Federal Court of Appeal | Cour d'appel fédérale

Date: 20231215

Docket: A-207-23

Citation: 2023 FCA 245

Present: **STRATAS J.A.**

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

Dealt with in writing and heard by online video conference hosted by the Registry on November 30, 2023.

Order delivered at Ottawa, Ontario, on December 15, 2023.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

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A. Introduction

[1] The Canadian National Railway Company has brought an appeal from a decision of the Canadian Transportation Agency. CN moves for an order requiring the Agency to disclose certain documents to it. It wants to place these documents before the Court in the appeal.

[2] This sort of motion frequently arises. It sounds like a technical matter. But really it is not.

[3] As we shall see, the admissibility of evidence in statutory appeals and judicial reviews of administrative decisions is a fundamental matter, one that bears on the proper functioning of our democracy.

[4] Many decisions have been written in the area. In technical terms and practical effect, they largely say the same thing. However, from time to time, it is useful to take a step back and review the general principles and methodology in a motion such as this.

[5] In this case, I will allow the motion and grant the disclosure sought by CN.

B. General principles and methodology

(1) The *Federal Courts Rules*

[6] This is a statutory appeal from a decision of the Agency: *Canada Transportation Act*, S.C. 1996, c. 10, s. 41. In its motion for disclosure, CN invokes Rule 317. Although Rule 317 speaks of "applications" and appears in Part 5 of the *Federal Courts Rules*, S.O.R./98-106, which explicitly concerns "applications", it can be invoked in appeals from administrative decision-makers: Rule 350.

(2) Disclosure from administrative decision-makers for the purposes of statutory appeals and judicial reviews: general principles

[7] In recent years, governments have been assigning more and more responsibility to administrative decision-makers to decide matters of great public importance, influence and impact. In a mature, healthy democracy, these sorts of decisions must be open to meaningful review and public scrutiny:

- *Meaningful review.* In our democracy, immunization of administrative decision-making and total prohibitions on judicial review are not allowed: *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72, [2021] 3 F.C.R. 294 at paras. 102-105 and the numerous cases cited therein; see also *Payne v. Ontario Human Rights Commission*, (2000), 192 D.L.R. (4th) 315 (Ont. C.A.) at para. 161.

- *Public scrutiny.* Barriers to public scrutiny should be exceptional, permitted only to the extent necessary, and supported by evidence establishing a recognized legal ground for secrecy. The availability of meaningful review and public scrutiny of administrative decision-making ensures accountability, promotes better decisions, and increases public confidence in governance: *Slansky v. Canada (Attorney General)*, 2013 FCA 199, [2015] 1 F.C.R. 81 at paras. 313-315 (dissenting but not disputed by the majority), and the numerous authorities cited therein.

[8] As our democracy has matured and developed, these principles have found greater recognition, at least as far as judicial reviews and statutory appeals of administrators' decisions are concerned.

[9] In recent years, courts have narrowed the legal grounds for secrecy in proceedings, have become more willing to test justifications offered for secrecy, and have been more vigilant to ensure that the disclosure of evidence in proceedings is adequate: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 and *Sherman Estate v. Donovan*, 2021 SCC 25, 458 D.L.R. (4th) 361 (limits on secrecy in court); *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158, [2011] 4

F.C.R. 425 (narrowing of public interest privilege); *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3 (enhancement of review of privilege under section 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5); *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952 at 965-966 and *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221 (deliberative secrecy must sometimes give way so that there can be meaningful review); *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at paras. 53-54, *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418 and *Canadian Council for Refugees* at paras. 111-112 (in appropriate circumstances adverse inferences can be drawn from an assertion of secrecy or a failure to disclose).

[10] In reviews of administrative decision-making—whether by application for judicial review or a statutory appeal—public scrutiny and meaningful review are interrelated. If an administrative decision-maker improperly withholds the documents and information it relied upon for its decision, the spectre of immunization of decision-making arises. The party trying to have the decision reviewed and the reviewing court itself cannot test whether the decision had a legitimate, rational basis and was consistent with the laws passed by our elected representatives. As a result, the administrative decision-maker can become a law unto itself, accountable to no one except itself: *Tsleil-Waututh Nation* at paras. 67-85.

[11] In our democracy, we simply do not allow that:

> "L'etat, c'est moi" and "trust us, we got it right" have no place in our democracy. In our system of governance, all holders of public power, even the most powerful of them—the Governor-General, the Prime Minister, Ministers, the Cabinet, Chief Justices and puisne judges, Deputy Ministers, and so on—must obey the law: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385; *United States v. Nixon*, 418 U.S. 683 (1974); *Marbury v. Madison*, 5 U.S. 137 (1803); *Magna Carta* (1215), art. 39. From this, just as night follows day, two

> corollaries must follow. First, there must be an umpire who can meaningfully assess whether the law has been obeyed and grant appropriate relief. Second, both the umpire and the assessment must be fully independent from the body being reviewed. See the discussion in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at paras. 77-79, *Slansky v. Canada (Attorney General)*, 2013 FCA 199, [2015] 1 F.C.R. 81 at paras. 313-315 (dissenting but not disputed by the majority), and the numerous authorities cited therein.
>
> Tyranny, despotism and abuse can come in many forms, sizes, and motivations: major and minor, large and small, sometimes clothed in good intentions, sometimes not. Over centuries of experience, we have learned that all are nevertheless the same: all are pernicious. Thus, we insist that all who exercise public power—no matter how lofty, no matter how important—must be subject to meaningful and fully independent review and accountability.

