Federal Court of Appeal

Cour d'appel fédérale

Date: 20220906

Docket: A-98-21

Citation: 2022 FCA 153

CORAM: **GAUTHIER J.A.**
STRATAS J.A.
LASKIN J.A.

BETWEEN:

CANADA (MINISTER OF HEALTH)

Appellant

and

PREVENTOUS COLLABORATIVE HEALTH,
PROVITAL HEALTH and COPEMAN HEALTHCARE CENTRE

Respondents

Heard by online video conference hosted by the Registry, on September 6, 2022.
Judgment delivered from the Bench at Ottawa, Ontario, on September 6, 2022.

REASONS FOR JUDGMENT OF THE COURT BY: STRATAS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on September 6, 2022).

STRATAS J.A.

[1] A requester under the *Access to Information Act*, R.S.C. 1985, c. A-1 requested certain documents. Some of the documents concern certain third parties, Preventous Collaborative

Health, Provital Health and Copeman Healthcare Centre. The documents are in the possession of the appellant Minister. The Minister was minded to release them pursuant to the request.

[2] In response, the third parties brought an application to the Federal Court under section 44 of the Act to prevent disclosure. Section 44 of the Act permits third parties potentially affected by a disclosure to "apply for a review of the matter".

[3] Somewhat later, the third parties filed a request for disclosure from the Minister under Rule 317 of the *Federal Courts Rules*, S.O.R./98-106. The third parties' request is best described as an attempt to discover the records gathered by the Minister in response to the request and other documents including documents evidencing the Minister's consultations with others.

[4] The Minister objected to disclosure under Rule 317 on the ground that the proceeding in the Federal Court was not a judicial review of the Minister, Rule 317 was being improperly used as a discovery tool, and the Rule 317 request was overbroad and untimely. In response, the third parties moved in the Federal Court for an order enforcing their Rule 317 request.

[5] A Prothonotary of the Federal Court (*per* Ring P.) dismissed the third parties' motion, finding that Rule 317 of the *Federal Courts Rules* did not apply to applications under section 44 of the Act.

[6] On appeal under Rule 51, the Federal Court (*per* Bell J.) reversed the Prothonotary's decision, finding that Rule 317 did apply to applications under section 44 of the Act: 2021 FC 253. The Minister now appeals.

[7] For the reasons that follow, the appeal should be allowed.

[8] Rule 317 provides that "[a] party may request material relevant to an application that is in the possession of a tribunal whose order is the subject matter of the application". Rule 317 is a means by which applicants for judicial review of a tribunal's decision can request production of the tribunal's record so they can place it before the reviewing court.

[9] As the Prothonotary held, Rule 317 does not apply in this case. In the words of Rule 317, in this case there is no "order [that] is the subject matter of the application". Further, the application the third parties have brought is an application under section 44 of the Act, not an application for judicial review and, as will be explained later in these reasons, a section 44 application is different from a judicial review. Thus, in a section 44 application, there is no record on judicial review that is liable to be produced under Rule 317.

[10] In oral argument, the third parties submitted that the "interests of justice" allow Rule 317 to be used to discover material in the hands of the Minister. A number of cases confirm that this is not so and Rule 317 is just a limited purpose tool to obtain an administrator's record on a judicial review: *1185740 Ont. Ltd. v. M.N.R.* (1999), 247 N.R. 287 (Fed. C.A.); *Access Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224, 66 Admin. L.R. (4th) 83 at

para. 17; *Atlantic Prudence Fund Corp. v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15917 (F.C.) at para. 11; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at para. 115.

[11] When third parties wish to prevent the disclosure of their information under the Act by a government institution and the government institution has notified the third parties that it is minded to disclose the information, an application under section 44 of the Act is the proper recourse. In this case, the third parties have brought an application under section 44. That was indeed open to them.

[12] But to reiterate, the application under section 44 is not a judicial review of an administrative decision but rather, in the words of section 44, a fresh “review of the matter”. The “matter” is whether the information requested should be disclosed. In many cases, a significant issue in deciding that matter will be whether the exemptions under the Act apply: *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23 at paras. 53 and 250.

