Federal Court Cour fédérale

Date: 20201015

Docket: T-538-19

Citation: 2020 FC 970

Ottawa, Ontario, October 15, 2020

PRESENT: Mr. Justice Pentney

BETWEEN:

GCT CANADA LIMITED PARTNERSHIP

Applicant

and

VANCOUVER FRASER PORT AUTHORITY and ATTORNEY GENERAL OF CANADA

Respondents

ORDER AND REASONS

[1] The Applicant, GCT Canada Limited Partnership (GCT), brings a motion in writing under Rule 369 for an Order for leave to cross-examine a senior official of the Respondent, Vancouver Fraser Port Authority (VFPA), regarding the disclosure VFPA made in response to GCT's request for the "record" pursuant to Rule 317. The Attorney General of Canada did not file any submissions on this motion.

I. Background

[2] The history and context for GCT's application for judicial review is set out in previous decisions dealing with other motions (see 2019 FC 1147 and 2020 FC 348). In summary, GCT wishes to expand its facilities at the Vancouver port and challenges decisions made by VFPA, which is also seeking to pursue its own project to expand the port. Among other claims, GCT argues that VFPA demonstrated actual bias when it decided not to proceed with the approval process for the GCT project because VFPA was pursuing its own project instead.

[3] The VFPA project was at the hearing stage of the environmental review process under the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 [*CEAA*] when GCT launched its application for judicial review. Since then, a number of important events have occurred, including the following:

- The *CEAA* was repealed and replaced with the *Impact Assessment Act*, SC 2019, c 28, s 1 on August 28, 2019;
- VFPA wrote to GCT on September 23, 2019, indicating that it was rescinding its March 2019 decision to not process GCT's Preliminary Project Enquiry for its port expansion project (September 2019 decision);
- GCT then sought to amend its Notice of Application and to file two additional affidavits;
- VFPA and the Attorney General of Canada brought motions to strike the application for judicial review on the basis that it was moot, and to strike certain affidavit evidence filed by GCT. The motions to strike were partially granted, and the motion to amend the Notice of Application was granted in part, by Case Management Judge Angela Furlanetto

on March 9, 2020 (*GCT Canada Limited Partnership v Vancouver Fraser Port Authority*, 2020 FC 348);

- VFPA appealed that decision. The appeal was heard before Justice Michael Phelan on September 24, 2020, and taken under reserve. The Attorney General of Canada did not make submissions on the appeal.

[4] In its motion for leave to amend its Notice of Application, GCT included a request for an Order that VFPA produce documents relating to both its March 2019 and its September 2019 decisions, as well as any documents relating to the decision-making process. This request was rejected by the Case Management Judge, who ruled at paragraph 73 of her decision that any request for the production of the record should be made by a specific request pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106 [*Rules*].

[5] GCT then submitted its Rule 317 request, in response to which VFPA produced documents on September 9, 2020. Unsatisfied with VFPA's disclosure, GCT brought a motion pursuant to Rule 318 seeking further documents. The present motion arises in relation to the Rule 318 motion.

[6] During a Case Management Conference on September 29, 2020, GCT indicated that it intended to seek leave of the Court to cross-examine Mr. Peter Xotta, VFPA's Vice President, Planning and Operations, in advance of the Rule 318 motion. It was directed to provide submissions to explain this request and, in the circumstances, it was agreed that the matter would proceed as a Rule 369 motion in writing, with both parties making written submissions. The parties agreed there was no need for a further motion record, in light of the material that had already been filed with the Court.

II. Submissions of the Parties

[7] GCT seeks leave of the Court to cross-examine Mr. Xotta in aid of its pending Rule 318(2) motion seeking further Rule 317 disclosure (in the course of its written submissions on its Rule 316 motion, GCT refers to this as the "317 motion"). GCT submits that it requires leave of the Court to cross-examine Mr. Xotta to probe what was considered by the VFPA in coming to the decision under review in the application given that he signed the certification of the Rule 317 disclosure on behalf of VFPA.

[8] In support of its Rule 318 motion objecting to the disclosure provided by VFPA, GCT filed an affidavit detailing the categories of documents not produced by VFPA, which GCT says are relevant and necessary for a fair determination of the issues raised by its application for judicial review. In response, VFPA filed two affidavits of an administrative assistant employed in the office of VFPA's counsel. GCT submits that this individual did not, and cannot, provide information that it claims is needed for its Rule 318 motion, including:

- Evidence responding to GCT's claim that VFPA has made only partial production of relevant Board materials and minutes of relevant Board meetings;
- Any "positive evidence" affirming that all relevant communications with external advisors, government communication and internal correspondence has been provided;
- Any information regarding third party agreements that GCT claims are relevant; or
- Any rationale for VFPA's failure to produce any documents relevant to its September 2019 decision purporting to rescind the initial March 2019 decision that refused to consider GCT's project proposal.

