Federal Court of Appeal  Cour d'appel fédérale

Date: 20200207

Docket: A-223-19

Citation: 2020 FCA 41

Present: **LASKIN J.A.**

BETWEEN:

ATHLETES 4 ATHLETES FOUNDATION

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on February 7, 2020.

REASONS FOR ORDER BY: LASKIN J.A.

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REASONS FOR ORDER

LASKIN J.A.

I. Introduction

[1] The appellant Foundation has appealed to this Court under paragraph 172(3)(*a*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), from the refusal of the respondent Minister to register the Foundation as a Canadian amateur athletic association. The grounds set out in the notice of appeal include the Minister's failure to exercise her discretion reasonably by, among

other things, considering "irrelevant information in comparing the [Foundation] to other applicants and existing registered CAAAs."

[2] In its notice of appeal, the Foundation requested, following the procedure provided by rules 317, 318, and 350 of the *Federal Courts Rules*, SOR/98-106, that the Minister send it and the Registry "[a] certified copy of any and all materials produced by, referenced, consulted or relied upon in any way by the Minister in refusing to register the [Foundation] as a [CAAA] up to the time the Notice of Refusal to Register was issued […]."

[3] The Foundation had earlier appealed to this Court from the Minister's deemed refusal of its application for registration, and had also included a rule 317 request in that notice of appeal. That request extended to, among other things, "[a]ny materials produced by or reviewed or relied upon by the Minister in failing to register the [Foundation] as a" CAAA. A dispute arose concerning the scope of and the Minister's compliance with the rule 317 request. The Foundation challenged, among other things, certain redactions from the documents provided. A motion by the Foundation for an order under rule 318(4) requiring further disclosure was decided by Justice Gleason (2016 FCA 108). She determined, among other things, that certain redactions were appropriate because the information redacted was subject to solicitor-client privilege. Her order provided for the Minister to seek direction from the Court if an issue arose as to whether certain other documents should be disclosed. No appeal was taken from her order.

[4] A dispute arose with respect to the status of three further documents. Justice de Montigny issued a direction that the three documents not be disclosed, on the basis that they did not come

within subsection 241(3.2) of the *Income Tax Act* (which permits provision to any person of certain taxpayer information relating to a registered charity or registered CAAA) and were therefore to be considered confidential. He also determined that a portion of one of the documents was privileged.

[5] The Foundation discontinued the previous appeal. It subsequently commenced the current appeal.

[6] In her response to the rule 317 request in the current appeal, the Minister provided a Tribunal Record from which certain redactions were made on the basis that the redacted information was subject to solicitor-client privilege or was confidential personal or third-party information. She also objected to the rule 317 request as overbroad, and in the nature of discovery.

[7] When the parties reached an impasse concerning the redactions and the Minister's objection, the Court gave a direction under rule 318(3) for its resolution under rule 318(4) based on written submissions. The Court has received and considered the written submissions and supporting affidavits filed by both parties. Rule 318(4) authorizes the Court, based on the parties' submissions, to order that all or part of the disputed material be disclosed.

[8] After the submissions and affidavits were filed, and in accordance with a further direction of the Court, the Minister brought a motion for a confidentiality order in relation to the redacted information. The motion was heard by Justice Gleason. She ordered that certain documents be

filed confidentially for purposes of disposition of the parties' rule 317 dispute. The order also stated that

> [t]he judge deciding the request under Rule 317 shall determine what portion, if any, of the foregoing documents shall continue to be treated confidentially and whether and on what terms counsel for the [Foundation] may be given access to some or all of these documents and what copies, if any, shall be retained by the Court.

[9] There are, therefore, two issues to be determined: (1) whether the redactions should continue to be treated confidentially, and (2) whether the Court should make an order under rule 318(4) for further disclosure.

II. Should the redactions continue to be treated confidentially?

[10] According to the Foundation's submissions, the redactions on the following pages of the Tribunal Record remain in question: pages 389, 400 to 401, 408, and 339 to 388. The redactions on the first four pages were based on solicitor-client privilege. Those on pages 339 to 388 were made on the basis that they contain confidential personal information or third-party information.

