

Federal Court



Cour fédérale

Date: 20220311

Docket: T-577-20

Citation: 2022 FC 332

Ottawa, Ontario, March 11, 2022

PRESENT: The Associate Chief Justice Gagné

BETWEEN:

**CANADIAN COALITION FOR FIREARM
RIGHTS, RODNEY GILTACA,
RYAN STEACY, MACCABEE DEFENSE
INC. and WOLVERINE SUPPLIES LTD.**

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicants claim that two expert witnesses for the Respondent, experts Murray Smith and Ralph Blake Brown, failed to produce, upon request, certain documents relevant to this application for judicial review. The Applicants are therefore filing a motion to

compel (an 1800-page motion record) the production of these documents under Rule 91(2)(c) and 94(1) of the *Federal Courts Rules* (SOR/98-106) [Rules].

[2] Both parties failed to comply with the rules in this request. The Applicants' directions to attend were served on Mr. Smith and Dr. Brown less than 10 days before the scheduled cross-examination and they did not ask for an extension of time on motion. In addition to arguing that the Applicants' request is invalid, the Respondent argues that the documents are not "relevant" or in the "possession, power or control" of Mr. Smith and Dr. Brown. However, the Respondent did not apply for relief from production.

[3] The Applicants also seek an order under Rules 52.2, 91, and 94 of the Rules for the production of the remaining letters of instruction given to three of the Respondent's six expert witnesses.

[4] The Applicants do not seek to strike any evidence, but may ask for further questioning or the right to make succinct supplemental written submissions, should they be successful with their motion.

II. Background

[5] Mr. Smith's and Dr. Brown's affidavits were served and filed on December 10, 2021, per the Court's directed timetable for procedural steps. The parties scheduled the cross-examination of Mr. Smith for January 19 and 21, 2022 and of Dr. Brown for January 25 and February 4, 2022.

[6] Mr. Smith's Affidavit at Exhibit C included a document called "Inspection Protocol: Business." This document referred to two underlying documents called the "SFSS [Specialized Firearms Support Services] Standard Operating Procedures" and the "FRT Standards and Editing Procedures" (the Applicants refer to these two documents collectively as the "SOPs"). Counsel for the Applicants requested the SOPs from the Respondent on January 4, 2022, and received them on January 11, 2022. On January 13, 2022, counsel for the Applicants noted that the SOPs state that for each inspected firearm, the associated file must contain the work notes, research, correspondence, and written notes (the "Underlying Records") that the SFSS employee created during inspection. The Applicants requested these documents, and the Respondent declined to provide them.

[7] On January 17, 2022, the Applicants served directions to attend for Mr. Smith and Dr. Brown. According to Rule 91(3)(b) of the Rules, a direction to attend must be served, "where the person to be examined is not a party to the proceeding, at least 10 days before the day of the proposed examination."

[8] The direction to attend asked Dr. Brown to produce any social media posts he had made or commented on that relate to firearm regulation, or lobbying efforts by gun control or firearm advocacy organizations; and any correspondence he had sent to any gun control or firearm advocacy organization (the Applicants refer to this as the "Lobby Correspondence"). Dr. Brown did not produce the Lobby Correspondence.

[9] Mr. Smith's direction to attend repeated the Applicants' request for the Underlying Records, which he did not produce.

[10] On the request of the Respondent, the Applicants provided an instruction letter for one of their own expert witnesses to the Respondent on December 30, 2021. The Applicants also requested records of instruction for each of the Respondent's expert witnesses. On January 14, 2022, the Respondent provided the Applicants with letters of instruction for its expert witnesses Drs. Simon Chapman and Louis Klarevas, but did not provide the letters of instruction for the remaining four expert witnesses, Dr. Ahmed, Dr. Brown, Mr. Smith and Mr. Baldwin. The Respondent later sent the Applicants its instruction email to Dr. Brown. The Respondents say that Dr. Ahmed, Mr. Smith, and Mr. Baldwin did not receive instructions.