[13] Section 44.1 of the Act, a recent amendment to the Act, supports this interpretation. Section 44.1 provides that the application made to the Federal Court is “to be heard and determined as a new proceeding”. The proceeding does not concern what the holder of the information requested, here the Minister, did or did not do, or should do or should have done. That is the normal subject-matter of an application for judicial review, not a section 44 application. Rather, under section 44 the issue is whether the information requested should be disclosed to the requester. See *Merck Frosst*, above.

[14] Section 44.1 requires the Federal Court to receive evidence in a "new proceeding"; in other words, the evidentiary record must be built afresh. It is not limited to what was before the Minister or the Information Commissioner. As well, the parties in the Federal Court are not limited to submissions based on what was before the Minister or the Information Commissioner, as they would be in a judicial review. Rather, they are free to make submissions on whether disclosure must be made under the Act. After receiving submissions, the Federal Court is to make its own findings of fact on the basis of the fresh evidentiary record filed before it, apply the provisions of the Act and the existing jurisprudence to that evidentiary record, and ultimately decide whether the information should be disclosed. In short, as many cases suggest, in this way the Federal Court is acting *de novo*: see, *e.g.*, *Merck Frosst* at paras. 53 and 250-251 and cases cited therein.

[15] This interpretation of section 44.1 is supported not only by the plain text of the Act and *Merck Frosst*, but also by the express statement of purpose in the Act that "the disclosure of government information should be reviewed independently of government": para. 2(2)(*a*). Vesting the independent and impartial Federal Court with the power to review, *de novo*, the disclosure of government information furthers that statutory purpose.

[16] Some guidance on how the evidentiary record is to be developed will assist these parties and those in future section 44 applications.

[17] Part 5 of the Rules sets out the procedure for applications: see Rule 300(*b*) ("proceedings required or permitted by or under an Act of Parliament to be brought by application…"). Under

Part 5, the parties are entitled to serve affidavits under Rules 306-307, conduct cross-examinations under Rule 308, and file records under Rules 309-310.

[18] As well, the Federal Court, on motion brought on notice to all affected parties, may order the production of evidence necessary to allow the application to be meaningfully heard and determined: see generally *Tsleil-Waututh Nation*, above. The application under section 44 cannot be meaningfully heard and determined unless the Court has this power: by analogy, see *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394, 92 D.L.R. (4th) 609. Alternatively, the authority for such an order may found in the Federal Court's powers under Rule 313, its general supervisory power in administrative matters (*Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385), its plenary jurisdiction to make orders necessary for the conduct of proceedings (see, *e.g.*, *Dugré v. Canada (Attorney General)*, 2021 FCA 8 and cases cited therein), and its powers to compel evidence under other provisions of the *Federal Courts Rules* or by analogy to them under Rule 4. In oral argument, the parties seemed to agree that many tools exist by which evidence can be obtained in a section 44 application.

[19] The backdrop against all of this is that applications under section 44 of the Act must proceed in a "summary" way: section 45. To fulfil this, the parties must work quickly, diligently and cooperatively, communicating with each other to determine how they can jointly best ensure that a complete evidentiary record is placed before the Court.

[20] Now to the disposition of this appeal. We are to review the Federal Court's decision using the appellate standard of review in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: *Canada (Health) v. Elanco Canada Limited*, 2021 FCA 191 at paras. 22-24. This makes sense, as the Federal Court under section 44 is a first-instance decision-maker on the facts and the law.

[21] As is evident from the foregoing, the Federal Court erred in law in reversing the Prothonotary and relying upon Rule 317 to order disclosure from the Minister. Rule 317 is not available.

[22] Disclosure may potentially be available following the various means set out above. But since the third parties have not pursued these means, we decline to rule on whether the material they seek is relevant to the section 44 application in this case and whether the third parties have been timely. That will be for the Prothonotary at first instance to decide on a fresh motion, if brought.

[23] Therefore, I would allow the appeal, quash the order of the Federal Court, restore the order of the Prothonotary, and grant the appellant costs here and below.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-98-21

APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE BELL DATED MARCH 25, 2021, NOs. T-189-19, T-190-19 and T-191-19

STYLE OF CAUSE:	CANADA (MINISTER OF HEALTH) v. PREVENTOUS COLLABORATIVE HEALTH, *et al.*
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	SEPTEMBER 6, 2022
REASONS FOR JUDGMENT OF THE COURT BY:	GAUTHIER J.A. STRATAS J.A. LASKIN J.A.
DELIVERED FROM THE BENCH BY:	STRATAS J.A.

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