VIA EMAIL: FCARegistry-CAFGreffe@cas-satj.gc.ca

May 27, 2022

The Judicial Administrator
Federal Court of Appeal
90 Sparks Street, Main Floor
Ottawa, Ontario
K1A 0H9

Dear Sir/Madam:

Re: *Air Passenger Rights v Attorney General of Canada*
Court File No.: A-102-20

This is the Canadian Transportation Agency's ("Agency") reply in respect of its motion for relief from production under Rule 94 of the *Federal Courts Rules.*[1]

The issue before the Court is whether the Agency's affiant should be required to produce the 25 categories of documents listed in the Applicant's Direction to Attend a cross-examination.[2] The Agency submits that these documents are irrelevant within the meaning of Rule 94(2).

The Applicant claims that the August 25, 2021 Federal Court order in *GCT v. Vancouver Fraser Port Authority* ("*GCT*") is a complete answer to the Agency's objection on relevance.[3] However, *GCT* concerned whether questions could be asked on cross-examination, not broad and additional document production. In the present case, in addition to determining what documents must be produced, the Court ordered the Agency to file an affidavit with a prescribed purpose and specific contents. It is not the affidavit that the Applicant sought from the Court or the same type of affidavit ordered in *GCT*. In the reply to its bifurcated motion on additional document production dated February 6, 2022, the Applicant asked this Court to order a new document search under the supervision of an independent counsel, and an affidavit covering 11 topics.[4]

The Court did not order the Agency to conduct a new document search. Further, while the Court ordered an affidavit, it did not order that this affidavit cover all of the topics proposed by the Applicant. Notably, the Court did not require the Agency to address its record-keeping policies

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[1] SOR/98-106.
[2] Direction to Attend a cross-examination on behalf of the Applicant to Barbara Cuber on May 3, 2022 (*Direction to Attend*), Affidavit of Meredith Desnoyers, affirmed the 12th day of May, 2022, Exhibit "G" (or *Desnoyers Affidavit*, Exhibit "G"), in the Motion Record of the Intervener, Canadian Transportation Agency, Motion for Relief from Production, dated May 12, 2022.
[3] See paragraph 52 and following of Air Passenger Rights' Written Representations, Motion Record of the Responding Party, dated May 20, 2022.
[4] Reply of the Applicant, Air Passenger Rights, Bifurcated Show Cause Motion for Contempt of Court, dated February 6, 2022, Document number 113 in the Recorded Entry Summary Information for Federal Court of Appeal File No. A-102-20 at pages 9-11, para. 39-44.

and practices, whether these were followed and if not why; the Agency's pdf conversion process; and the number of documents searched and reviewed in the new search.[5]

Instead, the Court made a more limited order.[6] It follows that cross-examination and document production must respect these limitations. The Agency submits that the documents listed in the Applicant's Direction to Attend do not respect these limits, but rather attempt to go beyond the scope of the Order concerning the affidavit and attempt to obtain further production not covered by the existing document production orders[7].

In fact, it is submitted that the Direction to Attend represents an attempt to obtain direct or indirect access to information about all the Agency's search results, including information about documents that the Court has excluded from production, namely internal documents and documents outside the temporal scope of the existing orders. The Applicant should not be permitted to re-litigate the Court's production orders, nor should it be permitted to revisit the Court's refusal to appoint an external search supervisor by appointing itself into that role.

It is open to the Applicant to ask questions during cross-examination about the Agency's search efforts and to test the affiant's credibility. However, the documents the Agency was required to produce in this proceeding have already been identified by the Court in two orders and were produced by the Agency. Despite this, in its Direction to Attend, the Applicant is insisting on the production of the following additional and wholly irrelevant information, much of which does not exist or is privileged, and which was not ordered to be produced under the existing Court orders:

- Information technology policies (item 5, 20, 23)
- Outlook system logs (item 12)
- Outlook calendar printouts for Agency personnel (item 14)
- Lists of backup tapes (item 22)
- Documents obtained in the context of searches (item 7)
- All telephone conferences using a specific dial-in code between March 9 and 25, 2020 (item 15)
- Print outs of all meetings recorded between March 9 and 25, 2020 (item 16)
- Documents showing search results (items 17 and 18)
- Documents proving document preservation and search efforts, as well documents showing search terms used (items 1, 2, 3, 4, 6, 8, 9, 10, 11, 13, 21)
- Any index, table of contents, summary or listing of search results (items 24 and 25)

The Agency submits that the purpose of the cross-examination is not to revisit the question of what documents should be produced. This question has already been determined. Documents not

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[5] Ibid. at para. 43, items (g), (j) and (k).

