Court File No. A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Appellant

-and-

ATTORNEY GENERAL OF CANADA

Respondent

-and-

CANADIAN TRANSPORTATION AGENCY

Intervener

MOTION RECORD OF THE ATTORNEY GENERAL OF CANADA

Applicant's Feb 27 2023 Motion for Leave to Issue Subpoena
(pursuant to Rules 41 and 369.2 of the *Federal Court Rules)*

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WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL OF CANADA

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(pursuant to Rules 41 and 369.2 of the *Federal Court Rules)*

Overview

1. The Applicant's Motion seeks four things from this Court of Appeal:

    a. A subpoena requiring the Respondent to produce four documents or sets of documents, "in their original native formats, including any attachments, without redactions";[1]
    b. An unnecessary and unavailable Direction requiring the parties to "confer";[2]

[1] Applicant's Motion Record, Notice of Motion, pages 1-2, para 1
[2] Applicant's Motion Record, Notice of Motion, page 3, para 2(i)

c. An unnecessary Direction for submissions for further subpoenas;[3]
d. Additional subpoenas of Transport Canada employees.[4]

2. The Respondent concedes to the location and production, if available, of some of the documents set out in 'a.', in an appropriate format and with attachments where relevant, and not already in the Applicant's possession. The Respondent reserves the right to protect information where appropriate due to privilege or any other ground.

3. The additional Directions and 'alternative subpoenas' demanded by the Applicant are unnecessary in light of the *Federal Court Rules*; outside of the scope of the underlying application; and/or an unnecessary expenditure of time and resources contrary to the summary nature of a judicial review proceeding.

[3] Applicant's Motion Record, Notice of Motion, page 3, para 2(ii)

[4] Applicant's Motion Record, Notice of Motion, page 3, paras 3-4

Background

4. The background for the underlying application is set out in detail in the various Orders attached to the Applicant's Motion Record and again in the Applicant's written submissions.

Exceptional Nature Of A Subpoena In A Judicial Review Proceeding

5. As evidenced by the extensive procedural history set out in the Applicant's motion record, the Applicant has engaged in a prolonged and repetitious demand for documents from the Intervener Canadian Transport Agency (CTA), the actual decision maker in the underlying application (to the extent that any decision is actually raised therein, a point which remains to be argued and is not conceded by anything in these submissions).

6. The Applicant now seeks to supplement the document set received from the CTA, and, not satisfied with the extensive disclosure already obtained and wholly in disregard for the summary nature of a judicial review proceeding, to procure further documents from a third party, TC, as represented by the Respondent.

7. It is important to note that a subpoena in a judicial review application is an exceptional remedy to be granted in "rare cases".[5]

8. Nonetheless, given the pronouncements of this Honourable Court of Appeal to date the Respondent concedes that the documents set out in subparagraphs 1(a), 1(b), and 1(c) of

[5] *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 (CanLII) at para. 103, cited in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 104 at para 22, Applicant's Record, page 506

the Notice of Motion meet the relevant test for the grant of a subpoena, and should be produced if available.

9. However, the Applicant seeks to expand the scope of production, and the Respondent opposes this as an unnecessary and unsupported fishing expedition seeking documents beyond any reasonable scope of production from third parties on judicial review.

The Applicant's Demands Regarding Document Format Are Unjustified

10. This Court of Appeal's decisions to date have not referenced, nor required, production of 'forwards and responses' as sought by the Applicant by way of their current demand for documents in 'native format'. The Applicant seeks specific documents and to the extent that those specific documents have been found by this Court of Appeal to be relevant, the Respondent is prepared to produce those documents if available.

11. The Respondent should not, however, be required to support, engage in, or facilitate a prolonged, needlessly expanded search for 'forwards and responses' to such documents. This motion commenced with a request for a CTR under the *Federal Court Rules* Rule 317, and such an expanded search is well outside the scope of the Rule. A Rule 317 request is made to obtain the documents that were before a decision maker, and not documents exchanged by other individuals or third parties. 'Forwards and responses' are a step beyond and a format demand to facilitate their production is unnecessary.

