Federal Court  Cour fédérale

Date: 20150817

Docket: T-91-09

Citation: 2015 FC 978

Ottawa, Ontario, August 17, 2015

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

MATTHEW G. YEAGER

Applicant

and

STOCKWELL DAY, MINISTER (AS HE THEN WAS), DEPARTMENT OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS, AND MINISTER, DEPARTMENT OF PUBLIC SAFETY, AND ATTORNEY GENERAL OF CANADA

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The applicant Mr. Matthew Yeager is a professor of sociology and criminology who is doing research on the Correctional Service Canada Review Panel [CSC Review Panel]. In June

2007, pursuant to the *Access to Information Act*, RSC 1985, c A-1 [*AIA*], Mr. Yeager made an access to information request to Public Safety Canada in order to obtain documents relating to the CSC Review Panel [ATIP Request]. Public Safety Canada responded to Mr. Yeager that there were no relevant records in the department. Following a complaint by Mr. Yeager, the Information Commissioner of Canada investigated and confirmed that Public Safety Canada had conducted a thorough search of departmental records and that no responsive records existed.

[2] In January 2009, Mr. Yeager filed an application for judicial review of the decision dismissing his ATIP Request [Application]. Since then, several interlocutory proceedings have taken place and Mr. Yeager's Application has not yet been heard on the merits. The present case is one of those interlocutory matters and relates to a document production issue.

[3] In December 2014, Mr. Yeager filed a motion for the issuance of a *subpoena duces tecum* to compel the production of certain documents following a cross-examination conducted in the context of his Application. In January 2015, Prothonotary Lafrenière dismissed Mr. Yeager's motion on various grounds, including that the issue had already been decided in prior proceedings and that the applicable rules did not support the issuance of the subpoena sought by Mr. Yeager.

[4] This motion is for an appeal of the order issued by Prothonotary Lafrenière. In his appeal, Mr. Yeager is asking the Court to overturn the order, to grant his motion for leave to issue the requested subpoena and to extend the time to review the materials by at least 90 days.

[5] Mr. Yeager contends that Prothonotary Lafrenière erred in concluding that this matter of production of documents was *res judicata,* in raising the failure to issue a direction to attend, in questioning the use of the subpoena procedure in the context of his Application, in adopting the Respondents' written representations, in acting as prothonotary in this matter, and in awarding costs in the amount of $750 against him. The Respondents reply that, on all fronts, the prothonotary's order was not clearly wrong and that the Court should therefore not intervene.

[6] This motion raises the following issues:

A. Are the questions raised by Mr. Yeager's appeal vital to the final issue in his underlying Application?

B. Is Prothonotary Lafrenière's order based on a wrong principle or upon a misapprehension of the facts?

C. If the answer to A or B is yes, should the Court issue the subpoena requested by Mr. Yeager?

[7] For the reasons that follow, Mr. Yeager's motion is dismissed. I do not find that the motion raises an issue vital to the final outcome of the case and, except on the ground of *res judicata,* I am satisfied that Prothonotary Lafrenière's order is not based upon a wrong principle or upon a misapprehension of the facts. In addition, while the evidence suggests that the documents requested by Mr. Yeager in this motion for production of documents do not completely overlap with those covered by a previous motion rejected by this Court, I would reach the same conclusion as Prothonotary Lafrenière and dismiss Mr. Yeager's motion as, in the circumstances of this case, a subpoena shall not be issued to obtain what in fact amounts to the tribunal record in the context of Mr. Yeager's Application.

II. Background

[8] On June 7, 2007, Mr. Yeager made his ATIP Request to Ms. Seguin-Brant, who was then Co-ordinator of the Access to Information/Privacy Division at Public Safety Canada. He noted that the recently appointed members of the CSC Review Panel had refused to participate in an interview prior to the completion of their report due at the end of October 2007, and he requested access to the following documents:

- A copy of the Review Panel's recently approved work plan, and copies of all previous drafts of that plan;
- A copy of the Review Panel's budget breakdown in terms of activities and staffing;
- A copy of the appointment papers by the Minister to the Review Panel members, including their official resumes;
- All e-mails, post-its, hand-written comments, and Blackberry messages pertaining to a decision taken on or about May 4, 2007, not to consent to Review Panel member interviews by Mr. Yeager;
- Copies of all comments sent in by e-mail to info@csrp-cescc.cal;
- Copies of all submissions sent in, to date, from interested parties by mail, courier, hand delivery, or the like.

