

**PRACTICE**

## CONFIDENTIALITY ORDERS

Motion for confidentiality order pursuant to *Federal Courts Rules*, SOR/98-106 (Rules), rr. 151, 152 — Applicant submitting workplace violence complaint against several individuals employed by Department of Natural Resources Canada under *Canada Occupational Health and Safety Regulations*, SOR/86-304 (Regulations), Part XX — Department appointing independent investigator to look into complaint — Applicant submitting complaint that investigator not impartial, had failed to follow principles of procedural fairness — Complaint dismissed — As part of application for judicial review, applicant seeking disclosure of documents containing identities of participants in investigation of complaint — Respondent arguing not in public interest for identifying information about individuals involved in workplace violence complaint to be made public without consent of those individuals — Main issue raised in motion whether Court should issue confidentiality order — Court hearing confidentiality motion having to apply test set out by Supreme Court in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 (*Sierra Club*), elaborated in *Sherman Estate v. Donovan*, 2021 SCC 25 — In *Desjardins v. Canada (Attorney General)*, 2020 FCA 123 (*Desjardins*), Federal Court of Appeal (F.C.A.) considered these principles in response to confidentiality motion brought in case involving alleged wrongdoing disclosed under *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46 — F.C.A. allowed appeal on basis that evidence of risks associated with disclosure too general, did not meet standard of “well grounded” or convincing evidence — One of issues in this case whether clarification of test in *Sherman* having any bearing on principles established in *Desjardins* — In applying guidelines set out in *Sherman*, person asking court to exercise discretion in way that limits open court presumption must establish that court openness poses serious risk to important public interest; order sought necessary to prevent this serious risk to identified interest; and benefits of order outweigh its negative effects — Prevention of violence in workplace being type of important public interest that may warrant protection of confidentiality order in appropriate circumstances — Question being whether evidence meeting test of demonstrating that open court principle poses serious risk to public interest — Fact that disclosure of personal information may cause inconvenience not sufficient to rebut open court presumption — In present case, several considerations supporting order sought identified — Intention to maintain anonymity of participants in workplace violence investigation reflected in provisions of Regulations — Clear from provisions of Regulations that employer cannot disclose names, other identifying information of survey participants without their consent — *Desjardins* rejects approach restricting exercise of discretion under rule 151 in systematic way — Evidence demonstrating that disclosure of identities of those involved in investigation of applicant’s complaint would pose serious risk of harm to important public interest — Accordingly, confidentiality order sought by respondent granted — Limited confidentiality order sought necessary to avert risk, other reasonable measures to avoid apprehended harm not available — Benefits of limited confidentiality order in present case outweighing potential impact on open

court principle — Motion granted.

POTHIER V. CANADA (ATTORNEY GENERAL) (T-325-20, 2021 FC 979, Pentney J., reasons for order dated September 22, 2021, 25 pp.)