

Federal Court of Appeal



Cour d'appel fédérale

Date: 20220301

Docket: A-342-21

Citation: 2022 FCA 40

Present: MONAGHAN J.A.

BETWEEN:

MARTIN DUHAMEL

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on March 1, 2022.

REASONS FOR ORDER BY:

MONAGHAN J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20220301

Docket: A-342-21

Citation: 2022 FCA 40

Present: MONAGHAN J.A.

BETWEEN:

MARTIN DUHAMEL

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER

MONAGHAN J.A.

[1] The appellant, Martin Duhamel, has appealed the Federal Court's order in *Duhamel v. Attorney General of Canada*, 2021 FC 1255, (per Favel J.) to this Court. That order dismissed the appellant's application for judicial review of the April 15, 2020 decision of the Acting Executive Director of the Canadian Judicial Council (CJC) concerning the appellant's complaint against a judge.

[2] Under Rule 343(3) of the *Federal Court Rules*, SOR/98-106, the appellant must bring a motion seeking the Court’s determination concerning the contents of the appeal book if the parties do not agree on the contents within the prescribed time period. The parties to this appeal have not agreed. The dispute concerns two matters: whether several documents the appellant seeks to include are properly part of the appeal book and how certain documents should be identified in the table of contents for the appeal book.

I. Contents of the Appeal Book

[3] On this appeal, from the Federal Court’s decision dismissing an application for judicial review, this Court must “step into the shoes” of the Federal Court and focus on the administrative decision: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 [*Agraira*], at para. 46. This Court’s role is to determine whether, in reviewing the CJC’s decision, the Federal Court identified the appropriate standard of review and applied it correctly: *Agraira*, at para. 47.

[4] The notice of appeal confirms that the appellant understands this. In fact, the appellant does not suggest the Federal Court incorrectly identified the standard of review. Rather, the grounds of appeal are that the Federal Court “misapplied the standard of review of reasonableness” and the CJC’s “decision was unreasonable”.

[5] Rule 344(1) specifies what is to be included in the appeal book—identifying certain items with specificity (e.g., the notice of appeal: Rule 344(1)(b)) and others more generally (e.g., any other document relevant to the appeal: Rule 344(1)(g)). However, Rule 343(2) limits the

documents included in an appeal book; only such documents, exhibits and transcripts as are required to dispose of the issues on appeal are included. The purpose of this Rule is to discourage parties from including material in the appeal book that is not useful: *Shire Canada Inc. v. Apotex Inc.*, 2011 FCA 10, 414 N.R. 270, at para. 14.

[6] Thus, not all material before the Federal Court is required—or indeed permitted—to be included in the appeal book. The inclusion of documents that are not relevant to the issues under appeal does not lead to an appeal process that is efficient and effective: *Smith v. Canada (Attorney General)*, 2022 FCA 28, at para. 6.

[7] The contents of the appeal book are determined by what documents are required for this Court to decide whether the Federal Court correctly applied the standard of review when it reviewed the CJC’s decision. Nonetheless, the appellant seeks to include in the appeal book motion materials from procedural motions he brought before the Federal Court, as well as the decisions in those motions. The appellant submits this material was before the Federal Court, is relevant background information, and will assist this Court in understanding “why the [Federal Court] was unable to correct the irregularities in the evidentiary record” before the Federal Court.

[8] The appellant did not appeal any of the decisions in the motions to this Court. None was decided by Justice Favel, whose decision is the subject of this appeal. But, critically none of this material is required to decide the only issue to be decided in this appeal—whether the Federal Court correctly applied the standard of reasonableness when it reviewed the CJC’s decision. In

fact, none of it is relevant to that question. What is relevant and necessary is the material relied upon by the CJC in making its decision and any other documents permitted by Rule 343(2).

Thus, none of the motion material should be included in the appeal book.

[9] The appellant also seeks to include in the appeal book his written submissions made before the Federal Court. The respondent objects on the basis that the disposition of the appeal depends on evidence and legal principles.

[10] Absent special circumstances, memoranda of fact and law filed with the court below are not included in the appeal book: *McBride v. Canada (Minister of National Defence)*,

2008 FCA 111, at para. 3 and *Gambler First Nation v. Ledoux*, 2020 FCA 204, at para 18.

The appellant has not referred to any exceptional circumstances here. Moreover, as explained above, in this appeal this Court will step into the shoes of the Federal Court and focus on the decision of the CJC. While this Court will review and consider the Federal Court's decision under appeal, the question before this Court is the same as the question that was before the Federal Court—whether the CJC decision was reasonable. Thus, the arguments advanced by the appellant in his submissions to the Federal Court about the unreasonableness of the CJC decision may be reiterated before this Court in the appellant's memorandum of fact and law, should the appellant choose to do so.

II. Labels Used in the Table of Contents for the Appeal Book

[11] The second area of dispute concerns the table of contents for the appeal book—how documents in the appeal book should be labelled or identified in the table of contents. Rule 344(1)(a) requires the appeal book to contain a table of contents describing each document.

[12] The first dispute of a labelling nature relates to the *Canadian Judicial Council Procedures for the Review of Complaints or Allegations About Federally Appointed Judges [Review Procedures]*. When the appellant made his request under Rule 317(2), he asked the CJC to provide two documents not in his possession: a signed copy of the CJC’s decision letter dated April 15, 2020 and *Ethical Principles for Judges*, a CJC publication. The CJC provided certified copies of those documents as required under Rule 318.

