Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

ATTORNEY GENERAL OF CANADA

Respondent

– and –

CANADIAN TRANSPORTATION AGENCY

Intervener

REPLY OF THE APPLICANT, AIR PASSENGER RIGHTS

Motion for Leave to Issue Subpoena
(pursuant to Rules 41 and 369.2 of the *Federal Courts Rules*)

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FEDERAL COURT OF APPEAL

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AIR PASSENGER RIGHTS

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REPLY OF THE MOVING PARTY / APPLICANT

1. The AGC conceded the factual background of this motion and, *if available*, to produce three sets of documents. Paragraphs 2-4 of the Orders Sought enables the Court to craft alternative solutions if the TC documents are unavailable or insufficient, which the AGC seeks to hinder by relying on its own ambiguity on document availability. Peculiarly, the AGC also suggested filing an affidavit on document unavailability *later*. If documents are unavailable, the AGC should have stated so in its responding record.

2. Relatedly and in reply to the CTA's objection, Rules 358-369 do not require service on a non-party. A subpoena to the former or current CTA or TC personnel only becomes necessary as a last resort if the requested TC documents are unavailable or insufficient. The Court can require notice when that eventuality becomes apparent.

3. For the fourth set of requested documents (i.e., the TC-CTA Undisclosed Exchanges on Air Transat), the AGC misrepresented this motion as akin to discovery of TC and Finance Canada, when it was clear that only *specific* documents relating to TC-CTA interactions are requested. The AGC also seeks to relitigate whether this Application captures third-party influence on the development of the Statement on Vouchers.

A. AGC Misstates the Nature of the Motion and the Remedies Sought

4. The AGC's written representations are fraught with materially inaccurate assertions about both the nature of this Rule 41 motion and the remedies being sought.[1]

5. **First**, the AGC misstates that "[t]his motion commenced with a request for a CTR under [*FCR*] Rule 317," and then builds a straw man from this erroneous foundation.[2] The motion record is clear that it is pursuant to Rule 41, and not Rule 317.

6. **Second**, the AGC twisted paragraph 1(d) of the Order Sought as seeking "documents exchanged between TC and the Department of Finance,"[3] when it actually states:

> **TC-CTA Undisclosed Exchanges on Air Transat**: Correspondences between Transport Canada and the CTA between March 18-25, 2020 relating to aspects of Air Transat's request that involves a decision from the CTA, as revealed by a March 19, 2020 email chain between Transport Canada and Finance Canada.[4]

The exchange between TC and Finance Canada was tendered only as evidence supporting the fact that the TC-CTA Undisclosed Exchanges on Air Transat likely exist.[5]

7. **Third**, the AGC coined a misleading term "forwards and responses" to describe the requested documents.[6] The assertion that the Applicant seeks a "needlessly expanded search for 'forwards and responses' [...]" is wholly unsupported in the record. The four sets of requested documents[7] are not "forwards and responses" by any stretch. The TC-CTA Weekend Meeting Documents relate to meetings that occurred. The other three sets of documents are *specific* TC-CTA exchanges that exist or likely exist.

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1 AGC's Written Representations (Mar. 9, 2023) at paras. 1(d), 11, and 21.
2 AGC's Written Representations (Mar. 9, 2023) at para. 11.
3 AGC's Written Representations (Mar. 9, 2023) at para. 21.
4 Applicant's Notice of Motion (Feb. 27, 2023), para. 1(d) (emphasis added) [Motion Record (**"MR"**), Tab 1, p. 2]; see also Applicant's Written Representations (Feb. 27, 2023) at para. 19 [MR, Tab 11, p. 289].
5 Lukács Affidavit (Feb. 27, 2023) at para. 29(e) and Exh. "Y" [MR, Tabs 2 & 2Y, pp. 23 & 117].
6 AGC's Written Representations (Mar. 9, 2023) at paras. 10, 11 and 15.
7 Notice of Motion, Orders Sought, paragraph 1 [MR, Tab 1, pp. 1-2].