12. Further, where documents are encrypted, they must be decrypted for disclosure or else the recipient may not view them. The process of decryption – while it does not alter the text contents of a document - by necessity removes the document from 'native format'.

13. The appropriate test for leave to issue a subpoena, as referenced above, was set down the this Honourable Court of Appeal as:

> [103] In some cases, witnesses may be less than forthcoming. In rare cases, witnesses may be subpoenaed to produce a document or other material on an application for judicial review: Rule 41(1) and Rule 41(4)(c). The subpoena power in Rule 41 applies to "proceedings" and Rule 300 shows that applications are "proceedings." This is allowed with leave of the Court where:
>
> - the evidence is necessary;
> - there is no other way of obtaining the evidence;
> - it is clear that an applicant is not engaged in a fishing expedition but, instead, has raised a credible ground for review beyond the applicant's say-so; and
> - a witness is likely to have relevant evidence on the matter.[6]

14. While the Respondent is prepared to concede that the actual documents demanded at para 1(a)-(c) of the Applicant's Notice of Motion, if available, may be 'necessary' as contemplated by the test, the additional information the Applicant seeks to elicit by way of a format demand is not necessary. They do not require, are not entitled, and should not be permitted, access to further documents, and other parties' documents, which were not before the decision maker. That is the only possible outcome of their format demand.

15. Still further, the Applicant's 'say-so' is the sum total of evidence they have raised in support of this demand. They insist, by way of their submissions and subjective evidence, that 'forwards and responses' documents exist, and that mere existence meets this branch of the test. It does not. The existence of a single document does not open a floodgate to

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[6] *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 (CanLII) at para. 103, cited in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 104 at para 22, Applicant's Record, page 506

every instance of communication or observation of that document – that is the realm of discoveries, not Rule 317 and not a judicial review. A judicial review applicant may seek information that was before a decision-maker, not information before other individuals engaged in other business.

16. The Applicant alleges that they 'need to know' what may have taken place in the halls of TC or elsewhere in respect of the purported decision. Their insistence is insufficient basis for this demand. They have raised no evidence that the purported decision was made by any party other than the Intervener CTA, and to the extent that the business of government engaged other parties, those parties did not make the purported decision in issue.

17. Further, the Applicant's own evidence indicates they have already requested the document sets identified at paras 1(a), 1(b), and 1(d) b way of the *Access to Information Act*.[7] That they were unsatisfied with the outcome of those requests is in no way evidence that the TC production was incomplete, and in any event, were that the Applicant's concern, the ATIA provides a means for pursuing such. That the Court of Appeal is now a forum for yet another set of near identical demands is further evidence that this motion has become a fishing expedition, and that the 'native format' aspect is unnecessary.

18. Accordingly, the Respondent submits that the documents may be produced in .pdf format, with attachments where such exist.

19. Further, the Applicant seeks these documents 'without redaction'. It is wholly inappropriate for the Applicant to seek to circumvent the Respondent's right to claim privilege or otherwise withhold from disclosure information where it may rightly be subject

[7] Applicant's Motion Record, Written Representations, page 298, para 44

to privilege or other recognized ground for non-disclosure. This Court of Appeal is the arbitrator of privilege claims, and not the Applicant.

20. Accordingly, it the Respondent's respectful submission that the Court of Appeal's Order limit any subpoena to production of the 1(a), (b) and (c) documents in a .pdf format as would ordinarily be produced for the purposes of a Certified Tribunal Record, without the specificity of format and additional requirements demanded by the Applicant.

Set 1(d)

21. The Applicant seeks documents exchanged between TC and the Department of Finance. Neither TC nor Finance are a party to these proceedings and there is no allegation nor evidence to support any suggestion that Finance ever communicated with the CTA regarding the purported decision that is the subject of the underlying application. It is wholly inappropriate, bordering on abuse of process, that the Applicant now demands documents from parties even further removed from the purported decision maker. This aspect of the request for a subpoena should be wholly denied.

