64, 68-70.

[37] The Court's intervention in relation to filing affidavits of documents under Rule 227 is not intended to allow for fishing expeditions in the opposite parties' records in hopes of possibly finding something that would support the moving party's position: *Sibomana v Canada*, 2018 FC 43 at para 35. A moving party's suspicions, speculation and assumptions relied upon to justify the existence or relevance of a document must be supported by evidence: *Sibomana* at para 34; *Grand River Enterprises Six Nations Ltd v Canada*, 2011 FCA 121 at para 15. Even where the Court finds that a document is relevant, there is a residual discretion to refuse to order it to be

disclosed where, for example, the document would likely be of little value to the requesting party: *Novopharm* at para 83.

[38] The Plaintiff contends that Prothonotary Aylen made palpable and overriding errors of fact and errors of law:

a) by admitting hearsay evidence;

b) by holding that the Plaintiff had to first bring a motion to challenge the claim of privilege made by the Attorney General of Canada for its Schedule 2;

c) by utilizing Rule 55 when no special circumstances existed;

d) by determining that the investigation of the Office of the Commissioner of the Communications Security Establishment (OCCSE) was not relevant to this action;

e) by misapprehending the pleadings and failing to comprehend the relevance of the requested documents;

f) by assessing the Plaintiff's evidence on a piecemeal basis;

g) by misapprehending the Statements of Defence of Ms. Sayat and Ms. Duhaime;

h) by not ordering Ms. Duhaime to provide a sworn and particularized Affidavit of Documents;

i) by varying the Order of Justice Gleeson and amending her prior Order to strike out the backstory related to Gary Gibbs and Shannon Fitzpatrick; and

j) by ignoring the Treasury Board's Operational Standard for the Security of Information Act.

[39] Prothonotary Aylen permitted counsel for Ms. Sayat to advise the Court that after the Notice of Motion was filed, she had served the Plaintiff with four supplemental affidavits of documents. This arose at the outset of the hearing when Prothonotary Aylen asked the Plaintiff to clarify how Ms. Sayat's schedules were deficient and asked counsel for Ms. Sayat to confirm how many supplementary affidavits of documents had been produced. The Plaintiff raised no objections to the Court's questions and did not address this question in his oral arguments. As a result, he waived his right to later raise an objection.

[40] While it may have been preferable for the supplemental affidavits to have been introduced as exhibits to an affidavit, counsel is an officer of the Court and Prothonotary Aylen was entitled to take judicial notice of the facts relayed by Ms. Sayat's counsel on the basis that they were capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy: *R v Krymowski*, 2005 SCC 7 at para 22.

[41] Additionally, the Plaintiff is estopped from raising this evidentiary issue in appeal. The Plaintiff could have and should have raised this issued during the hearing. His failure to do so amounts to a waiver of the right to later raise an objection: *Teva Canada Limited v Pzifer Canada Inc*, 2017 FC 526 at paras 38-39.

[42] Prothonotary Aylen did not err by refusing to order the Defendants to particularize their Schedules 2, 3 and 4. This was, in my view, simply a fishing expedition by the Plaintiff. With respect to Ms. Sayat, the Plaintiff failed to meet his burden and identify how Ms. Sayat's Schedules were insufficiently particularized. He had an opportunity during the hearing to elaborate on this point but failed to substantiate his assertion. The Plaintiff failed to establish the relevance of the documents requested. Simply stating that such documents must exist or that it is unimaginable to think that they do not exist is not sufficient to meet the burden to show that the documents likely exist. As a result, Prothonotary Aylen decided not to exercise her discretion to compel Ms. Sayat to produce further particularized Schedules 2, 3 and 4. I see no errors in that decision.

[43] Prothonotary Aylen did not err in finding that the OCSEC documents are not relevant to this action. In essence, the OCSEC inquiry was another fishing expedition by the Plaintiff, as he admitted himself at paragraph 72 of his Memorandum of Fact and Law. He acknowledges that he sent a copy of the Statement of Claim filed in this action seeking an investigation into his own allegations. This post-dated the events at issue in this action. The response received by the Plaintiff does not in any way confirm any intelligence activities on the part of Ms. Sayat or any of the Defendants. Unfortunately, the Plaintiff interprets any response and any redaction of information in a response as supporting his claim.