8. **Finally**, the AGC misrepresents the motion as requesting documents on "what may have taken place in the halls of TC or elsewhere[...]."[8] It is clear that the four requested sets of documents deal with the interactions *between* the CTA and TC, that is, "third-party influence in the development of the impugned statement on vouchers."[9]

B. AGC Seeks to Relitigate Issues that this Court Has Already Decided

9. The AGC is attempting to relitigate a range of matters that this Court has already decided in its October 2021 Order and the subsequent orders. The AGC also seeks to repudiate its previous position that the Statement on Vouchers was not a formal "decision" or "order" and now advances an entirely inconsistent position.[10]

10. **First**, the AGC erroneously claims that the Application is a judicial review of a formal "decision" or "order."[11] In addition, the AGC recycles its earlier argument that the scope of relevant documents is limited to what was before the "decision-maker." These arguments have already been considered and rejected in the October 2021 Order:

> [19] [...] the AGC opposes the requested disclosure for several reasons. First, he says that Rule 317 of the Federal Courts Rules does not permit or require the requested disclosure because the Rule only applies to material in the possession of a tribunal whose order is the subject of an application for judicial review. According to the AGC, there is no basis for disclosure under Rule 317 or 318 because the applicant contends that the impugned statements do not have the force of an order and no order has been made. In the alternative, the AGC submits that the request for disclosure should be denied because it is overly-broad, constitutes a fishing expedition and the materials sought are irrelevant to the issues raised in the application, which the AGC says have been impermissibly expanded by the applicant to include alleged third-party interference in the adoption of the impugned statement.
>
> [20] I disagree in large part with each of these assertions.

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8 AGC's Written Representations (Mar. 9, 2023) at para. 16.
9 Reasons for Order of Gleason, J.A. (Oct. 15, 2021) at para. 24 [MR, Tab 4, p. 198].
10 AGC's letter on July 5, 2021 adopting the CTA's submissions in its entirety; CTA's Written Representations (January 18, 2021) at para. 45 [Court Docket No. 57].
11 AGC's Written Representations (Mar. 9, 2023) at paras. 5, 14 and 30.

> [21] Turning to the first of the foregoing assertions, as the applicant rightly notes, the breadth of materials that are subject to disclosure under Rules 317 and 318 of the Federal Courts Rules is broader where bias or breach of procedural fairness is alleged, particularly where, as here, relief in the nature of prohibition is sought. In such circumstances, disclosure is not limited to the materials that were before the tribunal when an order was made. Rather, where such arguments are raised, documents in the possession, control or power of a tribunal that are relevant to the allegations of bias or breach of procedural fairness are subject to disclosure. Indeed, were it otherwise, this Court would be deprived of evidence necessary for the disposition of an applicant's claims of bias or breach of procedural fairness and the availability of relief in the nature of prohibition would be largely illusory: see, e.g., [citations omitted]. Thus, the first assertion advanced by the AGC as to the scope of permitted disclosure under Rules 317 and 318 is without merit.
>
> [22] As concerns the subsidiary arguments advanced by the AGC to resist disclosure, I do not agree that all the documents sought by the applicant are irrelevant or fall outside the scope of the claims made in the applicant's Notice of Application. However, the requested disclosure is broader than necessary and goes beyond that which is relevant to the bias issues raised by the applicant. Disclosure should instead be limited to documents sent to or from a member of the CTA (including its Chairperson and Vice-Chairperson), related to a meeting attended by CTA members **or** sent to or from a third party concerning the impugned statement between Mar. 9 and March 25, 2020, the date the statement was posted on the CTA website. In addition, privileged documents should be exempt from disclosure.[12]

11. **Second**, the AGC is rearguing the propriety of the Court ordering production of documents under the *Federal Courts Rules* when those documents *might* be accessible after a lengthy process under the *Access to Information Act*.[13] This Court has already carefully considered similar arguments[14] before making the October 2021 Order.[15]

12. **Third**, the AGC proposes to send this Honourable Court and the Applicant on

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[12] Reasons for Order of Gleason, J.A. (Oct. 15, 2021) at paras. 19-22 (emphasis added) [MR, Tab 4, pp. 196-198].

