Federal Court  Cour fédérale

Date: 20210521

Docket: T-628-20

Citation: 2021 FC 484

Ottawa, Ontario, May 21, 2021

PRESENT: Madam Justice Pallotta

BETWEEN:

JELISA PHILLIPS

Applicant

and

CAPITAL ONE BANK (CANADA BRANCH)

Respondent

ORDER AND REASONS

I. Introduction

[1] The applicant and moving party, Ms. Phillips, brings this motion under Rule 51 of the *Federal Courts Rules*, SOR/98-106 [***Rules***] to appeal the August 11, 2020 order of Prothonotary Aalto (**Order**). Ms. Phillips submits that Prothonotary Aalto erred in dismissing her Rule 317 motion for an order requiring the Office of the Privacy Commissioner of Canada (**OPC**) to

produce documents. The motion was dismissed on the basis that Ms. Phillips' production request is outside the scope of production that is permitted by Rule 317.

[2] By way of background, Ms. Phillips filed a complaint with the OPC, alleging that the respondent Capital One Bank (Canada Branch) (**Capital One**) breached the provisions of the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [***PIPEDA***]. The OPC issued a non-binding report of its findings regarding the complaint on May 9, 2019 (**OPC Report**). After receiving the OPC Report, Ms. Phillips filed a notice of application (**Application**) in this Court against Capital One (incorrectly named "Capital One Canada" in the style of cause). The Application included a request, under Rule 317, seeking the production of all materials related to Ms. Phillips' complaint before the OPC, for use in the Application against Capital One. Both the OPC and the respondent Capital One objected to the production request, which led to Ms. Phillips' motion to compel production.

[3] The nature of Ms. Phillips' Application is a key issue. On its face, the Application indicates that it is an application for judicial review made pursuant to ss. 18-18.1 of the *Federal Courts Act*, RSC 1985, c F-7 and pursuant to s. 14 of *PIPEDA*. The requested relief is an order for a hearing under s. 14 of *PIPEDA* for damages against Capital One, arising from Capital One's alleged breaches of *PIPEDA*, and an order quashing the OPC Report.

[4] Prothonotary Aalto agreed with the position of the OPC and Capital One that Rule 317 relates to the production of materials in an application for judicial review, and despite Ms. Phillips' assertions, the Application is not an application for judicial review. Rather, the nature

of Ms. Phillips' Application is a request for a *de novo* hearing under s. 14 of *PIPEDA* that seeks damages against Capital One for its alleged breaches of *PIPEDA*, and such a proceeding is the "appropriate recourse" for Ms. Phillips, according to *Kniss v Canada (Privacy Commissioner)*, 2013 FC 31 [*Kniss*]. Prothonotary Aalto found that the fact the Application seeks an order quashing the OPC Report was insufficient to ground a production order under Rule 317.

[5] Ms. Phillips submits Prothonotary Aalto erred by dismissing the motion for production of the OPC's materials on the basis that the requested production is outside of the scope of Rule 317 of the *Rules*. She maintains that the Application plainly seeks an order quashing the OPC Report, and a production order under Rule 317 is available on an application under s. 14 of *PIPEDA*.

[6] In addition, Ms. Phillips submits the Prothonotary erred by ignoring binding jurisprudence, by failing to address Ms. Phillips' submissions, and by providing inadequate reasons.

[7] For the reasons below, I am not satisfied that the Prothonotary committed any of the alleged errors in refusing Ms. Phillips' request for the OPC's materials under Rule 317. Ms. Phillips' motion appealing the Order is dismissed.

II. **Preliminary Issue: Style of Cause**

[8] Capital One is incorrectly named as "Capital One Canada" in the style of cause. The style of cause is hereby amended to properly name the respondent as "Capital One Bank (Canada Branch)".

III. **Issues and Standard of Review**

[9] The issues on this Rule 51 appeal are as follows:

1. Did the Prothonotary err in dismissing the motion on the basis that the requested production is outside of the scope of Rule 317 of the *Federal Courts Rules*?
2. Did the Prothonotary err by ignoring binding jurisprudence, by failing to address Ms. Phillips' submissions, or by providing inadequate reasons?

