

**Date: 20070608**

**Docket: A-184-07**

**Citation: 2007 FCA 224**

**Present: PELLETIER J.A.**

**BETWEEN:**

**THE ACCESS INFORMATION AGENCY INC.**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA  
(TRANSPORT CANADA)**

**Respondent**

**and**

**IRENA LANG CONSULTING**

**Respondent**

Motion in writing decided without appearance of the parties.

Order delivered at Ottawa, Ontario, on June 8, 2007.

**REASONS FOR ORDER:**

**PELLETIER J.A.**

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**REASONS FOR ORDER**

**PELLETIER J.A.**

[1] The applicant, the Access Information Agency Inc., filed an application for judicial review of a decision of the Canadian International Trade Tribunal (the Tribunal). In its application for judicial review, the applicant included a request for transmission of certain materials in the Tribunal's possession, a request that reads as follows:

[TRANSLATION]

By the service of this application for judicial review on the Canadian International Trade Tribunal, in accordance with section 317 of the *Federal Court Rules, 1998* [sic] the applicant **REQUIRES THAT**

the Canadian International Trade Tribunal sent it and transmit to the Registry of the Federal Court of Appeal, a complete and certified copy of all of the documents in the Tribunal's record bearing number PR-2006-031; including all written submissions and documents filed with the Tribunal in the context of its investigation procedure, whether these documents were entered into evidence or not, and all correspondence documents, in any format whatsoever, from all individuals who participated directly or indirectly in drafting the decision and orders made in the matter.

[2] The Tribunal objected to this request on the basis that it could contemplate communications protected by professional privilege and that it could also go so far as to include communications which, if filed, would compromise the Tribunal members' privileged deliberations. Further, the Tribunal objected to the request on the grounds that the relevance of the documents requested by the applicant had not been established. On the other hand, the Tribunal had provided the applicant with all but two of the exhibits filed for the purposes of the procedures leading to the decision under judicial review.

[3] The applicant disputes the Tribunal's refusal to disclose the documents other than the exhibits. It filed this motion in which it requests that the Court:

- Give the parties directions to file submissions regarding an objection to a request for material whose disclosure is challenged.
- After hearing the parties, make an order requiring the Tribunal to transmit a complete and certified copy of the documents described in its request to the Registry and to the applicant.
- Give it an additional 20 days to file and serve its affidavit and its documentary evidence.
- Give it additional time to file and serve the applicant's record.

[4] The Tribunal filed the affidavit of H el ene Nadeau, the Tribunal's secretary, in support of its objection. She acknowledged that two exhibits filed at the hearings had not been transmitted to the applicant. In the case of exhibit PR-2006-031-14, it was sent to the applicant's counsel as soon as

the Tribunal learned that it had not been included in the documents sent to the applicant. With regard to exhibit PR-2006-031-34A, Ms. Nadeau stated that this was a confidential exhibit [TRANSLATION] “containing scoring tables developed and used by the Department of Transport to evaluate bids received for procurement purposes, which is the subject of the applicant’s complaint.” Ms. Nadeau noted the fact that this document is protected [TRANSLATION] “by section 45 of the *Canadian International Trade Tribunal Act*, and given that the applicant’s counsel is also the applicant’s director”, he is not entitled to this document.

[5] Also according to the affidavit of Ms. Nadeau, the presiding member is assisted by the Tribunal’s personnel, [TRANSLATION] “usually counsel, a research officer and a research director”. They prepare various documents for the presiding members and may also assist them in drafting the reasons [TRANSLATION] “in accordance with the member’s directions and very specific instructions.” The documents prepared by these personnel are not filed into the official record. Tribunal panel members are also assisted by the Tribunal’s personnel in the form of briefing notes. Ms. Nadeau claims that the disclosure of the Tribunal’s internal documentation would compromise the confidentiality of communications between members of the Tribunal and their legal counsel, as well as the privilege extending to their deliberations. Further, the relevance of this documentation had not been established.

[6] In its reply record, the applicant says that it agreed to have exhibit PR-2006-031-34A transmitted to the Court under seal for the Court to decide whether it is privileged. It justifies its request for the other documents by relying on page iii of the Tribunal’s decision listing the names of the tribunal director, the senior investigator and legal counsel for the Tribunal. The applicant stated

that it has the right to ensure that there was no breach of procedural fairness, particularly the *audi alteram partem* rule. That said, the applicant has not put forward any circumstance suggesting that there was interference in this matter.

## **ANALYSIS**

[7] It has been consistently held in the case law that the requesting party is entitled to be sent everything that was before the decision-maker (and that the applicant does not have in its possession) at the time the decision at issue was made: *1185740 Ontario Ltd. v. Canada (Minister of National Revenue)*, [1999] F.C.J. No. 1432 (F.C.A.).

