Federal Court  Cour fédérale

Date: 20231013

File: T-203-23

Citation: 2023 FC 1364

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 13, 2023

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

CHRISTOPHER LILL

Applicant

and

HIS MAJESTY THE KING

Respondent

JUDGMENT AND REASONS

[1] Christopher Lill is appealing under section 51 of the *Federal Courts Rules*, SOR/98-106 [Rules] the decision of Associate Justice Steele dated August 10, 2023.

[2] The applicant, Mr. Lill, is an inmate residing at Cowansville Penitentiary. On January 30, 2020, he filed an application for judicial review of a decision rendered on November 27, 2022, regarding a grievance (V30R00065317) in which the applicant was denied a request to correct a

security intelligence report [SIR of December 10, 2004] and to assess the reliability of the sources cited in it.

[3] Inmate grievances are decided by senior officials of the Correctional Service of Canada [CSC].

[4] Clearly, litigation on judicial review is only in its preliminary phase, in that the applicant is only complaining at this stage about the constitution of the certified tribunal record, i.e. the file he requested under section 317 of the Rules. It is section 318 that creates an obligation to do so.

[5] A second decision challenged before our Court is that of the associate judge to refuse to extend the time limit for the applicant to produce the affidavit provided for in section 306. This rule reads as follows:

306 Within 30 days after issuance of a notice of application, an applicant shall serve its supporting affidavits and documentary exhibits and file proof of service. The affidavits and exhibits are deemed to be filed when the proof of service is filed in the Registry.	306 Dans les trente jours suivant la délivrance de l’avis de demande, le demandeur signifie les affidavits et pièces documentaires qu’il entend utiliser à l’appui de la demande et dépose la preuve de signification. Ces affidavits et pièces sont dès lors réputés avoir été déposés au greffe.

These are the two issues that are being appealed to this Court.

I. Appeals under section 51 of the Rules

[6] Before getting to the heart of the matter, it is useful to recall the parameters of an appeal under section 51 of the Rules.

[7] Since the Federal Court of Appeal decision in *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 FCR 331, it is settled law that appeals from decisions rendered by associate judges of this Court follow the standard of review as do any decision in civil matters (at para 79). This is the standard set out by the Supreme Court in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235.

[8] On a question of law, the standard of review on appeal is correctness. In the words of the Court of Appeal in *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 FCR 344 [*Mahjoub*], "if there is error, this Court can substitute its opinion for that of the Federal Court" (at para 58).

[9] For questions of fact or of mixed fact and law, the standard is rather that of palpable and overriding error, unless, for a mixed question, an error on an extricable question of law or legal principle is present (*Mahjoub*, at para 74). It is obviously up to the applicant to meet the appropriate standard.

[10] In *Benhaim v St-Germain*, 2016 SCC 48, [2016] 2 SCR 353, the Court accepted the description of what constitutes a palpable and overriding error presented by the Federal Court of Appeal and the Quebec Court of Appeal:

> [38] It is equally useful to recall what is meant by "palpable and overriding error". Stratas J.A. described the deferential standard as follows in *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31, at para. 46:
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> > Palpable and overriding error is a highly deferential standard of review . . . . "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.
>
> [39] Or, as Morissette J.A. put it in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77 (CanLII), [TRANSLATION] "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions."

[11] The deferential rule continued to be applied. It does not seem pointless to me to present the additional articulation of the palpable and overriding error standard described in the *Mahjoub* judgment, despite the length of the quotation:

> [60] In this case, many of Mr. Mahjoub's submissions focus on the Federal Court's fact-finding and its factually suffused application of legal standards to the facts, particularly on the issue of the reasonableness of the security certificate. These matters can only be reviewed for palpable and overriding error.
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> [61] Palpable and overriding error is a highly deferential standard of review: *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, at paragraph 38; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall. See *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 [*South Yukon*], at paragraph 46, cited with approval by the Supreme Court in *St-Germain*, above.
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> [62] "Palpable" means an error that is obvious. Many things can qualify as "palpable". Examples include obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received in