[10] The standard of review on an appeal of a discretionary order of a prothonotary is palpable and overriding error for questions of fact and questions of mixed fact and law, and correctness for questions of law and questions of mixed fact and law where there is an extricable legal principle at issue: *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 FCR 331 [*Hospira*] at paras 64, 66; *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235. As noted by the Federal Court of Appeal in *Hospira* at paragraph 64, "discretionary orders of prothonotaries should only be interfered with when such decisions are incorrect in law or are based on a palpable and overriding error in regard to the facts."

[11] For the reasons below, I find that the Prothonotary did not commit an extricable error of law. I agree with the submissions of Capital One and the OPC that the question of whether Ms.

Phillips' production request is outside the scope of Rule 317 is a question of mixed fact and law, and the Prothonotary's decision in this regard is reviewable for palpable and overriding error.

IV. **Analysis**

A. *Did the Prothonotary err in dismissing the motion on the basis that the requested production is outside of the scope of Rule 317 of the Federal Courts Rules?*

(1) Applicant's submissions

[12] Ms. Phillips makes two main points in support of her position that the Prothonotary erred in finding her request for production to be outside the scope of Rule 317.

[13] First, Ms. Phillips submits that the Prothonotary relied on the non-binding nature of the OPC Report to conclude that judicial review is not available to Ms. Phillips, effectively finding the OPC Report is not "a decision" of the OPC. Ms. Phillips argues that this runs contrary to jurisprudence establishing that the Court's powers of judicial review are broad enough to encompass review of a report in the nature of an opinion or recommendation, even if the report does not decide any issue: *Girouard v Canada (Attorney General)*, 2018 FC 865, [2019] 1 FCR 404 [*Girouard*] at paras 167-170. As the Application seeks an order in the nature of *certiorari* to quash the report, Ms. Phillips submits that the Prothonotary effectively struck out part of the relief in her Application on an erroneous basis, and contrary to jurisprudence setting stringent requirements for striking an application for judicial review: *David Bull Laboratories (Canada) Inc. v Pharmacia Inc.*, 1994 CanLII 3529 (FCA), [1994] FCJ No. 1629, [1995] 1 FC 588

[*Pharmacia*] at paras 10, 15. She submits that the Application must be taken as pleaded, not as reconfigured by the respondent: *Canada v Arsenault*, 2009 FCA 242 at para 10.

[14] Second, Ms. Phillips submits that Prothonotary Aalto misunderstood the nature of a proceeding under s. 14 of *PIPEDA* to be an alternative to judicial review, and erroneously relied on *Kniss*, which, in her view, did not conclusively decide this issue. The applicant in *Kniss* had filed "standalone" applications for judicial review of OPC reports of findings, solely under s. 18.1 of the *Federal Courts Act* and not under s. 14 of *PIPEDA*. The question before the Court in *Kniss* was whether to exercise "discretion" to judicially review the reports under s. 18.1 of the *Federal Courts Act* when the applicant had an alternative remedy under s. 14 of *PIPEDA*. While Ms. Phillips takes issue with the Court's characterization of judicial review as a discretionary power (she submits it is a constitutional right, relying on *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paras 28-32), she argues that the Court in *Kniss* did not set down a conclusive principle that an OPC report of findings cannot be challenged by way of a s. 14 proceeding under *PIPEDA*. Furthermore, she argues there was no issue before the Court regarding whether an order to compel production under Rule 317 is unavailable in an application under s. 14.

[15] Ms. Phillips contends that s. 14 of *PIPEDA* provides a substantive right to judicial review, through the procedure of a *de novo* hearing before the Federal Court. In other words, she submits that a standalone application for judicial review under ss. 18-18.1 of the *Federal Courts Act* is not required, as the language of s. 14 is broad enough to encompass a challenge to an OPC

report itself, and not merely a claim for damages against Capital One. Thus, in her view, *Kniss* is distinguishable because it does not relate to precisely the same issue raised by her motion.