[9] At the time of Mr. Yeager's request, Mr. Stockwell Day was the minister in charge of the Department of Public Safety and Emergency Preparedness (as Public Safety Canada was then known) [Minister]. The Public Safety portfolio also included CSC but the institutions within the

Public Safety portfolio were considered as separate government institutions for the purposes of the *AIA*.

[10] On June 15, 2007, Ms. Seguin-Brant responded to Mr. Yeager, informing him that a search had been conducted and that it was determined that there were no relevant records in the department. Mr. Yeager was not satisfied and filed a complaint with the Information Commissioner challenging this response received from Public Safety Canada. Further to his investigation of the complaint, the Commissioner sent a letter dated December 10, 2008 to Mr. Yeager, informing him that Public Safety Canada had conducted a complete and thorough search of departmental records and that no records responsive to his ATIP Request were located. The letter concluded that Mr. Yeager's complaint was not considered to be substantiated. The Commissioner then added that CSC might have control of the records responsive to Mr. Yeager's ATIP Request, and that Public Safety Canada had not transferred the request to CSC. The letter further informed Mr. Yeager that he could file such a request to CSC and seek the documents from them.

[11] Mr. Yeager never did. Instead, on January 20, 2009, he filed his Application before the Court, seeking judicial review of the response to his ATIP Request.

A. *Prior interlocutory proceedings*

[12] In June 2009, in the context of his Application, Mr. Yeager brought a motion under Rule 317 the *Federal Courts Rules*, SOR/98-106 [Rules] for the production of the "all emails, blackberry messages, hand-written notes, Post-its, memoranda, reports, and directives related to

the Minister's creation of the CSC Review Panel, ongoing supervision of the Review Panel, [and] responsibility for the work for the Review Panel" [2009 Motion]. This was not the typical request submitted by an applicant under Rule 317 in order to obtain the material in the possession of a federal office whose order is the subject of an application for judicial review. It was a motion for production of documents.

[13] The 2009 Motion was dismissed by Justice Tannenbaum in *Yeager v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 813, as the Court found that there was evidence that the Minister did not possess the material requested (at para 7). The Court also concluded that the motion was an attempt to obtain information otherwise requested by Mr. Yeager in his underlying Application and in his ATIP Request, and that a judgment granting the motion could not be issued as this would put an end to the principal application (at para 11). The Court further noted that Mr. Yeager had been advised that the information he sought might be available from another source, the CSC, but had apparently not moved to try to obtain it.

[14] In October 2009, Mr. Yeager filed a motion to reconsider, raising that as a deputy judge over the age of 75, Justice Tannenbaum was not legally entitled to hear the 2009 Motion. Further to the Federal Court of Appeal decision in *Felipa v Canada (Minister of Citizenship and Immigration*), 2011 FCA 272, Mr. Yeager's motion to reconsider was dismissed in October 2012 in *Yeager v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1157. Mr. Yeager appealed that decision to the Federal Court of Appeal, which dismissed it in November 2013 in *Yeager v Canada (Minister of Public Safety and Emergency Preparedness*), 2013 FCA 258.

[15] In the fall of 2014, as part of the interlocutory proceedings in the context of his Application, Mr. Yeager made arrangements for the cross-examination on affidavit of Ms. Seguin-Brant, requesting the Respondents' counsel to remind Ms. Seguin-Brant to bring her ATIP file. However, he did not serve Ms. Seguin-Brant with a direction to attend and to bring documents under Rule 91, as he was unaware of the procedure and considered it superfluous. At the cross-examination of Ms. Seguin-Brant held on November 28, 2014, Ms. Seguin-Brant did not bring her ATIP file as she no longer worked in the relevant Public Safety Canada department, and she was unable to answer questions about some meetings that had occurred many years before, in 2007.

