Federal Court Cour fédérale

Date: 20210325

Dockets: T-189-19
T-190-19
T-191-19

Citation: 2021 FC 253

Ottawa, Ontario, March 25, 2021

PRESENT: The Honourable Mr. Justice Bell

Docket: T-189-19

BETWEEN:

PREVENTOUS COLLABORATIVE HEALTH

Applicant

and

CANADA (MINISTER OF HEALTH)

Respondent

Docket: T-190-19

AND BETWEEN:

PROVITAL HEALTH

Applicant

and

CANADA (MINISTER OF HEALTH)

Respondent

Docket: T-191-19

AND BETWEEN:

COPEMAN HEALTHCARE CENTRE

Applicant

and

CANADA (MINISTER OF HEALTH)

Respondent

PUBLIC ORDER AND REASONS

(Confidential Order and Reasons issued March 25, 2021)

I. OVERVIEW

[1] The Applicants bring the within motion under Rule 51 of the *Federal Courts Rules,* S.O.R./98-106, (the "Rules") to appeal the October 20, 2020 Order of a Prothonotary of this Court, wherein she dismissed the Applicants' motion for an Order for production of documents (the "Requested Records") under Rules 317 and 318.

[2] The Prothonotary dismissed the Applicants' motion upon concluding that Rule 317 does not apply to *de novo* reviews conducted pursuant to section 44 of the *Access to Information Act,* R.S.C. 1985, c. A-1, (the "ATIA").

[3] The Applicants contend that due to the novel nature of some of the legal issues raised in the underlying application, including an argument regarding the division of powers under the *Constitution Act*, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5, it is in the interests of the administration of justice that they be provided access to the Requested Records.

[4] For the reasons set out herein, I agree with the Applicants and allow the appeal.

II. FACTS

[5] On June 22, 2020, each of the Applicants served the Respondent with a Request for Material in the possession of a Tribunal pursuant to Rule 317 of the Rules (the "Requests for Material"). The Requests for Material sought disclosure of a number of documents relevant to each of their Applications, brought pursuant to section 44 of the ATIA. Those documents had not been produced to the Applicants and were allegedly before the Chief of the Access to Information and Privacy Division of Health Canada (the "Chief of ATIP") when she made her decision to release certain records (the "Records") in response to Access to Information Request A-2016-001859 (the "ATI Request").

[6] The material sought, which was not in the possession of the Applicants, constitutes the following:

a) [redacted]

b)

c)

d)

e)

f)

g)

h)

[7] On July 13, 2020, the Respondent informed all parties of its objection to the Requests for Material, pursuant to Rule 318(2), citing the following reasons for the objection:

a) First, Rules 317 and 318 do not apply because the Applicants have sought an application in the nature of a *de novo* hearing pursuant to section 44 of the ATIA. In a *de novo* review, the Court will determine whether Health Canada correctly applied the exemptions to the records at issue. Both parties can lead new evidence, and the Applicants bear the burden of demonstrating that the disclosure under the ATIA should not be made on a balance of probabilities;

b) Second, the Rule 317 Requests were not made in a timely fashion. These requests were made less than one month before the Applicants' Application Records are due, a year and a half after they filed their respective Applications, and eight months after they cross-examined Canada's two affiants. Further, the Applicants made these requests only after being denied access to these materials by way of a motion to this Court;

c) Third, if this Court finds that Rules 317 and 318 apply to this scenario, then the Rule 317 Requests are overbroad, in the nature of discovery of documents, and seek material irrelevant to the application. The Applicants have not provided any reasons why the documents requested are relevant to their Notices of Application. Canada has already served (and cross-examinations have already taken place on) affidavits attaching the relevant material pertaining to the processing of the requests and the unredacted material captured by the requests. The material sought in the Rule 317 Requests, included communication between Health Canada and Alberta Health, are not relevant.

[8] On July 15, 2020, the Applicants brought a motion for an Order for production of the Requested Records pursuant to Rule 318 of the Rules.

[9] On October 20, 2020, a Prothonotary dismissed the Applicants' motion after concluding that Rule 317 does not apply to *de novo* reviews conducted pursuant to section 44 of the ATIA. She did not consider the Respondent's second two objections to producing the Requested Records.

III. ISSUES

[10] The sole issue for determination on this motion is whether the Prothonotary erred in concluding that Rule 317 of the Rules does not apply to the section 44 review, in the circumstances.

IV. STANDARD OF REVIEW

[11] The question of whether Rule 317 applies to a section 44 review is a pure question of law. Pursuant to *Housen v. Nikolaisen,* 2002 SCC 33, [2002] 2 S.C.R. 235 questions of law are reviewable on a standard of correctness.