[13] AGC's Written Representations (Mar. 9, 2023) at para. 17.

[14] CTA's Written Representations (Jan. 18, 2021) at para. 75; and AGC's Letter (Jul. 5, 2021).

[15] Reasons for Order of Gleason, J.A. (Oct. 15, 2021) at para. 11 [MR, Tab 4, p. 194].

a wild goose chase by seeking evidence from the CTA[16] in spite of this Court's express finding that the CTA had not retained the relevant documents.[17] The AGC also misleads the Court on the limited scope of cross-examination for the CTA's document search affidavit,[18] which in reality was confined to "the scope and nature of the document search undertaken by the CTA and about the adequacy of its disclosure," and not on issues directed to the merits of the Application or the contents of the relevant documents.[19]

13. **Fourth**, the AGC is attempting to carve out an exception for TC itself to determine "other recognized ground for non-disclosure," which appears to include relevance.[20] It is this Court, and not the AGC or TC, that should decide any privilege assertion or any other objection to production. Should the AGC advance any such claims, they should be addressed in the manner prescribed in the October 2021 Order.[21]

14. **Finally**, the AGC argues that documents should be produced in PDF files without any metadata, instead of their native formats.[22] This Court already addressed the requirement to produce electronic documents in their native formats, holding that:

> [...] [g]iven the prevalence of computer use and electronic documents, it cannot seriously be contested in 2022 that documents include electronic documents.[23]

15. For encrypted emails, the Treasury Board guidelines clearly show that emails are available in native form (i.e., Outlook format) *after* decryption.[24] The AGC's claim that decrypted emails are not available in native format[25] is demonstrably inaccurate.

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16 AGC's Written Representations (Mar. 9, 2023) at paras. 25-26.
17 Reasons for Order of Gleason, J.A. (Jan. 4, 2023) at paras. 20-30 and 48 [MR, Tab 10, pp. 274-277 and 282].
18 AGC's Written Representations (Mar. 9, 2023) at para. 26.
19 Reasons for Order of Gleason, J.A. (Jul. 19, 2022) at paras. 33-35 [MR, Tab 8, pp. 253-255].
20 AGC's Written Representations (Mar. 9, 2023) at paras. 2 and 19.
21 Reasons for Order of Gleason, J.A. (Jul. 19, 2022) at paras. 37-39 [MR, Tab 8, pp. 255-256].
22 AGC's Written Representations (Mar. 9, 2023) at paras. 12, 18, and 20.
23 Reasons for Order of Gleason, J.A. (Apr. 11, 2022) at para. 23 [MR, Tab 6, p. 217].
24 Lukács Affidavit (Feb. 27, 2023), Exhibit "AJ" [MR, Tab 2AJ, pp. 161-162].
25 AGC's Written Representations (Mar. 9, 2023) at para. 12.

C. AGC is Being Ambiguous About Availability of the Documents

16. This Court should be concerned about the ambiguity in the AGC's position on the "availability" of the requested documents. The AGC prefaced its concession to produce three of the four sets of requested documents with the condition "if available."[26]

17. While a motion for subpoena under Rule 41 could be heard *ex parte*, without input from the subpoena's recipient,[27] in this instance the recipient of the subpoena for *documents* is TC, which the AGC represents.[28] The motion seeks as an *alternative* relief to subpoena current or former CTA or TC personnel if the TC documents are unavailable or insufficient. Therefore, it was incumbent on the AGC to advise the Court if those requested documents are still available so the Court may then consider the alternative relief sought for ensuring the necessary evidence will be before the panel.

18. Unfortunately, the AGC remained mum despite the four sets of documents being very specific and easily identifiable (three are uncontested). Rather, the AGC misdirects the Court to decide the motion while withholding the material fact of whether TC could still produce the documents. It is open for the Court to direct the AGC to promptly clarify this simple yet material fact that is within TC's exclusive knowledge.

