Federal Court of Appeal  Cour d'appel fédérale

Date: 20230808

Docket: A-78-23

Citation: 2023 FCA 175

Present: **BIRINGER J.A.**

BETWEEN:

RON W. CAMERON CHARITABLE FOUNDATION

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on August 8, 2023.

REASONS FOR ORDER BY: BIRINGER J.A.

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REASONS FOR ORDER

BIRINGER J.A.

I. Introduction

[1] The Ron W. Cameron Charitable Foundation ("the appellant") appealed to this Court in respect of the Minister of National Revenue's ("the Minister") decision to confirm its notice of intention to revoke the appellant's charitable status.

[2] The appellant, in their Notice of Appeal, requests that the Minister provide it and the Registry with certain materials, following the procedure contemplated by Rules 317 and 318 of the *Federal Courts Rules*, S.O.R./98-106.

[3] The request is for:

> "a certified copy of any and all materials produced by, referenced, consulted or relied upon in any way by one or more representatives of the Government of Canada in the planning, decision, execution and any other step involved in the drafting and issuance of the March 19, 2019 Notice of Intention to Revoke ("NIR") and the February 10, 2023 Confirmation ("Confirmation") to Ron W Cameron Charitable Foundation, including […]" (Notice of Appeal, p. 8).

[4] More specific aspects of the request are set out below.

[5] In response, the Minister provided a Certified Tribunal Record ("CTR") to the Registry and the appellant. The Minister objected, with reasons, to providing any other documents.

[6] Following directions made by Locke J.A. on May 24, 2023, the appellant now asks this Court to order the Minister to forward additional material requested in its Notice of Appeal to them and the Registry.

II. The Applicable Rules

[7] 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". Pursuant to Rule 2, as

well as subsection 2(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, a tribunal includes the Minister of National Revenue. Rule 318(2) sets out the process for the tribunal to object. Rule 318(4) authorizes the Court to order that further material be produced.

[8] The general principles governing the extent of the tribunal's obligation to produce material under Rule 317 are well established. They are summarized by this Court in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at paras. 86-115 [*Tsleil-Waututh*], *Lukács v. Swoop Inc.*, 2019 FCA 145, and *Canadian National Railway Company v. Canada (Transportation Agency)*, 2019 FCA 257 [*Canadian National*].

[9] The purpose of Rule 317, as stated in *Canadian National* at para. 12, is:

> Rule 317 embodies the principle that judicial review is premised on review of the record before the tribunal; *certiorari* means to bring forth the record. It entitles a party to receive everything that the decision maker had before it when it made its decision […]. The requirement that a tribunal produce, without hesitation, the entire record has long been central to judicial review. This is tempered by the pragmatic consideration that frequently large portions of the tribunal record, particularly in the case of standing, highly specialized agencies, may not be pertinent to the disposition of the issues on appeal.

[10] Only material "relevant to an application" must be produced. Relevance is determined by reference to the notice of application or, in this case, the Notice of Appeal (*Tsleil-Waututh* at paras. 106-110; *Canadian National* at para. 14; *Canada (Human Rights Commission) v. Pathak*, [1995] 2 F.C. 455 at p. 460, 1995 CanLII 3591 (F.C.A.), leave to appeal refused, [1995] S.C.C.A. No. 306, 198 N.R. 237 [*Pathak*]).

[11] In reviewing an objection to disclosure under Rule 318, a court must seek to provide a remedy that reconciles, as much as possible, three objectives: (i) providing meaningful review of administrative decisions, which the reviewing court will be unable to engage in without being satisfied that the record before it is sufficient; (ii) procedural fairness; and (iii) the protection of any legitimate confidentiality interests while ensuring that court proceedings are as open as possible (*Girouard v. Canadian Judicial Council*, 2019 FCA 252 at para. 18, citing *Lukács v. Canada (Transportation Agency)*, 2016 FCA 106 at para. 15; see also *GCT Canada Limited Partnership v. Vancouver Fraser Port Authority*, 2021 FC 624 at para. 27).

III. The Certificate and the Affidavit

[12] The certificate for the CTR is signed by Holly Brant, Manager, Charities Section, Appeals Branch for the Canada Revenue Agency ("CRA") and provides that the documents are "true copies of the material relevant to the appeal and in the possession of the CRA, whether or not the materials are in the possession of the appellant".

[13] The Minister provided an affidavit of Holly Brant with its submissions. The affidavit provides, at paras. 4 and 5:

> 4. The CTR contains everything that was before the decision-maker at the time the decision was made, and that is relevant to the issues under appeal.
>
> 5. In compiling the CTR, I did not withhold any relevant documents or information from the decision-maker's record, other than redactions to protect personal information that are shown on the face of the CTR.

[14] The appellant claims that Holly Brant is not the decision-maker and did not have personal knowledge of the content of the affidavit. I disagree. Ms. Brant is the Manager, Charities Section, Appeals Branch for the CRA and, as discussed below, signed the Confirmation on behalf of the Minister (the decision-maker). I accept that she has personal knowledge of the facts and matters deposed to in the affidavit.

