Federal Court  Cour fédérale

Date: 20200924

Docket: T-1951-19

Citation: 2020 FC 930

Ottawa, Ontario, September 24, 2020

PRESENT: Mr. Justice McHaffie

BETWEEN:

KENNETH MCCARTHY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Attorney General has filed three written motions in respect of this application for judicial review. The first seeks to strike the notice of application on grounds that it is out of time as being effectively an application for judicial review of a decision issued on June 21, 2019, and/or that it seeks judicial review of a matter that is grievable under the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 [*FPSLRA*]. The second seeks relief from Rule 318

production and a confidentiality order in respect of certain documents in the tribunal record. The third seeks a sealing order over an exhibit filed by Mr. McCarthy in response to the first motion. Mr. McCarthy opposes all three motions.

[2] The motions were filed in January, February and March, 2020, respectively. This Court's Suspension Period arising from the COVID-19 pandemic went into effect before the date for reply submissions on the third motion. Determination of the three related motions was therefore delayed, and the parties have more recently confirmed that there are no further submissions to be filed. These reasons address the first two motions. The third motion will be addressed separately as I am inviting further submissions from the parties on recent jurisprudence relevant to that motion.

[3] For the reasons set out below, I allow the motion to strike on the basis that the issues raised in the notice of application for judicial review are grievable and the process provided under the *FPSLRA* must be followed before an application for judicial review may be brought. In consequence, I dismiss as moot the motion regarding Rule 318 and seeking a confidentiality order in respect of the tribunal record.

[4] I note as a preliminary matter that Mr. McCarthy's response to each of the Attorney General's motions was in the form of a motion seeking an order striking the Attorney General's motion. This is not the approach provided for in Part 7 of the *Federal Courts Rules*, SOR/98-106. The proper way to respond to a motion is through a respondent's motion record that accords with Rule 365(2), not through a motion to strike the motion: *Greens At Tam*

O'Shanter Inc (The) v Canada, 1999 CanLII 7512 (FC) at para 8; *Sandpiper Distributing Inc v Ringas*, 2020 FC 366 at para 48. I have taken Mr. McCarthy's responding motions in each case to be effectively his respondent's motion record filed pursuant to Rule 365.

II. Attorney General's Motion to Strike

A. *Issue*

[5] Mr. McCarthy's application for judicial review seeks to quash a decision by the President of the Canada Border Services Agency (CBSA) dated November 7, 2019. The background is an investigation triggered by disclosures made under the *Public Servants Disclosure Protection Act*, SC 2005, c 46 [*PSDPA*], alleging workplace conflict of interest and mismanagement. The November 7, 2019 decision in question was an email from the President entitled "Notice of Pre-Disciplinary Hearing" [Notice], in which the President accepted the findings of an investigation and gave notice of a hearing to be held before making a determination on any corrective or disciplinary measures.

[6] The issue on the Attorney General's first motion is whether Mr. McCarthy's application for judicial review should be struck, either because it was brought after the 30-day time limit for applications for judicial review, or because the issues raised in it are grievable under the *FPSLRA*.

B. *Availability of a Motion to Strike an Application for Judicial Review*

[7] While not provided for in the *Federal Courts Rules*, this Court has a plenary jurisdiction to strike an application for judicial review: *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at para 48; *Forner v Professional Institute of the Public Service of Canada*, 2016 FCA 35 at paras 9–10.

[8] The Federal Court of Appeal has been clear that given the summary nature of applications for judicial review, the way to raise objections to an application, as a general rule, is to address them on their merits at the hearing of the application: *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 (CA) at p 600; *JP Morgan* at para 48. Only where a notice of application is "so clearly improper as to be bereft of any possibility of success" should it be struck on a preliminary motion: *JP Morgan* at para 47; *Forner* at para 9. This will only occur where there is, in Justice Stratas' evocative language, a "show stopper" or "knockout punch" that strikes at the root of the Court's power to entertain the application: *JP Morgan* at para 47, quoting *Donaldson v Western Grain Storage By-Products*, 2012 FCA 286 at para 6.

[9] In order to assess whether the application for judicial review is bereft of any possibility of success, the notice of application must be read "with a view to understanding the real essence of the application": *JP Morgan* at para 49. This requires reading it holistically and practically to appreciate its "essential character": *JP Morgan* at para 50. Before addressing this question, however, I must address the issue of what evidence I will consider on this motion, in light of the

volume of evidence filed that does not conform with the Federal Court of Appeal's guidance on motions to strike.