[44] Prothonotary Aylen did not err by refusing to order Ms. Sayat to disclose personal records. None of the documents he requested were relevant to establish whether Ms. Sayat is an

intelligence officer. He argues that the documents all speak to whether she is who she purports to be. This is entirely speculative.

[45] The "train of inquiry" test requires the Plaintiff to establish that it is reasonably likely that the disclosure of a document will lead to useable information. Prothonotary Aylen correctly held that the personal documents requested from Ms. Sayat would not lead to useable information. As held in *Novopharm*, an outside chance that such documentation will lead to useable information is not sufficient to compel disclosure.

[46] Ms. Sayat's and Ms. Duhaime's personal records are, as the Prothonotary found, irrelevant to the Plaintiff's claim. This finding is a question of mixed fact and law subject to the standard of palpable and overriding error. No such error was identified.

[47] As the Plaintiff had failed to demonstrate that the documents sought existed and were relevant to his claim, responding affidavits from the Defendants were not required. There was no obligation on the part of Ms. Duhaime to file an affidavit of documents. That the Plaintiff wants one from her was not grounds for the Prothonotary to order it and her refusal does not constitute an error.

[48] The Plaintiff is unsatisfied with Prothonotary Aylen's assessment of his evidence. However, as held in *Housen*, the weight to be assigned to the various pieces of evidence is essentially the province of the trier of fact. Here, Prothonotary Aylen conducted an extensive and thorough review of the Plaintiff's evidence and referred to his record throughout her analysis.

After her review of the evidence, Prothonotary Aylen correctly concluded that the Plaintiff had failed to present any persuasive, non-speculative evidence that Ms. Sayat or Ms. Duhaime are intelligence officers.

[49] Additionally, Prothonotary Aylen committed no reviewable error by accepting that Ms. Sayat had denied that she is an intelligence officer on the basis of her Statement of Defence. The Plaintiff has failed to present any persuasive, non-speculative evidence other than his own self-serving assertions to the contrary. Prothonotary Aylen was entitled to take judicial notice of the Statement of Defence as a court record: *R v Evaglok*, 2010 NWTCA 12 at para 14. Ms. Sayat very clearly denies that she is an intelligence officer in her Statement of Defence. The Plaintiff's interpretation of her alternative argument is unreasonable and speculative.

[50] With respect to Plaintiff's argument that Prothonotary Aylen varied the Order of Justice Gleeson and amended her prior Order to strike out the backstory related to Gary Gibbs and Shannon Fitzpatrick, Prothonotary Aylen ordered the Plaintiff to strike all claims related to the conduct of Gary Gibbs, Peter Mitchell, Chris Ritchie and Shannon Fitzpatrick from his Statement of Claim in her Order dated June 29, 2018. Justice Gleeson's Order dated July 11, 2019, upheld Prothonotary Aylen's Order. Prothonotary Aylen's decision on the Motion for Further and Better Affidavits of Documents was entirely consistent with her earlier order and Justice Gleeson's order.

[51] In the result, I find no basis on which to interfere with the Prothonotary's decision and this appeal will be dismissed.

VIII. **Obiter**

[52] This is one of six actions and applications for judicial review that the Plaintiff has filed in the Federal Court since 2017. All of them have required the expenditure of public funds and judicial resources as well as those of the Defendants and Respondents. The Court does not lightly point to what appears to be delusional behaviour, but it has to be concerned when there is no realistic basis for the proceedings brought by the Plaintiff. This judge has fifteen years of experience in dealing with matters relating to national security as well as related prior legal experience. Nothing in that experience suggests that there is any merit to the Plaintiff's claims.

[53] To this point, the Summary of Recorded Entries in the Federal Court Proceedings Management System for this file includes 313 entries indicating steps in the proceedings since the initial filing in 2017. The amount of time that reflects on the part of the judicial officers and court staff is difficult to estimate but it is significant, and is a cost borne by the taxpayers.