[16] On December 16, 2014, following his cross-examination of Ms. Seguin-Brant, Mr. Yeager filed a motion in writing under Rules 41 and 369 seeking an order for the issuance of a *subpoena duces tecum* to compel the production of the following:

- A note on file concerning a meeting between Ms. Seguin-Brant, CSC and the consultant Mr. Terry Firman pertaining to his ATIP Request [Firman Note]; and
- The entire Access to Information file that was in the possession of Ms. Seguin-Brant in her official capacity as ATIP Coordinator for Public Safety and Emergency Preparedness Canada [ATIP File].

B. *Prothonotary Lafrenière's order*

[17] On January 29, 2015, Prothonotary Lafrenière dismissed Mr. Yeager's motion. He mentioned four different grounds in support of his order.

[18] He first noted that the matter of production of documents was *res judicata*, as a previous request by Mr. Yeager seeking essentially the same relief had been made in the 2009 Motion and was dismissed by Justice Tannenbaum, who had found that there was evidence showing the Respondents did not possess the material requested. Prothonotary Lafrenière reached the same conclusion as Justice Tannenbaum, who had also noted that the 2009 Motion was an attempt to obtain the same information that was requested in the underlying application for judicial review, and that granting the motion would put an end to the principal proceeding. He found that there were no new facts to justify revisiting this issue.

[19] Prothonotary Lafrenière also found that Mr. Yeager had failed to issue a direction to attend pursuant to Rule 91 in advance of the cross-examination of Ms. Seguin-Brant, observing afterwards that the Respondents would have likely moved to strike such direction if Mr. Yeager had included a request for production of the same documents.

[20] Prothonotary Lafrenière then questioned whether the Rule 41 subpoena procedure would be available in the context of an application for judicial review, given that subpoenas are typically issued for hearings involving witnesses. He stated: "[t]he fact that a respondent has filed an affidavit in accordance with Rule 307 does not entitle an applicant to obtain documentary discovery or go on a fishing expedition for information which may prove useful."

[21] Finally, Prothonotary Lafrenière adopted the Respondents' written representations as his own.

[22] He dismissed Mr. Yeager's motion and saw no reason why costs should not follow the event. Because he found that the motion was ill-founded and abusive and should not have been brought, he awarded costs in the amount of $750.

III. Analysis

[23] It is well established that, on appeals under Rule 51, orders of prothonotaries ought not to be disturbed and the Court should not interfere with a prothonotary's discretion unless the questions raised are vital to the final issue in the case or the impugned order is clearly wrong in the sense that the prothonotary's exercise of discretion was based upon a wrong principle or upon a misapprehension of the facts (*Merck & Co. v Apotex Inc.*, 2003 FCA 488 [*Merck*]). Where the decision of the prothonotary falls within the scope of either of these two categories, the reviewing judge may then exercise his or her discretion *de novo* (*Louis Bull Band v Canada*, 2003 FCT 732 at para 13; *Seanix Technology Inc v Synnex Canada Ltd*, 2005 FC 243 at para 11).

A. *Are the questions raised by Mr. Yeager's appeal vital to the final issue in his underlying Application?*

[24] I do not agree with Mr. Yeager that his motion for a *subpoena duces tecum* raises a vital issue for the final disposition of his Application.

[25] This Court has already decided that matters of document production and discovery are not vital to the final outcome of a case (*Stubicar v Canada (Minister of Public Safety & Emergency Preparedness)*, 2011 FC 267 at para 10 [*Stubicar*]; *Apotex Inc. v Warner-Lambert*

Company LLC, 2011 FC 1136 at para 4). I find that a notice for the issuance of a *subpoena duces tecum* falls in that category. In addition, as discussed below, Mr. Yeager's motion relates to the production of documents which, according to Mr. Yeager, form the tribunal record relating to his Application and are covered by other Rules applicable in the context of judicial reviews.

[26] Having found that the question raised by Mr. Yeager's motion is not vital to the final issue, I must now engage in the process of determining whether Prothonotary Lafrenière's order was based on a wrong principle or upon a misapprehension of the facts.