D. AGC Ignored this Court's Guidance on Cooperation and Proportionality

19. The AGC unreasonably objects to this Court directing the parties to confer and cooperate about the adequacy of the evidentiary record for the determination of the Application's merits.[29] A panel of this Honourable Court recently confirmed that the summary nature of a proceeding imposes upon the parties a duty to cooperate and to *jointly* ensure that a complete evidentiary record will be placed before the Court.[30]

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[26] AGC's Written Representations (Mar. 9, 2023) at paras. 2, 8, 10, 14, and 31.
[27] Federal Courts Rules, Rule 41(5) [Tab 2, p. 11].
[28] AGC's Written Representations (Mar. 9, 2023) at para. 6.
[29] AGC's Written Representations (Mar. 9, 2023) at paras. 22-24.
[30] *Canada v. Preventous Collaborative Health*, 2022 FCA 153 at para. 19 [Tab 3, p. 16].

20. When a party is remiss of its duty to cooperate, as the AGC has been since May 2022 for documents likely held by TC,[31] this Court may invoke its plenary jurisdiction to control its process, and give directions it considers just, as articulated in Rule 53(1).

> **53 (1)** In making an order under these Rules, the Court may impose such conditions and give such directions as it considers just.[32]

E. Examining Witnesses on Document Content, Not Data Retention Policies

21. The AGC seeks to circumvent this motion by proposing an alternative position to present an affidavit explaining the unavailability of the requested documents instead of presenting witnesses with knowledge on the **contents** of the requested documents.[33]

22. The aim of this motion is to ensure that the panel hearing the Application has a complete evidentiary record to ascertain the nature and extent of third-party influences on the inception of the Statement on Vouchers. A "document unavailability affidavit" about TC's data retention policies would not assist the panel on this key merits issue.

23. Furthermore, if the requested documents are in fact unavailable, then the AGC should have advised the Court in its response so that the Court can craft an appropriate relief to ensure that the complete evidentiary record, whether documents or out-of-court testimony, will be available to the panel. The AGC, as the defender of the rule of law, has a duty to ensure that the Court can properly discharge its judicial review function.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 14, 2023

"Simon Lin"

SIMON LIN
Counsel for the Applicant,
Air Passenger Rights

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[31] Lukács Affidavit (Feb. 27, 2023), Exhibits "AE" & "AF" [MR, Tabs 2AE & 2AF, pp. 139 & 141].
[32] *Federal Courts Rules*, Rule 53(1) [Tab 2, p. 12].
[33] AGC's Written Representations (Mar. 9, 2023) at para. 31.

LIST OF AUTHORITIES

Statutes and Regulations

Federal Courts Rules, S.O.R./98-106,
Rules 41(5) and 53

Case Law

Canada (Health) v. Preventous Collaborative Health, 2022 FCA 153

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Rules

Règles des Cours fédérales

SOR/98-106

DORS/98-106

Current to February 8, 2023

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render a judgment that has been reserved, the Chief Justice of the court in question may order that the proceeding be reheard or retried, on any terms that the Chief Justice considers just.

SOR/2004-283, s. 8.

audience ou instruction, selon les modalités qu'il estime équitables.

DORS/2004-283, art. 8.

Rota of Judges for Vancouver

40 (1) On or before July 1 in each year, the Chief Justice of the Federal Court shall, in consultation with the other judges of that court, establish a rota of judges for Vancouver for the twelve months commencing on September 1 of that year, excluding the seasonal recess.

Liste de roulement de Vancouver

40 (1) Au plus tard le 1er juillet de chaque année, le juge en chef de la Cour fédérale, après consultation des autres juges de cette cour, dresse la liste de roulement des juges à Vancouver pour la période de douze mois commençant le 1er septembre de l'année, en excluant les vacances judiciaires saisonnières.

Powers of Chief Justice of the Federal Court

(2) The Chief Justice of the Federal Court may make changes to the Vancouver rota, including the substitution of one judge for another during all or part of the judge's period of assignment.

Pouvoirs du juge en chef adjoint

(2) Le juge en chef de la Cour fédérale peut modifier la liste de roulement, notamment remplacer un juge par un autre pour tout ou partie de sa période d'affectation.

Responsibilities of judges

(3) A judge assigned to Vancouver shall reside in Vancouver for the period of the assignment and hold sittings and otherwise transact the judicial business of the Federal Court in Vancouver and in such other places as may be required.