[9] GCT brought this motion pursuant to Rule 316, which states:

316 On motion, the Court may, in special circumstances, authorize a witness to testify in court in relation to an issue of fact raised in an application.	**316** Dans des circonstances particulières, la Cour peut, sur requête, autoriser un témoin à témoigner à l'audience quant à une question de fait soulevée dans une demande.

[10] GCT argues that the situation that has arisen in this case falls within the "special circumstances" contemplated by Rule 316. It submits that VFPA's affiant is incapable of providing any evidence in respect of the deficiencies in the record because she does not have any independent knowledge of the contents of that record. GCT contends that any cross-examination of this affiant would be hollow, given the limits of her knowledge.

[11] GCT submits that its only means of testing the adequacy of the record is through the cross-examination of Mr. Xotta, as he has direct personal knowledge of the decision-making process of VFPA in relation to the key decisions in this matter. GCT says that without that cross-examination, there will be no evidence before the Court regarding the documents relied on by VFPA in making its decisions – first its decision in March 2019 to not process the GCT project approval, and then its September 2019 decision to rescind that decision. GCT further argues that without the cross-examination of Mr. Xotta, "[t]here will also be no evidence before the Court regarding what other documents VFPA has in its possession relevant to the Application and to which GCT is presumptively entitled."

[12] GCT contends that the Court should examine its request in light of the fact that it alleges that VFPA demonstrated actual bias in its decision-making. It also notes that: "[t]he VFPA is not a traditional tribunal where the record of decision-making is demarcated. The murky decision-making process of this non-adjudicative decision-maker warrants evidence (by cross-

examination or otherwise) to establish precisely what information was before the decision-maker."

[13] In light of this, GCT argues that the Court should exercise its jurisdiction to order out-of-court cross-examination of Mr. Xotta pursuant to Rule 316. Relying on *Ginena v Canada (Attorney General)*, 2010 FC 297 at paras 4-5 [*Ginena*], it submits that the "special circumstances" to be considered by the Court under Rule 316 are fact-specific, with the key consideration being whether the affidavit evidence is inadequate.

[14] VFPA advances several arguments against GCT's motion. First, it says that Rule 316 is not applicable to a Rule 318 motion, because Rule 316 applies only to an "application" as defined in the *Rules*, and therefore it does not apply to a motion. It argues that Part V of the *Rules* governing applications contemplates that applications will proceed in a summary fashion based on affidavits and documents introduced as evidence through affidavits, as well as any cross-examination. It further contends that the *Rules* specifically provide for cross-examination on affidavits filed in an application, pointing to Rules 306-308.

[15] VFPA argues that Rule 316 does not authorize cross-examination outside of court. Instead, it says that Rule 316 provides a means to introduce *viva voce* evidence at the hearing, in addition to documentary evidence. VFPA submits that GCT's request is without precedent and contrary to the explicit wording of Rule 316. It argues that *Ginena* has no application because in that case, the applicant had requested permission to testify at the hearing, and that request was denied, with Prothonotary Richard Morneau noting the "exceptional nature" of such requests.

[16] Further, VFPA argues that Rules 317 and 318 do not contemplate cross-examination; Rule 317 provides a means by which a party can request a record, and Rule 318 sets out the process for objecting to such a request. VFPA notes that Rule 317 does not require a decision-maker to produce any documents that might be relevant to the issues raised in the application for judicial review. Rather, as confirmed by the Federal Court of Appeal in *Tsleil-Waututh First Nation v Canada (Attorney General)*, 2017 FCA 128 at para 107 [*Tsleil-Waututh 2017*], VFPA argues that Rule 317 only requires disclosure of material that is "relevant to an application" and is "in the possession" of the administrative decision-maker, not others. It does not serve the same purpose as documentary discovery in an action (*Tsleil-Waututh 2017* at para 115).

[17] Finally, VFPA submits that Mr. Xotta's evidence is not needed for the Court to make a determination on GCT's Rule 318 objection because the Court can make an Order pursuant to Rule 318(4) requiring further disclosure if it is persuaded that VFPA has made inadequate disclosure. VFPA argues that Rule 317 is not intended to provide the equivalent of documentary discovery to the parties to an application for judicial review, and that the Court should not accept GCT's efforts to obtain further discovery.

