Federal Court of Appeal  Cour d'appel fédérale

Date: 20191022

Docket: A-244-19

Citation: 2019 FCA 257

Present: **RENNIE J.A.**

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

CANADIAN TRANSPORTATION AGENCY,
CANADIAN PACIFIC RAILWAY COMPANY,
BNSF RAILWAY COMPANY,
THE FOREST PRODUCTS ASSOCIATION OF CANADA,
THE CANADIAN OILSEED PROCESSORS ASSOCIATION,
THE FREIGHT MANAGEMENT ASSOCIATION OF CANADA,
THE WESTERN CANADIAN SHIPPERS' COALITION AND
THE WESTERN GRAIN ELEVATOR ASSOCIATION

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 22, 2019.

REASONS FOR ORDER BY: RENNIE J.A.

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REASONS FOR ORDER

RENNIE J.A.

[1] The Court has before it three motions in writing pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 (*Federal Courts Rules*):

1) A motion by the Canadian National Railway Company (CN) for an order under Rule 343(3) determining the contents of the appeal book, filed August 6, 2019;

2) A motion filed September 3, 2019 by the Freight Management Association of Canada (FMAC) for an order under Rules 317 and 318 requiring production of the record of the Canadian Transport Agency (CTA) in Decision No. CONF-9-2019 and for the determination of objections raised by the CTA, CN and Canadian Pacific Railway Company (CP) to disclosure of a portion of the record; and

3) A motion by FMAC filed August 21, 2019 for an order under Rule 383 designating this appeal as a specially managed proceeding and requesting the appointment of a case management judge.

[2] The origins of these motions lie in the January 14, 2019 decision of the CTA to investigate freight rail service in Vancouver (the Investigation). The investigation concerned whether railways were meeting their service obligations in respect of certain classes of shippers as a result of the imposition of embargoes on the release of rail cars destined for the port of Vancouver. The CTA requested that various parties, including CN, provide certain information. Pursuant to the CTA's request, CN provided approximately 5.8 million documents of operational data to the CTA.

[3] CN sought and obtained a confidentiality order over the data in an *ex parte* application to the CTA. The CTA ordered that the data be kept confidential from both the public *and* from the

other participants to the Investigation. Although the data was kept confidential from FMAC and the other participants, the data formed part of the record before the CTA in the Investigation Proceeding.

[4] On April 15, 2019, the CTA released its Decision No. CONF-9-2019 (the Decision). It concluded that CN had breached its level of service obligations with respect to freight rail service in Vancouver. More specifically, it found that CN breached its level of service obligations by announcing in September 2018 and implementing in December 2018, embargoes of wood pulp shipments destined to the Vancouver area. The embargoes prevented wood pulp producers from shipping to Vancouver area terminal facilities without first obtaining a permit from CN. Permits had to be obtained before producers could release any loaded car at their pulp mills for movement by rail.

[5] CN obtained leave to appeal the Decision pursuant to section 41 of the *Canada Transportation Act*, SC 1996, c. 10 and Rule 352 of the *Federal Courts Rules*. CN filed its Notice of Appeal on June 25, 2019. Notices of appearance were subsequently filed on behalf of four of the respondents: FMAC, Forest Products Association of Canada, CP and the CTA.

[6] Against this background, I return to the three motions.

[7] The motion for an order under Rule 383 can readily be disposed of.

[8] This motion was motivated by a legitimate concern on the part of counsel that the motion on the Rule 317 disclosure, the Rule 318 objection and the motion under Rule 343 to settle the contents of the appeal book would not be decided by the same judge and could result in conflicting decisions. There were also evident economies in having all three motions determined by the same judge.

[9] As all three motions are being determined by a single judge of this Court, the prospect of conflicting decisions does not arise and the desired efficiencies have been realized. The motion will therefore be dismissed.

[10] Two motions remain. There is an interrelationship between the issue that lies at the heart of both the Rule 317 and Rule 343 motions – the requirement under Rule 317 that a tribunal produce the record before it and the requirement under Rule 343(2) that the appeal book include the documents, exhibits and transcripts that are required to dispose of the issues on appeal. The objective of Rule 343 cannot be met if the obligation under Rule 317 is not fully discharged.

[11] While interrelated, these rules are, however, directed at different objectives, and are motivated by different policy considerations. In consequence, their application is governed by different criteria.

[12] Rule 317 embodies the principle that judicial review is premised on review of the record before the tribunal; *certiorari* means to bring forth the record. It entitles a party to receive everything that the decision maker had before it when it made its decision (*Canadian Copyright*

Licensing Agency (Access Copyright) v. Alberta, 2015 FCA 268, [2016] 3 FCR 19). The requirement that a tribunal produce, without hesitation, the entire record has long been central to judicial review. This is tempered by the pragmatic consideration that frequently large portions of the tribunal record, particularly in the case of standing, highly specialized agencies, may not be pertinent to the disposition of the issues on appeal.

[13] The purpose of Rule 343(2) is to avoid waste, reduce expense and enhance the delineation of the issues on appeal (*Daoud v. Canada (Attorney General)*, 2011 FCA 173). As such, the obligation to minimize the contents of the appeal book has been described as mandatory (*Office of the Superintendent of Bankruptcy v. MacLeod*, 2010 FCA 97).

[14] The tension between the objectives served by Rules 317 and 343 is moderated by reference to the grounds of review or appeal set out in the Notice of Application or Notice of Appeal (*Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128). In determining what must be produced in the appeal book and what must be produced by the tribunal, regard can be had to the grounds of review and whether the documents targeted bear on the resolution of these grounds. When there is any doubt or uncertainty as to the necessity of the documents, the scales always weigh in the favour of inclusion.