[6] *Air Passenger Rights v Attorney General of Canada*, 2022 FCA 64 (or *Additional Production Order*), para. 47, Book of Authorities of the Moving Party (Intervener) Canadian Transportation Agency (Motion for Relief from Production), volume 2, Tab B2, para. 47.

[7] See the *Additional Production Order* and *Air Passenger Rights v Canada (Attorney General),* 2021 FCA 201, Book of Authorities of the Moving Party (Intervener) Canadian Transportation Agency (Motion for Relief from Production), volume 2, Tab B3 at paras. 27 and 29.

already ordered to be produced and that are not relevant to the application should not be produced under cross-examination.

The Applicant claims the Agency is making bald assertions about the non-existence of documents and the applicability of solicitor-client privilege to documents sought. The Agency denies this; its motion under Rule 94(2) concerns the relevance of documents. The Agency is not seeking a ruling on non-existence or privilege from the Court at this time. Instead, the Agency's motion has informed the parties of its intent to object to document production on these grounds at the cross-examination.

In regards to the Applicant's request for a direction that the Agency provide the cross-examination materials two days in advance, Rules 91 and 94 contain a complete code for the provision of documents for inspection, and as such, "the Court has no jurisdiction to order early production."[8]

The Agency asks the Court to grant its motion, and reiterates its agreement with the Respondent Attorney General of Canada that special case management is appropriate in this case.

Yours truly,

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[8] *Sierra Club of Canada v. Canada (Minister of Finance),* 1999 CanLII 7756 (FC) at para. 16.

Sierra Club of Canada v. Canada (Minister of Finance), 1999 CanLII 7756 (FC)

Date:	1999-03-04
File number:	T-85-97
Other citations:	[1999] FCJ No 306 (QL) — 163 FTR 109
Citation:	Sierra Club of Canada v. Canada (Minister of Finance), 1999 CanLII 7756 (FC), <https://canlii.ca/t/4822>, retrieved on 2022-05-27

Date: 19990304

Docket: T-85-97

BETWEEN:

SIERRA CLUB OF CANADA, a national organization concerned

with environmental protection and restoration and a non-profit

corporation duly constituted on April 27, 1992 by Letters Patent

under the Canadian Corporation Act, having its head office at

1 Nicholas Street, Suite 412, Ottawa, Ontario, K1N 7B7,

Applicant,

- and -

THE MINISTER OF FINANCE OF CANADA,

having his principal office at the House of Commons,

Room 515-S, Centre Block, Ottawa, Ontario, K1A 0A6,

- and -

THE MINISTER OF FOREIGN AFFAIRS OF CANADA,

having his principal office at the House of Commons,

Room 418-N, Centre Block, Ottawa, Ontario, K1A 0A6,

- and -

THE MINISTER OF INTERNATIONAL TRADE OF CANADA,

having his principal office at the House of Commons,

Room 365, West Block, Ottawa, Ontario, K1A 0A6,

- and -

THE ATTORNEY GENERAL OF CANADA,

having his principal office at 239 Wellington Street,

Ottawa, Ontario, K1A 0H8 and his Montréal office at

Guy Favreau Complex, 200 Rene-Levesque Blvd. West,

East Tower, 9th Floor, Montréal, Quebec, H2Z 1X4,

Respondents,

- and -

ATOMIC ENERGY OF CANADA LIMITED,

Intervenor.

REASONS FOR ORDER

JOHN A. HARGRAVE,

PROTHONOTARY

[1] These reasons arise out of two interlocking motions. The Applicant's motion is for production of documents, referred to in, but not exhibited to, two affidavits filed by the Intervenor, Atomic Energy of Canada Limited ("AECL"), at a reasonable time before the deponents are to be produced for cross-examination. AECL's motion, among other things, seeks an Order that it not be required to produce any documents in the possession, power or control of the affiants before their respective cross-examinations. Using a motion in response to a motion is, in most instances, not appropriate.