[15] The appellant also submits that the use of the word "relevant" in the certificate and affidavit allows the Minister to avoid production of material that was before the decision-maker but determined by the decision-maker to be irrelevant. The appellant says that everything before the decision-maker is relevant.

[16] I do not read the certificate or affidavit in that way. The essential basis for the Minister's refusal to produce material is that it was not before the decision-maker; there was no other material before the decision-maker. The respondent states (at paragraph 52) in its submissions: "The Respondent has already produced the decision maker's record in the CTR."

IV. The Requested Material

[17] The sub-paragraphs listed below are a subset of the appellant's broader request in paragraph 1 of its Notice of Appeal on pp. 8-9.

[18] **Sub-paragraph 1(a) of the appellant's request** asks the Minister to produce "all correspondence regarding the NIR and Confirmation, to any recipient, from any sender, sent or

received by one or more representatives of the Government of Canada, including but not limited to: […]". The list includes five named individuals and numerous unnamed government representatives described by reference to their office.

[19] I conclude that correspondence concerning the NIR and Confirmation is relevant to the notice of appeal.

[20] The Minister objects to producing documents that were not in front of the Minister at the time the decision was made. The affidavit confirms that all relevant material that was before the decision-maker at the time the decision was made has been produced. The Minister clarifies in its submissions (at paragraph 30) that "there were no other documents before the decision-maker because nothing more exists". I have no reason to reject this clarification.

[21] Only the actual material that was before the decision-maker when making the decision must be produced, nothing more (*Tseil-Waututh* at para. 112, citing *Pathak, 1185740 Ontario Ltd. v. Canada (Minister of National Revenue)*, [1998] 3 C.T.C. 215, 1998 CanLII 7910 (F.C.)).

[22] No further production of documents will be ordered with respect to sub-paragraph 1(a) of the request.

[23] **Sub-paragraph 1(b) of the appellant's request** asks for "all correspondence and materials related to any and all Gender-based Analysis Plus (GBA Plus) performed regarding the NIR and Confirmation".

[24] The appellant claims in the Notice of Appeal that the alleged inactivity of the charity resulted from the medical disability of past director Ron Wood. They say (at paragraph 28) that the disclosure is relevant to "whether disability discrimination or a breach of procedural fairness occurred".

[25] The appellant has provided no evidence of Mr. Wood's disability and if he required or requested an accommodation from the CRA. The appellant has not indicated whether or how a GBA Plus analysis was relevant to the Minister's decision.

[26] An allegation of disability discrimination or breach of procedural fairness may warrant broader disclosure under Rule 317. Where these arguments are raised, documents that are relevant to the allegations—even if not before the decision-maker—are subject to disclosure (*Air Passenger Rights v. Canada (Attorney General)*, 2021 FCA 201 at para. 21).

[27] There must however be some evidence to support the claim (*Tseil-Waututh* at para. 99; *Access Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224 [*Access*] at paras. 18-19). The party alleging the breach must also establish the relevance of documents sought to the purported discrimination or breach (*Château d'Ivoire Stores Inc. v. Canada (Attorney General)*, 2022 FC 405 at para. 27).

[28] The appellant has not provided any evidence that discrimination or breach of procedural fairness occurred. Material that "could be relevant in the hopes of later establishing relevance"

does not fall within Rule 317; the Rule does not sanction fishing expeditions (*Tseil-Waututh* at para. 108, also citing *Access* at para. 21).

[29] No further production of documents will be ordered with respect to sub-paragraph 1(b) of the request.

[30] **Sub-paragraph 1(c) of the appellant's request** asks for "all correspondence and materials, prepared, reviewed, sent or received by one or more Government Representatives relating to Robert I. Tennant's alleged status as an illegible [*sic*] individual".

[31] "Illegible individual" is a typographical error and should be "ineligible individual".

[32] The appellant claims in the Notice of Appeal that the overwhelming motivation of the audit leading to the NIR was the involvement of an alleged ineligible individual, Robert I. Tennant. Mr. Tennant resigned as a director and the NIR acknowledged that his resignation resolved the issue. Yet, the NIR was nevertheless issued for other reasons.

[33] I have reviewed the Confirmation; it does not refer to an ineligible individual or Robert I. Tennant.

[34] The appellant's submissions further particularize the request for documents that relate to Mr. Tennant's status as an ineligible individual, but there is no evidence that such documents exist.

[35] I do not see how the requested material is relevant to the appeal. Even the appellant acknowledges that the NIR was not issued on the basis that there was an ineligible individual on the board of directors, but for other reasons – a failure to devote resources to charitable purposes. The Confirmation also refers only to those other reasons.

[36] Nonetheless, the CTR includes some documents that refer to Robert I. Tennant. The Holly Brant affidavit confirms that all relevant documents before the decision-maker have been produced. I accept the Minister's submission that there are no further documents responsive to sub-paragraph 1(c).

[37] No further production of documents will be ordered in respect of sub-paragraph 1(c) of the request.

