Federal Court of Appeal  Cour d'appel fédérale

Date: 20200207

Docket: A-224-19

Citation: 2020 FCA 42

Present: **LASKIN J.A.**

BETWEEN:

TOMORROW'S CHAMPIONS 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 apply correctly the statutory definition of "Canadian amateur athletic association" and her failure 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.

[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 Minister objected to this request as overbroad. She also redacted certain information from the certified Tribunal Record that she produced on the basis that it was subject to solicitor-client privilege, and certain other information on the basis that it comprised confidential personal information or third-party information. When the parties reached an impasse concerning the Minister's objections, the Court gave a direction under rule 318(3) for their resolution 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.

[4] In the meantime, 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 Court 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.

[5] 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?

[6] According to the Foundation's submissions, the redactions that remain in question are (1) the redactions based on solicitor-client privilege at pages 214 and 224 to 226 of the Tribunal Record, and (2) the redaction based on section 241 of the *Income Tax Act* at page 236 of the Tribunal Record.

[7] With respect to the solicitor-client privilege claims, the Foundation submits that the Minister has not met her burden of establishing that the privilege applies. It also argues, among other things, that the evidence that the two-page memorandum at pages 224 and 225 was written by a non-lawyer, and summarizes a meeting involving in-house counsel and non-lawyers, suggests that the meeting was not for the purpose of giving or receiving legal advice, but for the purpose of business or policy discussions. It relies on what it describes as the "serious honesty problems with the affirmed evidence of" one of the non-lawyers who was present at the meeting, and gave evidence describing it, in arguing that "there is no credible evidence whatsoever" to support the privilege claim.

[8] I have reviewed the redacted information at pages 214 and 224 to 226 for which solicitor-client privilege is claimed. I am satisfied that the information is subject to solicitor-client privilege. It follows that it should continue to be treated confidentially. The Foundation has stated that it does not oppose the further redaction on page 214 of personal information. It too should continue to be treated confidentially.

[9] In the evidence submitted by the Minister (at Respondent's Response Record, page 3), the redaction on page 236 is described as follows:

> [P]age 236 of the Tribunal Record contains the name of one entity that was redacted, which will be referred to as Entity "A" […]. For the purpose of preparing a response to the [Foundation], it was suggested to me by another CRA officer to use a paragraph that was previously used in respect of Entity "A" because it completely stated the CRA's views on that subject matter. The reference to Entity "A" was limited to this purpose.

[10] The Minister's evidence also states that Entity "A" does not refer to Athletes 4 Athletes Foundation, another applicant for registration as a CAAA, with which the Foundation asserts it was wrongly compared. On the redacted page 236, the redaction is said to be for "protection of information personal to individuals not relevant to matters in issue in this application."

[11] Subsection 241(1) of the *Income Tax Act* prohibits the provision to a third party of taxpayer information, as defined in subsection 241(10). (While subsection 241(3.2) provides for disclosure of taxpayer information respecting a registered CAAA, there is no indication that Entity "A" was at any time registered.)

[12] Subsection 241(1) does not apply in respect of "any legal proceedings relating to the administration or enforcement" of the *Income Tax Act*, where the information sought to be disclosed is relevant to the proceeding or was relied on by the Minister in making the challenged decision: *Income Tax Act*, s. 241(3); *Tor Can Waste Management Inc. v. The Queen*, 2015 TCC 157, [2016] 1 C.T.C. 2180 at paras. 24-26; *Oro del Norte, S.A. v. The Queen*, [1990] 2 C.T.C. 67 at 70, 35 F.T.R. 107.

[13] I do not see how the name of an organization that applied to be registered as a CAAA – Entity "A" – is relevant in this proceeding. In any event, the Minister's affiant deposed that he did not rely on any application materials of Entity "A" in formulating his decision respecting the Foundation. On the evidence submitted, the paragraph concerning Entity "A" was used only because "it completely stated the CRA's views" on the Foundation's application: see *Oro del Norte*, at 70-71. Accordingly, I will not order the disclosure of the name of Entity "A" at page 236 of the Tribunal Record, and will maintain the redaction.

III. Should further information be ordered disclosed?

A. *Scope and function of the applicable rules*

[14] 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."

[15] 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.

[16] 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.

[17] 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."

[18] 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.

[19] 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.

[20] 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*

[21] 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.

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

> In making my decision to deny the [Foundation's] application for registration as a CAAA, I did not use any relevant material regarding [two other applicants]. As such, the CRA's record does not include any relevant material regarding either of those entities because no such material was used in reaching a final decision regarding the Application. I considered the Application on its own merit, independently from [the two other applicants].

[23] 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 he did not use "any relevant material" (emphasis added) regarding them. 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.

[24] 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 provided 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.

[25] 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.

[26] 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-224-19
STYLE OF CAUSE:	TOMORROW'S CHAMPIONS 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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