[54] One of the tools available to the Court for preventing the abuse of its procedures is a vexatious litigant declaration under s 40 of the *Federal Courts Act* RSC 1985, c F-7. Section 40 provides that:

Vexatious proceedings	**Poursuites vexatoires**
40 (1) If the Federal Court of Appeal or the Federal Court is satisfied, on application, that a person has persistently instituted vexatious proceedings or has conducted a proceeding in a vexatious manner, it may order	**40 (1)** La Cour d'appel fédérale ou la Cour fédérale, selon le cas, peut, si elle est convaincue par suite d'une requête qu'une personne a de façon persistante introduit des instances vexatoires devant elle ou y a agi de façon vexatoire au cours d'une

that no further proceedings be instituted by the person in that court or that a proceeding previously instituted by the person in that court not be continued, except by leave of that court.	instance, lui interdire d'engager d'autres instances devant elle ou de continuer devant elle une instance déjà engagée, sauf avec son autorisation.
Attorney General of Canada	**Procureur général du Canada**
(2) An application under subsection (1) may be made only with the consent of the Attorney General of Canada, who is entitled to be heard on the application and on any application made under subsection (3).	**(2)** La présentation de la requête visée au paragraphe (1) nécessite le consentement du procureur général du Canada, lequel a le droit d'être entendu à cette occasion de même que lors de toute contestation portant sur l'objet de la requête.

[55] Subsection 40 (3) of the Act allows a person against whom an order has been made under s 40 (1) to apply to the Court for recission of the order or for leave to institute or continue a proceeding. Under s 40 (4) of the Act, the Court may grant leave to institute or continue a proceeding if it is satisfied that the proceeding is not an abuse of process and that there are reasonable grounds for the proceeding. These provisions ensure that an individual is not denied access to the courts when there is some merit to the proposed proceedings.

[56] An application under s 40 (1) of the Act may only proceed with the consent of the Attorney General of Canada. In practice, this means that such applications are usually brought by the Attorney General of Canada. This is in contrast to legislation applicable to the superior courts and courts of appeal of the provinces and territories. The provinces of Quebec and Manitoba allow courts to declare a litigant vexatious on their own motions, without notice or consent of the Attorney General: *Code of Civil Procedure,* CQLR c C-25.01, arts 51, 55; *Regulation of the*

Superior Court of Québec in civil matters, CQLR c C-25.01, r 0.2.1, s 68; *Civil Practice Regulation (Court of appeal)*, CQLR c C-25.01, r 10, s 13; *Court of Queen's Bench Act*, CCSM c C280, s 73; *The Court of Appeal Act*, CCSM c C240, s 31.1.

[57] The provinces of Alberta and Nova Scotia and the territories of Yukon and Nunavut allow the courts to declare a litigant vexatious on their own motions but require notice to be given to the Attorney General or Solicitor General (and the Minister of Justice in Alberta and Nova Scotia) and the courts must allow them to be heard: *Judicature Act*, RSA 2000, c J-2, s 23.1; *Judicature Act*, RSNS 1989, c 240, s 45B; *Supreme Court Act*, RSY 2002, c 211, s 7.1; *Court of Appeal Act*, RSY 2002, c 47, s 12.1; *Judicature Act*, SNWT (Nu) 1998, c 34 s 1, s 51.2. In Nova Scotia and Nunavut, notice is not required if the Minister or Government is party to the proceedings.

[58] The provinces of British Columbia, Ontario, New Brunswick, Prince Edward Island, and the Northwest Territories have legislation and/or regulations that allow their courts, on application, to make orders requiring vexatious litigants to obtain leave from the court before initiating future proceedings: *Supreme Court Act*, RSBC 1996, c 443, s 18; *Court of Appeal Act*, RSBC 1996, c 77, s 29; *Courts of Justice Act*, RSO 1990, s 140; *Rules of Court*, NB Reg 82-73, r 76.1; *Judicature Act*, RSPEI 1988, c J-2.1, s 65; *Judicature Act*, RSNWT 1988, c J-1, ss 14.1, 21.

[59] The *Rules of the Supreme Court of Canada*, SOR/2002-156, r 66, allow the court to declare a particular proceeding vexatious or meritless at the behest of the court registrar.