[16] Ms. Phillips submits the Prothonotary's error resulted from confusion between a substantive right to judicial review and the procedure for undertaking such judicial review. She argues that it was proper to commence the Application under s. 14 of *PIPEDA* as the source of the substantive right of review, and under the *Federal Courts Act* as the procedure for exercising that substantive right. She contends that s. 14 of *PIPEDA* and the *Federal Courts Act* are not mutually exclusive because ss. 18 and 18.1-18.5 of the *Federal Courts Act*: (i) provide a substantive right to seek judicial review when such a right does not arise by way of another statute, such as *PIPEDA* in this case; and (ii) set out the procedural mechanism for bringing an application for judicial review, regardless of whether the right to review arises from the *Federal Courts Act* or a different statute. Thus, Ms. Phillips disagrees with the position of the OPC and Capital One that the right to commence a proceeding under s. 14 of *PIPEDA*, although triggered by the OPC Report, does not involve a review of the OPC Report. Ms. Phillips submits that this position would improperly immunize the OPC from review—as noted above, even investigative reports and recommendations that do not decide any issue may be subject to judicial review: *Girouard*.

[17] Thus, Ms. Phillips submits that a request for production pursuant to Rule 317 is not inconsistent with an application under s. 14 of *PIPEDA* for a *de novo* hearing, and there is no jurisprudence that squarely addresses and definitively concludes that Rule 317 does not, and cannot, apply to such an application.

[18] Ms. Phillips submits that she requires the full record before the OPC in order to advance her position on the Application. She relies on the Supreme Court of Canada's decision in *Radulesco v Canadian Human Rights Commission*, 1984 CanLII 120 (SCC), [1984] 2 SCR 407 [*Radulesco*], for the proposition that a failure to allow an opportunity to fairly rebut facts and allegations contained in an investigator's report recommending the dismissal of a complaint is prejudicial, and constitutes a breach of natural justice. She submits the *Radulesco* decision is indistinguishable from the case at bar, and binds this Court. Ms. Phillips submits that the Federal Court is not required to grant an oral hearing under s. 14 of *PIPEDA* in this proceeding, and that she is entitled to the OPC's record, before perfecting her application record, in order to make her case that such a hearing should be granted.

(2) Capital One and OPC's submissions

[19] Capital One is the respondent in this proceeding, but for convenience, I will refer to Capital One and the OPC together as "the respondents". Also, although they provided separate oral and written submissions on this motion, Capital One's submissions and the OPC's submissions are closely aligned. To simplify matters, I have not distinguished between them in these reasons.

[20] The respondents submit the Prothonotary correctly concluded that an application brought under s. 14 of *PIPEDA* is not a judicial review of an OPC report of findings. They disagree with Ms. Phillips' argument that the language of s. 14 is broad enough to encompass a challenge to an OPC report, as s. 14 only permits an applicant to raise matters referred to in specific sections of *PIPEDA* or its schedules, all of which relate to the conduct of the organization responding to the

complaint. The respondents submit that s. 14 of *PIPEDA* allows an individual, after bringing a complaint before the OPC and receiving a non-binding report of findings, to apply to the Court for a *de novo* hearing of the conduct of an organization against whom the complaint was initiated: *Englander v Telus Communications Inc.*, 2004 FCA 387 [*Telus*] at paras 47-48. Thus, s. 14 provides a mechanism for obtaining a legally binding decision regarding whether an organization's conduct complies with *PIPEDA*. Section 14 provides an adequate and broader right for dealing with matters raised in a complaint than does an application for judicial review, such as providing for an award of damages: *Kniss* at para 31.

[21] According to the respondents, the delivery of the OPC's report of findings acts as a procedural pre-requisite for a new application and hearing regarding an alleged breach of *PIPEDA* by the organization that was the subject of the complaint. In an application under s. 14 of *PIPEDA*, the Federal Court will look at the matter afresh, and is not constrained by the OPC's report of findings or any evidence before the OPC in the course of its investigation: *Eastmond v Canadian Pacific Railway*, 2004 FC 852 at paras 118-124. Thus, an application under s. 14 of *PIPEDA* is a *de novo* hearing, not an application for judicial review, and the OPC's report of findings is not to be treated as the impugned decision but rather as evidence that may be challenged or contradicted, and to which no deference is owed: *Bertucci v Royal Bank of Canada*, 2016 FC 332 [*Bertucci*] at para 11, citing *Telus* at paras 47-48. Further, the fact that no deference is owed to the OPC Report distinguishes this case from *Girouard*, where the reports in question were persuasive, and indeed, it was found that the conclusions and recommendations in the reports themselves would have "a devastating impact" on a judge's career and family: *Girouard* at para 185.