[8] The Court points out that the French version of section 317 of the Rules appears to lack an element which appears in the English version of the same section, specifically that the right to require communication of material is limited to material that is not in the possession of the party when the party's request is made. Given that the applicant participated fully in the Tribunal hearings, it would be surprising that it would not have any of the exhibits filed during the hearing of its complaint. The Tribunal does not therefore have to deliver to the applicant what it already has in its hands. That being said, the Court does not think that an order need be made on this point, given the Tribunal's willingness to give the applicant all but one of the exhibits.

[9] With regard to exhibit PR-2006-031-34A, the Tribunal submits that this document is confidential under section 45 of the Act. Subsection 45(1) of the Act reads as follows:

45. (1) Where a person designates information as confidential pursuant to paragraph 46(1)(a) and that designation is not withdrawn by that person, no member and no person employed in

45. (1) Les agents de l'administration publique fédérale et les membres qui ont en leur possession, au cours de leur emploi ou de leur mandat, selon le cas, des renseignements

the federal public administration who comes into possession of that information while holding that office or being so employed shall, either before or after ceasing to hold that office or being so employed, knowingly disclose that information, or knowingly allow it to be disclosed, to any other person in any manner that is calculated or likely to make it available for the use of any business competitor or rival of any person to whose business or affairs the information relates.

désignés comme confidentiels aux termes de l'alinéa 46(1)a) ne peuvent, si la personne qui les a désignés ou fournis n'a pas renoncé à leur caractère confidentiel, sciemment les communiquer ou laisser communiquer de manière à ce qu'ils puissent être vraisemblablement utilisés par un concurrent de la personne dont l'entreprise ou les activités sont concernées par les renseignements. Cette interdiction s'applique même après que l'agent ou le membre a cessé ses fonctions.

[10] Paragraph 46(1)(a), referred to in subsection 45(1), appears below:

46. (1) Where a person who provides information to the Tribunal for the purposes of proceedings before the Tribunal wishes some or all of the information to be kept confidential, the person shall submit to the Tribunal, at the time the information is provided,

46. (1) La personne qui fournit des renseignements au Tribunal dans le cadre d'une procédure prévue par la présente loi et qui désire qu'ils soient gardés confidentiels en tout ou en partie fournit en même temps que les renseignements :

(a) a statement designating as confidential the information that the person wishes to be kept confidential, together with an explanation as to why that information is designated as confidential; and

a) d'une part, une déclaration désignant comme tels les renseignements qu'elle veut garder confidentiels avec l'explication à l'appui;

(b) a non-confidential edited version or non-confidential summary of the information designated as confidential pursuant to paragraph (a) in sufficient detail to convey a reasonable understanding of the substance of the information or a statement

b) d'autre part, soit une version ne comportant pas les renseignements désignés comme confidentiels ou un résumé ne comportant pas de tels renseignements suffisamment précis pour permettre de les comprendre, soit une déclaration accompagnée d'une explication destinée à la justifier, énonçant, selon le cas:

(i) that such a non-confidential edited version or non-confidential summary cannot be made, or

(i) qu'il est impossible de faire la version ou le résumé en question,

(ii) that such a non-confidential edited version or non-confidential summary would disclose facts that the person has a proper reason for wishing to keep confidential, together with an explanation that justifies the making of the statement.

(ii) qu'une version ou un résumé communiquerait des faits qu'elle désire valablement garder confidentiels.

[11] According to these provisions, the person who provides information to the Tribunal can file a statement to the effect that the information is confidential.

[12] If the Tribunal does not take issue with this statement, the confidential information cannot be disclosed to a competitor of the person who provided it. However, this information can be disclosed to opposing counsel and to its expert under conditions stipulated by the Tribunal regarding confidentiality (subsection 45(3) of the Act). For the purposes of this provision “counsel” does not include a person who is a party’s director.

[13] If, after hearing the parties, the Tribunal does not agree that the information is confidential, it must proceed without taking into account this information, unless this information is available from another source (subsection 48(3) of the Act).

[14] The Tribunal alleges that the applicant’s counsel also holds a position as the applicant’s director, who is in fact a person to whom disclosure is forbidden. The applicant does not deny that its counsel is a director.

[15] The fact that counsel is a director is only relevant in the case where the information is contemplated by section 45 of the Act. The affidavit filed by Ms. Nadeau is silent regarding the process through which the Tribunal identified the information in exhibit PR-2006-031-34A as confidential. Did the Department of Transport file a statement as provided under section 46 of the Act? Did the Tribunal consider this statement? Do sections 45 and 46 apply to the Department of Transport? Neither the Tribunal nor the Attorney General of Canada addressed these issues in their memoranda. The Court is therefore not able to decide this issue on account of these deficiencies.