III. Issues

[11] This motion raises the following issues:

- A. *Were the Applicants' requests for documents from Mr. Smith and Dr. Brown served respecting the relevant timelines, according to the Federal Courts Rules and/or the Protocol for Virtual Cross-Examinations of the present file?*
- B. *Are the "Underlying Records" and "Lobby Correspondence" relevant and accessible enough for the witnesses to be required to produce them per Rule 91(2)(c) of the Rules?*
- C. *Should the Respondent be required to produce the letters of instruction for Dr. Ahmed, Mr. Smith, and Mr. Baldwin?*

IV. Analysis

- A. *Were the Applicants' requests for documents from Mr. Smith and Dr. Brown served respecting the relevant timelines, according to the Federal Courts Rules and/or the Protocol for Virtual Cross-Examinations of the present file?*

[12] The Applicants argue that the first informal request for the Underlying Records was sufficiently timely, citing *Preventous Collaborative Health v Canada (Health)* [*Preventous*], an order from Prothonotary Ring in file T-189-19 (2020 CanLii 32965 (FC)) at para 20.

[13] With respect to the Lobby Correspondence, the Applicants argue that although the direction to attend was only served eight days prior to Dr. Brown's first cross-examination date, the timeline was reasonable given the tight deadlines in the Protocol. They note that the Respondent did not refuse service of the direction to attend.

[14] The Respondent, on the other hand, argues that it had no obligation to produce the Underlying Documents or the Lobby Correspondence because the directions to attend were filed late. The Respondent argues that, according to Rule 91(3)(b) of the Rules, it must be served at least 10 days before the day of the proposed examination. The Respondent submits that Mr. Smith's direction to attend was only filed two days before the scheduled cross-examination, and that even the first informal request for the Underlying Records was not sent within the 10-day notice period. With respect to Dr. Brown, the Respondent notes that the direction to attend was only filed eight days before the scheduled cross-examination.

[15] The Respondent argues that the Applicants are retroactively seeking an abridgement of time under Rule 8 of the Rules to serve the directions to attend to Mr. Smith and Dr. Brown. Citing *Alani v Canada (Prime Minister)*, 2015 FC 859 at para 15, the Respondent submits that the Applicants bear the burden of justifying the abridgment of time, which they have not met.

[16] While nothing that the *Preventous* order cited by the Applicants suggests an exception to the 10 day deadline to serve and file the direction to attend, it does recognize that “less formal communications between counsel in advance of the examination could have the same effect as a formal demand for production of documents through the direction to attend”. It is true that the informal request for the Underlying Documents was sent to Mr. Smith less than 10 days before the cross-examination, but it was triggered by the SOPs that were received by the Applicants on January 11, 2022, also less than 10 days before the first day of cross-examination on January 19, 2022. Under these circumstances, I am of the view that the Applicants must be relieved of their default to request for production of documents by Mr. Smith in accordance with the Rules.

[17] However, the same can not be said about the direction to attend that was sent to Dr. Brown. I will therefore only look at the relevance of the Underlying Records.

B. *Are the “Underlying Records” and “Lobby Correspondence” relevant and accessible enough for the witnesses to be required to produce them per Rule 91(2)(c) of the Rules?*

[18] Just as I am relieving the Applicants from their default to serve their request for production of documents in time, I am also relieving the Respondent from its default to file a motion for relief from production under *Rule 94(2)* of the Rules.

[19] I agree with the Applicants that the request for the Underlying Records was specific and limited, not unduly broad and that they are producible and relevant. While the Underlying Records were previously subject to a Rule 317 decision, that decision (*Parker v Canada (Attorney General)*, 2021 FC 496) did not consider or render a decision regarding the relevance of the Underlying Records to the proceedings at large and was limited to the application of Rule 317 of the Rules.