V. ANALYSIS

A. *Rule 317 Applies to the section 44 Review in the circumstances*

[12] In her decision, the Prothonotary concluded it is “untenable” that a section 44 review constitutes an application for judicial review because a *de novo* review is not, according to established jurisprudence, a judicial review.

[13] The Applicants contend that a section 44 review is a judicial review despite the fact that it is conducted on a *de novo* basis. They assert that the Prothonotary erred in deciding that Rule 317 does not apply to such a review. They say the jurisprudence, which suggests the contrary, is largely distinguishable. According to the Applicants, it is the Chief of ATIP’s decision to release the Records that is the subject of judicial review.

[14] Importantly, the Applicants assert that even though a section 44 review is a *de novo* review, it is clear that the administrative decision-maker’s decision is under review. See, *Merck Frosst Canada Ltd v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at para. 53 [*Merck Frosst*] where the Court states:

> There are no discretionary decisions by the institutional head at issue in this case. Under s. 51 of the Act, the judge on review is to determine whether "the head of a government institution is required to refuse to disclose a record" and, if so, the judge must order the head not to disclose it. It follows that when a third party, such as Merck in this case, requests a "review" under s. 44 of the Act by the Federal Court of a decision by a head of a government institution to disclose all or part of a record, the Federal Court judge is to determine whether the institutional head has correctly applied the exemptions to the records in issue: *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66, at para. 19; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306, at para. 22. This review has sometimes been referred to as *de novo* assessment of whether the record is exempt from disclosure: see, e.g., *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (F.C.T.D.), at pp. 265-66; *Merck Frosst Canada & Co. v. Canada (Minister of Health)*, 2003 FC 1422 (CanLII), at para. 3; *Dagg*, at para. 107. The term "*de novo*" may not, strictly speaking, be apt; there is, however, no disagreement in the cases that the role of the judge on review in these types of cases is to determine whether the exemptions have been applied correctly to the contested records. Sections 44, 46 and 51 are the most relevant statutory provisions governing this review.

[15] It is the administrative decision-maker's decision that is "the subject of the application". This fits squarely within the language of Rule 317. In *Viandes du Breton Inc. c. Canada*, 2006 FC 335, at para. 30, [*Viandes du Breton*], this Court identified a section 44 review as an application for judicial review.

> The remedy under section 44 of the Act is a summary proceeding (application for judicial review). It is of a hybrid nature since, as several decisions of this Court and the Federal Court of Appeal have indicated, it is more like a *de novo* proceeding than a typical judicial review proceeding.[…]

[16] The Respondent relies, in part, upon *Lavigne v. Canada Post Corp*, 2009 FC 756, [2009] A.C.F. No. 942 [*Lavigne*], wherein Justice de Montigny, then of this Court, upheld the decision of a Prothonotary in finding that Rule 317 does not apply to an application under section 77 of the *Official Languages Act*, R.S.C., 1985, c. 31 (the "OLA"). However, it is evident that Rule 317 could not be invoked against the Commissioner of Official Languages for one simple reason. The Commissioner's decision was not under review. An application under section 77 of the OLA is different from an application for judicial review:

> It is designed to verify the merits of the complaint made to the Commissioner, not of the Commissioner's decision or report, and to secure relief that is appropriate and just in the circumstances. […] (see *Lavigne* at para. 27).

[17] An attack upon the merits of the complaint is not an attack upon the Commissioner's decision or report, and, hence, not reviewable. The *ratio* of that case does not support the proposition that the Chief of ATIP's decision in the present appeal, is not subject to judicial review.

[18] The Respondent also relies upon *Lukács v. Swoop Inc.*, 2019 FCA 145, 305 A.C.W.S. (3d) 500 [*Lukács*] to support its contention that the Chief of ATIP's decision is not under judicial review. In *Lukács*, however, the issue concerned the applicability of Rule 317 to a motion for leave to appeal under Rule 352. Rule 352 is not found in Part 5 of the Rules while Rule 317 is found under that Part, which specifically addresses the issue of judicial reviews. *Lukács*, like *Lavigne*, lends limited support to the position advanced by the Respondents in the within motion.

[19] Not surprisingly, the Prothonotary relied upon *Philippe Nolin v. Attorney General of Canada*, (20 November 2015), Ottawa, Docket: T-1749-14 (FC) [*Nolin*], which holds that Rule 317 does not apply to applications brought pursuant to section 41 of the ATIA. In *Nolin*, the individual bringing the section 41 review attempted to use Rule 317 to seek production of the exact records to which he had requested access in his original Access to Information Request and for which the Department of Justice had refused access. This Court, in *Nolin*, upheld the ruling of Prothonotary Tabib wherein she concluded that an application brought pursuant to section 41 of ATIA was a *de novo* determination of the validity of the government department's denial of access and not a judicial review of that decision. The decision also held that since the section 41 review was on a *de novo* basis, the Office of the Information Commissioner of Canada's decision to uphold the Department of Justice's refusal to disclose the information was not "the subject of the application".