[16] The Attorney General has the obligation to justify the non-disclosure of exhibit PR-2006-031-34A since it is the Minister of Transport who filed this exhibit and the confidentiality statement. The Tribunal must disclose exhibit PR-2006-031-34A to the applicant and to any other party after 21 days have elapsed from the date of the order in the case at bar unless, within that 21-day period, the Attorney General serves and files a motion for an order prohibiting the disclosure of the exhibits except in accordance with the terms set out in section 45 of the Act.

[17] With regard to the request for disclosure of documents other than the exhibits, this betrays a misunderstanding of the purpose of section 317. As is so aptly stated by Mr. Justice Hugessen in *Atlantic Prudence Fund Corp. v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1156, section 317 does not serve the same purpose as documentary discovery in an action:

11 . . . Rule 317 does not have the same theoretical foundation, nor does it produce the same results as documentary discovery and does not require a tribunal (by contrast to a respondent in an action) to engage in an extended and exhaustive search for material whose relevance may at best be marginal and whose selection will necessarily involve an exercise of judgment.

[18] The applicant did not advance any fact which would lead to a finding of interference in this matter. The fact that the Tribunal is assisted in its endeavours by its personnel is entirely normal. As the Supreme Court states in *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canada Human Rights Commission)*, [1989] 2 S.C.R. 879, at page 898:

. . . This is merely an example of the principle that applies to administrative tribunals, that they do not have to do all the work themselves but may delegate some of it to others.

Therefore, the mere fact that the members of the Tribunal have access to legal counsel or to researchers is not a breach of procedural fairness. The applicant relies on this Court's decision in *Telus Communications Inc. v. Canada (Attorney General) (Telus)*, 2004 FCA 317, [2004]



F.C.J. No. 1587, to say that the working document of an administrative tribunal must be disclosed to the requesting party if the document could have influenced its decision. In *Telus*, there were reasons to believe that a government policy had been implemented before it had been made public. There was therefore a factual basis for the disclosure request. In this case, there is nothing of the sort. The applicant did not advance anything that would suggest that there was interference in the matter.

[19] Under the circumstances, the applicant's argument is limited to the statement that it wants to be satisfied that the case was decided by the individual who heard it (see, on this point, the affidavit of Lorraine Turcotte sworn April 23, 2007, at paragraph 8). In the absence of a factual basis justifying such a concern, the Court is not disposed to impose an obligation to disclose on the Tribunal which goes beyond what the parties filed into evidence or in written submissions.

[20] In closing, the Court would like to express its disapproval for document disclosure requests drafted in terms as vague as the one at issue. Judicial review does not proceed on the same basis as an action; it is a procedure that is meant to be summary. There is therefore a series of limits on the parties as a result of this distinction. Evidence is brought by affidavit and not by oral testimony. There is less leeway for preliminary procedures such as discovery of evidence in the hands of the parties and examination on discovery. If such proceedings do prove to be necessary, the Rules provide that a judicial review may be transformed into an action.

[21] It is in this context that we find section 317 of the Rules dealing with the request for disclosure of material. The purpose of the rule is to limit discovery to documents which were in the hands of the decision-maker when the decision was made and which were not in the possession of

the person making the request and to require that the requested documents be described in a precise manner. When dealing with a judicial review, it is not a matter of requesting the disclosure of any document which could be relevant in the hopes of later establishing relevance. Such a procedure is entirely inconsistent with the summary nature of judicial review. If the circumstances are such that it is necessary to broaden the scope of discovery, the party demanding more complete disclosure has the burden of advancing the evidence justifying the request. It is this final element that is completely lacking in this case.

[22] As for the applicant's request for an extension of time to file its affidavit and its memorandum, it can refile its request once the Minister of Transport has filed his motion, or once the 21 days he was given to do so have elapsed and no such motion has been filed.

[23] For these reasons, except in regard to exhibit PR-2006-031-34A, the motion is dismissed with costs.

“J.D. Denis Pelletier”

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J.A.

Certified true translation

Kelley A. Harvey, BCL, LLB

**FEDERAL COURT OF APPEAL**

**SOLICITORS OF RECORD**

**DOCKET:** A-184-07

**STYLE OF CAUSE:** *THE ACCESS INFORMATION AGENCY INC. and  
ATTORNEY GENERAL OF CANADA (TRANSPORT  
CANADA) and IRENA LANG CONSULTING*

**MOTION IN WRITING DECIDED WITHOUT APPEARANCE BY THE PARTIES**

**REASONS FOR ORDER:** PELLETIER J.A.

**DATE OF REASONS:** JUNE 6, 2007

**WRITTEN SUBMISSIONS:**

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