C. *Evidence Filed on the Motion*

[10] The Federal Court of Appeal has stated, very plainly, that "[a]s a general rule, affidavits are not admissible in support of motions to strike applications for judicial review": *JP Morgan* at para 51. This general rule exists because of the summary nature of judicial review, the potential for delay from cross-examinations, and the fact that motions to strike are based on whether the notice of application itself shows that it is of no merit, taking the facts alleged to be true: *JP Morgan* at para 52. Narrow exceptions to this rule include, for example, documents referred to and incorporated by reference in the notice of application: *JP Morgan* at paras 53–57. However, broader affidavits from an applicant that add information not included in the grounds set out in the notice of application, even if known to the respondent, should not be included: *JP Morgan* at paras 58–64.

[11] In the present case, the Attorney General filed an affidavit from a senior officer at the CBSA that attaches seven documents. Of these, Exhibits E and G are Mr. McCarthy's notice of application for judicial review and the Attorney General's notice of appearance, which are clearly unobjectionable. Exhibit C is the November 7, 2019 Notice of Pre-Disciplinary Hearing that is the very subject of the application for judicial review. This is again appropriate as being a document referred to and incorporated by reference into the notice of application: *JP Morgan* at paras 56–57. Exhibit B is a letter issued on June 21, 2019 by the Senior Officer for Internal Disclosure (SOID) at the CBSA, setting out the results of the investigation. While perhaps less

clear, I accept that this is also a document referred to and incorporated by reference into the notice of application, which states that the November 7, 2019 decision accepted the results of the SOID's investigation.

[12] The three other documents attached to the Attorney General's affidavit are not referred to or incorporated into the notice of application. One (Exhibit A) is a letter outlining preliminary findings in the SOID's investigation. Two others post-date the Notice of Pre-Disciplinary Hearing and the notice of application, namely the ultimate determination of the President arising from the Pre-Disciplinary Hearing, dated December 9, 2019 (Exhibit D), and an Individual Grievance Presentation filed by Mr. McCarthy to grieve the President's December 9, 2019 determination (Exhibit F).

[13] In addition to these documents, the Attorney General's affiant makes statements regarding the disclosure leading to the investigation, and the timing of that disclosure. While these facts are not themselves in the notice of application, they are duplicative of information contained in the SOID letter (Exhibit B), so their inclusion does not add new facts.

[14] In response to the motion, Mr. McCarthy filed an affidavit that attaches 37 exhibits. Again, these exhibits include the notice of application (Exhibit HH), the Notice of Pre-Disciplinary Hearing that is the decision at issue (part of Exhibit DD), and the SOID investigation letter (Exhibit N). However, the exhibits also include extensive correspondence between Mr. McCarthy and others pertaining to the investigation and the allegations underlying it, as well as a number of documents that post-date the decision at issue and the application for

judicial review, including the December 9, 2019 disciplinary determination and the Individual Grievance Presentation that are attached to the Attorney General's affidavit.

[15] The final exhibit attached to Mr. McCarthy's affidavit is a response from the CBSA to a request he made under the *Access to Information Act*, RSC 1985, c A-1 [*ATIA*]. Mr. McCarthy relies on this to raise a new argument, not identified in the notice of application or the Attorney General's motion, namely that the SOID was not properly designated as "senior officer" under subsection 10(2) of the *PSDPA*. In reply, the Attorney General sought leave to file a further affidavit speaking to the appointment of the SOID, and attaching documents relating to that question. In a sur-reply objecting to the request for leave, Mr. McCarthy attached a response to a different *ATIA* request related to the SOID's appointment, and argued that the Attorney General should not be permitted to file evidence in reply that had not been provided in response to that *ATIA* request.

[16] I recite this evidence at some length to show how far the parties have strayed from the principles established by the Court of Appeal regarding admissible evidence on motions to strike a notice of application. Neither party cited these principles, and neither party objected to the other's evidence, save for Mr. McCarthy's *ATIA*-based objection to the request for reply evidence.