[18] In reply, GCT argues that its request properly fits within Rule 316 since it is in the context of an existing application for judicial review. GCT specifies that it does not seek to cross-examine Mr. Xotta at the hearing of the Rule 318 motion itself, but rather, "as is customary," to do so outside of court and to rely on the transcript at the hearing of the motion. It submits that Rule 316 is comparable to Rule 371, which provides that "the Court may, in special circumstances, authorize a witness to testify in court in relation to an issue of fact raised on a motion." Further, citing Rule 3, GCT argues "[w]hile there is no explicit provision for out of

court cross-examination of non-affiants, the *Rules* are to be interpreted and applied in a manner that secures a just, expeditious and cost-effective determination of every proceeding."

III. Analysis

[19] The crux of GCT's argument is set out in the following passage of its reply submissions:

> Having delayed the delivery of the record, the VFPA provided what GCT says is a deficient record. The VFPA should have produced the complete record long ago.
>
> On the 317 Motion, the VFPA has put forward an affiant with no knowledge of the record and/or of the VFPA. Any cross-examination of this affiant would be hollow.
>
> The only individual with actual knowledge of the adequacy of the VFPA's record is Mr. Xotta, who both swore the certification on behalf of the VFPA and signed the letter containing the March 1, 2019 decision at the root of the application for judicial review. As such he would be familiar with documents that underlie that decision and its September "rescission." On the judicial review application itself, the VFPA has not provided an affidavit from Mr. Xotta, despite his role in the decision-making process and knowledge of the record.
>
> Given the allegation of bias in the application, the VFPA's reluctance in producing its record and the clear deficiencies alleged in the record produced, GCT respectfully submits that the requested cross-examination is the only means by which it may properly test the adequacy of the VFPA's record for a fair determination of the Rule 317 Motion by the Court.

[20] I am not persuaded that it is necessary, at this stage, to make the Order requested by GCT. Three main reasons relating to the appropriate interpretation and scope of Rule 316 buttress my conclusion, namely, the plain wording of Rule 316, the limited jurisprudence applying and interpreting it, and the reported commentary as to its interpretation.

[21] First, the plain wording of Rule 316 provides that "the Court may, in special circumstances, authorize a witness to testify in court in relation to an issue of fact raised in an application" (emphasis added). The French version is consistent with this: "[d]ans des circonstances particulières, la Cour peut, sur requête, autoriser un témoin à témoigner à l'audience quant à une question de fait soulevée dans une demande" (emphasis added). Rules 306 and 307 provide for the filing of affidavits by the applicant and respondent, and Rule 308 provides for cross-examination on such affidavits. This evidence, together with the certified tribunal record filed pursuant to a request under Rule 317, comprise the evidentiary record in most applications for judicial review.

[22] I agree with GCT that Rule 316 is comparable to Rule 371, which enables the Court, in "special circumstances," to authorize a witness to testify in court on a motion. As with applications for judicial review, the *Rules* provide that in most cases a motion will be based on evidence submitted by affidavit and any cross-examination on such affidavits. Only in special circumstances will a witness testify in court at the hearing of a motion pursuant to Rule 371.

[23] These provisions may be contrasted with Rules 87-100 and Rules 271-273 relating to the taking of evidence out of court in the context of actions. These rules indicate that the drafters specifically considered the question of when evidence may be taken out of court and included specific and detailed provisions where it was deemed necessary and appropriate. I find that this is consistent with an interpretation of Rule 316 that limits it to authorizing testimony in court.

[24] In *Tsleil-Waututh 2017* at paragraph 107, Justice David Stratas stated, "Rule 317 means what it says." I interpret Rule 316 in the same way – it means what it says when it refers to the Court authorizing "a witness to testify in court."

[25] Second, this interpretation is consistent with the limited jurisprudence on the question. I agree with VFPA that the *Ginena* decision cited by GCT is of limited assistance, other than to emphasize the exceptional nature of an order under Rule 316, and the primacy of affidavit evidence on applications for judicial review.

[26] In *Tsleil-Waututh 2017* and other decisions, it has been recognized that there are exceptions to the general requirement that a Rule 317 request is limited to the material that was before the decision-maker when it made the decision under review (*Tsleil-Waututh 2017* at paras 112-114). One such exception relates to allegations of procedural unfairness (*Tsleil-Waututh 2017* at paras 98-99), which would include an allegation of actual bias. Each case must be examined on its own facts. However, this does not support an interpretation of Rule 316 that would extend it to taking of evidence out of court.