Direction to "Confer"

22. Notwithstanding that this motion purports to be brought under Rule 41, the Applicant also seeks an Order that the parties be directed to confer regarding the adequacy of the documents disclosed in the proceeding.

23. This request is beyond the scope of Rule 41, which in no way contemplates such an Order, nor does any other rule or legislation. Further, it is always open to parties in a proceeding to speak via their counsel, and no order is required to facilitate such communications. There is simply no basis in law for an applicant to seek an order to compel a respondent to have

a specific discussion as to the adequacy of the evidence for their own application. The sufficiency of the evidence before this Court of Appeal is for the parties to argue and the Court of Appeal to decide. An applicant does not have any right to seek to compel a respondent to chat about it. In any event case management is also always an option for parties to request.

Direction Regarding Submissions For Further Subpoenas

24. Similarly, if the Applicant feels they are entitled to further disclosure by subpoena, they have recourse to Rule 41. There is no basis to 'reserve the right' without the necessary motion for leave as required by the Rule. The Applicant's attempt to circumvent that requirement is yet another abuse of process and should be denied.

Direction Regarding Subpoenas of Transport Canada Employees

25. The purported decision at issue in this matter was made by the CTA, not TC. To the extent that TC employees had any communication with the CTA that is relevant to the application, it is incumbent on the Applicant to seek that evidence from the CTA, which they have done at length.

26. This Court of Appeal has made conclusions regarding the relevance of specific documents which the CTA has not been able to produce. To the extent that the Applicant was entitled to pursue such documents, they have had an opportunity to examine CTA representatives. That they now seek to examine representatives of a third party is a step too far and encroaches into the territory of discoveries. It is well beyond the summary nature of a judicial review proceeding and should not be permitted.

27. The *Tabingo* case relied upon by the Applicant[8] merely acknowledges the existence of Rule 41. It makes no finding in respect of its appropriate scope, nor supports any suggestion that third parties should be subject to subpoenas in judicial review applications.

28. Similarly, the *Conille* decision[9] relates to contempt of court in response to a mandamus Order in an immigration matter, and is no useful precedent here.

29. Other jurisprudence raised by the Applicant discusses this Court of Appeal's general jurisdiction, and situations wholly distinct from the present matter, and do not provide any basis to support the extension of the judicial review application of a purported decision by an independent agency into a wide ranging inquiry against various government departments and entities.

30. The Applicant argues that the possibility of "third party influence" justifies these additional subpoenas and examination of TC witnesses. They are incorrect. A judicial review application proceeds on the record before the decision maker, and the decision is subject to scrutiny by the reviewing Court with due consideration for the standard of review. It is for the applicant to demonstrate, based on the decision and the Certified Tribunal Record of documents which were before the decision maker, that the decision does not withstand scrutiny. To cast a wider net to scrutinize the actions of third parties, and call those parties to explain such actions, is contrary to the summary nature of a judicial review application.

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[8] *Tabingo v. Canada (CI)*, 2014 FCA 191 at para. 85, Applicant's Motion Record, Tab 22, page 462, raised on page 311 para 77

[9] *Conille v. Canada (CI)*, 2001 FCT 932 at paras. 4 and 29-31, Applicant's Motion Record Tab 18, pages 399 and 406, raised on page 311 at para 77

31. In the alternative, should this Court of Appeal conclude that subpoenas of TC employees are appropriate, in order to speak to the unavailability of specific documents, the Respondent submits that such subpoenas should be limited to written affidavits addressing the unavailability, without recourse to examination by the Applicant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 9th DAY OF March 2023

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LIST OF AUTHORITIES

1. *Conille v. Canada (CI)*, 2001 FCT 932
2. *Tabingo v. Canada (CI)*, 2014 FCA 191
3. *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 (CanLII)