[17] Despite this lack of objection, I will ignore the evidence filed that does not conform with the Court of Appeal's guidance in *JP Morgan*. The Court should not encourage or countenance a disregard for the law on appropriate evidence on a motion to strike, even on consent. The

evidence filed in this case shows precisely the concern about procedural distraction raised by Justice Stratas in *JP Morgan*. Rather than focusing on the merits, a dispute arose with respect to whether certain evidence could be filed in reply to a new issue raised in response to the motion to strike, and a further motion was filed with respect to confidentiality and privacy issues concerning one of the exhibits filed.

[18] For the same reason, I decline to grant leave to the Attorney General to file evidence in reply. This is based not on the *ATIA* grounds raised by Mr. McCarthy, but because the reply evidence addresses evidence that should not have been filed, and because both the original evidence and the reply evidence are irrelevant to the issues on the motion. The judicial review is related to a decision of the President and the notice of application raises no grounds regarding the designation of the SOID. While I appreciate the Attorney General's desire to respond to the new argument about the legitimacy of the SOID's designation, that argument is irrelevant to the motion to strike.

[19] In any event, I note that my determination on the motion to strike would be the same whether I consider the extraneous evidence or not, since the evidence does not affect the issues on the motion to strike.

[20] Having addressed these procedural matters, I turn to the merits of the Attorney General's motion to strike the notice of application.

D. *Timeliness*

[21] The Attorney General argues that the application for judicial review, while facially directed at the November 7, 2019 Notice issued by the President, is in "pith and substance" an attack on the SOID's decision that was issued in June 2019. The Attorney General argues that the notice of application filed in December 2019 was therefore well beyond the 30-day period provided for in subsection 18.1(2) of the *Federal Courts Act*, RSC 1985, c F-7. In support of the argument, the Attorney General points to the roles of the SOID (as "senior officer") and the President (as "chief executive") under section 10 of the *PSDPA*, asserting that the determination of wrongdoing is made by the former and not the latter. Mr. McCarthy responds that the President made a decision to accept the findings of the SOID, as expressed in the Notice, and that his application is directed at that Notice. Alternatively, he requests that the Court permit him additional time to file the notice of application.

[22] This Court has held that an argument that an application for judicial review is untimely is not a ground on which to strike the application. Rather, absent exceptional circumstances, it should be addressed at the hearing of the application: *Kaquitts v Council of the Chiniki First Nation*, 2019 FC 498 at paras 23–26; *Coffey v Canada (Minister of Justice)*, 2004 FC 1694 at paras 10–16. In my view, there is no reason to depart from these principles in the present case, and there is nothing exceptional about the Attorney General's arguments on timeliness.

[23] This is particularly so since there is an arguable issue as to whether the President's November 7, 2019 Notice accepting the findings of the investigation by the SOID constitutes a

separate “decision” or “matter” distinct from the investigation findings themselves: *Federal Courts Act*, s 18.1(1)–(2). While the Attorney General argues it is the SOID who makes the determination of wrongdoing and not the President, the Notice itself states that the President only accepted the investigator’s conclusions after reviewing the investigation findings and Mr. McCarthy’s comments, and “careful consideration of all the information available to me.” I therefore conclude that Mr. McCarthy’s argument that he seeks review of the President’s decision and not the SOID’s conclusions, and that the application is therefore not out of time, is not bereft of any possibility of success.

[24] I therefore will not strike the notice of application on the timeliness ground.

E. *Grievability*

[25] The second ground raised by the Attorney General is that the matters raised in the application for judicial review are grievable under the *FPSLRA*, and that Mr. McCarthy therefore has an adequate alternative remedy that must be exhausted before an application for judicial review can be brought.

[26] As set out above, determining whether the application for judicial review is bereft of any possibility of success requires an assessment of the “essential character” of the application: *JP Morgan* at paras 49–50. In this case, that essential character is revealed by the nature of the decision being challenged and the grounds for the challenge raised in the notice of application.