[20] The Applicants correctly note that while *Nolin* holds that a section 41 review is not a judicial review, the Court, in its reasons, refers to such a review as constituting a "judicial review". The Applicants contend *Nolin* is internally inconsistent. I agree. The procedure either constitutes a judicial review or it does not.

[21] The facts of the *Nolin* case placed the Court in a difficult position. Had it found Rule 317 applied in the circumstances, it would have created a loophole whereby someone seeking access to information, which a government department refused to disclose, could simply access the same information through Rule 317. Understandably, the Court interpreted the application of Rule 317 in such a way as to avoid creating such confusion.

[22] In addition to the above observations, the *Nolin* case is distinguishable from the present appeal. A section 41 review permits individuals who are seeking disclosure of records to bring the matter before this Court for review. A section 44 review, on the other hand, permits third parties affected by access to information requests to seek a remedy from the courts. The fact scenario implicit in a s. 41 review, brought by a party seeking disclosure of records, provides compelling reasons to find that Rule 317 does not apply. However, under a s. 44 review, there are no similar considerations which militate in favour of a conclusion that Rule 317 does not apply. The *Nolin* decision is silent on that issue.

[23] The Respondent also relies on *Kelly A. O'Grady v. Attorney General of Canada*, (10 March 2015), Ottawa, Docket: T-2587-14 (FC) [*O'Grady*], to support its position that Rule 317 only applies in the context of judicial review of an order or decision which is the subject of an application pursuant to section 18.1 of the *Federal Courts Act,* R.S.C., 1985, c. F-7. While the *O'Grady* Order does make this statement, it would appear to have been made in *obiter*. A fulsome reading of the Order demonstrates that the issue in that case, as in *Lukács*, did not relate to the potential judicial review of the investigation and findings of the Privacy Commissioner. Rather, in *O'Grady*, the applicant sought a declaration that an agreement between Statistics Canada and the McGill University Health Centre was illegal, void and of no effect.

[24] The Court in *O'Grady* found that the applicant had improperly sought review of two or more decisions, in contravention of Rule 302, and was seeking production of one tribunal's record for the sole purpose of supporting the judicial review of the other decision. As in *Nolin*,

the Rule 317 motion was an improper use of the Rule because the decision of the Privacy Commissioner was not the real issue under review in the application.

[25] In the within appeal, the decision of Health Canada is under review. The principles in *O'Grady* therefore do not apply. The Court in *O'Grady*, with respect, opined upon an issue that it was not required to address.

[26] As is evident from *Lavigne*, Rule 317 is designed to obtain materials from a tribunal in cases of judicial review of its decision. Based upon *Merck Frosst,* and consistent with this Court's decision in *Viandes du Breton,* I conclude a section 44 review is a judicial review. Nothing in Rule 317 indicates that its application is limited to applications brought pursuant to section 18.1 of the *Federal Courts Act*. Had Parliament intended same, it could easily have done so.

[27] Moreover, as a matter of public policy it would be wrong to conclude that Rule 317 is not applicable to a *de novo* review. As the Federal Court of Appeal recognized in *Canadian Copyright Licensing Agency v. Alberta,* 2015 FCA 268, 479 N.R. 345, at para. 14:

> If the reviewing court does not have evidence of what the administrative decision-maker has relied upon, the reviewing court may not be able to detect reviewable error. In other words, an inadequate evidentiary record before the reviewing court can immunize the administrative decision-maker from review on certain grounds.
>
> [Emphasis Added]

[28] This statement applies equally to a *de novo* judicial review as it does to a traditional judicial review.

[29] The Respondent contends in its July 13, 2020 objection to producing the requested records, that both parties can lead new evidence on a *de novo* review. That is true. The Respondent also contends the Applicants bear the burden of demonstrating, on a balance of probabilities, that the disclosure under the ATIA should not be made. That is also true. However, the following fault lines appear in the analysis. First, it is the Respondent who is in possession of the evidence which the Applicants wish to adduce. To insulate the Respondent from disclosure of this evidence would unfairly disadvantage the Applicants, and would immunize the Respondent from effective review on the basis of the content of the Requested Records. Second, the Applicants raise a constitutional challenge regarding division of powers which must be addressed. The Applicants are entitled to know what, if anything, the decision-maker had and considered, on that issue. Third, section 46 of the ATIA is not an adequate alternative to Rule 317 because it does not provide a means by which the Applicants can present the Requested Records to the Court. Finally, the Applicants have no control over whether or not a Court chooses to review records pursuant to section 46 of the ATIA.