(*Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132 at paras. 23-24.)

[12] In judicial reviews and statutory appeals from administrative decision-makers in the Federal Courts system, much of the heavy lifting is done under Rules 317 and 318. Rule 317 allows those applying for judicial review to "request material relevant to an application [or appeal] that is in the possession of [an administrative decision-maker] whose order is the subject of the application [or appeal] and not in the possession of the party [who is making the request]". Rule 318 allows the administrative decision-maker to object.

[13] What is "relevant to an application [or appeal]" under Rule 317? The answer is found in the pleading: in the case of judicial reviews, the notice of application or in the case of statutory appeals, the notice of appeal.

[14] The Court must read the pleading "with a view to understanding the real essence of the application [or appeal]" and gaining "'a realistic appreciation' of the [proceeding's] 'essential character'". The Court must not fall for skilful pleaders who are "[a]rmed with sophisticated wordsmithing tools and cunning minds". Instead, it must read the pleading "holistically and

practically without fastening onto matters of form". See *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557 at paras. 49-50.

[15] Disclosure motions, whether within a judicial review or a statutory appeal, must be governed and abide by the foregoing principles. Non-disclosure that threatens the meaningfulness of judicial review, causes the immunization of administrative decision-making, or hinders or frustrates the prosecution and adjudication of a legitimate ground of review cannot be permitted. But attempts to conduct discovery of material to see whether a ground of judicial review might exist—the proverbial fishing expedition—also cannot be permitted: *Tsleil-Waututh Nation* at para. 115; *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 CanLII 15917 (F.C.T.D.) at para. 11; *Maax Bath Inc. v. Almag Aluminum Inc.*, 2009 FCA 204, 392 N.R. 219 at para. 15. Attempts to use Rule 317 for a fishing expedition are common and the Court must never permit it. In special circumstances, however, the Federal Court may convert an application to an action, which may include examinations for discovery: *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.4(2); *Brake v. Canada (Attorney General)*, 2019 FCA 274, [2020] 2 F.C.R. 63; *Canada (Human Rights Commission) v. Saddle Lake Cree Nation*, 2018 FCA 228 at paras. 23-25.

[16] In assessing what material is responsive to a Rule 317 request, the Court must pay close attention to context. For example, take a decision concerning a one-off, isolated matter. All of the documents and information leading to the decision will be found in the one specific file for the case. But take a decision that is just the latest chapter in an ongoing regulatory project

consisting of multiple decisions. The documents and information will rest in the specific file for the case but also in related files. See generally *Bell Canada v. 7262591 Canada Ltd. (Gusto TV)*, 2016 FCA 123, 17 Admin L.R. (6th) 175 at paras. 14-15.

[17] In assessing relevance, the Court must also remember that Rule 317 is not a summary judgment provision. It is not meant to be a tactical opportunity for a respondent to nip in the bud a judicial review or statutory appeal before complete disclosure is made and analyzed. If there is an arguable case that the documents sought might well be relevant to the grounds or relief set out in the pleading, they should be disclosed. Fine, precise and final determinations of relevance are for the judge or panel hearing the merits of the application or appeal. By then, the judge or panel will have the benefit of the parties' submissions on the complete evidentiary and legal picture and, thus, will be empowered to make the best possible decision on relevance.

[18] Also relevant to issues of disclosure are the principles of materiality and proportionality, the need for expedition and cost-effectiveness (Rule 3), and, in the case of applications for judicial review, the imperative that judicial review proceedings are to be heard and determined without delay and in a summary way (*Federal Courts Act*, s. 18.4): see generally *Tsleil-Waututh Nation* at paras. 82-84 and 158-159. But the spectre of partial or total immunization of administrative decision-making is the paramount concern: *Tsleil-Waututh Nation* at para. 166.

[19] Of course, legal privileges against disclosure and other confidentiality interests can be asserted in an objection under Rule 318. In appropriate circumstances, where a legal privilege against disclosure or an assertion of confidentiality is not absolute, the Court can devise creative orders that allow for necessary disclosure while protecting demonstrable, legitimate and

significant interests in confidentiality: *Canadian Council for Refugees* at paras. 98-122 and *Portnov v. Canada (Attorney General)*, 2021 FCA 171, 461 D.L.R. (4th) 130 at para. 51.

C. The particular circumstances of this case

(1) The decision that led to CN's appeal

[20] CN is in the business of transporting western grain. It is limited in what it can charge in a crop year by a revenue cap. The Agency sets the revenue cap in part based on a forecast for something known as the "volume-related composite price index".