Responsabilités des juges

(3) Le juge affecté à Vancouver y réside durant sa période d'affectation; il tient des audiences et voit aux travaux de la Cour fédérale à Vancouver et à tout autre endroit requis.

Assignment period

(4) Except with a judge's consent, the Chief Justice of the Federal Court shall not

(a) assign the judge to Vancouver for a period exceeding two months; or

(b) reassign the judge to Vancouver for a second assignment within two months after the end of the first.

SOR/2004-283, ss. 9, 33, 34; SOR/2021-244, s. 7.

Consentement du juge affecté

(4) Le juge en chef de la Cour fédérale ne peut, à moins d'obtenir le consentement du juge en cause :

a) l'affecter à Vancouver pour plus de deux mois;

b) le réaffecter à Vancouver avant l'expiration des deux mois suivant la fin de la dernière période d'affectation à Vancouver.

DORS/2004-283, art. 9, 33 et 34; DORS/2021-244, art. 7.

Summoning of Witnesses or Other Persons

Assignation de témoins et d'autres personnes

Subpoena for witness

41 (1) Subject to subsection (4), on receipt of a written request, the Administrator shall issue, in Form 41, a *subpoena* for the attendance of a witness or the production of a document or other material in a proceeding.

Subpœna

41 (1) Sous réserve du paragraphe (4), sur réception d'une demande écrite, l'administrateur délivre un *subpœna*, selon la formule 41, pour contraindre un témoin à comparaître ou à produire un document ou des éléments matériels dans une instance.

Issuance in blank

(2) A *subpoena* may be issued in blank and completed by a solicitor or party.

Subpœna en blanc

(2) Le *subpœna* peut être délivré en blanc et rempli par l'avocat ou la partie.

Multiple names

(3) Any number of names may be included in one *subpoena*.

Where leave required

(4) No *subpoena* shall be issued without leave of the Court

(a) for the production of an original record or of an original document, if the record or document may be proven by a copy in accordance with an Act of Parliament or of the legislature of a province;

(b) to compel the appearance of a witness who resides more than 800 km from the place where the witness will be required to attend under the *subpoena*; or

(c) to compel the attendance of a witness at a hearing other than a trial or a reference under rule 153.

Ex parte motion

(5) Leave may be granted under subsection (4) on an *ex parte* motion.

Personal service of *subpoena*

42 No witness is required to attend under a *subpoena* unless the *subpoena* has been personally served on the witness in accordance with paragraph 128(1)(a) and witness fees and travel expenses have been paid or tendered to the witness in the amount set out in Tariff A.

SOR/2002-417, s. 6.

Witness fees

43 Where a witness is required under these Rules to attend a proceeding other than pursuant to a *subpoena*, the witness is entitled to witness fees and travel expenses in the amount set out in Tariff A.

44 [Repealed, SOR/2002-417, s. 7]

Compelling attendance of detainee

45 On motion, the Court may make an order in Form 45 requiring that any person who is in the custody of a prison or penitentiary be brought before the Court.

Failure to obey

46 Where a witness who is required to attend at a hearing fails to do so, on motion, the Court may, by a warrant in Form 46, order that the witness be apprehended anywhere in Canada, brought before the Court and

Nombre de noms

(3) Le nombre de noms pouvant être inscrits sur le même *subpœna* n'est pas limité.

Autorisation de la Cour

(4) Un *subpœna* ne peut être délivré sans l'autorisation de la Cour dans les cas suivants :

a) pour la production de l'original d'un dossier ou d'un document qui peut être prouvé par une copie en vertu d'une loi fédérale ou provinciale;

b) pour la comparution d'un témoin qui réside à plus de 800 km du lieu de comparution requis;

c) pour la comparution d'un témoin à une audience, sauf lors d'une instruction ou lors d'un renvoi ordonné en vertu de la règle 153.

Requête *ex parte*

(5) L'autorisation visée au paragraphe (4) peut être accordée sur requête *ex parte*.