[27] The President's November 7, 2019 Notice accepted a finding that Mr. McCarthy had engaged in wrongdoing with respect to his conduct in the workplace. The findings related specifically to conflict of interest with respect to an employee, and gross mismanagement. The grounds for challenging the decision relate to the procedural fairness of the underlying investigation, and to the merits of the decision itself. On the fairness issue, a number of allegations are raised, including alleged failures to provide Mr. McCarthy with the particulars of the allegations against him, to provide the evidence collected in the investigation and an opportunity to respond, to conduct a thorough investigation, and/or to provide reasons for accepting the SOID investigation results. The challenge to the merits alleges legal and factual errors in concluding that Mr. McCarthy's actions met the definition of wrongdoing in the *PSDPA* or violated the Treasury Board of Canada Secretariat's *Values and Ethics Code for the Public Sector* [*Ethics Code*] and *Policy on Conflict of Interest and Post Employment* [*Conflict of Interest Policy*].

[28] The essence of the application for judicial review is therefore that a determination relating to Mr. McCarthy's employment, made by the chief executive of the government department where he worked, was procedurally unfair and legally and factually erroneous. On my review of the applicable law, it is clear that (1) these issues can be the subject of a grievance brought pursuant to the provisions of the *FPSLRA*, and (2) that application for judicial review is therefore precluded until that grievance process has been pursued.

[29] Before turning to these two questions, I pause to note that Mr. McCarthy's submissions address the grievability issue in the context of responding to the Attorney General's argument

regarding timeliness. On the timeliness issue, Mr. McCarthy argued in the alternative that the Court ought to exercise its discretion to allow further time, applying the factors discussed in *Canada (Attorney General) v Hennelly*, 1999 CanLII 8190, 167 F.T.R. 158 (CA) at para 3. One of those factors is whether the application has some merit. As Mr. McCarthy did not address the grievability issue elsewhere, I take his submissions on this issue to also be his response to the motion to strike on the grievability question.

(1) The issue is grievable

[30] Subsection 208(1) of the *FPSLRA* reads as follows:

Right of employee	**Droit du fonctionnaire**
208 (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved	**208 (1)** Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé :
(a) by the interpretation or application, in respect of the employee, of	**a)** par l'interprétation ou l'application à son égard :
(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or	**(i)** soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document de l'employeur concernant les conditions d'emploi,
(ii) a provision of a collective agreement or an arbitral award; or	**(ii)** soit de toute disposition d'une convention collective ou d'une décision arbitrale;
(b) as a result of any occurrence or matter affecting his or her terms and conditions of employment.	**b)** par suite de tout fait portant atteinte à ses conditions d'emploi.

[31] As the Ontario Court of Appeal has noted, section 208 provides employees with "a very broad right to grieve," such that "[a]lmost all employment-related disputes can be grieved under s 208": *Bron v Canada (Attorney General)*, 2010 ONCA 71 at paras 14–15. If a matter falls within section 208, the *FPSLRA* provides a process for resolving the grievance. After presenting the grievance to the final level of the grievance process, qualified matters can be referred to

adjudication by the Federal Public Sector Labour Relations and Employment Board: *FPSLRA*, ss 13, 209; *Augustin v Canada (Attorney General)*, 2018 FC 55. If the grievance is not one that may be referred to adjudication, the decision on the grievance at the final level in the grievance process is final and binding: *FPSLRA*, s 214.

[32] Mr. McCarthy does not dispute that he is an employee within the meaning of section 208 of the *FPSLRA* (a matter defined in section 2 of the *FPSLRA*). The issues raised in Mr. McCarthy's application for judicial review relate to the interpretation and application, in respect of Mr. McCarthy, of provisions of a statute (the *PSDPA*) and other directions or instruments (the Treasury Board *Ethics Code* and *Conflict of Interest Policy*). They also relate to occurrences and matters affecting the terms and conditions of Mr. McCarthy's employment. On their face, and assessing their essential character, Mr. McCarthy is entitled to present a grievance under section 208 with respect to these issues.

[33] Mr. McCarthy concedes that the subsequent disciplinary action imposed against him by the President may be properly grieved. However, he argues that only the Federal Court has authority to review the decision of the President to accept the investigation findings and address the substance of the SOID's investigation. He raises two arguments in support of this contention. First, he argues that the President's decision to accept the results of the SOID's investigation and his procedural fairness arguments with respect to the investigation cannot be adjudicated, and that an adjudicator under the *FPSLRA* cannot grant the orders he seeks in this judicial review. Second, he argues that he is challenging the President's decision on procedural fairness grounds,

and is not challenging the disciplinary action, so that judicial review rather than grievance is appropriate. In my view, neither of these arguments raise a possibility of success.