[22] Furthermore, the respondents submit the Order did not strike out part of the Application, but simply recognized that the thrust of the Application is a *de novo* hearing pursuant to s. 14 of *PIPEDA* and not a judicial review of the OPC Report, despite bald statements that purport to characterize the Application as both. In other words, Prothonotary Aalto engaged in an exercise of recognizing the substance of the Application over its form. Even if s. 14 is broad enough to encompass a challenge to a report of findings by the OPC, which the respondents deny, Ms. Phillips' Application does not raise such a challenge. The respondents submit the Application does not plead any grounds of review to support her request for an order quashing the OPC Report, and does not make even a general allegation that the conclusions of OPC Report are incorrect or unreasonable. The sole grounds pleaded in support of the Application are allegations that Capital One violated provisions of *PIPEDA*, that Ms. Phillips is entitled to damages against Capital One for the alleged breaches, and that the Court should convene a hearing pursuant to s. 14 of *PIPEDA* to determine those issues against Capital One.

[23] Turning to Ms. Phillips' production request, the respondents submit that the production of documents under Rule 317 is only available on an application for judicial review (*Lukács v Swoop Inc.*, 2019 FCA 145 [*Lukács*] at para 21; *Lill v Canada (Attorney General)*, 2020 FC 551 [*Lill*] at para 34) and Ms. Phillips' request does not satisfy the condition of Rule 317 that requires the requested material to be in the possession of a tribunal "whose order is the subject of the application". The respondents submit that the Prothonotary's conclusion on this point is entitled to deference, and in any event, it is legally correct: *Bertucci* at para 11; *Kniss* at para 28.

[24] The respondents submit that Ms. Phillips seeks no meaningful relief against the OPC, other than a bald request to quash a report that is not binding on her. At its core, the Application is not an application for judicial review, but rather, a private dispute for damages that would be decided based on a record that is not limited to the record before the OPC. The respondents assert that Ms. Phillips is attempting to use the production rules of Rule 317, which exist for the purpose of facilitating the full review of an administrative decision on judicial review, to obtain documents that will be used for a different purpose, in the context of a dispute between private litigants for monetary relief. The respondents submit that Ms. Phillips is not entitled to use Rule 317 to "cooper up allegations that never should have been made" (*Lukács* at para 19) or to assist a private claim for damages.

[25] In addition, the respondents argue that Ms. Phillips' request for production fails a second condition under Rule 317, namely, that the requested records are not relevant to the Application. Relevancy is defined by the grounds of review set out in an originating notice of application: *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 [*Tsleil-Waututh Nation*] at para 109. In this case, the Application does not state any grounds of review in respect of the OPC Report, and there are no allegations that would justify the request for production. The respondents submit that Rule 317 is a limited purpose tool that does not function in the same way as documentary discovery, and cannot be used on a fishing expedition: *Lukács* at para 16.

[26] Thus, the respondents submit the Prothonotary correctly concluded that Rule 317, which 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", is not applicable to a hearing *de novo*

pursuant to s. 14 of *PIPEDA*. The respondents submit this conclusion is consistent with past rulings of the Court, including:

- *Erwin Eastmond v Canadian Pacific Railway and Privacy Commissioner of Canada*, (May 23, 2003), Ottawa T-309-03 (FCTD) [*Erwin Eastmond*]: Prothonotary Tabib held that Rule 317 is not available for an application brought under s. 14 of *PIPEDA* since such an application does not involve a review of a report by the OPC, but rather involves a *de novo* review of the conduct of an organization that is the subject of a complaint to the OPC;
- *O'Grady v Attorney General of Canada*, (March 10, 2015), T-2587-14: Prothonotary Tabib, in a decision under s. 41 of the *Privacy Act*, RSC 1985, c P-21, held that Rule 317 applies exclusively in the context of the judicial review of an order or decision, and permits an applicant to have access to the record underlying the specific decision under review;
- *Lill* at paras 33 to 37: Justice Gascon held that a Rule 317 request for documents or material "must relate to the 'order' of the federal board, commission or other tribunal that is the subject of the application for judicial review."

