Federal Court of Appeal  Cour d'appel fédérale

Date: 20180328

Docket: A-176-17

Citation: 2018 FCA 66

Present: WEBB J.A.

BETWEEN:

HUMANE SOCIETY OF CANADA FOUNDATION

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard at Vancouver, British Columbia, on March 15, 2018.

Order delivered at Ottawa, Ontario, on March 28, 2018.

REASONS FOR ORDER BY: WEBB J.A.

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REASONS FOR ORDER

WEBB J.A.

[1] The appellant brought a motion that was heard in Vancouver on March 15, 2018. In its notice of motion the appellant stated that:

> THE MOTION IS FOR the following orders:

(1) The appellant requests that the court order under Rule 318(4) the respondent to provide a certified copy of all documents in its possession requested by the appellant under Rule 317 of the *Federal Courts Rules*. Specifically, after having now examined the record for the first time, the appellant respectfully requests the following:

a. All documents and records of all meetings and conversations related to issuing the notice of intention to revoke the registration of the appellant as a charity under s. 168(1) of the Act date stamped 22 April 2015, including clear identification as to which documents were not considered by Charities Directorate in issuing the said notice of intention to revoke;

2. all documents and records of all meetings and conversations related to the notice of objection dated July 20, 2015 filed by the appellant pursuant to s. 168(4) of the Act with clear identification as to which documents were considered by Tax and Charities Appeal Directorate in abandoning the proposal to suspend and instead issuing the notice of intention to revoke date stamped 22 April 2015;

3. all documents and records of all meetings and conversations related to the issuance of the confirmation of the notice of intention to revoke date stamped May 2, 2017;

4. all Canada Revenue Agency policies and procedures used to ensure independence between Audit Division, Charities Directorate and Charities Redress Section;

5. all Canada Revenue Agency policies and procedures used to ensure independence between the above CRA divisions and the Tax and Charities Appeals Directorate and Appeals Branch;

6. the legal interpretations applied by the auditor, appeals officer and Minister to the Organization. These legal interpretations may be contained in Audit Guidelines, Audit Considerations, or some other type of document unknown to the appellant;

7. Any other material prepared or considered by the Minister or others at the Canada Revenue Agency in the course of the decision to audit and revoke the registration of the appellant as a charitable foundation, including:

    a. all of the documents involving Humane Society of Canada for the Protection of Animals and the Environment (“HSCPAE”), Ark Angel Foundation and Ark Angel Fund reviewed by the Minister in coming to the determination to issue the Notice of Intention to Revoke;

b. a list of all individuals at the Charities Directorate and Tax and Charities Appeals Directorate who worked on the Appellant's file and the related files of HSCPAE, Ark Angel Foundation and Ark Angel Fund;

c. a list of those individuals with delegated authority to decide, on behalf of the Minister, to issue a Notice of Intent to Revoke; and

d. the entire record of the court file of *Humane Society of Canada for the Protection of Animals and the Environment v. Canada (National Revenue)*, 2015 FCA 178 be included in the appeal book.

[2] At the commencement of the hearing of this motion counsel for the appellant stated that the motion for disclosure has been reduced to the following:

1. all documents and records of all meetings and conversations related to issuing the notice of intention to revoke the registration of the appellant as a charity under s. 168(1) of the Act date stamped 22 April 2015;

2. all documents and records of all meetings and conversations related to the notice of objection dated July 20, 2015 filed by the appellant pursuant to s. 168(4) of the Act;

3. all documents and records of all meetings and conversations related to the issuance of the confirmation of the notice of intention to revoke date stamped May 2, 2017.

[3] In this case the Minister of National Revenue (Minister) produced a tribunal record of more than 1500 pages. In addition the appellant filed a request for the disclosure of documents under the *Access to Information Act*, R.S.C., 1985, c. A-1 (the ATIP Request). The appellant received 1907 pages of documents as a result of the ATIP Request. There is significant overlap between the documents that were disclosed to the appellant as part of the tribunal record and as a

result of the ATIP Request. The disclosure sought in this motion is for documents that are in addition to these documents.

[4] The appellant submitted that it is entitled to additional disclosure in this case because it alleged, in its notice of appeal, that the Minister was biased and that there was a breach of procedural fairness.

[5] In *Gagliano v. Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities - Gomery Commission)*, 2006 FC 720, 293 F.T.R. 108 (appeal dismissed by the FCA – 2007 FCA 131), Teitelbaum J. discussed the entitlement to additional disclosure:

> **50** It is trite law that in general only materials that were available to the decision-maker at the time of rendering a decision are considered relevant for the purposes of Rule 317. However, the jurisprudence also carves out exceptions to this rule. The Commission's own written representations indicate that, "An exception exists where it is alleged that the federal board breached procedural fairness or committed jurisdictional error": David Sgayias et al., *Federal Practice*, (Toronto: Thomson, 2005) at 695, reproduced in the Commission's Memorandum of Fact and Law (Chrétien, T-2118-05) at para. 24. The above comment is clearly supported by jurisprudence which indicates that materials beyond those before the decision-maker may be considered relevant <u>where it is alleged that the decision-maker breached procedural fairness, or where there is an allegation of a reasonable apprehension of bias on the part of the decision-maker</u>: Deh Cho First Nations, above; Friends of the West, above; Telus, above; Lindo, above.
>
> (emphasis was added by Teitelbaum J.)