[11] The Minister submits that *res judicata* or issue estoppel, or in the further alternative, the doctrine of abuse of process, prevents the Foundation from obtaining disclosure under rule 318(4) of the redacted information. It argues that the order of Justice Gleason and the direction of Justice de Montigny in the previous appeal constitute binding adjudications that finally determine whether the information was properly redacted.

[12] The Foundation concedes that the test for *res judicata* or issue estoppel is met for the redactions based on solicitor-client privilege. There is therefore no basis to order that those redactions not be maintained. I have in any event reviewed them, and agree that the redacted information is protected by privilege.

[13] While the Foundation makes no similar concession with respect to the redactions on pages 339 to 388, I consider that the test is also met with respect to those documents. Justice de Montigny expressly decided in a proceeding between the same parties that the redacted documents "do not fall within subsection 241(3.2) of the Income Tax Act and are therefore to be considered confidential." At a minimum, it is abusive to try to relitigate this issue. Having also reviewed the documents in any event, I see no basis to disagree with Justice de Montigny's finding.

[14] I will not, therefore, order disclosure of the redacted information that remains in issue.

III. Should further information be ordered disclosed?

[15] In addition to challenging certain redactions, the Foundation seeks an order on the basis of rules 317, 318, and 350, requiring disclosure of the following material:

> all materials relating to the Minister's comparison of the [Foundation] to Tomorrow's Champions Foundation and Entity "A" at p. 403 of the 2019 Tribunal Record including the name of Entity "A";
>
> the purposes in the constitutions, articles or other constating documents of all [registered CAAAs] at the time the [Foundation's] application was decided; and

> any and all materials produced by, referenced, consulted or relied upon in any way by the Minister in refusing to register the [Foundation] as a [CAAA] up to the time the Notice of Refusal to Register was issued, not already provided in the 2019 Tribunal Record.

A. *Scope and function of the applicable rules*

[16] Rule 317(1) provides for a party to 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." As already noted, in the event of a dispute over what material should be produced in response to a rule 317(1) request, rule 318(4) authorizes the Court to order that further material be produced. Rule 350 makes these rules also applicable to appeals and motions for leave to appeal, "with such modifications as are necessary."

[17] In *Access Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224 at para. 21, this Court described the purpose of rule 317 as "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." It went on to state that "[w]hen 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." This would be an impermissible "fishing expedition": *Maax Bath Inc. v. Almag Aluminum Inc.*, 2009 FCA 204 at para. 15.

[18] More recently, in *Canadian National Railway Company v. Canada (Transportation Agency)*, 2019 FCA 257 at para. 12, this Court reiterated the function of rule 317 in the following terms:

> Rule 317 embodies the principle that judicial review is premised on review of the record before the tribunal; *certiorari* means to bring forth the record. It entitles a party to receive everything that the decision maker had before it when it made its decision […]. The requirement that a tribunal produce, without hesitation, the entire record has long been central to judicial review. This is tempered by the pragmatic consideration that frequently large portions of the tribunal record, particularly in the case of standing, highly specialized agencies, may not be pertinent to the disposition of the issues on appeal.

[19] The Foundation submits that rule 350 requires that rules 317 and 318 be interpreted more broadly in the context of appeals than in the context of applications for judicial review. In making this submission, it relies on the provision in rule 350 for the application of rules 317 and 318 to appeals "with such modifications as are necessary." It argues that the interpretation of rules 317 and 318 in the context of applications for judicial review is premised on the availability, as a safeguard, of an order under subsection 18.4(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, that an application for judicial review be treated and proceeded with as an action. It submits that the application of rules 317 and 318 in appeals in the same way as in applications for judicial review would put appellants "at the mercy of tribunals," and necessitate interlocutory proceedings inconsistent with Parliament's stipulation in section 180 of the *Income Tax Act* that appeals to this Court are to be heard and determined "in a summary way."

[20] I do not accept these submissions. The meaning of rule 350 is a question of statutory interpretation. The "modern approach" to statutory interpretation applies. Therefore, "the words of the statute [must] be read 'in their entire context and in their grammatical and ordinary sense

harmonious with the scheme of the Act, the object of the Act, and the intention of Parliament'": *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66 at para. 41.