[27] As argued in response to the motion before Prothonotary Aalto, the respondents submit that the *Radulesco* decision is distinguishable because it does not address whether an investigation file is compellable, but rather whether a tribunal (in that case, the Canadian Human Rights Commission) failed to observe a principle of natural justice by dismissing a complaint based on the recommendation in an investigator's report, without first allowing the complainant to see the investigator's report and provide submissions in response.

(3) Applicant's reply

[28] Ms. Phillips replies it is inconsequential that a s. 14 application under *PIPEDA* eventually leads to a proceeding between private parties. She argues that she does not request private documents, but rather, documents from a government body that gave an opinion regarding her complaint, and as such, the documents are relevant and compellable according to the principles in *Carey v Ontario*, [1986] 2 SCR 637 [*Carey*].

[29] Ms. Phillips submits that the cases relied on by the respondents—*Bertucci*, *Lill*, *Lukács*, and *Kniss*—are not directly on point, as none was made in the context of a motion under Rule 317 to compel production of the OPC's record in furtherance of an application under s. 14 of *PIPEDA*, and the only decision which is directly on point is *Erwin Eastmond*. Ms. Phillips submits that *Erwin Eastmond* consists of a short endorsement without analysis, which should be revisited.

[30] Ms. Phillips argues that she does not bear the onus of demonstrating that the OPC's record is relevant to the proceeding; rather, the onus is on the OPC to raise an objection pursuant to Rule 318, and establish that it should not be compelled to produce its record for reasons such as relevance or privilege.

(4) Analysis

[31] In deciding whether Ms. Phillips is entitled to an order compelling the production of the OPC's materials, the Prothonotary considered the nature of the Application in question and

found that it is not an application for judicial review, but a request for a *de novo* proceeding under s. 14 of *PIPEDA* to recover damages against Capital One for its alleged breaches of *PIPEDA*. The Prothonotary's finding regarding the nature of the Application was a question of mixed fact and law. I am not persuaded of any extricable error of law or palpable and overriding error of mixed fact and law in the Prothonotary's finding.

[32] In my view, the cases relied on by Ms. Phillips do not support the argument that s. 14 of *PIPEDA* provides a substantive right to judicial review by way of the procedure of a *de novo* hearing. This Court and the Federal Court of Appeal have recognized that a proceeding under s. 14 of *PIPEDA* is not a review of the OPC's report of findings, but a fresh application regarding the conduct of the organization against whom the complaint was filed: *Englander* at paras 47-48; *Eastmond* at para 118-124; *Kniss* at para 28. As noted by this Court in *Eastmond*, at paragraph 118:

> [118] A proceeding under section 14 of *PIPEDA* is not a review of the Privacy Commissioner's report or his recommendation. It is a fresh application to this Court by a person who had made a complaint to the Privacy Commissioner under *PIPEDA* and who, in order to obtain a remedy under section 16, bears the burden of demonstrating [the responding organization] violated its *PIPEDA* obligations.

[33] In any event, even if Ms. Phillips is correct that a proceeding under s. 14 of *PIPEDA* is broad enough to encompass a review of the OPC Report, the Application in question does not plead any basis for reviewing the OPC Report, or engage any substantive right of judicial review that may exist under s. 14.

[34] Furthermore, I disagree with Ms. Phillips' submission that the Prothonotary concluded a judicial review was unavailable because the OPC Report is not "a decision", since it is in the nature of a recommendation without legal effect, and it is not binding. The Prothonotary's statement that the Application "is not a judicial review of any decision of the Privacy Commissioner" was a finding about the nature of Ms. Phillips' Application, not the nature of the OPC Report. In other words, the Prothonotary found that Ms. Phillips' Application did not challenge any aspect of the OPC Report. There is no reviewable error in that finding.

