Federal Court of Appeal  Cour d'appel fédérale

Date: 20190515

Docket: 19-A-14

Citation: 2019 FCA 145

Present: **STRATAS J.A.**

BETWEEN:

DR. GÁBOR LUKÁCS

Moving Party

and

SWOOP INC.

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 15, 2019.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] Dr. Lukács has moved under Rule 352 for leave to appeal from two decisions of the Canadian Transportation Agency. Dr. Lukács alleges, among other things, that the Agency failed to act in good faith in its decision-making.

[2] In his notice of motion for leave to appeal under Rule 352, Dr. Lukács requested certain material in the hands of the Agency. He did this under the purported authority of Rule 317. He is looking for evidence to support his claim of bad faith decision-making.

[3] In response, the Agency transmitted only the cross-application (minus the appendix) that had been filed before it. The Agency objected to producing the remainder of the requested documents.

[4] Dr. Lukács has now brought a motion seeking the enforcement of his Rule 317 request for production. He requests an oral hearing for his motion. The decision to determine a motion orally or on the basis of written materials is a discretionary one: *SNC-Lavalin Group Inc. v. Canada (Public Prosecution Service)*, 2019 FCA 108.

[5] In this case, I am not persuaded that an oral hearing is necessary. The materials filed on the motion are more than sufficient to determine this motion. In my review of the materials, I did not have any questions of the parties and certainly none that would necessitate an oral hearing. I will dismiss the motion.

[6] Rule 317 provides that a "party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party." The central question is whether a motion for leave to appeal under Rule 352 is an "application" within the meaning of Rule 317.

[7] This is a question of legislative interpretation. As in every case of legislative interpretation, the text, context and purpose of the legislative provision in issue must be examined: *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193 and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559.

[8] I begin with an examination of the text of relevant provisions.

[9] An "application" under the Rules "means a proceeding referred to in rule 300": see Rule 2. Rule 300 covers applications for judicial review and "proceedings required by or under an Act of Parliament to be brought by application, motion, originating notice of motion, originating summons or petition or to be determined in a summary way, other than applications under subsection 33(1) of the *Marine Liability Act*."

[10] In light of Rule 300, a new question emerges at the level of the text of the relevant provisions: is a motion for leave to appeal under Rule 352 a proceeding "required or permitted…under an Act of Parliament to be brought by…application [or] motion"?

[11] Looking only at the text of relevant provisions, the motion for leave to appeal in this case is a proceeding required or permitted to be brought by application by an Act of Parliament, namely the *Canada Transportation Act*, S.C. 1996, c. 10, and specifically section 41 of that Act.

[12] I recognize that on the surface there appears to be a disconnect between the text of section 41 of the Act and Rule 352: section 41 of the Act refers to an "application" for leave to

appeal and Rule 352 refers to a motion for leave to appeal. But there is no disconnect: I read Rule 352 as meaning that a person must apply (in the colloquial sense) for leave to appeal and should do it by way of a motion.

[13] So far, I have restricted myself to an examination of the text. But one cannot stop the analysis at the level of text. One must also look at matters of context and purpose. Sometimes a literal reading of the text does not capture the authentic meaning of a legislative provision: see *Hillier v. Canada (Attorney General)*, 2019 FCA 44 at para. 24 and the Supreme Court cases cited therein.

[14] In my view, there are four important strands of case law that provide indications of context and purpose and shed light on the issue whether Rule 317 production requests are available in motions for leave to appeal.

[15] First is the nature of motions for leave to appeal. Motions for leave to appeal are not full determinations of the merits of the matter. Motions for leave to appeal are supposed to be summary—a quick assessment whether a full review of the administrative decision is warranted. Further, parties moving for leave to appeal need only show a fairly arguable issue: *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79, [2018] 2 F.C.R. 573 at paras. 13 and 56*; Canadian Pacific Railway Co. v. Canada (Transportation Agency)*, 2003 FCA 271, [2003] 4 F.C.R. 558 at para. 17; *CKLN Radio Incorporated v. Canada (Attorney General)*, 2011 FCA 135, 418 N.R. 198; *Rogers Cable Communications Inc. v. New Brunswick (Transportation)*, 2007 FCA 168, 367 N.R. 78. In this context, a "fairly arguable case" should be

seen in a functional and purposive way and can be resolved down into a question: has enough been raised in the motion for leave to appeal to warrant a full review of the administrative decision, a review that will entitle a party to use all of the procedural rights and investigative techniques associated with reviews?