[38] **Sub-paragraph 1(d) of the appellant's request** asks for "a list of all charitable foundations that were inactive within the last 10 years, indicating which of them had their status revoked as a result".

[39] The appellant claims at paragraph 56 of the Notice of Appeal that the NIR and Confirmation invent "an arbitrary activity threshold". The appellant therefore seeks material in order to prove that other inactive foundations did not have their charitable status revoked.

[40] The appellant asserts that it is surprising the Minister would not have consulted such a list, but provides no evidence that a list exists or that the Minister consulted such a list.

[41] This Court will not order production of documents where there is no evidence of their existence (*Beno v. Canada (Commission of Inquiry into the Deployment of Canadian Forces in Somalia – Létourneau Commission)*, [1997] 130 F.T.R. 183, [1997] F.C.J. No. 535 at para. 16).

[42] If the request is for the Minister to create a list, when one does not exist, Rule 317 does not provide for this (*Quebec Port Terminals Inc. v. Canada (Labour Relations Board)*, FCA [1993] F.C.J. No. 421 (F.C.A.) at para. 10) (Rules 1612 and 1613 are predecessors to Rules 317 and 318). Rule 317 presumes that the material requested already exists, on the basis that it was used by the decision-maker in its deliberation or decision-making.

[43] No further production of documents will be ordered in respect of sub-paragraph 1(d) of the request.

[44] **Sub-paragraph 1(e) of the appellant's request** asks the Minister to provide "all delegation instruments delegating authority to issue the NIR to the Director General, Charities Directorate or Confirmation to a Manager, Charities Section, Tax and Charities Appeals Directorate from the Minister of National Revenue".

[45] The appellant claims in the Notice of Appeal that the signatories to the NIR and the Confirmation (being the Director General, Charities Directorate and Manager, Charities Section, Tax and Charities Appeals Directorate, respectively) did not have delegated legal authority to issue them.

[46] The appellant has adduced no evidence to support this allegation and on this basis alone, the request fails. Further, as the Minister points out, the legislation (subsection 220(2.01) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Suppl.) and section 8 of the *Canada Revenue Agency Act*, S.C. 1999, c. 17), and publicly available information (Canada Revenue Agency, "Income Tax Act – Delegation of Ministerial powers, duties, and functions" (March 29, 2023), online: <https://www.canada.ca/en/revenue-agency/services/tax/technical-information/delegation-powers-duties-functions/delegation-ministerial-powers-duties-functions.html>) indicate the contrary.

[47] The appellant seeks official versions of what is on the CRA webpage. As this Court has said on numerous occasions, Rule 317 is a limited purpose tool; it does not serve the same purpose as discovery in an action (*Tseil-Waututh* at para. 115, citing *Access* at para. 17; *Atlantic Prudence Fund Corp. v. Canada (Minister of Citizenship and Immigration*), [2000] F.C.J. No. 1156 (Fed. T.D.), 2000 CanLII 15917 at para. 11).

[48] No further production of documents will be ordered in respect of sub-paragraph 1(e) of the request.

[49] **Paragraph 1 of the appellant's request**, according to the appellant, asks for "significantly more" material than is covered by the specific sub-paragraphs addressed above. The appellant provides particulars of these further materials at paragraphs 56 to 59 of its submissions.

[50] The appellant makes a general claim in the Notice of Appeal that there is a reasonable apprehension of CRA bias. The submissions make various allegations and cite as evidence, for example, a 2019 Senate Report on the charitable sector and a 2023 Taxpayers' Ombudsperson report.

[51] The appellant has provided no evidence supporting a reasonable apprehension of bias. Further, the appellant has not demonstrated how the documents sought would be relevant to such an allegation.

[52] In reliance on the cases cited in respect of sub-paragraph 1(b) above, and for similar reasons, no further production of documents will be ordered in respect of paragraph 1 of the request.

[53] **At paragraph 2 of the Notice of Appeal**, the appellant requests a list "describing each document that the Minister objects to producing, including materials not produced because the Minister believes the material is already in the possession of the appellant".

[54] The respondent does not object to further production on the basis that material is in the possession of the appellant. The respondent's objection is largely on the basis that the requested material was not before the decision-maker. Given the reasons for not ordering further material to be produced, the Minister will not be ordered to prepare such a list.

V. Conclusion

[55] The documents requested are not accessible under Rule 317 as they are beyond the scope of what was considered by the decision-maker and are not relevant to the issues raised in the Notice of Appeal. In light of the Minister's success, costs of the dispute concerning the Rule 317 request shall be awarded to the Minister in any event of the cause.

VI. Disposition

[56] An order will issue in accordance with these reasons. Provision will also be made for the timing of future steps in the appeal.

"Monica Biringer"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-78-23
STYLE OF CAUSE:	RON W. CAMERON CHARITABLE FOUNDATION v. MINISTER OF NATIONAL REVENUE

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	BIRINGER J.A.
DATED:	AUGUST 8, 2023

APPEARANCES:

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