[35] As noted by the respondents, all of the pleaded grounds supporting the Application are allegations against Capital One: for example, that Capital One violated *PIPEDA* by failing to disclose the purpose of the collection of information and by failing to limit the use, disclosure, and retention of Ms. Phillips' personal information. Although the Application requests an order quashing the OPC Report, it pleads no grounds to support the request. It does not plead any of the grounds for relief in the nature of judicial review that are set out in s. 18.4 of the *Federal Courts Act*, and makes no allegation of an error in the OPC Report or any irregularity in the OPC's process leading to the OPC Report.

[36] I agree with the respondents that the Prothonotary's Order did not amount to striking out a part of the Application. Ms. Phillips' motion sought to compel documentary production, and Prothonotary Aalto did not err by considering the substance of her Application in order to determine whether an order to compel production under Rule 317 was appropriate. As noted above, the Application contains no pleaded grounds against the OPC Report or the procedure undertaken before the OPC. In my view, Prothonotary Aalto did not err in finding the bare

request for an order quashing the OPC Report to be an insufficient basis to ground an order compelling the OPC to produce materials under Rule 317. It is not necessary to quash the OPC Report in order to obtain any of the other relief sought in the Application, as the OPC Report is non-binding, and does not constrain Ms. Phillips or the Court in a *de novo* hearing.

[37] In my view, it is unnecessary to decide the issue raised by Ms. Phillips that there is no jurisprudence that definitively states Rule 317 can never apply to an application under s. 14 of *PIPEDA*. The issue on appeal before me is whether Prothonotary Aalto erred in ruling that Ms. Phillips is not entitled to an order compelling production of the OPC's records under Rule 317. In my view, the Prothonotary did not err in finding that the request for production in Ms. Phillips' Application is outside of the scope of Rule 317.

[38] The scope of Rule 317 is summarized in *Lill* at paras 33 to 35:

> [33] Rule 317 is found in Part 5 of the Rules, which applies to "Applications", including applications for judicial review (rule 300). Rule 317 allows any party, in the context of an application for judicial review, to "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 by serving on the tribunal and filing a written request, identifying the material requested" (emphasis added). Such a request must specify the documents or material requested. In addition to being relevant, the documents or material must relate to the "order" of the federal board, commission or other tribunal that is the subject of the application for judicial review.
>
> [34] Rule 317 therefore requires that there be a judgment or decision of a federal board, commission or other tribunal. Indeed, there can be no production of documents under rule 317 "unless an order of the tribunal exists and is under review" (*Lavigne* at para 26).
>
> [35] An application under rule 317 is intended to obtain documents from an administrative decision maker whose decision is under

> judicial review. It allows for the disclosure of documents that were before the federal board, commission or other tribunal that made a decision subject to judicial review, so as to allow the Court to consider and decide on the merits of the judicial review with all the material that was before the administrative decision maker.

[39] For the reasons noted above, the Application is not an application for judicial review of the OPC Report. Rule 317 is only for use in applications for judicial review: *Lukács* at para 21. The Prothonotary did not err in concluding that Ms. Phillips' request is outside the scope of Rule 317.

[40] In addition, Rule 317 is a limited purpose tool—it does not serve the purpose of documentary discovery in an action and cannot be used on a fishing expedition: *Lukács* at para 16. As the Application does not make any allegations against the OPC's process, or the integrity or conclusions of the OPC Report, the requested materials are not relevant to the Application and Ms. Phillips' request is outside the scope of Rule 317: *Tsleil-Waututh Nation* at para 109.

[41] Ms. Phillips relies on the Supreme Court's decision in *Radulesco* for the proposition that it is prejudicial, and a breach of natural justice, to deny a complainant an opportunity to fairly rebut facts and allegations that are contained in an investigator's report recommending the dismissal of a complaint. Ms. Phillips wishes to make submissions regarding the OPC Report in support of her application under s. 14 of *PIPEDA*, and states that she requires the record before the OPC in order to make full submissions; she submits that the point of Rule 317 is to compel production of the OPC's full record so that she may do so.

