Federal Court of Appeal  Cour d'appel fédérale

Date: 20160405

Docket: A-39-16

Citation: 2016 FCA 103

Present: **STRATAS J.A.**

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on April 5, 2016.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] The parties are working to perfect this application for judicial review. The applicant has requested under Rule 317 that the respondent Agency transmit the record it relied upon when making its decisions that are the subject of the application. In response, the Agency has objected under Rule 318(2) to disclosure of some of the record and has informed the applicant and the Court of the reasons for the objection.

[2] Under Rule 318(3), the applicant now requests directions as to the procedure for making submissions on the objection.

[3] The Court has read the Agency's reasons for objection. Although unnecessary under Rule 318, the applicant has supplied his responses to the Agency's reasons.

[4] A reading of the parties' reasons and responses shows that they may not have a clear idea of the relationship between Rules 317 and 318 and the Court's remedial flexibility in this area. This affects the submissions on the objection that this Court will need. Before giving directions concerning the steps the parties need to take concerning the objection, it is necessary to clarify matters.

A. Rules 317-318 and the Court's remedial flexibility

[5] Rules 317-318 do not sit in isolation. Behind them is a common law backdrop and other Rules that describe how the record of the administrative decision-maker can be placed before a reviewing court. This was all explained in *Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2015 FCA 268 at paras. 7-18 and will not be repeated here. On admissibility of evidence before the reviewing court on judicial review, see, most recently, *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263.

[6] Under Rule 317, a party can request from the administrative decision-maker material relevant to the application for judicial review. Under Rule 318, the requesting party is entitled to be

sent everything that it does not have in its possession and that was before the decision-maker at the time it made the decision under review, unless the decision-maker objects under Rule 318(2): *Access Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224, 66 Admin. L.R. (4th) 83 at para. 7; *1185740 Ontario Ltd. v. Canada (Minister of National Revenue* (1999), 247 N.R. 287 (F C.A.). The Saskatchewan Court of Appeal set out the guiding principle on this entitlement rather well:

> In order to effectively pursue their rights to challenge administrative decisions from a reasonableness perspective, the applicants in judicial review proceedings must be entitled to have the reviewing court consider the evidence presented to the tribunal in question [absent well-founded objection by the tribunal].

(*Hartwig v. Commission of Inquiry into matters relating to the death of Neil Stonechild*, 2007 SKCA 74, 284 D.L.R. (4th) 268 at para. 24.)

[7] This passage recognizes the relationship between the record before the reviewing court and the reviewing court's ability to review what the administrative decision-maker has done. If the reviewing court does not have evidence of what the tribunal has done or relied upon, the reviewing court may not be able to detect reversible error on the part of the administrative decision-maker. In other words, an inadequate evidentiary record before the reviewing court can immunize the administrative decision-maker from review on certain grounds. Our judge-made law in the area of administrative law develops in a way that furthers the accountability of public decision-makers in their decision-making and avoids immunization, absent the most compelling reasons: *Slansky v. Canada (Attorney General)*, 2013 FCA 199, 364 D.L.R. (4th) 112 at paras. 314-15 (dissenting reasons, but not opposed on this point).

[8] Now to objections under Rule 318(2). Where the relevant administrative decision-maker, here the Agency, objects under Rule 318(2) to disclosing some or all of the material requested under Rule 317 and the applicant does not dispute the objection, then the material is not transmitted. However, if, as here, the applicant disputes the objection, either the applicant or the administrative decision-maker may ask the Court for directions as to how the objection should be litigated: see Rule 318(3).

[9] In response to a request for directions, the Court may determine that the objection cannot succeed solely on the basis of the reasons given by the administrative decision-maker under Rule 318(2). In that case, it may summarily dismiss the objection and require the administrative decision-maker to transmit the material under Rule 318(1) within a particular period of time.

[10] In cases where the Rule 318(2) objection might have some merit, the Court can ask for submissions from the parties on a set schedule. But sometimes the Court will need more than submissions: in some cases, there will be real doubt and complexity and sometimes evidence will have to be filed by the parties to support or contest the objection. In cases like these, the Court may require the administrative decision-maker to proceed by way of a written motion under Rule 369. That Rule provides for motion records, responding motion records and replies, and also the deadlines for filing those documents. The motion records require supporting affidavits and written representations.

[11] Regardless of the manner in which the Court proceeds, when determining the validity of an objection under Rule 318(2) what standpoint should it adopt? Is the Court reviewing the administrative decision-maker's decision to object?

[12] No. When determining the validity of an objection, the Court is tasked with deciding the content of the evidentiary record in the proceeding—the application for judicial review—before it. Like all proceedings before the Court, it must consider what evidence is admissible before it. The Court, regulating its own proceedings, must apply its own standards and not defer to the administrative decision-maker's view. See *Slansky*, above at para. 274. (Much of the discussion that follows is based on *Slansky*.)

[13] What can the Court do when determining the validity of an objection? Quite a bit. There is much remedial flexibility. The Court can do more than just accept or reject the administrative decision-maker's objection to disclosure of material. It is not an all-or-nothing proposition.

[14] In this regard, Rule 318 should not been seen in isolation. Other rules and powers inform and assist the Court in determining an objection. For example:

- Rules 151 and 152 allow for material before the reviewing court to be sealed where confidentiality interests established on the evidence outweigh the substantial public interest in openness: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522.