Signification à personne

42 Un témoin ne peut être contraint à comparaître aux termes d'un *subpœna* que si celui-ci lui a été signifié à personne conformément à l'alinéa 128(1)a) et qu'une somme égale à l'indemnité de témoin et aux frais de déplacement prévus au tarif A lui a été payée ou offerte.

DORS/2002-417, art. 6.

Indemnité de témoin

43 Lorsqu'une disposition des présentes règles oblige un témoin à comparaître dans une instance autrement qu'aux termes d'un *subpœna*, celui-ci a droit à une indemnité de témoin et aux frais de déplacement selon le montant prévu au tarif A.

44 [Abrogé, DORS/2002-417, art. 7]

Comparution d'un détenu

45 La Cour peut, sur requête, rendre une ordonnance, selon la formule 45, exigeant qu'une personne détenue dans une prison ou un pénitencier soit amenée devant elle.

Défaut de comparution

46 Lorsqu'un témoin assigné à comparaître à une audience ne se présente pas, la Cour peut, sur requête, ordonner, au moyen d'un mandat établi selon la formule 46, d'appréhender le témoin en tout lieu du Canada, de l'amener devant elle et :

Presence of judge or prothonotary

(3) The Court may order that an expert conference take place in the presence of a judge or prothonotary.

Joint statement

(4) A joint statement prepared by the expert witnesses following an expert conference is admissible at the hearing of the proceeding . Discussions in an expert conference and documents prepared for the purposes of a conference are confidential and shall not be disclosed to the judge or prothonotary presiding at the hearing of the proceeding unless the parties consent.

SOR/2010-176, s. 2.

Orders and Directions

Orders on terms

53 (1) In making an order under these Rules, the Court may impose such conditions and give such directions as it considers just.

Other orders

(2) Where these Rules provide that the Court may make an order of a specified nature, the Court may make any other order that it considers just.

Motion for directions

54 A person may at any time bring a motion for directions concerning the procedure to be followed under these Rules.

Varying Rules and Dispensing with Compliance

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.

SOR/2004-283, s. 11.

Failure to Comply with Rules

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.

Wrong originating document

57 An originating document shall not be set aside only on the ground that a different originating document should have been used.

Présence d'un protonotaire ou d'un juge

(3) La Cour peut ordonner la tenue de la conférence en présence d'un juge ou d'un protonotaire.

Déclaration conjointe

(4) La déclaration conjointe préparée par les témoins experts à la suite de la conférence est admissible en preuve à l'instance. Les discussions survenues au cours de la conférence et les documents préparés pour les besoins de celle-ci sont confidentiels et ne doivent pas être communiqués au juge ou au protonotaire qui préside le procès sauf si les parties y consentent.

DORS/2010-176, art. 2.

Ordonnances et directives

Conditions des ordonnances

53 (1) La Cour peut assortir toute ordonnance qu'elle rend en vertu des présentes règles des conditions et des directives qu'elle juge équitables.

Ordonnances équitables

(2) La Cour peut, dans les cas où les présentes règles lui permettent de rendre une ordonnance particulière, rendre toute autre ordonnance qu'elle juge équitable.

Requête pour obtenir des directives

54 Une personne peut présenter une requête à tout moment en vue d'obtenir des directives sur la procédure à suivre dans le cadre des présentes règles.

Modification de règles et exemption d'application

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.

DORS/2004-283, art. 11.

Inobservation des règles

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.

Non-annulation de l'acte introductif d'instance

57 La Cour n'annule pas un acte introductif d'instance au seul motif que l'instance aurait dû être introduite par un autre acte introductif d'instance.

2022 FCA 153
Federal Court of Appeal

Canada (Health) v. Preventous Collaborative Health

2022 CarswellNat 6051, 2022 FCA 153, 2022 A.C.W.S. 3860

CANADA (MINISTER OF HEALTH) (Appellant) and PREVENTOUS COLLABORATIVE HEALTH, PROVITAL HEALTH and COPEMAN HEALTHCARE CENTRE (Respondents)

Gauthier, David Stratas, Laskin JJ.A.