> accordance with the doctrine of judicial notice, findings based on improper inferences or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence.
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> [63] But even if an error is palpable, the judgment below does not necessarily fall. The error must also be overriding.
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> [64] "Overriding" means an error that affects the outcome of the case. It may be that a particular fact should not have been found because there is no evidence to support it. If this palpably wrong fact is excluded but the outcome stands without it, the error is not "overriding". The judgment of the first-instance court remains in place.
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> [65] There may also be situations where a palpable error by itself is not overriding but when seen together with other palpable errors, the outcome of the case can no longer be left to stand. So to speak, the tree is felled not by one decisive chop but by several telling ones.

I also note *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 72, [2021] 3 FCR 294, at para 134.

[12] Mr. Lill therefore had to identify the legal issues to apply the standard of correctness. Otherwise, he was subject to the standard of palpable and overriding error, which means that it is not enough to pull at the leaves and branches, but rather that the whole tree must be shown to have been felled, even if several chops are necessary.

II. The dispute involving the decision under appeal

[13] This applicant is acting independently, without the assistance of a lawyer. He has initiated an application for judicial review. For the purposes of an appeal of the associate judge's

decision, it is preferable to know the context in which the decision was rendered, but there is no need to explore every single nook and cranny that the applicant proposes.

[14] This applicant, Mr. Lill, is involved in numerous disputes in a number of jurisdictions. His application record in this case lists litigation before this Court, the Federal Court of Appeal, the Quebec Superior Court, the Quebec Court of Appeal and federal administrative tribunals. What brings Mr. Lill before our Court is an incident relating to the application for judicial review that he initiated in a Notice of Application dated January 19, 2023, but which was not served and filed until January 30.

[15] The application for judicial review is from a decision made by a senior official within CSC regarding a grievance (V30R00065317) Mr. Lill filed. The decision was rendered on November 22, 2022, when the grievance sought a request to correct a security intelligence report [SIR of October 12, 2020]. Here is how the allegations that were the subject of the grievance are summarized on pages 1 and 2 of 6 in the November 22, 2022 decision:

> [TRANSLATION]
> In your previous submissions, you contested the denial of your request for corrections to the Assessments for Decision (A4Ds) dated 2020-12-15 and 2021-01-13. As you explained, the information you were disputing was taken from an SIR dated 2020-12-10 produced by the Security Intelligence Officer (SIO). You were of the opinion that sufficient information had not been shared with you to support the refusal of your request, and that the information compiled in the SIO's SIR had not been compiled in accordance with the provisions of Annex B to Commissioner's Directive (CD) 568-2, *Reporting and Sharing of Security Information and Intelligence*. On the one hand, you questioned the reliability of the sources of information used in this report and, on the other, you believed that the criteria set out in paragraph 6 of CD 568-2 had not been met at the time the report was completed. You were therefore of the opinion that this information should not

> be reported in other reports in your file. In the end, you asked that your request for corrections be processed in accordance with the laws and policies, that ARS be reminded to comply with them, and that all the points raised in your complaints and grievances be addressed.
>
> In your final submission, you dispute the responses received at previous levels, explaining that not all the points raised in your submissions were addressed. You question the Warden's allegation that you referred in your grievances to information that did not appear in the SIR of 2020-12-10. The information in question related to your involvement with other inmates whom you allegedly encouraged to use the complaints and grievance process to file complaints on various subjects, including wearing masks in the canteen and unescorted temporary absences (UTAs). You maintain that this information must be in the SIR in question, since it is referred to in the 2 A4Ds of 2022-12-15 and 2021-01-13. Finally, you ask that all the corrective measures requested at previous levels be implemented.
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> In the addendum dated 2022-08-14, you forwarded emails received following an access to information request, and you are of the opinion that these emails demonstrate malicious intent and attempts at retaliation from staff members at the Federal Training Centre (FTC) in order to put an end to the steps you have taken with the *Canadian Human Rights Commission*, the Office of the *Correctional Investigator of Canada* and your lawyers. In the end, you asked that your requests for corrections be accepted and that all the corrective measures requested at previous levels be implemented.

