

**Date: 20090608**

**Docket: A-586-08**

**Citation: 2009 FCA 192**

**Present: LÉTOURNEAU J.A.**

**BETWEEN:**

**THE ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**VOLD, JONES AND VOLD AUCTION CO. LTD**

**Respondent**

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on June 8, 2009.

**REASONS FOR ORDER BY:**

**LÉTOURNEAU J.A.**

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**REASONS FOR ORDER**

**LÉTOURNEAU J.A.**

**Procedural History**

[1] Two motions for an extension of time have been filed respectively in Files A-575-08 and A-586-08, both involving applications for judicial review. The motions followed a Direction from a motions judge of this Court to file an affidavit in accordance with the ruling in *The Attorney General of Canada v. Lacey*, 2008 FCA 242.

[2] The facts giving rise to the motions are as follows. Applications for judicial review were made by the Attorney General of Canada to challenge two decisions of a Review Tribunal

(Tribunal) invested with the power to determine whether violations pursuant to section 176 of the *Health of Animal Regulations* have been committed.

[3] Pursuant to Rules 317 and 318 of the *Federal Courts Rules* (Rules), a request was made to the Tribunal to obtain copy of its records and a certified copy of the said records was transmitted to the Registry of this Court.

[4] The Attorney General of Canada filed a motion in each file to consolidate the two files. The motion was dismissed on April 29, 2009. On the same occasion, the motions judge issued the Direction previously mentioned which reads: “It is noted that the applicant has not yet filed an affidavit. The parties are referred to *Attorney General of Canada v. Lacey*, 2008 FCA 242.

### **The Lacey Direction**

[5] In the *Lacey* case, the motions judge ruled that there were no provisions in the Rules permitting the certified record of a Tribunal, as such, to be included in the applicant’s record or the respondent’s record. In order to do so, a party must file an affidavit providing the Court with sworn evidence authenticating the documents upon which the applicant’s argument depends.

[6] Paragraphs 5 to 7 of the Reasons for Order contain the essence of the decision. They read:

[5] In an application for judicial review, the function of the applicant's affidavit is to provide the Court with sworn evidence authenticating the documents upon which the applicant's argument depends. The applicant in this case apparently believes that this function will be served by the certified record transmitted to the Registry pursuant to Rule 318 of the *Federal Courts Rules*, SOR/98-106. However, that belief is not well founded.

[6] There is no provision of the *Federal Courts Rules* that permits the certified record, as such, to be included in the applicant's record or the respondent's record. Rather, Rule 309(2)(d) requires the applicant's record to include "each supporting affidavit and documentary exhibit", a reference to the supporting affidavits and documentary exhibits that the applicant is required by Rule 306 to file. (The corresponding provisions applicable to the respondent are Rules 310(2)(b) and Rule 307.)

[7] The correct way to include the certified record in the applicant's record is to append it as an exhibit to an affidavit filed under Rule 306. (Similarly, a respondent may include the certified record as an exhibit to an affidavit filed under Rule 307.) Of course, in many cases it will not be necessary to append the entire record, only the documents upon which the applicant or the respondent, as the case may be, intends to rely.

[7] Technically, it is true that the Rules, especially Rule 309, do not specifically mention the possibility of adding to the motion record excerpts from the Tribunal's record. However the Rules do not prohibit that. On the contrary.

[8] First, Rule 309(2) does not prohibit that possibility. The Rule is cast in mandatory terms. It reads:

Respondent's record

310.(1) A respondent to an application shall, within 20 days after service of the applicant's record,  
 (a) serve the respondent's record; and  
 (b) file  
 (i) where the application is brought in the Federal Court, three copies of the respondent's record, and  
 (ii) where the application is brought in the Federal Court of Appeal, five copies of the respondent's

Dossier du défendeur

310.(1) Dans les 20 jours après avoir reçu signification du dossier du demandeur, le défendeur :  
 a) signifie son dossier;  
 b) dépose :  
 (i) dans le cas d'une demande présentée à la Cour fédérale, trois copies de son dossier,  
 (ii) dans le cas d'une demande présentée à la Cour d'appel fédérale, cinq copies de son dossier.

record.

Contents of respondent's record

(2) The record of a respondent shall contain, on consecutively numbered pages and in the following order,

- (a) a table of contents giving the nature and date of each document in the record;
- (b) each supporting affidavit and documentary exhibit;
- (c) the transcript of any cross-examination on affidavits that the respondent has conducted;
- (d) the portions of any transcript of oral evidence before a tribunal that are to be used by the respondent at the hearing;
- (e) a description of any physical exhibits to be used by the respondent at the hearing; and
- (f) the respondent's memorandum of fact and law.

[my underlining]

Contenu du dossier du défendeur

(2) Le dossier du défendeur contient, sur des pages numérotées consécutivement, les documents suivants dans l'ordre indiqué ci-après :

- a) une table des matières indiquant la nature et la date de chaque document versé au dossier;
- b) les affidavits et les pièces documentaires à l'appui de sa position;
- c) les transcriptions des contre-interrogatoires qu'il a fait subir aux auteurs d'affidavit;
- d) les extraits de toute transcription des témoignages oraux recueillis par l'office fédéral qu'il entend utiliser à l'audition de la demande;
- e) une description des objets déposés comme pièces qu'il entend utiliser à l'audition;
- f) un mémoire des faits et du droit.

[9] The Rule describes the basic material that must be in the application's record. It does not exclude the addition of relevant material for the benefit and convenience of the Court and the parties. Indeed it is, for example, a common and much appreciated practice for the parties to file compendiums which contain various kinds of excerpts, including evidence or exhibits from a Tribunal's record. It contributes to expedite the hearing.

[10] It has certainly been the practice for the parties, as reflected in the authors' Notes under Rule 318, to include in their respective motion record the Tribunal's material upon which they intend to rely at the hearing: see Saunders et al. Federal Courts Practice, Thomson/Carswell, 2009, at page 722 where the practice is resumed as follows: "In order to rely on the material on the hearing of the application, the requesting party must include the material in its application record".

[11] From a practical standpoint, only one certified copy of a Tribunal's record is filed with the Registry. Making three copies for the panel sitting would often be costly and unnecessary, especially when only part of the record is being referred to at the review hearing. Adding the needed material to the motion record or inserting it in a compendium is a convenient and practical means of facilitating the work of the Court and reducing the costs to the parties. It is one which is envisaged and encouraged by Rule 3:

General principle

3. These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits

Principe général

3. Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible.

[12] As counsel for the Attorney General submitted, the Tribunal's record is already certified as to its contents and is already before the Court. While it is possible to do so, there is no requirement in the Rules that the record or parts of it be filed again by way of an affidavit from a party who wants to refer to it.

[13] In view of the foregoing and the motions judge's Direction, it is in the interest of justice that an extension of time be granted to comply with that Direction.

[14] Copy of these reasons shall be filed in File A-575-08 in support of the Order issued therein.

“Gilles Létourneau”

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-586-08

**STYLE OF CAUSE:** The Attorney General of Canada v.  
Vold, Jones and Vold Auction Co. Ltd

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

**REASONS FOR ORDER BY:** LÉTOURNEAU J.A.

**DATED:** June 8, 2009

**WRITTEN REPRESENTATIONS BY:**

Dominique Guimond

FOR THE APPLICANT

Kenneth G. Heintz

FOR THE RESPONDENT

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