[2] Mr. Justice Hugessen recently commented, in *The Greens at Tam O'Shanter Inc. v. The Queen*, unreported reasons of 24 February 1999, in Action T-2946-92, on the inappropriateness of a motion in answer to a motion:

> [8] In the second place, and in the same interests of a sensible modern procedure, I think parties should be discouraged from bringing motions with respect to other motions. Motions should be opposed on their merits and should not be made the subject matter of further procedural motions. We risk building endless pyramids of motion materials if we do not enforce such a rule.
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> (page 3)

In the present instance there has already been substantial delay. Nothing would be served by refusing to hear the AECL motion in opposition. However, I might have awarded costs to AECL, for it succeeded in its opposition to the motion for early inspection of documents, had AECL not made this procedural lapse.

BACKGROUND

[3] By way of background, this judicial review involves the absence of an environmental review, under the *Canadian Environmental Assessment Act*, before federal government financing of CANDU reactors for Qinshan, China. AECL, who have been allowed to intervene with all the rights of a party, filed among their affidavits those of Mr. Lin Feng and Mr. Simon Pang.

[4] Messrs. Feng and Pang, while exhibiting some material to their affidavits, refer to, comment upon and summarize the effect of a very substantial number of technical and legal documents, including environmental impact reports, feasibility studies and both specified and unspecified Chinese legislation and regulation concerning a wide variety of environmental and civil issues. AECL says the material to which its witnesses refer (some of which it believes need not be produced - but that is an issue for another day) is very extensive, consisting of over a thousand documents by AECL's estimate.

[5] The Applicant is concerned that it will be faced with an overwhelming mass of unfamiliar material, some of it in Chinese, at the last minute before the cross-examination and thus be unable either to properly assimilate or

effectively cross-examine on the material. Thus, the request and now a motion for production of documents a reasonable time in advance of the scheduled cross-examinations.

[6] AECL says the Rules do no require production of documents before the time of the cross-examination and thus, taking the issue at its most basic level, an Order such as requested by the Applicant is beyond the Court's jurisdiction. Instead, AECL submits, the Applicant should get on with cross-examination and then, if necessary, apply to the Court should it not be satisfied with the result.

CONSIDERATION

[7] AECL's approach, that of incorporating by reference but not exhibiting obscure material, which may be, for practical purposes, not available in the West, is not one that ought to be encouraged. In an instance such as this, it might, at least in the first instance, shield a deponent from any effective cross-examination. The Applicant's request, to avoid an ambush, is not unreasonable. Indeed, to borrow a phrase from Mr. Justice Hugessen, from *Tam O'Shanter* (*supra*), "Trial by ambush is not part of a sensible modern procedure.". Thus, while given the present state of the law and of the Rules I have concluded that AECL succeeds on its lack of jurisdiction point, it may well be that the Applicant will, at the end of the day, have some other effective remedy. I will now consider this in more detail.

[8] The key to determining this motion is the jurisdiction of the Court to grant the Applicant an early inspection of documents, an inspection before cross-examination is to take place. Counsel were not able to refer me to any case law dealing with production of documents on an application, pursuant to a direction to attend or otherwise, before cross-examination on an affidavit. Counsel for the Applicant suggests, in written argument, that I should analyze the issue in the context of preventing the Applicant being surprised by the production of a thousand documents and by a variation of the best evidence rule, the concept as phrased by counsel, being that "...where a party seeks to rely on the contents of a document to support its case, that party must produce the document itself.".

Best Evidence Rule

[9] This view of the best evidence rule is an inclusionary view, certainly a view stressed in the early cases, beginning in *Ford v. Hopkins,* [1700] 1 Salk 283, 91 E.R. 250, by Chief Justice Holt who said that "the best proof that the nature of the thing will afford is only required: ...". This concept was picked up in *Robinson Brothers (Brewers) Ltd. v. Houton and Chester-Lee-Street Assessment Committee*, [1937] 2 K.B. 445 at 469, there Lord Justice Scott, giving one of the three sets of reasons for the Court of Appeal, referred to the best evidence alone being admissible and that indirect evidence being excluded because it is not the best evidence. However, this was put into perspective by Lord Denning, M.R., in *Garton v. Hunter*, [1969] 2 Q.B. 37 at 44:

> It is plain that Scott L.J. had in mind the old rule that a party must produce the best evidence that the nature of the case will allow, and that any less good evidence is to be excluded. That old rule has gone by the board long ago. The only remaining instance of it that I know is that if an original document is available in your hands, you must produce it. You cannot give secondary evidence by producing a copy. Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility. So I fear that Scott L.J. was in error.