[16] The significance for the applicant of the said SIR appears to stem from the fact that a recommendation for transfer and a change to the inmate's security clearance followed the SIR of December 10, 2020. This report was based, at least in part, on information obtained from "sources" whose reliability is questioned by the applicant. In the end, Mr. Lill was sent to Cowansville Institution, a medium-security facility. This facility has a higher security level than the facility where he was previously held, with a security rating also changed to moderate/medium.

[17] The grievance was rejected. No corrections have been made. The decision maker concluded [TRANSLATION] “that sufficient explanations have been provided to you to justify the refusal of your Request for Corrections” (decision of November 22, 2022, p 5 of 6). Furthermore, although no corrections to the content of the SIR are granted, the fact that the applicant has requested corrections to his file must be reflected in it. The grievance decision states that corrective action is necessary: [TRANSLATION] “the management of the Federal Training Centre [where Mr. Lill was detained prior to his transfer to Cowansville in early January 2023] will ensure that the assessments for decision dated 2020-12-15 and 2021-01-13 are unlocked to reflect that a Request for Corrections was made with respect to certain information included in the report and to direct the reader to Memorandum #37” (decision of November 22, 2022, p 6 of 6).

[18] The application for judicial review, filed on January 30, is a short document in which the applicant alleges an unreasonable decision about which he would like to have expunged all information filed in his prison file [TRANSLATION] “in connection with the security intelligence report of December 10, 2020”. In it, the applicant alleges a series of errors or contraventions of the *Corrections and Conditional Release Act*, SC 1992, c 20 [Act] (reference is made to sections 24 and 27) and the Commissioner’s Directives.

[19] The applicant also makes a request that will lead to the incidental litigation discussed here. The following is written in the application for judicial review:

> [TRANSLATION]
> The applicant requests that *the federal tribunal, the Correctional Service of Canada*, forward to him and to the registry a certified

> copy of the following documents which are not in his possession, but which are in the possession of the federal tribunal:
>
> 1. a copy of all documentation, information and materials considered or consulted by the *Correctional Service of Canada* in the analysis of Final Grievance # V30R00065317 for its decision.
>
> 2. the names of all *Correctional Service of Canada* personnel who were met with or consulted and the notes resulting from these meetings or consultations for consideration in the analysis of Final Grievance # V30R00065317 for its decision making.
>
> [Translated as it appears in the French version.]

[20] The Rules set out the steps that must be taken by the administrative decision maker whose decision is challenged. Section 317 of the Rules, which follows, obliges the federal tribunal (the administrative decision maker) to forward the documents relevant to the request:

317 (1) A party may 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.	317 (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.
(2) An applicant may include a request under subsection (1) in its notice of application.	(2) Un demandeur peut inclure sa demande de transmission de documents dans son avis de demande.
(3) If an applicant does not include a request under subsection (1) in its notice of application, the applicant shall	(3) Si le demandeur n'inclut pas sa demande de transmission de documents dans son avis de demande, il

serve the request on the other parties.	est tenu de signifier cette demande aux autres parties.

Section 318 of the Rules requires the federal tribunal to send a certified copy of the requested material within 20 days of service of the request for transmission. Section 318 of the Rules also provides a procedure for objecting to the request for transmission.

[21] In our case, the request for transmission was not opposed. In fact, a certified 193-page file was transmitted on or around February 17, 2023. The certificate states that [TRANSLATION] "the certified copy of the documents considered in the decision rendered on November 22, 2022 in final grievance No. V30R00065317" was transmitted. As for the second request under section 317 of the Rules found in the notice of application for judicial review, according to which the applicant was seeking [TRANSLATION] "the names of all Correctional Service of Canada personnel who have been met or consulted". The certificate states that this list does not exist, but that [TRANSLATION] "this information is contained in the file".