[34] Mr. McCarthy's first arguments, as to the availability of adjudication and the powers of an adjudicator, miss the issue. The question is not whether the decision or matter is referable to adjudication. It is whether it may be grieved, even if it cannot be referred to adjudication under section 209 of the *FPSLRA*. As noted above, not every matter that is grievable is subject to adjudication: *FPSLRA*, ss 208, 209, 214; *Vaughan v Canada*, 2005 SCC 11 at para 18 (referring to equivalent provisions in the predecessor *Public Service Staff Relations Act*, RSC 1985, c P-35); *Renaud v Canada (Attorney General)*, 2013 FC 18 at paras 24–27; *Bron* at para 15.

[35] Mr. McCarthy's second argument that the fairness of the underlying investigation is not something that can be grieved under section 208 must also be rejected. Nothing in the language of section 208 suggests that the fairness of a workplace investigation is excluded from the broad definition of what is grievable, which includes any application of a statute or other instrument, and occurrences or matters affecting conditions of employment. Indeed, this Court has heard applications for judicial review arising from grievances under section 208 in which the fairness of a workplace investigation had been specifically raised and addressed in the grievance process: *Renaud* at paras 57–64; see also *Nosistel v Canada (Attorney General)*, 2018 FC 618 at paras 41–41.

[36] Nor does the fact that the investigations in this case arose under the *PSDPA* affect their grievability: *Bron* at paras 26–33. As the Attorney General points out, the *PSDPA* confirms that,

with two exceptions that do not apply in this case, the *PSDPA* does not prevent the presentation of an individual grievance under the *FPSLRA*:

Saving	**Exception**
51 Subject to subsections 19.1(4) and 21.8 (4), nothing in this Act is to be construed as prohibiting	**51** Sous réserve des paragraphes 19.1(4) et 21.8(4), la présente loi ne porte pas atteinte :
(a) the presentation of an individual grievance under subsection 208(1) or 238.24 of the *Federal Sector Labour Relations Act*; or	**a)** au droit du fonctionnaire de présenter un grief individuel en vertu du paragraphe 208(1) ou de l'article 238.24 de la *Loi sur les relations de travail dans le secteur public fédéral*;
(b) the Canada Industrial Relations Board from considering a complaint under section 242 of the *Canada Labour Code*.	**b)** au droit du Conseil canadien des relations industrielles de procéder à l'instruction d'une plainte sous le régime de l'article 242 du *Code canadien du travail*.

[37] The Attorney General argues that Mr. McCarthy is entitled to file a grievance against the President's decision to impose disciplinary measures, and has in fact done so. In my view, this is not the relevant issue, for three reasons. First, as noted above, the facts that post-date the application for judicial review do not address the issue of whether the application, on its face, is so clearly improper as to be bereft of any possibility of success: *JP Morgan* at para 47. Second, whether a grievance is in fact taken does not directly affect the availability of judicial review. The question is whether the matter is grievable: *FPSLRA*, s 236(2); *Glowinski v Canada (Treasury Board)*, 2006 FC 78 at para 13. Third, the issue is not whether the President's subsequent imposition of disciplinary measures is grievable. It is whether the decision

Mr. McCarthy seeks to challenge on judicial review, namely the acceptance of the SOID investigation results, is grievable.

[38] Nonetheless, I agree with the Attorney General on the main question, which is that the issues raised on Mr. McCarthy's application for judicial review are subject to the grievance procedures in the *FPSLRA*. Whether these issues are raised as part of a separate grievance directed to the November 7, 2019 Notice, or as part of a grievance that also addresses the final imposition of discipline, is immaterial. Either way, the procedural fairness and substantive issues raised by Mr. McCarthy on this application are matters that may be grieved.

[39] Mr. McCarthy refers to the decision in *Chapman v Canada (Attorney General)*, 2019 FC 975, and states that as in that case, he is "seeking this honourable court's views on the issues of procedural fairness that he has raised." In *Chapman*, Justice Zinn considered allegations of unfairness in an investigation conducted under the *PSDPA*. While there is no question that the issues raised in *Chapman* appear similar to those raised by Mr. McCarthy, there is no indication that the question of whether those issues were grievable was raised before Justice Zinn. Perhaps Ms. Chapman was not entitled to grieve, perhaps the issue simply was not raised. Regardless of why the issue was not before the Court, the fact that Justice Zinn addressed the merits of Ms. Chapman's application for judicial review does not affect the grievability of the issues raised by Mr. McCarthy in this case, or raise any possibility that Mr. McCarthy could succeed in arguing that the issues he raises are not grievable.