Today, the best evidence rule deals primarily with the weight to be given to evidence, not with exclusion, or with production of a document at any particular time. Indeed, in summing up the present status of the best evidence rule Sopenka and Lederman, on The Law of Evidence in Canada, 1992 Edition, remark, at page 940:

> The modern law, statutory provisions, rules of practice and modern technology, have rendered the Rule obsolete in most case and the question is one of weight and not admissibility.

I do not think the best evidence rule is of any immediate assistance to the Applicant.

[10] It may well be that AECL will run into difficulty if it does ambush counsel for the Applicant with a massive shovelling in of documents at the last minute before cross-examination, or, if the documents are not produced at all and there was a suggestion of this when this motion was argued, AECL may have difficulty getting the judge hearing the matter to give any weight to bare assertions in affidavits not supported by documents and not adequately tested by cross examination. However, that is not the issue here, rather it is the time of production of documents and this is dealt with, quite clearly, by the *Federal Court Rules*.

Production of Documents on Cross-Examination

[11] In the present instance, the Applicant wishes production of documents, statutes and regulations which are rather cryptically referred to and commented upon in the two affidavits. Quite properly the Applicant has followed Rule 91(2)(c), adding to the direction to attend for cross-examination a requirement to produce documents at the examination. Rule 91 reads, in part:

> 91. (1) **Direction to attend -** A party who intends to conduct an oral examination shall serve a direction to attend, in Form 91, on the person to be examined and a copy thereof on every other party.
>
> (2) **Production for inspection at examination -** A direction to attend may direct the person to be examined to produce for inspection at the examination
>
> ....
>
> (c) in respect of a cross-examination on an affidavit, all documents and other material in that person's possession, power or control that are relevant to the application or motion;
>
> [emphasis added]

Further, Rule 94(1) is also relevant:

> 94.(1) **Production of documents on examination -** Subject to subsection (2), a person who is to be examined on an oral examination or the party on whose behalf that person is being examined shall produce for inspection at the examination all documents and other material requested in the direction to attend that are within that person's or party's possession and control, other than any documents for which privilege has been claimed or for which relief from production has been granted under rule 230.
>
> [emphasis added]

These Rules provide that, upon request, a person being cross-examined on an affidavit must produce relevant material in his or her possession, power or control, at that examination. Rule 94(2) goes on to provide for a relief from production on various grounds, however, that is not presently at issue.

Use of the Gap Rule

[12] The Applicant submitted that I ought to interpret the Rules to secure a just and expeditious outcome, as required by Rule 3 and then to apply Rule 4, the gap rule, which allows the Court to fill gaps, of a procedural nature, existing in the Rules. If this were possible one might import the Rules for discovery of documents in an action and thus allow an early inspection. Yet in order for Rule 4, the gap rule, to apply, there must in fact be a gap in the Rules:

> For Rule 5 [now Rule 4] to apply there must be a "gap" in the *Federal Court Rules*. Simply because those Rules do not contain every provision found in provincial court rules does not necessarily mean that there is a gap. If the absence of such a provision can be readily explained by the general scheme of the *Federal Court Rules* then that absence must be considered intentional and any application by analogy of provincial court rules or other provisions of the *Federal Court Rules* which are on their face inapplicable would amount to an amendment of the *Federal Court Rules*.
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> (*David Bull Laboratories v. Pharmacia Inc.*, 1994 CanLII 3529 (FCA), [1995] 1 F.C. 588 at 595 (F.C.A.))

In applying this concept, I should first look to see whether the absence of early production of documents relevant to cross-examination on an affidavit can be explained by the general scheme of the *Federal Court Rules* and if so, I should avoid setting out a procedure which in fact would amount to an amendment of the Rules.

[13] I must also keep in mind that the principle set out in Rule 3, that these Rules are to be interpreted and applied to facilitate rather than to delay, does not confer jurisdiction in a substantive way, but rather is to assist with interpretation: see *Brandlake Products Limited v. Adidas (Canada) Limited*, [1983] 1 F.C. 197 at 199 - 200 (F.C.A.).

Analysis of Jurisdiction

[14] To begin this analysis, and this is perhaps trite, a proceeding by way of an application, such as the present, is very different from a proceeding by way of an action. The former is to be "...without delay and in a summary manner" (section 18.4(2) of the *Federal Court Act*) with the proceeding to be moved along to a conclusion as quickly as possible, without pleadings and with a minimum of distraction including without unnecessary procedural delays. The latter, in contrast, involves an exchange of pleadings, discovery of documents and examinations for

discovery, which are usually much more protracted than mere cross-examination on an affidavit in support of a judicial review application.