III. Decisions under appeal

[22] Associate Justice Steele had two issues before her. The first, on a motion filed June 20, 2023, sought an order compelling CSC to provide the information required under the review application. The second, on a motion filed on July 12, sought an extension of time to be relieved of the failure to comply with section 306 of the Rules, until such time as the respondent provided Mr. Lill with the documentation he said he had requested in his application for judicial review. Although the applicant had made two separate applications by motion, the associate judge chose to render judgment in a single order dated August 10. The applicant is appealing both decisions

contained in this same order. I will do the same by rendering a single judgment disposing of the two issues raised.

[23] The first issue, relating to the content of the certified tribunal record, has been resolved by the associate judge, who recalled that [TRANSLATION] “only the material that was available to the decision maker at the time of rendering a decision is considered relevant for the purposes of section 317 of the Rules” (Order, at para 8). The associate judge cited the following case law: *Habitations Ilot St-Jacques Inc. v Canada (Attorney General)* 2017 FC 147; *Canadian National Railway Company v Canada (Transportation Agency)*, 2019 FCA 257 [*Canadian National Railway Company*]; *Canadian Constitution Foundation v Canada (Attorney General)*, 2022 FC 1232.

[24] Associate Justice Steele noted that the certified record may in some cases contain more than just the information that was before the administrative decision maker in reaching his or her decision. The judge made it clear that an allegation of reasonable apprehension of bias or breach of procedural fairness could allow the file to be amplified on judicial review. Relying on *Canada (Public Sector Integrity Commissioner) v Canada (Attorney General)*, 2014 FCA 270, the judge ruled that [TRANSLATION] “the applicant must invoke a ground of review that would allow the Court to consider evidence of which the decision maker was unaware” and that [TRANSLATION] “the ground of review must rest on a factual basis supported by appropriate evidence” (Order, at para 9). This was not the case here.

[25] Here, the application of section 317 of the Rules resulted in a 193-page record that was certified as complete. The applicant claims that other documents should have been included; but in this, the applicant confuses the obligation to transmit with potential arguments about the merits of the application for judicial review.

[26] Associate Justice Steele concluded that Mr. Lill failed to discharge his burden of demonstrating that CSC is in possession of documents other than those already forwarded and that he is entitled to claim under section 317 of the Rules. She declared that the applicant has all the information he needs to advance his case. He will be able to plead the facts or the absence of facts, depending on his theory of the case (Order, at para 15). Thus, the CSC has fulfilled its obligation under section 317 of the Rules: no further transmission was required.

[27] The second issue was the refusal to grant an extension of time for Mr. Lill to make use of section 306 of the Rules. Under this rule, within 30 days of the issuance of the notice of application, the affidavits and documentary exhibits to be used must have been served. This was not done.

[28] Associate Justice Steele refused to extend the deadline, which was March 1, 2023. She noted that the fundamental principle guiding the discretion to extend is the interests of justice. In the review that must take place, four criteria have generally been recognized since the decision of the Federal Court of Appeal in *Canada (Attorney General) v Hennelly*, 1999 CanLII 8190 (FCA) [*Hennelly*]. They are whether the applicant has demonstrated:

1. a continuing intention to pursue his or her application;
2. that the application has some merit;

3. that no prejudice to the respondent arises from the delay; and

4. that a reasonable explanation for the delay exists.