[42] I disagree that the principles in *Radulesco* apply to Ms. Phillips' case. In *Radulesco*, the tribunal breached natural justice by acting on the recommendation of an investigator without permitting the complainant to see the investigator's report. The complainant was invited to make submissions to the tribunal, but was denied any opportunity to make submissions that would address the investigator's findings: *Radulesco* at para 11. In this case, Ms. Phillips has the OPC's Report. Furthermore, unlike the situation in *Radulesco*, the Application does not allege the OPC breached natural justice by failing to afford Ms. Phillips an opportunity to be heard before issuing the OPC Report of findings. Finally, as noted above, Rule 317 does not serve the purpose of documentary discovery in an action and cannot be used on a fishing expedition.

[43] In conclusion, the Prothonotary did not err in dismissing Ms. Phillips' motion on the basis that the requested production is outside of the scope of Rule 317 of the *Federal Courts Rules*.

B. *Did the Prothonotary err by ignoring binding jurisprudence, by failing to address Ms. Phillips' submissions, or by providing inadequate reasons?*

(1) Applicant's submissions

[44] Ms. Phillips submits the Prothonotary erred by ignoring and refusing to apply the Supreme Court's decision in *Radulesco*, effectively overturning a precedent that was binding on the Court: *Canada v Craig*, 2012 SCC 43, [2012] 2 SCR 489 at paras 18-27.

[45] Also, Ms. Phillips submits the Prothonotary erred by failing to provide adequate reasons, and by not addressing her submissions. Ms. Phillips relies on *Baker v Canada (Minister of*

Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 SCR 817 [*Baker*] and other decisions in immigration proceedings, including: *Adu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 565; *Li v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1109; and *Kandhai v Canada (Citizenship and Immigration)*, 2009 FC 656. Ms. Phillips submits the Order parrots the submissions of the OPC and Capital One, resulting in a reasonable apprehension of bias, and the denial of a right to a fair hearing: *Siloch v Canada (Minister of Employment and Immigration)* (1993), 10 Admin. LR (2d) 285, 151 NR 76 (FCA).

(2) Capital One and OPC's submissions

[46] As noted above, the respondents submit that *Radulesco* is readily distinguishable. Ms. Phillips does not allege that the OPC breached natural justice by failing to afford an opportunity to be heard, and Ms. Phillips has a copy of the Report, unlike the complainant in *Radulesco*.

[47] The respondents submit Ms. Phillips had ample opportunity to make submissions to the Court through her motion record and reply. The Order indicates that the Prothonotary read and considered Ms. Phillips' materials and her reply, and the Order reflects a consideration of all relevant issues. The respondents submit that detailed reasons are not necessary, and a lack of detailed reasons does not detract from the deference owed to the Prothonotary's findings: *Apotex Inc v Canada (Health)*, 2016 FC 776 [*Apotex*] at paras 81-84; *Maximova v Canada (Attorney General)*, 2017 FCA 230 [*Maximova*] at para 11. According to the respondents, it would be unreasonable to require extensive reasons by a prothonotary dealing with a large volume of procedural issues, and the Order is sufficiently clear and detailed to inform Ms. Phillips why her

motion was dismissed: *Savanna Energy Services Corp. v Technicoil Corp.*, 2005 FC 842 at para 19; *Sarmadi v Canada*, 2017 FCA 131 at para 14.

(3) Analysis

[48] I am not persuaded that the Prothonotary erred by ignoring binding jurisprudence, by failing to address Ms. Phillips' submissions, or by providing inadequate reasons.

[49] I disagree that *Radulesco* is indistinguishable from the present case, for the same reasons noted above. The Prothonotary did not ignore binding precedent.

[50] The Prothonotary did not err by failing to address Ms. Phillips' submissions or by failing to provide adequate reasons. The decisions that Ms. Phillips cites in support of her argument that the reasons are inadequate were made in the context of a judicial review of an administrative decision, not an appeal of a prothonotary's order. Nonetheless, even in the context of a review of an administrative decision, the adequacy of reasons is assessed against the purpose for giving reasons, and is not measured by the pound: *Vancouver International Airport Authority v Public Service Alliance of Canada*, 2010 FCA 158 at paras 11 and 17. Lengthy and detailed reasons by a prothonotary are not required, and do not diminish the deference owed to the decision: *Maximova* at para 11; *Apotex* at para 84. The Order indicates that the thrust of Ms. Phillips' Application is a request for a *de novo* hearing under s. 14 of *PIPEDA*, that the proceeding is not a judicial review of any decision of the OPC, and that the production of documents requested by Ms. Phillips is therefore outside the scope of Rule 317. In my view, these reasons address Ms.