[27] In *Ermineskin Band of Indians v Canada (Minister of Indian and Northern Affairs)* (1987), 15 FTR 42 (FCTD) [*Ermineskin*], Justice Collier rejected a request for an order permitting the examination of an individual out of court. He noted that Rule 319(4) (the predecessor to the current Rule) provided that a court may authorize the oral testimony of a witness on the hearing of a motion, and stated: “That, of course, is for a witness to be called in support of, or in opposition to, the motion” (*Ermineskin* at 7). Justice Collier concluded that “[t]here is, however, nothing in the rules or procedures of this court permitting cross-examination, or examination, of a potential possible witness in advance of the hearing of an application” (*Ermineskin* at 7).

[28] In *Glaxo Canada Inc v Canada (Minister of National Health and Welfare)* (1987), 11 FTR 132 at 133 (FCTD), Justice Rouleau confirmed that an applicant seeking an order under

Rule 319(4) bears the burden of demonstrating the existence of a "special reason" to justify such an order. This was cited with approval in respect of the current Rule 316 in *Holland v Canada (Attorney General)*, 1999 CanLII 9168 at para 3 (FCTD). In turn, these decisions were cited with approval by Justice Richard Mosley in *Canadian Supplement Trademark Ltd v Petrillo*, 2010 FC 421 [*Petrillo*], where it was confirmed that the mere fact that the documentary evidence may contain contradictions was not a sufficient basis to make an order under Rule 316. In a similar vein, the desire to allow the Court to assess the demeanour of a witness does not, in itself, justify an order under Rule 316 (*Petrillo* at para 20). On the facts of that case, Justice Mosley found "[t]he present situation is not one which embodies the clearest of circumstances demonstrating that live evidence is necessary" (*Petrillo* at para 24).

[29] At this stage, it is not necessary to discuss the jurisprudence relating to the nature and scope of Rule 317 disclosure, since that will be the subject of GCT's Rule 318 motion, to be heard later. It suffices to note that the jurisprudence confirms that Rule 316 provides for oral testimony at the hearing of an application, not examination of a potential witness prior to the hearing. The jurisprudence also confirms that the onus lies on GCT to demonstrate that such an exceptional order is necessary.

[30] Third, this interpretation of Rule 316 is consistent with the reported commentary on the *Rules*: see, Brian Saunders et al, *Federal Courts Practice, 2020* (Toronto: Thomson Reuters) at 757; Hon Roger Hughes et al, *Canadian Federal Courts Practice, 2020* (Toronto: LexisNexis Canada) at 803; Bernard Letarte et al, *Recours et procédure devant les Cours fédérales* (Montréal: LexisNexis Canada) at 421-22.

[31] Finally, I would observe that the request might be premature. GCT has brought a motion under Rule 318 seeking better and further disclosure from VFPA. VFPA has, in turn, filed material defending its disclosure. The motion will be heard at a later date. The jurisprudence makes clear that a Court has "much remedial flexibility" in crafting a remedy in relation to a motion seeking greater disclosure under Rule 318(2): *Lukács v Canada (Transportation Agency)*, 2016 FCA 103 at para 13; *Girouard v Canadian Judicial Council*, 2019 FCA 252 at para 18.

[32] If the Court determines that VFPA's disclosure under Rule 317 is inadequate, it is evident that the Court has flexibility in crafting an appropriate Order, and thus GCT will not be without a remedy if it turns out that it is entitled to further disclosure. At this stage, however, I am not persuaded that any such disclosure is required in order for the Court to fairly hear and decide GCT's motion under Rule 318.

IV. Conclusion

[33] For these reasons, the motion by GCT pursuant to Rule 316 for leave to cross-examine Mr. Xotta in advance of the hearing of its motion under Rule 318(2) is dismissed.

[34] There shall be no order as to costs.

ORDER in T-538-19

THIS COURT'S ORDER is that:

1. The motion by GCT for an Order pursuant to Rule 316 for leave to cross-examine Mr. Xotta in advance of the hearing of its motion for further disclosure under Rule 318(2) is dismissed.

2. There is no order as to costs.

"William F. Pentney"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-538-19
STYLE OF CAUSE:	GCT CANADA LIMITED PARTNERSHIP v VANCOUVER FRASER PORT AUTHORITY AND ATTORNEY GENERAL OF CANADA

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURT RULES,* SOR/98-106

ORDER AND REASONS:	PENTNEY J.
DATED:	OCTOBER 15, 2020

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