[29] The decision under appeal states that the continuing intention to pursue the application can be inferred from the applicant's representations and communications since February 2023. Moreover, the respondent has not raised any prejudice that he would suffer if the extension were to be granted. Furthermore, neither the explanation for the delay nor the merits of the application, which constitute the other two criteria, have been satisfied. Thus, the evidence is silent on the merits of the application for judicial review. The application for judicial review does not shed any light on the matter, since it merely lists conclusions and alleged errors. As for the explanation for the delay, not only is section 306 of the Rules clear, but the filing of affidavits and exhibits is not conditional on the filing of the certified record under sections 317 and 318 (*Pfeiffer v Mayrand*, 2004 FCA 192, at para 20). The associate judge noted that if an extension could have been granted, it should have been requested diligently. A direction warned the applicant that he needed a motion for an extension, as his informal request of February 8 was inadequate. The applicant claims not to have received the direction until a month later, on March 16. However, even if this were the case, it does not explain why the request for an extension was not filed until July 12, 2023 (four months later). Mr. Lill was supposed to act promptly. He did not.

[30] Weighing the four factors, Associate Justice Steele concluded that the balance tipped in favour of denying the requested extension. The two criteria that were not met carry more weight

and are decisive. The request for an extension is denied, with costs of $250 ordered in favour of the respondent.

IV. Arguments and analysis

[31] As stated above, the burden is on the appellant to show that the decision suffers from a palpable and overriding error. An error is palpable if it is obvious. It must also be shown that the error has a decisive impact. As this Court noted in *Lessard-Gauvin v Canada (Attorney General)*, 2020 FC 730, this standard compels the reviewing tribunal to a high degree of deference (at para 43, with the abundant case law cited therein). To use the Federal Court of Appeal metaphor used repeatedly since *South Yukon Forest Corp. v R*, 2012 FCA 165, one cannot simply pull at the leaves and branches of the tree to satisfy the "palpable and overriding" standard. The entire tree must fall. The same standard of review applies to the two decisions rendered and now before this Court for decision.

[32] If, on the other hand, the applicant identified a question of law or a question of mixed law and fact, and in the latter case isolated the question of law, the standard of review would no longer be deferential but rather the standard of correctness.

A. *Access to documentation not included in the certified tribunal record*

[33] The applicant is not satisfied with the certified tribunal record.

[34] The position adopted by the applicant in his memorandum of facts and law, and amplified in his lengthy argument at the appeals hearing, boils down to claiming that the grievance

decision had to have been rendered by numerous public servants because numerous public servants provided advice, according to the applicant, to the ultimate decision maker, the person designated by the CSC Commissioner. This explains the express request made in the application for judicial review of January 30. According to the application, the names of all CSC staff members met with or consulted were to be provided under section 317 of the Rules. The certificate accompanying the certified record stated that such a list did not exist, but that the names of officials could be found in the disclosure. As for the content of the certified record, it consisted of documents in the CSC file relevant to the decision on the final grievance. The certificate adds that [TRANSLATION] "the documents that were considered in the decision rendered on November 22, 2022" are included. [TRANSLATION] "The complete file is 193 pages long".

[35] As far as the applicant is concerned, the certified record does not comply with the obligation created by sections 317 and 318 of the Rules. The exchanges between officials that may have taken place, even if they did not end up in the file considered by the Assistant Commissioner who decided the final grievance, should have been forwarded to him.

[36] Essentially, the grievance related to information placed in the applicant's file by correctional authorities, and specifically to the December 10, 2020 Security Information Report, where the applicant alleged that this information (from sources) was there without having been collated in accordance with the Act and certain Commissioner's Directives. The administrative decision maker dismissed the grievance, concluding that the information had been collected in

accordance with the Act and the Directives, and that what had been disclosed to the applicant regarding sources of information complied with subsection 27(3) of the Act.

[37] I will digress for the sake of clarity. Subsection 27(1) of the Act sets out the obligation to disclose this type of information to the inmate, and subsection 27(3) allows disclosure to be limited where there are reasonable grounds to believe "that disclosure . . . would jeopardize the safety of any person, the security of a penitentiary, or the conduct of any a lawful investigation". The grievance decision concluded that explanations had been provided justifying the refusal to make corrections.