[6] Therefore, documents in addition to those that were before the decision-maker may be considered relevant and subject to disclosure where there is an allegation of a breach of procedural fairness or an allegation of a reasonable apprehension of bias. However, as noted in *Access Information Agency Inc. v. Attorney General of Canada*, 2007 FCA 224:

> **20** In closing, the Court would like to express its disapproval for document disclosure requests drafted in terms as vague as the one at issue. Judicial review does not proceed on the same basis as an action; it is a procedure that is meant to be summary. There is therefore a series of limits on the parties as a result of this distinction. Evidence is brought by affidavit and not by oral testimony. There is less leeway for preliminary procedures such as discovery of evidence in the hands of the parties and examination on discovery. If such proceedings do prove to be necessary, the Rules provide that a judicial review may be transformed into an action.
>
> **21** It is in this context that we find section 317 of the Rules dealing with the request for disclosure of material. The purpose of the rule is to limit discovery to documents which were in the hands of the decision-maker when the decision was made and which were not in the possession of the person making the request and to require that the requested documents be described in a precise manner. When dealing with a judicial review, it is not a matter of requesting the disclosure of any document which could be relevant in the hopes of later establishing relevance. Such a procedure is entirely inconsistent with the summary nature of judicial review. If the circumstances are such that it is necessary to broaden the scope of discovery, the party demanding more complete disclosure has the burden of advancing the evidence justifying the request. It is this final element that is completely lacking in this case.
>
> (emphasis added)

[7] In *Maax Bath Inc. v. Almag Aluminum Inc.*, 2009 FCA 204, it was noted that:

> **15** In the words of this Court, the applicant's request "betrays a misunderstanding of the purpose of section 317 ... [S]ection 317 does not serve the same purpose as documentary discovery in an action" (*Access to Information Agency Inc. v. Canada* (*Attorney General*), 2007 FCA 224 at paragraph 17; *Atlantic Prudence Fund Corp., supra* at paragraph 11). It should not be open to the applicant to engage in a fishing expedition.
>
> (emphasis added)

[8] Therefore, while additional disclosure is warranted when there are allegations of a reasonable apprehension of bias or a breach of procedural fairness, this does not allow a person

to engage in a fishing expedition in the hopes of discovering some documents to establish the claim.

[9] The allegation of bias in this case is only contained in paragraph 5 of the Notice of Appeal:

> **5.** The notice of intention to revoke and its confirmation violate the principles of procedural fairness and natural justice and should be quashed or vacated on the basis that they suffer from personal and institutional bias, well beyond a mere apprehension of bias.

[10] This is simply a bald assertion of bias. In *Canada (Minister of National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, 450 N.R. 91, Justice Stratas, writing on behalf of this Court, stated that:

> **42** While the grounds in a notice of application for judicial review are supposed to be "concise," they should not be bald. Applicants who have some evidence to support a ground can state the ground with some particularity. Applicants without any evidence, who are just fishing for something, cannot.
>
> **43** Thus, for example, it is not enough to say that an administrative decision-maker "abused her discretion." The applicant must go further and say what the discretion was and how it was abused. For example, the applicant should plead that "the decision-maker fettered her discretion by blindly following the administrative policy on reconsiderations rather than considering all the circumstances, as section Y of statute X requires her to do."
>
> **44** The statement of grounds in a notice of application for judicial review is not a list of categories of evidence the applicant hopes to find during the evidentiary stages of the application. Before a party can state a ground, the party must have some evidence to support it.
>
> **45** It is an abuse of process to start proceedings and make entirely unsupported allegations in the hope that something will later turn up. See generally *Merchant Law Group v. Canada* (*Revenue Agency*), 2010 FCA 184 at paragraph 34; *AstraZeneca Canada Inc. v. Novopharm Ltd.*, 2010 FCA 112 at paragraph 5. Abuses of process can be redressed in many ways, such as adverse cost awards against parties, their counsel or both: Rules 401 and 404.

[11] Rule 337 of the *Federal Courts Rules*, SOR/98-106, also provides that in a notice of appeal the appellant is to set out "a complete and concise statement of the grounds intended to be argued".

[12] Therefore, a bald assertion of bias is not sufficient and cannot support an order for production of documents to allow the appellant to go on a fishing expedition to see if something can be found to support the allegation of bias.

[13] During the hearing of this motion, counsel for the appellant was asked whether there was any document, in the more than 2,000 pages of documents that were submitted as part of this motion record, that would support the allegation of bias. Counsel for the appellant was unable to identify any document in the voluminous motion record that could support the allegation of bias. It, therefore, seems clear that the appellant was on a fishing expedition.

[14] Counsel for the appellant submitted during the hearing that the breach of procedural fairness argument was based on a lack of evidence. If the Minister has any document to counter the breach of procedural fairness argument, then the Minister has an interest in disclosing it.

[15] As a result of discussions and concessions made during the hearing of the motion, the issue was reduced to the question of whether certain documents that were submitted by the Minister to the Court in a sealed envelope should be disclosed to the appellant. Documents comprising a total of 281 pages were included in this sealed envelope. Most of these pages were part of the documents that had been disclosed as a result of the ATIP Request, although parts had

been redacted. During the hearing, counsel for the Minister, without admitting the relevancy of any of the documents and to simply move the matter along, agreed to provide the appellant with unredacted copies of these documents.

[16] As a result only a few documents in the sealed envelope (comprising approximately 60 pages) remained for consideration. These consisted of copies of e-mails and copies of draft letters. Having reviewed these documents, in my view, none of these documents is relevant and, therefore, there is no basis to order disclosure of these remaining documents.

[17] As a result the appellant’s motion is dismissed, with costs payable in any event of the cause.

"Wyman W. Webb"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-176-17
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