[20] I also agree with the Applicants that the Underlying Records are relevant to the issues of whether the words “variant” and “modified version” from the Regulations led the Governor in Council (GIC) to impermissibly sub-delegate its authority to the RCMP and are vague and contrary to s. 7 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11*. Collateral questions arising out of answers and documents exhibited to affidavits, or otherwise produced, do fall within the scope of cross-examination (*Royal Bank of Scotland plc v Golden Trinity (The)*, [2000] 4 FC 211 at paras 19-22).

[21] Finally, I believe Mr. Smith does have access to the Underlying Records, as a current employee of the RCMP and a previous manager of the Specialized Firearms Support Services of the RCMP; he likely had access to these records for the purpose of preparing his affidavit. Under Rule 91(2)(c) of the Rules, this Court has held that “the ‘possession, power or control requirement’ will be ‘quite’ broad in the case of ‘an affiant with a broad scope of authority within an organization’” (*Ottawa Athletic Club Inc v Athletic Club Group Inc*, 2014 FC 672 at para 138).

[22] I will therefore order the production of the Underlying Records.

C. *Should the Respondent be required to produce the letters of instruction for Dr. Ahmed, Mr. Smith, and Mr. Baldwin?*

[23] Section 3(d) of the *Code of Conduct for Expert Witnesses* (Schedule to Rule 52.2) of the Rules does not require that letters of instruction exist or be produced. It states that “An expert’s report submitted as an affidavit or statement referred to in Rule 52.2 of the *Federal Courts Rules* shall include [...] the facts and assumptions on which the opinions in the report are based; in that regard, a letter of instructions, if any, may be attached to the report as a schedule.” The Respondent states that instruction letters do not exist for Mr. Smith, Mr. Baldwin, and Dr. Ahmed. That, in and of itself, should put the Applicants request to rest. But in addition, I agree with the Respondent that even if they did, the Code of Conduct does not require that they be produced, especially considering the fact that they were not listed in the formal or informal directions to attend.

V. Conclusion

[24] For these reasons, I am partially granting the Applicants' motion to compel the production of documents and ordering the Respondent to file the Underlying Records before the end of business day on March 20, 2022. Considering the mitigated result, no costs will be granted.

ORDER in T-577-20

THIS COURT ORDERS that:

1. The Applicants Motion to compel the production of documents is granted in part;
2. The Respondent has until the end of business day on March 20, 2022, to serve on the Applicants and file the following documents:

The associated file containing the work notes, research, correspondence, and written notes created as per section 3 and Appendix 3-1-4 of the Specialized Firearms Support Services Standard Operating Procedures and the Firearm Reference Table Standards and Editing Procedures, while inspecting or re-inspecting the following firearms:

Maccabee Defence SLR-MULTI (FRN 181822);

Derya Arms Carina CR-100 (FRN 179522);

Derya Arms MKIO (FRN 141381);

Derya Arms MK12 (FRN 141379);

Derya VR90 (FRN 164268);

Mossberg 702 Plinkster (FRN 122010);

Mossberg 715T Tactical 22 (FRN 136698);

CZ 550 Safari Classic Magnum (FRN 123420);

Alphard Model 15SA (FRN 147046);

Alberta Tactical Rifle Modem Series (FRN 149826, 162446, 194622);

Adler B210 (FRN 166822);

Ranger XT3 (FRN 179122);

Ranger XT3 Tactical (FRN 179042); and

Typhoon Defence F12 Typhoon (FRN 176624).

3. No costs are granted.

“Jocelyne Gagné”
Associate Chief Justice

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-577-20

STYLE OF CAUSE: CANADIAN COALITION FOR FIREARM RIGHTS,
RODNEY GILTACA, RYAN STEACY, MACCABEE
DEFENSE INC. AND WOLVERINE SUPPLIES LTD. v
ATTORNEY GENERAL OF CANADA

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

ORDER AND REASONS: GAGNÉ A.C.J.

DATED: MARCH 11, 2022

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