Heard: September 6, 2022
Judgment: September 6, 2022
Docket: A-98-21

Proceedings: reversing *Preventous Collaborative Health v. Canada (Health)* (2021), 2021 CF 253, 2021 FC 253, 2021 CarswellNat 2457, 2021 CarswellNat 2456, B. Richard Bell J. (F.C.)

Counsel: Andrew Cosgrave, Kerry Boyd, for Appellant
Gerald Chipeur, Q.C., for Respondents

***David Stratas J.A.*:**

1 A requester under the Access to Information Act, R.S.C. 1985, c. A-1 requested certain documents. Some of the documents concern certain third parties, Preventous Collaborative Health, Provital Health and Copeman Healthcare Centre. The documents are in the possession of the appellant Minister. The Minister was minded to release them pursuant to the request.

2 In response, the third parties brought an application to the Federal Court under section 44 of the Act to prevent disclosure. Section 44 of the Act permits third parties potentially affected by a disclosure to "apply for a review of the matter".

3 Somewhat later, the third parties filed a request for disclosure from the Minister under Rule 317 of the Federal Courts Rules, S.O.R./98-106. The third parties' request is best described as an attempt to discover the records gathered by the Minister in response to the request and other documents including documents evidencing the Minister's consultations with others.

4 The Minister objected to disclosure under Rule 317 on the ground that the proceeding in the Federal Court was not a judicial review of the Minister, Rule 317 was being improperly used

as a discovery tool, and the Rule 317 request was overbroad and untimely. In response, the third parties moved in the Federal Court for an order enforcing their Rule 317 request.

5 A Prothonotary of the Federal Court (*per* Ring P.) dismissed the third parties' motion, finding that Rule 317 of the *Federal Courts Rules* did not apply to applications under section 44 of the Act.

6 On appeal under Rule 51, the Federal Court (*per* Bell J.) reversed the Prothonotary's decision, finding that Rule 317 did apply to applications under section 44 of the Act: 2021 FC 253. The Minister now appeals.

7 For the reasons that follow, the appeal should be allowed.

8 Rule 317 provides that "[a] party may request material relevant to an application that is in the possession of a tribunal whose order is the subject matter of the application". Rule 317 is a means by which applicants for judicial review of a tribunal's decision can request production of the tribunal's record so they can place it before the reviewing court.

9 As the Prothonotary held, Rule 317 does not apply in this case. In the words of Rule 317, in this case there is no "order [that] is the subject matter of the application". Further, the application the third parties have brought is an application under section 44 of the Act, not an application for judicial review and, as will be explained later in these reasons, a section 44 application is different from a judicial review. Thus, in a section 44 application, there is no record on judicial review that is liable to be produced under Rule 317.

10 In oral argument, the third parties submitted that the "interests of justice" allow Rule 317 to be used to discover material in the hands of the Minister. A number of cases confirm that this is not so and Rule 317 is just a limited purpose tool to obtain an administrator's record on a judicial review: 1185740 Ont. Ltd. v. M.N.R.(1999), 247 N.R. 287 (Fed. C.A.); Access Information Agency Inc. v. Canada (Attorney General), 2007 FCA 224, 66 Admin. L.R. (4th) 83 at para. 17; Atlantic Prudence Fund Corp. v. Canada (Minister of Citizenship and Immigration), 2000 CanLII 15917 (F.C.) at para. 11; Tsleil-Waututh Nation v. Canada (Attorney General), 2017 FCA 128 at para. 115.

11 When third parties wish to prevent the disclosure of their information under the Act by a government institution and the government institution has notified the third parties that it is minded to disclose the information, an application under section 44 of the Act is the proper recourse. In this case, the third parties have brought an application under section 44. That was indeed open to them.

12 But to reiterate, the application under section 44 is not a judicial review of an administrative decision but rather, in the words of section 44, a fresh "review of the matter". The "matter" is whether the information requested should be disclosed. In many cases, a significant issue in deciding that matter will be whether the exemptions under the Act apply: Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3, [2012] 1 S.C.R. 23 at paras. 53 and 250.

