Federal Court of Appeal

Cour d'appel fédérale

Date: 20151126

Docket: A-293-15

Citation: 2015 FCA 268

Present: **STRATAS J.A.**

BETWEEN:

THE CANADIAN COPYRIGHT LICENSING AGENCY (OPERATING AS ACCESS COPYRIGHT)

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF MANITOBA, THE PROVINCE OF NEW BRUNSWICK, HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NOVA SCOTIA, THE GOVERNMENT OF NUNAVUT, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF PRINCE EDWARD ISLAND, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF SASKATCHEWAN, GOVERNMENT OF YUKON AND HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 26, 2015.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

A. Introduction and the basic facts giving rise to this motion

[1] Access Copyright has brought an application for judicial review in this Court. It seeks to quash the decision dated May 22, 2015 of the Copyright Board. The respondents have now brought a motion seeking the removal of certain material Access Copyright has included in its application record.

[2] At the outset, some brief description of the material in issue is necessary.

[3] In its notice of application, Access Copyright included a request under Rule 317 that the Board supply it with "material relevant to [the] application that is in the possession of [the Board]…and not in [Access Copyright's] possession." In response to the Rule 317 request, the Board informed the parties that it did not have in its possession any relevant material not already in the possession of the applicant.

[4] The motion before this Court concerns how Access Copyright dealt with the material that was before the Board and in its possession, *i.e.*, the material that it did not obtain under Rule 317. Access Copyright simply placed that material into its application record. It was not under an affidavit describing the provenance of the material.

[5] The respondents move to strike this material from the applicant's record. They say that the documents should have been supplied under affidavit. For the reasons below, I agree with the respondents.

[6] The failure to place the documents under affidavit sounds like a technical deficiency of no moment. As I shall explain, it is not—in some instances, that failure can cause procedural unfairness, and it offends a basic principle concerning the admissibility of evidence.

B. Analysis

(1) The applicable principles

[7] At the root of this motion is a question: on a judicial review, how does one bring the materials that were before the administrative decision-maker before the reviewing court?

[8] The frequency with which this question comes before the Federal Courts shows that many do not know the answer. There is little case law on point, perhaps because we regard the relevant rules as being clear. Indeed, the rules are clear but they are intricate and interrelated and, in some cases, stand against a common law backdrop. Now is the time to provide some more general guidance.

[9] As is the case with every procedural question in the Federal Courts system, the starting point must be the *Federal Courts Rules*.

[10] We begin with Rule 317, the rule that Access Copyright invoked in its notice of application. Rule 317 permits a party to obtain certain material from the administrative decision-maker. The administrative decision-maker responds in accordance with Rule 318.

[11] Rule 317 stands against a common law backdrop. Over six decades ago, the writ of *certiorari*—the writ used to quash decisions of an administrative decision-maker—was available in the case of an error on the face of the record. That sort of error was quite limited and in no way bears relation to the concept of unreasonableness as we know it today. As a result, the material before the administrative decision-maker that could be placed before the reviewing court was extremely limited: *R. v. Northumberland Compensation Appeal Tribunal. Ex Parte Shaw*, [1952] 1 K.B. 338 at pages 351-52.

[12] *Northumberland* stood for the proposition that the particular evidence before the administrative decision-maker was not to be produced to the reviewing court. But since *Northumberland*, the availability of *certiorari* has dramatically expanded and with that expansion has come the need for more materials to be placed before the reviewing court. Today, *certiorari* is available for substantive unreasonableness of the sort contemplated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. Review of that nature may require the reviewing court to have before it large portions of the material or even all of the material the administrative decision-maker considered in making its decision.

[13] Rule 317 reflects the reality today that the permissible grounds for judicial review are broader than they once were. It entitles the requesting party to receive everything that was before

the decision-maker at the time it made its decision and that the applicant does not have in its possession: *Access Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224, 66 Admin. L.R. (4th) 83 at paragraph 7. This allows parties "to effectively pursue their rights to challenge administrative decisions from a reasonableness perspective" and "have the reviewing court [that is engaged in reasonableness review] consider the evidence presented to the tribunal in question": *Hartwig v. Saskatchewan (Commission of Inquiry)*, 2007 SKCA 74, 284 D.L.R. (4th) 268 at paragraph 24 (commenting on a rule similar to Rule 317).

[14] This excerpt from *Hartwig* recognizes the relationship between the record before the reviewing court and the reviewing court's ability to review what the administrative decision-maker has done. If the reviewing court does not have evidence of what the administrative decision-maker has relied upon, the reviewing court may not be able to detect reviewable error. In other words, an inadequate evidentiary record before the reviewing court can immunize the administrative decision-maker from review on certain grounds. See *Slansky v. Canada (Attorney General)*, 2013 FCA 199, 364 D.L.R. (4th) 112 at paragraph 276 (dissenting reasons, but not opposed on this point).

[15] Rule 317 can fulfil another purpose that is less lofty but still important. Parties before the administrative decision-maker will often have in their possession all of the material the administrative decision-maker considered in making its decision. But not always. And sometimes parties may be unsure whether they do. Sometimes they wish to confirm exactly what the administrative decision-maker actually considered in making its decision. Rule 317 of the *Federal Courts Rules* provides a means by which parties can achieve those ends.

[16] The administrative decision-maker responds to a Rule 317 request by following Rule 318. Under that Rule, it delivers to the requester the material that was before the decision-maker (and that the applicant does not have in its possession) at the time the decision at issue was made. Under Rule 318, the administrative decision-maker can also object to disclosure, for example on the basis of public interest privilege or legal professional privilege: see *Slansky*, above at paragraphs 277-283 on the issue of how to litigate a Rule 318 objection involving confidential material.

[17] Materials produced by the administrative decision-maker in response to a Rule 317 request can simply be placed in the applicant's record or the respondent's record: see Rule 309(2)(*e.1*) and Rule 310(2)(*c.1*). When that is done, the material is in the evidentiary record before the reviewing court and may be used by the parties and the court. No affidavit is necessary.

[18] For completeness, I should note two other things. First, the portions of any transcript of oral evidence before a tribunal may also be filed in the applicant's or respondent's record without an affidavit: see Rule 309(2)(*f*) and Rule 310(2)(*d*). Second, Rule 318 provides that in addition to delivering the material to the party that made the request under Rule 317, the administrative decision-maker must also "transmit" a certified copy of the material to the reviewing court. Note that the Rule uses the word "transmit," not "file." The material is not formally before the reviewing court in the sense of being a part of the reviewing court's evidentiary record: *Canada (Attorney General) v. Lacey*, 2008 FCA 242. Instead, the Registry is given the material in order to authenticate that materials contained in an application record under

Rule 309(2)(*e.1*) or Rule 310(2)(*c.1*) are indeed those supplied by the administrative decision-maker: *Canada (Attorney General) v. Canadian North Inc.*, 2007 FCA 42 at paragraph 11.

[19] I turn now to material that the party has in its possession and that was before the administrative decision-maker at the time it made the decision in issue. This material is potentially relevant to the judicial review, but is not produced by a decision-maker in response to a Rule 317 request. Rules 309 and 310 do not permit this material to be filed into the applicant's record or the respondent's record. Thus, the parties must take affirmative steps to place that material before the reviewing court.

[20] Here, we must look at Rules 306-310. But before doing so, we must appreciate that those rules sit alongside a fundamental general principle: facts must be proven by admissible evidence. There are exceptions to this, such as the availability of judicial notice, the presence of legislative provisions speaking to the issue, and an agreed statement of facts (including an agreement that certain documents shall be admissible). Putting those exceptions aside, documents by themselves, not introduced by an affidavit authenticating them, are not admissible evidence. Documents simply stuffed into an application record are not admissible.

[21] Under Rule 306 and Rule 307, applicants and respondents, respectively, can serve upon each other an affidavit that appends the material. Parenthetically, for completeness, I note that material that was *not* before the administrative decision-maker can *potentially* be placed before the reviewing court by way of affidavit. However, there are restrictions and admissibility requirements unique to judicial review proceedings that must be obeyed: see, *e.g.*, *Bernard v.*

Professional Institute of the Public Service of Canada, 2015 FCA 263 and cases referred to therein.

[22] Under Rules 306 and 307, parties need not include all of the material that was before the administrative decision-maker. To save costs and to simplify the record, they need only include the material necessary for their application. So under Rule 306, an applicant may serve an affidavit appending only some of the material. In response, a respondent might regard other parts of the material as being necessary. That respondent may use Rule 307 to serve an affidavit appending additional material. See generally *Canadian North*, above at paragraphs 3-5.

[23] Cross-examinations may be conducted on the affidavits: Rule 308. Why might cross-examinations be necessary? Sometimes there is uncertainty about whether certain material appended to the affidavits was in fact before the administrative decision-maker at the time it made its decision. The parties are entitled to test each other's positions on that. Down the road, a reviewing court might have to determine the content of the evidentiary record before proceeding further, and in some cases it may be assisted by the cross-examinations.

[24] Any affidavits under Rules 306-307 are placed in the applicant's record or the respondent's record: see Rule 309(2)(*d*) and Rule 310(2)(*b*). Cross-examination transcripts are also to be included: see Rule 309(2)(*e*) and Rule 310(2)(*c*).

(2) Applying the principles to this case

[25] In this case, Access Copyright simply included in its application record material it had in its possession that it says was before the Board at the time it made its decision. It did not introduce the material by way of an affidavit.

[26] The foregoing analysis shows that this was an error. Access Copyright should have served an affidavit explaining that the material was before the Board when it made its decision, appending the relevant material to that affidavit. After receiving that affidavit, the respondents might have exercised their right to cross-examine. As explained in paragraph 23, above, the right to cross-examine can be important in some circumstances. In this case, I cannot tell whether or not the respondents would have exercised their right to cross-examine. The fact they might have underscores the need for Access Copyright to have served an affidavit. Finally, following any cross-examinations, Access Copyright should have included the affidavit (with exhibits) and any cross-examination transcripts in its application record: see Rule 309(2)(*d*) and Rule 309(2)(*e*).

[27] I am satisfied that Access Copyright's error was an innocent one. The candid and professional affidavit of senior counsel shows that Access Copyright had good intentions and was looking for a fast, easy way to place the material before the Court. Unfortunately, the way Access Copyright went forward offended the Rules, ran contrary to the general rule that facts before the reviewing court must be proven by evidence, and might have worked procedural unfairness.

[28] The *Federal Courts Rules* can accommodate good intentions that give rise to creative and practical solutions that simplify things. At the outset of this matter, Access Copyright and the respondents could have discussed the evidentiary record needed by the Court and could have agreed on a list of material to be placed in that record. Then, by informal letter before at or the same time as the filing of the application record, Access Copyright could have requested, on consent, an order allowing for the agreement and the material covered by it to be placed into the application record without an affidavit: see paragraph 20 above regarding agreed statements of fact.

[29] Given that Access Copyright mistakenly included materials in its application record, what should now happen?

[30] The respondents say that they have suffered "irredeemable prejudice" from this "egregious" irregularity. They say that they have served an affidavit responding to Access Copyright's affidavit without realizing that Access Copyright intended to include many more documents into the application record. As will be seen below, this minor irregularity can be easily fixed.

[31] On the issue of remedy, the respondents' primary position is basically "too bad, so sad": Access Copyright should be barred from including in the application record an affidavit appending the materials, regardless of how relevant the materials might be to the Court's determination of the judicial review.

[32] This is remedial overreach. Rule 3 requires us to apply the rules to secure a just determination on the merits, not to punish a party that has made a mistake—here, a relatively benign one—that can be fixed.

[33] To that end, this Court will order the following:

(a) Within ten days of the Court's order, the materials mistakenly included in Access Copyright's application record (to be detailed in this Court's order) should be removed from that record and Access Copyright's memorandum of fact and law, drafted on the basis of the improper record, should be removed from the record or the court file, as the case may be;

(b) Within twenty days of this Court's order, in accordance with Rule 306, Access Copyright may serve an affidavit appending materials it says were before the Board and in its possession, including the materials mistakenly included in Access Copyright's application record;

(c) In accordance with Rule 307, the respondents may serve affidavits responding to the affidavit served under (b);

(d) In accordance with Rule 308, cross-examinations may take place concerning the affidavits served under (b) and (c);

(e) The time limits for (c) and (d) are those set out in Rules 307 and 308;

(f) Within the time specified under Rule 309, Access Copyright shall prepare a supplementary application record containing the materials specified under Rule 309 that do not appear in its corrected application record; also at that time, Access Copyright shall file its memorandum of fact and law;

(g) The respondents (comprised of two separately-represented groups) shall file their records and memoranda of fact and law in accordance with Rule 310; for clarity, those records should include all of the respondent's affidavits, whether filed in response to Access Copyright's new affidavit or filed in response to Access Copyright's original application record;

(h) Time thereafter shall run in accordance with the *Federal Court Rules*.

[34] This motion was about a minor, fixable mistake. As long as humans are involved in litigating cases, no matter how much they try to prevent mistakes, mistakes like this will sometimes happen, even by excellent counsel. Happily, most procedural mistakes, like the one in this case, do not seriously implicate clients' rights. Mistakes of this sort should be nothing more than a minor inconvenience during the drive to the ultimate destination—a judicial determination on the merits that to all is proper and fair.

[35] But here, the parties pulled over to the side of the road and stopped to fight, forgetting the destination. After Access Copyright made its mistake, the respondents wrote, pointing out the mistake. Despite the clarity of the relevant rules, Access Copyright dug in its heels, maintaining its position rather than reassessing it. In reaction to that, the respondents brought their motion. But they too showed inflexibility, forcefully asserting their position that Access Copyright should be prevented in the judicial review from using any of the material it improperly included in its application record, whether or not it was needed by the Court. In counter-reaction to that, Access Copyright brought a counter-motion—one that in the end is unnecessary for this Court to determine—proposing a lesser, more practical remedy. In that counter-motion, it laudably advanced submissions showing an awareness of its mistake. But that changed nothing: everyone has remained stuck on the side of the road.

[36] All have acted in good faith, representing their clients' interests vigorously, advocating their positions with characteristic excellence. But here initial intransigence begat a motion with remedial overreach, and remedial overreach begat a counter-motion. Forgotten was the destination: this Court, as a practical problem-solver, simply wants to determine the judicial review properly and fairly on the merits, using a proper and fair evidentiary record. The focus should have been on a fix, not a fight.

[37] An order shall issue in accordance with these reasons. There shall be no order for costs.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-293-15
STYLE OF CAUSE:	THE CANADIAN COPYRIGHT LICENSING AGENCY (OPERATING AS ACCESS COPYRIGHT) V. HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA ET AL.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	NOVEMBER 26, 2015

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