[38] Mr. Lill wants information in order to challenge the reliability of information sources. To some extent, he is fishing. He argues that the judge erroneously concluded that he has all the information to advance his case because, he says, there should be more. So, either Mr. Lill must allege and demonstrate the error of law by the associate judge. This has not been done. Or he would have to show that the determination of the question of mixed fact and law that the associate judge was called upon to make constituted a palpable and overriding error on her part. I could not find in Mr. Lill's submissions what the error would consist of, let alone how it would be palpable and overriding, especially since the issues before the judge were in the form of a complaint about the composition of the certified record. That was what was at issue, not Mr. Lill's lengthy pleas as to the treatment of which he complains and which is the subject of his application for judicial review.

[39] I cannot see how the associate judge's decision to determine the scope of section 317 of the Rules as applying only to [TRANSLATION] "material that was available to the decision maker at the time of making a decision are considered relevant for the purposes of section 317 of the Rules" (Order, at para 8) would constitute a palpable and overriding error. This is the state of the law. Authors Letarte, Veilleux, et al, in their Recours et procédure devant les Cours fédérales (LexisNexis, 2013) seem to me to summarize the scope of the obligation well. They write at No. 5-67:

> [TRANSLATION]
> 5-67. Purpose - The purpose of section 317 and 318 of the Rules is to enable the parties to put in evidence, in the judicial review proceedings, the material that was before the federal tribunal at the time it issued the impugned decision, so that the Court can know the factual basis on which the impugned decision was issued. It is not intended to offer or facilitate the communication of all documents that may be in the possession of a federal tribunal. It is not as broad a discovery regime as that applicable in an action. In Atlantic Prudence Fund Corp. v Canada, Justice Hugessen stated this difference in no uncertain terms:
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> > . . . Rule 317 does not have the same theoretical foundation, nor does it produce the same results as documentary discovery and does not require a tribunal (by contrast to a defendant in an action) to engage in an extended and exhaustive search for material whose relevance may at best be marginal and whose selection will necessarily involve an exercise of judgment. Once again, the applicants must know the facts upon which they propose to argue that the impugned decisions should be set aside, and it is not enough merely to hope that there will be something "relevant" in the entire archive of the Government of Canada.
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> Similar comments were made by Justice Pelletier of the Federal Court of Appeal in *Access Information Agency Inc. v Canada*:
>
> . . . 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.
>
> [Emphasis added.]

[40] In *Canada (Human Rights Commission) v Pathak* (CA), 1995 CanLII 3591 (FCA), [1995] 2 FC 455 [*Pathak*], the Federal Court of Appeal emphasized the applicant's obligation, in the application for judicial review, to precisely state the relief sought, the reasons supporting the application and the legislative provisions invoked. These obligations were based on the rules then in force. The same rules apply today (section 301). However, as the Court of Appeal states, "[a]s the decision of the Court will deal only with the grounds of review invoked by the respondent, the relevance of the documents requested must necessarily be determined in relation to the grounds of review set forth in the originating notice of motion and the affidavit filed by the respondent" (at p 460); see also *Canadian National Railway Company*, at paragraphs 12 to 14. However, the application for judicial review is laconic, whereas the applicant merely alleges that the grievance decision is unreasonable.

[41] Undoubtedly, there will be circumstances where communication will be broader than documentation before the administrative decision maker who rendered the decision for which judicial review is sought. For example, where a question of natural justice, procedural fairness in the legal sense (inequity in terms of the process), improper purpose or corruption is raised on judicial review, the rule that only the record before the administrative decision maker is the subject of the section 317 motion could be broadened (*Bernard v Canada (Revenue Agency)*, 2015 FCA 263). In *Humane Society of Canada Foundation v Canada (National Revenue)*, 2018

FCA 66 [*Humane Foundation*], the Court accepted paragraph 50 of our Court in *Gagliano v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2006 FC 720, 293 FTR 108:

> [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 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: *Deh Cho First Nations*, above; *Friends of the West*, above; *Telus*, above; *Lindo*, above. [Emphasis in original.]