13 Section 44.1 of the Act, a recent amendment to the Act, supports this interpretation. Section 44.1 provides that the application made to the Federal Court is "to be heard and determined as a new proceeding". The proceeding does not concern what the holder of the information requested, here the Minister, did or did not do, or should do or should have done. That is the normal subject-matter of an application for judicial review, not a section 44 application. Rather, under section 44 the issue is whether the information requested should be disclosed to the requester. See *Merck Frosst*, above.

14 Section 44.1 requires the Federal Court to receive evidence in a "new proceeding"; in other words, the evidentiary record must be built afresh. It is not limited to what was before the Minister or the Information Commissioner. As well, the parties in the Federal Court are not limited to submissions based on what was before the Minister or the Information Commissioner, as they would be in a judicial review. Rather, they are free to make submissions on whether disclosure must be made under the Act. After receiving submissions, the Federal Court is to make its own findings of fact on the basis of the fresh evidentiary record filed before it, apply the provisions of the Act and the existing jurisprudence to that evidentiary record, and ultimately decide whether the information should be disclosed. In short, as many cases suggest, in this way the Federal Court is acting *de novo*: see, *e.g.*, *Merck Frosst* at paras. 53 and 250-251 and cases cited therein.

15 This interpretation of section 44.1 is supported not only by the plain text of the Act and Merck Frosst, but also by the express statement of purpose in the Act that "the disclosure of government information should be reviewed independently of government": para. 2(2)(*a*). Vesting the independent and impartial Federal Court with the power to review, *de novo*, the disclosure of government information furthers that statutory purpose.

16 Some guidance on how the evidentiary record is to be developed will assist these parties and those in future section 44 applications.

17 Part 5 of the Rules sets out the procedure for applications: see Rule 300(b) ("proceedings required or permitted by or under an Act of Parliament to be brought by application..."). Under Part 5, the parties are entitled to serve affidavits under Rules 306-307, conduct cross-examinations under Rule 308, and file records under Rules 309-310.

18 As well, the Federal Court, on motion brought on notice to all affected parties, may order the production of evidence necessary to allow the application to be meaningfully heard and determined: see generally *Tsleil-Waututh Nation* , above. The application under section 44 cannot be meaningfully heard and determined unless the Court has this power: by analogy, see Chrysler Canada Ltd. v. Canada (Competition Tribunal), [1992] 2 S.C.R. 394, 92 D.L.R. (4th) 609. Alternatively, the authority for such an order may found in the Federal Court's powers under Rule 313, its general supervisory power in administrative matters (Canada (Human Rights Commission) v. Canadian Liberty Net, [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385), its plenary jurisdiction

to make orders necessary for the conduct of proceedings (see, *e.g.*, Dugré v. Canada (Attorney General), 2021 FCA 8 and cases cited therein), and its powers to compel evidence under other provisions of the *Federal Courts Rules* or by analogy to them under Rule 4. In oral argument, the parties seemed to agree that many tools exist by which evidence can be obtained in a section 44 application.

19 The backdrop against all of this is that applications under section 44 of the Act must proceed in a "summary" way: section 45. To fulfil this, the parties must work quickly, diligently and cooperatively, communicating with each other to determine how they can jointly best ensure that a complete evidentiary record is placed before the Court.

20 Now to the disposition of this appeal. We are to review the Federal Court's decision using the appellate standard of review in Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235: Canada (Health) v. Elanco Canada Limited, 2021 FCA 191 at paras. 22-24. This makes sense, as the Federal Court under section 44 is a first-instance decision-maker on the facts and the law.

21 As is evident from the foregoing, the Federal Court erred in law in reversing the Prothonotary and relying upon Rule 317 to order disclosure from the Minister. Rule 317 is not available.

22 Disclosure may potentially be available following the various means set out above. But since the third parties have not pursued these means, we decline to rule on whether the material they seek is relevant to the section 44 application in this case and whether the third parties have been timely. That will be for the Prothonotary at first instance to decide on a fresh motion, if brought.

23 Therefore, I would allow the appeal, quash the order of the Federal Court, restore the order of the Prothonotary, and grant the appellant costs here and below.

Appeal allowed.