[16] Second, Rule 317 is a limited purpose tool. It does not in any way "serve the same purpose as documentary discovery in an action" and cannot be used on a fishing expedition: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128; *Access Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224, 66 Admin. L.R. (4th) 83 at para. 17; *Atlantic Prudence Fund Corp. v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1156 (T.D.) at para. 11. As *Tsleil-Waututh* suggests, other powers exist by which evidence and information can potentially be discovered and obtained when administrative decision-making is reviewed.

[17] Third, Rule 317 is part of the procedures available in the Federal Courts system aimed at ensuring that those who exercise public power by or under an Act of Parliament are properly and fairly reviewed. Those subject to the jurisdiction of the Federal Courts system must not be immunized from review on justiciable questions: *Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132 at paras. 23-24; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at paras. 50-51 and 73-78.

[18] Fourth, one cannot plead allegations without having at least some evidence behind the allegations. Making bald, conclusory allegations in a pleading, such as a motion for leave to appeal,

without any evidentiary foundation is an abuse of process: *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112 at para. 5; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184, 321 D.L.R. (4th) 301 at para. 34; *St. John's Port Authority v. Adventure Tours Inc.*, 2011 FCA 198, 335 D.L.R. (4th) 312; *Paradis Honey Ltd. v. Canada*, 2015 FCA 89, [2016] 1 F.C.R. 446 at para. 153. A legal proceeding, such as a motion for leave to appeal "is not a fishing expedition and a plaintiff who starts proceedings simply in the hope that something will turn up abuses the court's process": *Kastner v. Painblanc* (1994), 58 C.P.R. (3d) 502, 176 N.R. 68 at para. 4 (F.C.A.).

[19] Putting these strands together, I make some specific observations:

- A party's notice of motion for leave must make allegations about the administrative decision in issue. To the extent that factual allegations are made in the notice of motion for leave, such as an allegation that the administrative decision-maker is acting in bad faith, the party making the allegations must have some evidence to support them; that evidence may be culled from findings of fact made by the administrative decision-maker or in a supporting affidavit that is admissible.

- Rule 317 cannot be used to conduct a fishing expedition or discovery aimed at finding evidence where there is not enough evidence even to support the making of allegations.

- Rule 317, itself, is aimed at facilitating the full review of the administrative decision, preventing immunization of that decision-making from review, and ensuring that the reviewing court conducts its review on the basis of all admissible evidence. It is not aimed at helping a party cooper up allegations that never should have been made.

- The use of Rule 317 in motions for leave to appeal also threatens to transform the motions into something akin to full-scale factual investigations, rather than quick, summary matters.

- A motion for leave to appeal tests whether enough has been raised to warrant a full review of the administrative decision, which review includes all of the procedural rights, investigative techniques and, if applicable and necessary, evidence-gathering techniques available to those pursuing the review, including the use of Rule 317. The requirement of a "fairly arguable case" on a motion for leave to appeal should be construed in this way. The body of evidence placed before the Court on a leave motion may not be enough or of sufficient weight to guarantee success on the ultimate merits, but it should be enough and of a sufficient quality to persuade the Court that the investigation, assessment and scrutiny that takes place in a court review is warranted.

[20] I add an additional point of context concerning the architecture of the *Federal Courts Act*. Rule 317 is found in the part of the Rules dealing with applications for judicial review. This

suggests that it applies only to those proceedings. Rule 352 is found in the part of the Rules dealing with appeals. In appeals, the issue of what is to be placed before the reviewing court is resolved by settling the contents of the appeal book under Rule 343-345, not Rule 317.

[21] As a result of the foregoing observations and the additional point of context, I conclude that Rule 317 is only for use in applications for judicial review.

[22] Therefore, despite Dr. Lukács' able submissions, I will dismiss his motion for production under Rule 317. Rule 317 is not available in his motion for leave to appeal.

[23] The next procedural step in the motion for leave to appeal is the filing of Dr. Lukács' reply representations. I will provide for its timing in my order.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	19-A-14
STYLE OF CAUSE:	DR. GÁBOR LUKÁCS v. SWOOP INC.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	MAY 15, 2019

WRITTEN REPRESENTATIONS BY:

Dr. Gábor Lukács	ON HIS OWN BEHALF
Allan Matte	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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