[13] Although the CJC decision letter referred to the *Review Procedures*, the appellant did not ask the CJC to provide them under Rule 317. Neither the appellant nor the respondent included the *Review Procedures* in its record before the Federal Court. However, the respondent included them in its book of authorities under the heading “Legislation”. The appellant objected and unsuccessfully brought a motion to have the *Review Procedures* struck, twice before Prothonotary Ring and once on appeal from Prothonotary Ring’s orders, before Justice Diner.

[14] The Federal Court summarized the procedural history concerning the *Review Procedures* in the reasons for the decision under appeal here as follows:

Justice Diner noted that Prothonotary Ring’s reasons point out that the *Review Procedures* should have been filed in the Respondent’s Responding Record and

not in their Book of Authorities. She nevertheless correctly exercised her discretion under Rule 55 of the *Federal Courts Rules* to accept the irregular filing of the Review Procedures because it did not prejudice the Applicant, the document was relevant to the application, and the document was mentioned in the CJC's Decision. Justice Diner found that the Review Procedures already formed part of the Court record. The Applicant did not appeal Justice Diner's Order.

[15] There is no doubt the *Review Procedures* are part of the Federal Court record. And, critically, they are referred to in the CJC decision the reasonableness of which is being challenged in this appeal. The parties do not dispute that they should be in the appeal book, only how they should be identified. The appellant seeks to identify them in the table of contents as "Respondent's Book of Authorities (FC) to Justice Favel (all but Tab 12 omitted)". While it may be accurate that Tab 12 of the respondent's book of authorities before the Federal Court was the *Review Procedures*, that is neither useful nor frankly relevant information.

[16] The purpose of a table of contents in an appeal book is to describe the documents in a manner that assists the members of the panel hearing the appeal, the parties, their counsel and others, to easily identify and find material—to enable the reader to go directly to the document. That goal is achieved only when the table of contents describes the material in a straightforward and clear manner—not an ambiguous one. The appellant's proposed labelling entirely defeats that purpose—it invites the user to cross out the appellant's label and handwrite *Review Procedures*.

[17] The second dispute concerns the record certified by the CJC pursuant to Rule 318. The appellant initially proposed to label it in the table of contents as "So-called 'Certified Tribunal Record' from the Canadian Judicial Council". He explained he wanted to use "So-

called” because certified tribunal record is not a defined term in Rule 318. While it is true the Rules do not use a defined term, Rules 317 and 318 are concerned with the record certified by the tribunal or decision maker. Consequently, terms like “certified tribunal record” or “certified record” are typically used in appeal books to describe the documents certified under those Rules.

[18] However, the appellant has abandoned that proposal in the motion materials, and instead proposes to use “Applicant’s Record (FC) to Justice Favel Tab C—Certified Record (Rule 318) Tab E—Appellant’s Memorandum of Fact and Law (other tabs omitted)”. In other words, as with the Review Procedures, the appellant wants to identify the documents not by their name, but by how they appeared in the Federal Court record.

[19] I have already decided that the appellant’s memorandum of fact and law before the Federal Court will not be included in the appeal book. As to the certified record of the CJC, where it was found in the applicant’s record before the Federal Court is entirely irrelevant to this appeal. Bearing in mind the purpose of a table of contents—easy identification and location of the material—superfluous language and editorial commentary should be avoided absent some compelling reason to include it. None exists here.

[20] In summary, the table of contents and the contents of the appeal book in this appeal will be as follows:

1. Table of Contents;
2. Notice of Appeal, dated December 2, 2021;
3. Federal Court Order appealed from and Reasons for Order, dated November 19, 2021;

4. Notice of Application, dated April 19, 2020;
5. Certified Record of the Canadian Judicial Council:
 - a. Canadian Judicial Council's decision of April 15, 2020 under review;
 - b. *Ethical Principles for Judges*;
6. Affidavit of Martin Duhamel, dated June 1, 2020;
7. *Canadian Judicial Council Procedures for the Review of Complaints or Allegations about Federally Appointed Judges*, effective July 29, 2015;
8. A copy of the Order as to Contents of the Appeal Book; and
9. Certificate in Form 344, signed by the appellant.

III. Costs

[21] The respondent seeks costs for this motion payable forthwith. An award of costs on a motion is discretionary. However, if the Court decides to award costs on a motion, and is satisfied that the motion should not have been brought, it shall order that the costs of the motion be paid forthwith.

[22] I am sympathetic to the respondent's position. The respondent's counsel twice wrote to the appellant, not only disagreeing with the contents of the appeal book proposed but also explaining why the documents in dispute in this motion were not to be included, with reference to the Rules and the relevant principles. Respondent's counsel also explained why the labelling proposed by the appellant in the table of contents was not appropriate. I agree that this is a

circumstance in which the motion was unnecessary and should not have been brought. The respondent will be awarded costs in a fixed amount of \$300, payable forthwith.

"K.A. Siobhan Monaghan"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-342-21

STYLE OF CAUSE:

MARTIN DUHAMEL v.
ATTORNEY GENERAL OF
CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:

MONAGHAN J.A.

DATED:

MARCH 1, 2022

APPEARANCES:

Martin Duhamel

FOR THE APPELLANT
ON HIS OWN BEHALF

Shaun Ramdin

FOR THE RESPONDENT

SOLICITORS OF RECORD:

A. François Daigle
Deputy Attorney General of Canada

FOR THE RESPONDENT