[60] As stated by the Federal Court of Appeal in *Canada v Olumide*, 2017 FCA 42 at para 32 vexatiousness comes in all shapes and sizes:

> …**Sometimes it is the litigant's purpose, often revealed by the parties sued, the nature of the allegations against them and the language used**. Sometimes it is the manner in which proceedings and motions are prosecuted, such as multiple, needless filings, prolix, incomprehensible or intemperate affidavits and submissions, **and the harassment or victimization of opposing parties**. [Emphasis added]

[61] The Court is not aware of any consideration by the Attorney General of Canada of a s 40 application in these proceedings. But the requirement that the Attorney General must consent to an application under s 40 unnecessarily constrains the ability of the Federal Courts to control their own processes.

IX. **Costs**

[62] As the Defendants were entirely successful on the motion, Prothonotary Aylen was satisfied that they should be entitled to their costs. She very carefully considered the quantum and whether the costs should be payable forthwith or in any event of the cause. Having considered the submissions of the parties, she considered that the Plaintiff's conduct, which she described in detail, warranted a heightened cost award.

[63] Among other objectionable conduct, the Plaintiff had sought to persuade the Prothonotary that a document in Ms. Sayat's affidavit of documents was a summons issued to her under the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23. He attempted to do the same in the hearing before this Court. The document is simply a blank form sent to a third party by the

Plaintiff and forwarded by that third party to Ms. Sayat. It has absolutely no evidentiary value but reflects the Plaintiff's strained perception of factual reality.

[64] In the result, the Prothonotary found that the motion was abusive in that it sought documents that were clearly irrelevant such as Ms. Sayat's birth certificate, vaccination records, psychiatric records (if any exist) and other categories of documents. This had increased the duration and expense of the motion, was abusive and warranted being deterred by way of a heightened cost award. The motion should not have been brought and accordingly the cost award in favour of Ms. Sayat was made payable forthwith.

[65] On this appeal, Ms. Sayat has submitted a Bill of Costs for the actual amount of legal fees incurred and requests $10,000.00. I am satisfied that the appeal should not have been brought for substantially the same reasons as Prothonotary Aylen and agree that the costs awarded to Ms. Sayat should be on a full indemnity basis. She has borne the substantial burden of responding to the Plaintiff's appeal. Accordingly, I will award Ms. Sayat $10,000.00 payable forthwith against the Plaintiff.

[66] The Crown Defendants were awarded $4,650 by the Prothonotary. At the hearing of this appeal, counsel for the Crown Defendants requested a similar amount as a measure of deterrence. I agree that it would be appropriate. Accordingly, I will award the Crown Defendants the amount of $5,000.00 payable forthwith.

ORDER IN T-268-17

THIS COURT ORDERS that:

1. The Plaintiff's appeal is dismissed in its entirety;

2. The Plaintiff shall forthwith pay to the Defendant, Ria Sayat, her costs of this appeal in the amount of $10,000.00 in any event of the cause;

3. The Plaintiff shall forthwith pay to the Defendants, Lynn Duhaime, the Attorney General of Canada and Her Majesty the Queen, their costs of this motion in the amount of $5,000.00 in any event of the cause.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-268-17
STYLE OF CAUSE:	KRISTIN ERNEST HUTTON v RIA SAYAT, LYNN DUHAMIE also known as STEPHANIE DUHAMIE the former Canadian Charge d'affaires for the Republic of Iraq and THE ATTORNEY GENERAL OF CANADA (on behalf of THE DEPARTMENT OF NATIONAL DEFENCE, CANADIAN SECURITY INTELLIGENCE SERVICE and CANADIAN SECURITY ESTABLISHMENT)
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 5, 2020
ORDER AND REASONS:	MOSLEY J.
DATED:	DECEMBER 22, 2020

APPEARANCES:

Kristin Ernest Hutton	FOR THE PLAINTIFF (Self represented applicant)
Natai Shelsen	FOR THE DEFENDANT (for Ria Sayat)
Stewart Phillips	FOR THE DEFENDANT (Attorney General of Canada)

SOLICITORS OF RECORD:

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Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANT