Federal Court of Appeal  Cour d'appel fédérale

Date: 20170216

Docket: A-425-16

Citation: 2017 FCA 35

Present: **STRATAS J.A.**

BETWEEN:

ELIZABETH BERNARD

Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA
and TREASURY BOARD

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on February 16, 2017.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] The applicant has applied for judicial review of a decision of the Public Service Labour Relations and Employment Board. The applicant filed a request for disclosure of documents from the Board under Rule 317 of the *Federal Courts Rules*, SOR/98-106. Under Rule 318, the Board has objected to disclosing certain documents. It says the documents are covered by legal professional privilege.

[2] By direction, another judge of this Court asked for submissions on whether disclosure of these documents is necessary to allow the applicant to file an affidavit in support of her judicial review. The parties have provided their submissions. The Court thanks the parties.

[3] Both the applicant and the Attorney General of Canada (representing the Board) correctly state that if the documents are covered by legal professional privilege, the applicant cannot see them. It is apparent from the parties' submissions, particularly those of the applicant, that the real dispute is whether the documents in fact are privileged.

[4] The Board has only asserted that the documents are privileged. It says that "the Applicant has not provided any plausible or cogent basis to doubt the veracity or legitimacy of the Board's claim to privilege based on the description provided by Board Counsel." In effect, the Board is telling the applicant she should just trust counsel's description.

[5] In response, the applicant suggests that this insufficient. She basically asks, "Where's the evidence that supports the assertion of legal professional privilege?"

[6] The applicant's question is salient and well-founded in law. The general rule is that a court can act only on the basis of evidence. Legal professional privilege may be a very important matter and "must remain as close to absolute as possible" (see *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209), but this does not relieve litigants of the need to prove its existence in a particular case.

[7] In *Canada v. Kabul Farms*, 2016 FCA 143, this Court put it this way (at para. 38):

> The general rule is that this Court can only act on evidence in the record before it unless some exception applies. Two exceptions are legislative provisions that create factual presumptions and the doctrine of judicial notice as discussed in authorities such as *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458.

[8] In *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161, 483 N.R. 275, this Court expressed this same principle (at paras. 79-80):

> We start with a fundamental general principle: facts must be proven by admissible evidence: see *R. v. Schwartz*, [1988] 2 S.C.R. 443 at pp. 476-77, 55 D.L.R. (4th) 1; *Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2015 FCA 268, 392 D.L.R. (4th) 563 at para. 20; *Canada v. Kabul Farms Inc.*, 2016 FCA 143 at para. 38. Put another way, a court can act only on the basis of facts proven by admissible evidence or evidence whose admissibility has not been contested: *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548 at paras. 26-27.
>
> There are rarely-occurring exceptions to this. These include circumstances where facts are subject to judicial notice (see, *e.g.*, *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458), facts are deemed or presumed by legislation to exist, facts have been found in previous proceedings in circumstances where they bind the court (see, *e.g.*, *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460), and facts have been stipulated or agreed to.

See also *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151, 474 N.R. 268 at paras. 18-23; *Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2015 FCA 268, [2016] 3 F.C.R. 19 at para. 20.

[9] This sort of issue has arisen before in the context of a Rule 318 objection: *Lukács v. Canada (Transportation Agency)*, 2016 FCA 103, an authority also useful regarding the Court's remedial flexibility in dealing with the objection; see also *Canadian Copyright Licensing Agency*

(Access Copyright) v. Alberta, 2015 FCA 268, [2016] 3 F.C.R. 19, an authority offering general guidance on Rules 317 and 318 and how they work procedurally in the broader context of a judicial review.

[10] *Lukács* is most relevant here. It tells us that in some cases an objection to disclosure under Rule 318 can indeed be dealt with on the basis of an exchange of letters containing submissions, nothing more. In such cases evidence does not need to be filed: sometimes, for example, the parties agree on the facts relevant to the objection and so there is no need for evidence to be filed; sometimes the facts set out in their submissions letters concerning the Rule 318 objection are not in dispute; sometimes, given the nature of the objection, there is no need for a factual basis other than the Rule 317 request itself.

[11] But *Lukács* also tells us that sometimes the facts are in dispute and so evidence must be filed.

[12] In *Lukács* this Court explained the relevant principles in the following way (at paras. 8-10):

> Now to objections under Rule 318(2). Where the relevant administrative decision-maker, here the Agency, objects under Rule 318(2) to disclosing some or all of the material requested under Rule 317 and the applicant does not dispute the objection, then the material is not transmitted. However, if, as here, the applicant disputes the objection, either the applicant or the administrative decision-maker may ask the Court for directions as to how the objection should be litigated: see Rule 318(3).
>
> In response to a request for directions, the Court may determine that the objection cannot succeed solely on the basis of the reasons given by the administrative decision-maker under Rule 318(2). In that case, it may summarily dismiss the objection and require the administrative decision-maker to transmit the material under Rule 318(1) within a particular period of time.

> In cases where the Rule 318(2) objection might have some merit, the Court can ask for submissions from the parties on a set schedule. But sometimes the Court will need more than submissions: in some cases, there will be real doubt and complexity and sometimes evidence will have to be filed by the parties to support or contest the objection. In cases like these, the Court may require the administrative decision-maker to proceed by way of a written motion under Rule 369. That Rule provides for motion records, responding motion records and replies, and also the deadlines for filing those documents. The motion records require supporting affidavits and written representations.

[13] In this case, the applicant does not accept that the documents are privileged. The burden of proving the documents are privileged lies on the Board. The say-so of the Board does not discharge that burden.

[14] Even if we accepted the say-so of the Board, it does not go far enough. The Board says the documents were sent to and from its legal services branch. That's fine as far as it goes. But that alone does not establish legal professional privilege. For example, the dominant purpose of the creation of the documents must be proven. The dominant purpose may be something other than providing legal advice, such as the communication of general Board business.

[15] In this case, the Board was asked to supply submissions, nothing more. It was not allowed to file evidence. Further, the issue on which it was asked to file submissions was whether disclosure of the documents is necessary for the applicant to prepare her affidavit in support of her application for judicial review. In substance, the Board has never had an opportunity to file evidence on the existence of the privilege. And the applicant also has not had an opportunity to file evidence on that issue and, if necessary, cross-examine on the evidence offered by the Board.

[16] The solution, as counselled by *Lukács*, is for the Board to bring a motion under Rule 369 for an order upholding its Rule 318 objection, *i.e.*, its claim of legal professional privilege. The Board is the proper party to bring the motion as it bears the burden of proving its claim of legal professional privilege. The motion process solves the problems identified in the preceding paragraph: it allows the parties a full opportunity to file evidence and, if necessary, to test it.

[17] An order will issue requiring the Board to bring a motion if it intends to maintain its Rule 318 objection. The order will also regulate ancillary matters. When the filings are complete, the motion may be returned to me for determination.

[18] Before concluding, I note that the style of cause appears to be irregular. Under Rule 303(2), the government respondent should be the Attorney General of Canada, not the Treasury Board. Unless the parties persuade me to the contrary in their written representations on the motion, I shall also amend the style of cause.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-425-16
STYLE OF CAUSE:	ELIZABETH BERNARD v. PUBLIC SERVICE ALLIANCE OF CANADA AND TREASURY BOARD

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	FEBRUARY 16, 2017

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