As the Court said in *Humane Foundation*, documents that were not before the administrative decision maker may be relevant within the meaning of section 317 of the Rules if there is an allegation of a breach of procedural fairness or a reasonable apprehension of bias. But a mere general allegation would be insufficient to permit what is nothing more than a "fishing expedition". Here, there is not even such an allegation, let alone one based on some evidence.

[42] The Court in *Humane Foundation* adopted this passage from *Access Information Agency Inc. v Canada (Attorney General)*, 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.]

In essence, section 317 does not serve the same purpose as discovery in an action. In our case, there is no reason to believe that the section 317 obligation has not been met. But allegations of bias or breach of procedural fairness could open the door to broader disclosure (*Travellers' Rights v Canada (Attorney General)*, 2021 FCA 201) insofar as it can be justified on the basis of evidence. However, no such allegation, let alone such proof, has been made here.

[43] Consequently, Associate Justice Steele did not commit a palpable and overriding error in limiting the scope of the communication under section 317 to what is commonly the rule in this case. At the very least, the applicant has not demonstrated that it should be overridden as was demanded.

[44] Both in his memorandum and before the Court on judicial review, I fear that the applicant does not fully appreciate the scope of the obligation under section 317. He states that he is

seeking the documentation used or consulted in making the administrative decision (memorandum, at para 28), as well as that which was available to the administrative decision maker (memorandum, at para 51). In fact, he gives a lengthy account of CSC's obligation under section 27 of the Act, apparently to justify his request for additional disclosure (memorandum, at para 24). He states that it is more than clear that the legal obligation under section 27 of the Act has not been met (memorandum, at para 38) and, in the same breath, claims that the associate judge did not follow the jurisprudence holding, he says, that there is an obligation to provide the requested documentation [TRANSLATION] "in order to ensure procedural fairness" (memorandum, at para 39). The same point is made in paragraph 48 of his memorandum. It remains unclear what "procedural fairness" the applicant was referring to.

[45] According to Associate Justice Steele, this is a case of confusion between section 317 of the Rules and section 27 of the Act (decision, at paras 11, 13 and 15). First, the notion of procedural fairness as recognized in administrative law is not part of the application for judicial review. As established in *Pathak*, I repeat, "the relevance of the documents requested must necessarily be determined in relation to the grounds of review set forth in the originating notice of motion and the affidavit filed by the respondent". This was not done in this case. But, more than that, the applicant confuses what the respondent must produce under section 317 with his argument that the decision is unreasonable because it does not "[bear] the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653, at para 99). His interpretation of section 27 of the Act involves an exercise quite different from the obligation to

transmit what was before the administrative decision maker when the grievance decision was made. The conflation of these notions is inappropriate.

[46] This is probably what prompted the associate judge to state that [TRANSLATION] “Mr. Lill has all the information to advance his case on hand” (decision, at para 15). In my opinion, this is what is expressed in paragraph 13 of the decision when the judge says that [TRANSLATION] “Mr. Lill pleads at length that CSC should have had other documents in its possession, such as the SIR and the assessment reports he is seeking, when the decision in question was made, but this is not the crux of the issue to be determined under section 317. Rather, as the respondent argues, it is a question of arguments relating to the merits of the application for judicial review”. I agree.

[47] In the final analysis, and with all due respect, the applicant is mistaken in seeking additional disclosure when he is seeking judicial review solely on the basis that the decision rendered is unreasonable. He has not shown how the associate judge’s decision was tainted by a palpable and overriding error. This was his burden.

B. *Extension of the deadline for submitting affidavits and documentary evidence under section 306 of the Rules*

[48] Before this Court, the burden is the same for the first and second question: he must establish a question of law, which would be subject to the standard of correctness on appeal, or

he must demonstrate a palpable and overriding error in the other cases, unless of course he identifies an extricable error of law in the case of a question of mixed law and fact.

[49] The applicant's argument is based on a single premise: he is justified in not having produced the affidavits and documentary evidence because the obligation under section 317 of the Rules had not been met.