Phillips' submissions, and provide sufficient explanation for the basis for the Prothonotary's decision to dismiss her motion.

V. **Conclusion**

[51] The Prothonotary did not commit a reviewable error in dismissing the motion to compel production under Rule 317, and this motion to appeal the Order is dismissed.

[52] Ms. Phillips requests 45 days to deliver supporting affidavits in accordance with Rule 306, and Capital One does not object. Ms. Phillips shall comply with Rule 306 on or before July 5, 2021.

[53] The OPC does not seek costs.

[54] Capital One submits it should be awarded costs in respect of the motion and this appeal as Ms. Phillips was improperly seeking production that she is not entitled to, in an effort to develop a case against Capital One in pursuit of more than $400,000 in damages. Capital One submits it opposed the motion and this appeal to prevent an abuse of process that could potentially have an adverse impact on it, if Ms. Phillips were to succeed. Capital One asserts the proceedings were expensive to defend, and the requested cost award is modest. Prothonotary Aalto had granted costs to Capital One in the cause, on the basis that Capital One was successful on the motion and Ms. Phillips, although self-represented, should bear some consequence for having pursued relief to which she was not entitled. Capital One submits the award should be

reconsidered, as it appears that Ms. Phillips was assisted by Mr. Galati at the time, even if she did not have a solicitor of record.

[55] The total cost award requested is $2,712.00. Capital One seeks costs in the amount of $847.50, inclusive of HST, for the motion before Prothonotary Aalto, based on 5 units for preparation and filing of a contested motion under Column III of the Tariff and a per unit rate of $150.00. Capital One seeks costs in the amount of $1,864.50, inclusive of HST, for the appeal, based on 5 units for preparation of a contested motion and 6 units for attending a 3 hour hearing.

[56] Ms. Phillips submits that costs should not be awarded against her as Mr. Galati's assistance is on a *pro bono* basis, and her motion and appeal raise public interest issues.

[57] In my view, the costs of this appeal should follow the event. I am not satisfied that the appeal raised issues of sufficient public interest such that no costs should be awarded. While the amount claimed in Capital One's bill of costs is reasonable in view of the work involved, the hearing was just over 1.5 hours. I have decided to award costs of this appeal in the amount of $1,356.00 inclusive of HST, based on 8 units under the Tariff, in any event of the cause.

[58] I am not satisfied that Prothonotary Aalto's order as to costs of the motion should be revised.

ORDER in T-628-20

THIS COURT ORDERS that:

1. The style of cause is amended to reflect the proper name of the respondent, as Capital One Bank (Canada Branch);
2. The Rule 51 motion appealing Prothonotary Aalto's Order is dismissed;
3. Capital One is awarded costs in the amount of $1,356.00, in any event of the cause; and
4. Ms. Phillips shall comply with Rule 306 on or before July 5, 2021.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-628-20
STYLE OF CAUSE:	JELISA PHILLIPS v CAPITAL ONE CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JANUARY 19, 2021
ORDER AND REASONS:	PALLOTTA J.
DATED:	MAY 21, 2021

APPEARANCES:

Rocco Galati	FOR THE APPLICANT
Mitch Koczerginski	FOR THE RESPONDENT
Jennifer Seligy Raweya Abdulowali	FOR THE PRIVACY COMMISSIONER OF CANADA

SOLICITORS OF RECORD:

Rocco Galati Law Firm Professional Corporation Toronto, Ontario	FOR THE APPLICANT
McMillan LLP Barristers and Solicitors Toronto, Ontario	FOR THE RESPONDENT
Office of the Privacy Commissioner of Canada Gatineau, Quebec	FOR THE PRIVACY COMMISSIONER OF CANADA