[15] The absence, in an application, of a full documentary discovery procedure is readily understandable when one reflects on the summary nature of an application. With this in mind I do not believe there is a gap in the *Federal Court Rules* relating to inspection of documents required for cross-examination in a notice to a deponent of an affidavit to produce certain material. Rule 91(2) allows the cross-examining party, in a permissive sense, to add to a direction that a witness attend a request to produce certain documents "for inspection at the examination": these last words are emphasized in Rule 94(1) requiring the witness "to produce for inspection at the examination" the requested documents. The permissive nature of Rule 91(2) does not automatically mean the party requesting documents has other remedies.

[16] Rules 91 and 94 contain a complete code, without gaps, for the provision of documents for inspection on cross-examination. To add a requirement that production be at a reasonable common sense time, before the examination would, unfortunately, be contrary to the clear wording as to the time of production at the examination, set out in Rules 91(2)(c) and 94(1). The gap rule, Rule 4, is ineffective as there is no gap. On this analysis the Court has no jurisdiction to order early production.

[17] I cannot either make over the Rules or make an order, contrary to a clear Rule, utilizing Rule 3, for that Rule as pointed out in *Brandlake Products* (*supra*), only allows me to interpret a Rule to accomplish an expeditious and inexpensive result.

[18] I may not impose a requirement of early inspection, under Rule 53(1), for that Rule clearly allows me only to attach conditions: Rule 53(1) does not grant jurisdiction to make an Order contrary to a given Rule or Rules. Nor may I utilize Rule 55 to ignore or disregard Rules 91(2)(c) and 94(1) and then couple that with a new and different *adhoc* rule.

[19] I also considered the inherent jurisdiction of the Court to makes its procedure work. That is merely an implied procedural jurisdiction, not a substantive jurisdiction: see for example *Margem Chartering Co. v. The "Bocsa"*, 1997 CanLII 5351 (FC), [1997] 2 F.C. 1001 at 1014 and 1015. As a procedural jurisdiction it does not permit an amendment to the Rules, but merely a means of making the Rules work in the way they ought. It may be that those drafting the new provisions in the Rules for inspection of documents on cross-examination, an area left open under the former rules, felt that parties would act reasonably and eschew the practise of sand-bagging one another by producing masses of documents, perhaps 1000 documents in this instance, without any preview, at a cross-examination. But, here, AECL acts within the clear wording of the Rules by not providing documents until the time of the cross-examination.

CONCLUSION

[20] The Applicant is, in the immediate instance, not entitled to have documents to consider before the cross-examination. This may well result in further delay and further motions by reason of adjournment of cross-examination and for further cross-examination when counsel for the Applicant is able to properly prepare. This delay and perhaps the monetary cost of it to AECL, is something that AECL will have to keep in mind in taking its present course of action, for an intervenor, even one with the full rights of a party, is not allowed to highjack a proceeding, here by first putting Chinese environmental procedure, legislation and regulation at issue and then not only by not exhibiting the material to its affidavits, but also by refusing to produce it at a sensible time.

[21] The Applicant's motion is dismissed. The superfluous portions of AECL's motion are just that. The parties have sensibly opted for case management and have agreed on schedule for cross-examinations, which schedule is now embedded in an order.

[22] Leaving aside the procedure and positions taken, the material filed and the counsel work on this motion were thorough and good.

[23] Costs shall be in the cause.

(Sgd.) "John A. Hargrave"

Prothonotary

Vancouver, British Columbia

March 4, 1999

FEDERAL COURT TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DATED: March 2, 1999

COURT NO.: T-85-97

STYLE OF CAUSE: Sierra Club of Canada

v.

The Minister of Finance of Canada et al.

PLACE OF HEARING: Vancouver, BC

REASONS FOR ORDER OF MR. JOHN A. HARGRAVE, PROTHONOTARY

dated March 4, 1999

APPEARANCES:

Mr. Timothy Howard for Applicant

Mr. Brian Saunders for Respondents

Mr. Ahab Abdel-Azziz for Intervenor

SOLICITORS OF RECORD:

Timothy Howard

Sierra Legal Defence Fund

Vancouver, BC for Applicant

Morris Rosenberg for Respondent

Deputy Attorney General

of Canada

Ahab Abdel-Azziz for Intervenor

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