[50] The respondent points out that no palpable and overriding error has been demonstrated in the discretionary decision to deny the extension. This was the applicant's burden. That is correct. Indeed, neither in his memorandum nor during his lengthy oral argument did the applicant even attempt to discuss the weighing of the four *Hennelly* factors (the list is not exhaustive) presented by the associate judge to justify her decision not to grant the requested extension. Under section 51 of the Rules, it is not the role of the reviewing Court to substitute its discretion for the decision maker's. In the absence of an attempt to demonstrate an error of law or a palpable and overriding error in the exercise of Justice Steele's discretion, there is no choice but to dismiss the appeal of the associate judge's decision to deny the extension of time.

[51] The Court notes that the time limit set out in section 318 of the Rules for disclosure of information put before the administrative decision maker was respected in this case. The certificate issued to comply with the rule is dated February 17, and accompanies the 193 pages in the CSC file that were considered for the decision on the final grievance, the decision that is the subject of the judicial review. As noted by Associate Justice Steele, the applicant's obligation to produce his affidavits and exhibits under section 306 of the Rules is entirely independent of the

respondent's obligation to produce the certified tribunal record. *Pfeiffer v Mayrand* (above) even states that an applicant would not be relieved of his obligation under section 306 despite the respondent's failure to produce the certified record within the prescribed time. As authors Saunders, Rennie and Garton point out in *Federal Courts Practice* (Thomson Reuters, 2023), in their annotation to section 306, since judicial review proceeds on the basis of the record before the administrative tribunal, the parties cannot improve the record *ex post facto* (with recognized exceptions). In any case, here the respondent will have submitted the certified record within the prescribed time limit, and an applicant may well plead his or her case on the basis of the certified record.

V. Costs and conclusion

[52] Both parties requested costs. In Mr. Lill's case, he set them at a lump sum of $7,500. The respondent did not fix a sum, but merely asked for his costs.

[53] Associate Justice Steele ordered costs of $250 on the applicant's motion for an extension of time, awarding none on the first motion to amplify the certified tribunal record, since costs had not been requested.

[54] Two orders have been appealed. I will not award costs in the appeal of the decision not to amplify the certified tribunal record. On the other hand, the appeal regarding the request for an extension, where no arguments were offered, merits costs in the amount of $250 in favour of the respondent, including taxes and disbursements.

[55] As for the two appealed orders, these appeals are dismissed. The burden on the appellant has not been discharged by the applicant in each of his two appeals. I have no choice but to dismiss both appeals.

[56] Counsel for the respondent insisted that the denial of the request for an extension under section 306 of the Rules did not mean that the applicant's application for judicial review could not proceed. The Court notes that it may be appropriate that, should an extension of time to serve and file the applicant's record prove necessary in the circumstances, the parties make reasonable efforts to find common ground so that the application for judicial review can proceed.

ORDER in T-203-23

THE COURT ORDERS as follows:

1. The motion to appeal Associate Justice Steele's order of August 10, 2023, regarding her refusal to amplify the discovery of documents under section 317 of the Rules, is denied, without costs.

2. The motion to appeal Associate Justice Steele's order of August 10, 2023, for an extension of time to file affidavits and documentary exhibits under section 306 of the Rules, is dismissed. Costs of $250, including disbursements and taxes, are awarded to the respondent.

"Yvan Roy"
Judge

Certified true translation
Janna Balkwill

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-203-23
STYLE OF CAUSE:	CHRISTOPHER LILL v HIS MAJESTY THE KING
PLACE OF HEARING:	VIA VIDEOCONFERENCE
DATE OF HEARING:	SEPTEMBER 12, 2023
JUDGMENT AND REASONS:	ROY J.
DATED:	OCTOBER 13, 2023

APPEARANCES:

Christopher Lill	FOR THE APPLICANT (FOR HIS OWN BEHALF)
Renalda Ponari	FOR THE RESPONDENT

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