(2) Grievability precludes judicial review

[40] In *Vaughan*, the Supreme Court of Canada underscored the importance of respecting the scheme established by Parliament for dealing with labour disputes by pursuing and exhausting available procedures: *Vaughan* at para 39. This is so even where a matter may only be pursued through the grievance process and may not be referred to adjudication: *Vaughan* at para 38. The Supreme Court confirmed the principle that the courts should generally decline to get involved in workplace-related issues, except on the limited basis of judicial review of the outcome of the final available level of grievance: *Vaughan* at paras 2, 26, 31, 54.

[41] This is an expression in the labour relations context of the broader principle that unless exceptional circumstances exist, an application for judicial review will be premature where the statutory administrative process of adjudications and appeals has not been followed through to its end: *C.B. Powell Limited v Canada (Border Services Agency)*, 2010 FCA 61 at paras 4, 30–33; *Nosistel* at paras 50–53. Justice Stratas summarized the rule in the following language at paragraph 31 of *C.B. Powell*:

> Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional

> circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.
>
> [Emphasis added.]

[42] This principle has been applied repeatedly in the specific context of applications for judicial review brought prior to completion of the statutory grievance procedure under the *FPSLRA* and its predecessor: *Public Service Alliance of Canada v Canada (Treasury Board)*, 2002 FCA 239 at paras 2–3; *Augustin* at paras 22–23; *Nosistel* at paras 50–53; *Glowinski* at paras 12–13; *Estwick v Canada*, 2004 FC 970 at paras 16–22.

[43] Against these authorities, Mr. McCarthy has raised no examples where the Court has addressed an application for judicial review on its merits after determining that the subject matter is grievable under the *FPSLRA*. Nor has he raised any exceptional circumstances that might militate in favour of hearing the application for judicial review, so as to raise a possibility of success on his application. Rather, his arguments are limited to the irrelevant issue of the designation of the SOID, and the arguments referred to above, namely that the decision to accept the SOID's investigation cannot be adjudicated; that the remedies he seeks are not available on adjudication; and that his challenge to the fairness of the investigation is not grievable, with reference to *Chapman*. For the reasons set out above, none of these raises a possibility of success.

[44] In my view, based on the essential character of this application for judicial review, and the jurisprudence confirming clearly that available grievance procedures must be exhausted before an application for judicial review is brought, it is plain that Mr. McCarthy's application

for judicial review is bereft of any possibility of success. I therefore conclude that this is one of the rare circumstances described in *David Bull* and *JP Morgan* that a motion to strike an application for judicial review should be granted.

[45] The Attorney General's first motion is therefore granted and the notice of application for judicial review is struck. As the grounds for striking the notice of application for judicial review go to the basis for the application and not the manner in which it is expressed, no leave to amend is granted. The Attorney General did not request costs of the motion and no costs are granted.

III. Attorney General's Motion Regarding Rule 318

[46] The Attorney General's second motion seeks relief from the requirements of Rule 318 pertaining to the production of documents in the possession of the tribunal (here the President of the CBSA). The motion raises issues with the confidentiality of certain documents and seeks a confidentiality order governing the proceedings.

[47] In light of my determination on the Attorney General's first motion, the second motion is dismissed as moot. There is no order as to costs.

JUDGMENT IN T-1951-19

THIS COURT'S JUDGMENT is that

1. The Attorney General's motion to strike the notice of application for judicial review, filed January 29, 2020, is granted, and the notice of application for judicial review is struck without leave to amend.
2. The Attorney General's motion for relief from providing confidential materials pursuant to Rule 318 and for an order regarding the treatment of confidential materials, filed February 19, 2020, is dismissed as moot.
3. There is no order as to costs.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1951-19
STYLE OF CAUSE:	KENNETH MCCARTHY v ATTORNEY GENERAL OF CANADA

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	SEPTEMBER 24, 2020

WRITTEN REPRESENTATIONS BY:

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