- Rule 53 allows terms to be attached to any order and Rule 55 allows the Court to vary a rule or dispense with compliance with a Rule. The exercise of these discretionary powers is informed by the objective in Rule 3 (recently given further impetus by the Supreme Court's decision in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87): to "secure the just, most expeditious and least expensive determination of every proceedings on its merits." It is also informed by s. 18.4 of the *Federal Courts Act*, R.S.C. 1985, c. F-7: "an application shall be heard and determined without delay and in a summary way."

- The Court can draw upon its plenary powers in the area of supervision of tribunals to craft procedures to achieve certain legitimate objectives in specific cases: *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385 at paras. 35-38; *M.N.R. v. Derakhshani*, 2009 FCA 190, 400 N.R. 311 at paras. 10-11; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50, 443 N.R. 378 at paras. 35-36.

[15] These Rules and powers allow the Court determining a Rule 318 objection to do more than just uphold or reject the administrative decision-maker's objection to disclosure of material. The Court may craft a remedy that furthers and reconciles, as much as possible, three objectives: (1) meaningful review of administrative decisions in accordance with Rule 3 and s. 18.4 of the *Federal Courts Act* and the principles discussed at paras. 6-7 above; (2) procedural fairness; and (3) the protection of any legitimate confidentiality interests while permitting as much openness as possible in accordance with the Supreme Court's principles in *Sierra Club*.

[16] Where there is a valid confidentiality interest that could sustain an objection against inclusion of a document into the record, the Court must ask itself, "Confidential from whom?" Perhaps the general public cannot access the confidential material, but the applicant and the Court can, perhaps with conditions attached. Perhaps the only party that can access the confidential material is the Court, but a benign summary of the material might have to be prepared and filed to further meaningful review, as much procedural fairness as possible, and openness. In other cases, the objection may be such that confidentiality must be upheld absolutely against all, including the Court. Legal professional privilege is an example of this.

[17] And the fact that part of a document may be confidential does not necessarily mean that the whole document must be excluded from the record. The Court must consider whether deleting or obscuring the confidential parts of a document is enough or whether the entire document should be excluded from the record.

[18] In short, the Court's determination of the Rule 318(2) objection—a determination aimed at furthering and reconciling, as much as possible, the three objectives set out in para. 15, above—can result in an order of any shape and size, limited only by the creativity and imagination of counsel and courts: see, for example, the creative and detailed sealing order made in *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, 2002 BCSC 1509, 8 B.C.L.R. (4th) 281.

B. The directions to be given in this case

[19] In some cases, the Court might be able to determine an administrative decision-maker's Rule 318(2) objection solely on the basis of the reasons the decision-maker has provided under Rule 318(2). This case—a complex one requiring evidence to establish the objection—is not one of those cases. Thus, in the circumstances of this case, the Agency should file a motion record under Rule 369 seeking an order vindicating its objection.

[20] Without limiting whatever other relief the Agency might wish to seek, the Agency must address, both in its evidence and in written representations, the requirements for confidentiality and the test set out in *Sierra Club*.

[21] The Agency should be specific in its motion record concerning the type of order it wants. In doing so, it should have regard to the above discussion—in particular, the remedial flexibility the Court possesses and the Court's desire to craft a remedy that furthers and reconciles, as much as possible, the three objectives set out in para. 15, above.

[22] The Agency shall file its motion under Rule 369 within ten days of today's date and then the times set out under Rule 369 shall follow for the respondent's responding record and the reply. The Registry shall forward the motion to me for determination immediately after the reply has been filed or the time for reply has expired, whichever is first. An order shall go to this effect.

[23] To the extent the Agency wishes part of its motion record to be sealed under Rules 151-152, the Agency should request that in its notice of motion and support its request with evidence. Any confidential material may then be included in a confidential volume within a sealed envelope, filed only with the Court. At the time of determining the motion, the Court will review the material and assess whether further submissions on this point are needed from the applicant or whether the claim of confidentiality is made out.

[24] The parties have agreed to expedite this matter. The Court agrees that expedition is warranted and, following the motion, will schedule the remaining steps in this application. The parties should immediately discuss an expedited schedule on the footing that the motion will be determined by the end of April at the latest. The parties should also consider whether the application should be heard as soon as possible by videoconference rather than waiting for the Court's next sittings in Halifax after April. The parties shall make their submissions on these matters in their written representations in their motion records.

[25] The parties are also encouraged to engage in discussions to try to settle the record that should be placed before this Court in this application. Through their agreement to expedite this matter, the parties now recognize that there is a public interest in expedition. Quick agreement on this issue will speed this matter considerably. One possibility is to agree that the matter proceed with a public record and a sealed disputed record and the admissibility of the disputed record can be argued before the Court hearing the application, if necessary with affidavits filed in the parties'

respective records for the purpose of resolving the dispute. If the parties truly recognize there is a public interest in expedition, then this is probably the best way to proceed.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-39-16
STYLE OF CAUSE:	DR. GÁBOR LUKÁCS v. CANADIAN TRANSPORTATION AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	APRIL 5, 2016

WRITTEN REPRESENTATIONS BY:

Dr. Gábor Lukács	ON HIS OWN BEHALF
John Dodsworth	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Canadian Transportation Agency Gatineau, Quebec	FOR THE RESPONDENT