[21] On their plain and ordinary meaning, the words "with such modifications as are necessary" do not call for a different substantive application of rules 317 and 318 in appeals. It would be surprising for the Rules to leave it to the Court to determine what broader substantive meaning rules 317 and 318 should carry. As for the statutory context, the Rules include seven other rules that include the phrase "with such modifications as are necessary": rules 100, 170, 283, 315, 415, 419, and 463. In all of these rules, the apparent intention is to adopt procedures from one procedural context for purposes of another, without substantive change. In addition, applications for judicial review are, by subsection 18.4(1) of the *Federal Courts Act*, also presumptively to be heard "in a summary way." Finally, I note that this Court has applied rules 317 and 318 as interpreted in the judicial review context in an appeal from a decision of the Minister under the *Income Tax Act*: *Humane Society of Canada Foundation v. Canada (National Revenue)*, 2018 FCA 66. Similarly, *Canadian National Railway Company* was a statutory appeal (albeit not one under the *Income Tax Act*), and the Court in that case also relied on the case law applying rules 317 and 318 in applications for judicial review.

[22] I conclude that rule 350 does not require some heightened standard of disclosure under rules 317 and 318 in the context of statutory appeals. But rules 317 and 318 do, absent a recognized exception, "[entitle] a party to receive everything that the decision maker had before it when it made its decision": *Canadian National Railway Company* at para. 12.

B. *Application of the rules in this case*

[23] I will first deal with the second of the Foundation's three requests for further disclosure. As set out above in paragraph 15, it seeks production of "the purposes in the constitutions, articles or other constating documents of all [registered CAAAs] at the time the [Foundation's] application was decided."

[24] This is an overbroad request. It is not limited to what was before the Minister when she made the decision under appeal. It amounts to a fishing expedition. No order requiring production of this material will be made.

[25] The other two requests can conveniently be dealt with together. They are also overbroad, but not to the same extent.

[26] In applying rules 317 and 318, the relevance of a document is defined by the grounds of review in the notice of application (or notice of appeal): *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at para. 109. Here, as noted above, one of the grounds for appeal is that the Minister failed to exercise her discretion reasonably by, among other things, considering irrelevant information in comparing the Foundation to other applicants for registration as a CAAA and to registered CAAAs.

[27] The affidavit of the Canada Revenue Agency employee who actually made the decision to deny Foundation registration as a CAAA includes the following evidence:

> I have reviewed the Tribunal Record that was filed by the [Minister] […] in response to the [Foundation's] Notice of Appeal […]. I confirm that all relevant materials upon which the CRA relied, including those that were previously ordered to be disclosed by Justice Gleason by Order [in the earlier appeal], have been produced in the Tribunal Record.

[28] Thus, while the Foundation's appeal is based in part on the ground that the Minister considered irrelevant information concerning the other entities, the CRA employee states that all relevant materials on which the CRA relied have been produced. The affidavit evidence does not foreclose the possibility that the Minister used irrelevant material relating to the other entities. At a minimum, it does not foreclose the possibility that irrelevant material of this kind was before the Minister when the decision was made. The Foundation should be entitled to explore these possibilities with the benefit of all of the material that was before the Minister when the decision in issue was made. To that extent the first and third requests are appropriate.

[29] It follows in my view that, given the grounds of appeal and the purpose of rules 317 and 318, the Minister should be required to produce any material apart from that already disclosed that was before her when the decision was made, with the exception of properly redacted information. I will make an order accordingly. If there is additional information to be produced from which redactions may be appropriate, the parties should attempt to agree on those redactions. The parties should also attempt to agree on the contents of the appeal book.

[30] I should state that in disposing of this matter, I have given no weight to the repeated allegations of dishonesty made in the Foundation's material against the CRA employee whose

affidavit evidence the Minister tendered. These are serious allegations, which should not be made lightly. They were not helpful to the Court in resolving the issues before it.

[31] Since success was divided, I will order that costs be in the cause.

"J.B. Laskin"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-223-19
STYLE OF CAUSE:	ATHLETES 4 ATHLETES FOUNDATION v. THE MINISTER OF NATIONAL REVENUE

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	LASKIN J.A.
DATED:	FEBRUARY 7, 2020

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