[21] CN says that in a recent year the forecast turned out to be wildly inaccurate, which unduly reduced the rate cap. Thus, CN says, it was unduly limited in what it could charge.

[22] CN asked the Agency to reconsider its decisions that led to this undue limitation. The Agency declined to vary the decisions: Determination No. R-2023-88. CN's appeal in this Court is from Determination No. R-2023-88.

(2) CN's motion for disclosure

[23] In its notice of appeal, CN sought all documents, reports, and working papers that were prepared, used, or considered by the Agency, or otherwise provided to the Agency. It also sought a number of documents specifically referred to by the Agency in the decision under appeal and the underlying decisions on which it was based.

[24] The Agency objected to disclosure. In response, CN brought a motion seeking disclosure of all of the material sought in its request.

(3) CN limits its request

[25] Immediately before the oral hearing of this motion, CN substantially narrowed its request. It now requests the following:

(a) all documents, reports, and working papers that were prepared, used, or considered by the Agency or otherwise provided to the Agency for the purpose of the decision under appeal; and

(b) the forecasting models referred to in the decision under appeal, used by the Agency to prepare the forecast that led to the calculation of the revenue cap.

D. Applying the law and principles to the facts of this case

[26] The material sought by CN might well be relevant to the grounds and relief set out in its notice of appeal. The material bears upon the revenue cap and price index that led to the decision challenged by CN. This is seen from the Agency's reasons.

[27] To some extent, this case resembles *Gusto TV*. Here, we have underlying decisions that led in part to the decision under appeal. Thus, the materials associated with those underlying decisions are in play. This is not a fishing expedition. The Court is satisfied that the specific materials sought by CN in its Rule 317 request may well be relevant to CN's appeal. It will be for the appeal panel to determine their actual relevance and significance. The Agency is free to submit that the materials are irrelevant to its decision or are insignificant.

[28] Concerns about materiality and proportionality and the need for proceedings to proceed expeditiously and in a cost-effective manner are not live in the circumstances of this case.

[29] The Agency raises the issue of deliberative privilege. However, it overstates its scope. Deliberative privilege covers internal documents, often prepared by the administrator's staff, that individual decision-makers use to assist their deliberations in the case. For example, staff might prepare evaluations of the evidence, legal advice and recommendations for the individuals deciding the case, much like a law clerk does for a judge on a court. The individuals deciding the case might make personal notes setting out their tentative reflections. These sorts of things are covered by deliberative privilege.

[30] But deliberative privilege is not a device that can be used to withhold from the parties key evidence not otherwise available in the record or potentially decisive, new arguments unknown to the parties. Sometimes procedural fairness requires administrative decision-makers to disclose such matters, even though they are found in a document normally covered by deliberative privilege.

[31] In some cases, though, allegations about corruption or bad faith might be made. And some allegations of procedural unfairness can trigger concerns about the integrity of the decision-making. In cases like those, where there is an air of reality to the allegations, disclosure of material normally covered by deliberative privilege can be ordered: *Tremblay*, above.

[32] In this case, the Agency asserts deliberative privilege over a briefing note prepared by Agency staff. There is no indication it contains material of the sort that must be disclosed. As

well, the notice of appeal does not allege grounds or relief that would require lifting the confidentiality associated with the briefing note.

[33] Disclosure of the briefing note also seems unnecessary in a situation like this: to the extent that the briefing note contained errors and the Agency's decision relied on those errors, the errors will be apparent from the face of the reasons or will be apparent from a comparison of the reasons with the relevant evidence and law.

E. Disposition

[34] An order will issue in accordance with these reasons. In particular, the appeal book shall contain, in addition to the material listed in Rule 344(1), the material described in paragraph 25, above, with the exception of the briefing note.

[35] It is likely that some of this material is confidential. Thus, CN has sought a confidentiality order. However, CN has not made any submissions on why a confidentiality order should be made or what documents should be covered by it.

[36] It is possible that disputes could arise about the precise material covered by CN's request and what individual documents are confidential. Thus, in the interests of minimizing disputes and having this matter proceed "as quickly as is practicable" as required by subsection 41(3) of the *Canada Transportation Act*, this Court will order that the parties work together to prepare agreed-upon indices for a public appeal book and a confidential appeal book for the Court's review. The parties will also have to persuade the Court that a confidentiality order is supported by the principles in *Sherman Estate* and *Sierra Club*. In case the parties cannot agree on the

indices or the material that is to be confidential, this Court will also provide for the exchange of submissions.

[37] So that this matter may proceed in an orderly way, I shall remain seized.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DATED:	DECEMBER 15, 2023

APPEARANCES:

Nadia Effendi Benedict Wray	FOR THE APPELLANT
Gabrielle Fortier-Cofsky René David-Cooper	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Borden Ladner Gervais LLP Toronto, Ontario	FOR THE APPELLANT
Canadian Transportation Agency Legal Services Directorate Gatineau, Quebec	FOR THE RESPONDENT