[15] CN has identified three grounds of appeal.

[16] The first is that the CTA breached its duty of procedural fairness to CN. It has not been argued, in the context of these motions only, that these documents are pertinent to the disposition of this ground of appeal.

[17] The third ground of appeal raises a purely legal question – whether the CTA erred in concluding that a railway can be in breach of its statutory service obligations despite no evidence of unfulfilled demand. Again, this appears, as a matter of first impression, to be a legal question, the resolution of which does not depend on the production of the operational data.

[18] The second ground of appeal is that the CTA erred in making factual determinations in the absence of evidence. This is the battleground over which the parties contest relevancy. FMAC contends it cannot consent to the agreement as to contents of the appeal book, nor make any effective argument on the relevance of the documents to the grounds of appeal because it has never seen the documents; recall that the confidentiality order was obtained on an *ex parte* basis. Its underlying concern is that the exclusion of the documents will simply reinforce the "no evidence" argument advanced by CN.

[19] Ordinarily, the assertion that there was no evidence to support a decision would, by definition, suggest that the entire record was critical. But in this case, CN has narrowed its challenge to two paragraphs in the CTA decision (paras. 115 and 120), specifically its conclusion that:

> "[a] shipper that receives advance notice of a likely future refusal by a railway company to transport its traffic can be expected to take measures to mitigate the associated impacts …" and that the "…premature announcement of [CN's] intention to deny service [through embargoes] is likely to have negative

> consequences for affected shippers, to the extent that they altered preferred business plans after it was communicated."

[20] If this were the only representation by CN as to the scope of the issues on appeal, I would be inclined to agree that the operational data was not relevant. However, as FMAC notes, in CN's memorandum seeking leave to appeal, CN "relies heavily" on evidence that would have been derived from the operational data. In paragraph 72 of its leave memorandum, CN writes:

> … the Decision ultimately concluded that CN breached its service obligations by announcing and imposing embargoes on wood pulp shipments. However, during the course of the Proceeding, CN argued that the imposition of embargoes did not result in a failure to move wood pulp traffic and that, therefore, CN could not be found to be in breach. The record amply supported this argument. CN led specific evidence that established that wood pulp shippers actually failed to utilize 30% of the permits CN provided for shipping during the embargo period. In other words, all wood pulp traffic that shippers intended to ship was moved.

[21] As FMAC notes, paragraph 73 of CN's leave memorandum begins with the claim that there was "nothing to counter CN's evidence in this respect." Further, CN stated in its written representations in support of leave to appeal at paragraph 58:

> … the Agency determined in paragraph 101 and 102 of the Decision that there was insufficient evidence of any CN breach of service obligations in respect of "carloads requested and shipped."

[22] I appreciate that there is a distinction between this argument and the more narrow ground of appeal advanced by CN in the motion currently before the Court and reproduced above. It is, however, a fine line and one which can be readily tripped over.

[23] It is important that neither party's ability to advance arguments on appeal be constrained or prejudiced by an inadequate record. There is also an interest in ensuring that the Court has the

necessary evidence, or lack of evidence, to decide the matter. It would not be fair to the parties, or the Court, for the appeal to proceed to hearing only to be adjourned by reason of an inadequate record. Given these considerations, the balance tips in favour of production.

[24] I turn to the third issue - the objection to disclosure of the documents under Rule 318(2) on the basis that they were produced to the CTA subject to a confidentiality order.

[25] This argument has no merit. Orders are routinely deployed to preserve confidentiality of information at the Court of Appeal. Sealing orders, confidentiality or protective orders issued by tribunals and the Federal Court are frequently continued or reinstated on appeal (Rules 151 - 152). In sum, if the documents are at all pertinent to the grounds of appeal, the fact that they were produced subject to a confidentiality order is of no consequence. The necessary orders respecting confidentiality can be sought from this Court.

[26] I would therefore make the following order:

1) The motion of the Forest Products Association of Canada and the Freight Management Association of Canada to require production of the operational data by the Canadian Transportation Agency under Rule 317 is allowed in part: operational data in relation to the embargo of wood pulp shipments during the period of investigation is to be produced;

2) The motion by the Freight Management Association of Canada to designate their appeal as a specially managed proceeding is dismissed without costs;

3) The motion by Canadian National Railway Company to settle the contents of the appeal book is determined as follows:

   a) The contents of the appeal book shall consist of:

      (i) the documents listed in Schedule "A" to Canadian National Railway Company's written submissions in reply in respect of the motion to determine the contents of the appeal book;

      (ii) the operational data in relation to the embargo of wood pulp shipments during the period of investigation; and

      (iii) any further documents the parties may agree upon or the Court direct;

4) Should the parties conclude that operational data is to be included in the appeal book, it is to be produced in electronic format;

5) The objection under Rule 318 is dismissed without prejudice to the right of either party to bring forward a new motion for a protective order. The parties are requested to determine whether they can reach agreement on such an order in respect of confidential information contained in the operational data;

6) This order is made in full reserve of the panel assigned to hear this appeal to make any determination it sees appropriate with respect to the relevancy of the operational data;

7) The style of cause shall be amended to remove those parties who have filed notices of intention not to participate in this proceeding; and

8) There is no order as to costs given the divided results.

"Donald J. Rennie"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-244-19
STYLE OF CAUSE:	CANADIAN NATIONAL RAILWAY COMPANY v. CANADIAN TRANSPORTATION AGENCY ET AL.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	RENNIE J.A.
DATED:	OCTOBER 22, 2019

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