[30] For all of the above reasons, I conclude the learned Prothonotary erred in concluding that Rule 317 does not apply to a *de novo* judicial review under section 44 of the ATIA.

B. *It is in the Interest of Justice that the Requested Records be Produced*

[31] It is in the interests of the administration of justice that the Requested Records be produced. I reach this conclusion for the following reasons: First, it appears that many of the Requested Records relate to an issue that has not been considered by the courts, namely the constitutionality of a transfer of third-party health information from a Province, which has constitutional jurisdiction over health care, to the Federal government. There is a legitimate question about whether the Federal government can do through the back door that which it cannot do through the front door. Second, presuming the *Canada Health Act Extra-billing and User Charges Information Regulations*, S.O.R./86-259 survives a constitutional challenge, neither that regulation, nor any other provision of the *Canada Health Act*, R.S.C., 1985, c. C-6, purports to clothe Health Canada with investigatory powers to monitor compliance. Third, privacy, especially privacy of health information, is a significant public policy concern. There are multiple statutes curtailing the sharing of health information, including the federal *Privacy Act*, R.S.C., 1985, c. P-21, and the *Alberta Health Information Act*, R.S.A. 2000, c. H-5.

[32] In order to properly assess whether the disclosure of the [redacted] was lawful, the Court must have the benefit of fulsome submissions from both parties. Without access to all relevant information, the Applicants are prejudiced. Because there is no document production in a section 44 review, the Applicants require access to Rule 317, in order to effectively review the impugned decision.

VI. REMEDY

[33] In the result, I allow the appeal. The issue I must now consider is whether to make the order sought by the Applicants or refer the matter back to the prothonotary with a direction that

she rule upon the second and third issues raised by the Respondent; namely, those of timeliness and over breadth as outlined in paragraph 7, *supra*. Before this Court, the Applicants made no submissions on the issues of timeliness and over breadth, whereas both were addressed by the Respondent. I am of the view that the Prothonotary, who no doubt has fulsome arguments before her from all parties, is better positioned to address the outstanding issues (see: *Merck & Co. Inc. v. Apotex Inc.*, 2003 FC 1483 (CanLII) at paras. 26-28 and *Leo Pharma Inc. v. Teva Canada Limited*, 2014 FC 1241, at para. 34).

[34] The Prothonotary awarded costs on the motion before her, fixed in the amount of $1000.00, all-inclusive of disbursement and taxes, in favour of the Respondent. Each of the parties have sought costs on this appeal but have left the amount to be determined, pursuant to Rule 400(3) of the Rules, at the discretion of the Court. I adopt the same approach as did the Prothonotary, and award one set of costs in the amount of $1000.00, all-inclusive of taxes and disbursements, to the Applicants, jointly and severally. I also reverse the award of costs of $1000.00 awarded to the Respondent, by the Prothonotary and award one set of costs, all-inclusive of taxes and disbursements, to the Applicants, jointly and severally, on the motion before her.

ORDER in T-189-19, T-190-19, T-191-19

FOR ALL OF THE FOREGOING REASONS, THIS COURT:

1. Orders that the Applicants' appeal from the order of the Prothonotary dated October 20, 2020 is allowed;
2. Declares that Rule 317 of the *Federal Courts Rules* is applicable to the *de novo* review under section 44 of the ATIA, in the circumstances;
3. Orders that the matter be referred back to the Prothonotary for determination of the issues of timeliness and over breath raised before her;
4. Orders that the costs in the amount of $1,000.00, all-inclusive of taxes and disbursements, awarded to the Respondent by the Prothonotary, be reversed and awarded jointly and severally to the Applicants; and
5. Orders that the Respondent pay to the Applicants, jointly and severally, one set of costs in the amount of $1000.00 on the within appeal, all-inclusive of disbursements and taxes.

"B. Richard Bell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-189-19
STYLE OF CAUSE:	PREVENTOUS COLLABORATIVE HEALTH v CANADA (MINISTER OF HEALTH)
AND DOCKET:	T-190-19
STYLE OF CAUSE:	PROVITAL HEALTH v CANADA (MINISTER OF HEALTH)
AND DOCKET:	T-191-19
STYLE OF CAUSE:	COPEMAN HEALTHCARE CENTRE v CANADA (MINISTER OF HEALTH)
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	DECEMBER 7, 2020
REASONS FOR ORDER:	BELL J.
DATED:	MARCH 25, 2021

APPEARANCES:

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