B. *Is Prothonotary Lafrenière's decision based on a wrong principle or upon a misapprehension of the facts and, if so, would the Court issue the subpoena requested by Mr. Yeager?*

[27] Prothonotary Lafrenière based his order on four different grounds, and I will discuss each of them in turn.

(1) *Res judicata*

[28] In his order, Prothonotary Lafrenière first concluded that the documents sought by Mr. Yeager in his motion for a subpoena are essentially the same as in the 2009 Motion as well as in his original ATIP Request, and that the issue has already been decided. Prothonotary Lafrenière used the term "*res judicata*".

[29] Mr. Yeager contends that the matter is not *res judicata*, as he is not asking for the same documents as he did in the 2009 Motion. In 2009, Mr. Yeager had requested production of all

emails, blackberry messages, hand-written notes, post-its, memoranda, reports, and directives related to the Minister's creation of the CSC Review Panel, ongoing supervision of the Review Panel, and responsibility for the work of the Review Panel. This request was indeed found to equate with what Mr. Yeager was asking in his ATIP Request. In the present motion, Mr. Yeager says he is requesting only two documents, the Firman Note and the ATIP File. Mr. Yeager even mentioned that what he is asking for is the record of the tribunal whose decision is the subject of his Application. Citing the British Columbia Court of Appeal in *Lehndorff Management Ltd v LRS Development Enterprises*, (1980) 109 DLR (3d) 729 at para 15, he affirms that there cannot be *res judicata* unless every point which properly belonged to the subject of litigation is the same.

[30] The Respondents reply that the documents requested by Mr. Yeager in the present motion, especially his request for the "entire" ATIP File, overlap with the documents sought in his 2009 Motion.

[31] I agree with Mr. Yeager that the documents covered by the present motion and by the 2009 Motion constitute two different sets of documents and do not meet the strict requirements to qualify as "*res judicata*". While there is certainly a material overlap between the two requests made by Mr. Yeager, it cannot be said that they are identical and raise exactly the same question. To that extent, I agree that there was some misapprehension of the facts by Prothonotary Lafrenière and that a conclusion of "*res judicata*" could not be supported by the evidence. The misapprehension of the facts relating to the documents covered by Mr. Yeager's current subpoena request results in part from the uncertainty regarding the precise scope of what Mr.

Yeager means by "the entire Access to Information file". Prothonotary Lafrenière has interpreted this to mean the CSC Review Panel records originally requested. Mr. Yeager says that he is asking for the notes and records made by Ms. Seguin-Brant as the ATIP coordinator in dealing with Mr. Yeager's ATIP Request, which form the materials in the possession of the tribunal whose decision is challenged in his Application.

[32] There could be some debate as to whether or not the "entire" ATIP File requested by Mr. Yeager encompasses all of the documents requested in the 2009 Motion. But, having considered the contents of the 2009 Motion, the ATIP Request as well as the description of the Firman Note and of the ATIP File requested in this motion, I am satisfied that Mr. Yeager's present request is different, at least in some part, from what was covered in the 2009 Motion.

[33] That said, leaving aside for the moment the other grounds raised by Prothonotary Lafrenière in support of his order, I would nonetheless reach the same conclusion as he did in exercising my discretion *de novo* relating to Mr. Yeager's request for the production of the Firman Note and the ATIP File. I would still dismiss the motion for a *subpoena duces tecum* as Mr. Yeager acknowledged that what he is asking for are the contents of the tribunal record. Not only have the Respondents already indicated (more than once) that Public Service Canada had no such documents in its possession, but the way to obtain the tribunal record in an application for judicial review is through Rule 317, not a subpoena procedure under Rule 41.

[34] In the initial response to Mr. Yeager's ATIP Request, in the affidavit filed by Ms. Seguin-Brant and in her cross-examination on affidavit, the Respondents and Ms. Seguin-Brant

have repeatedly stated that Public Service Canada had no documents or records in its possession and confirmed the June 2007 response made to Mr. Yeager to that effect. To echo the decision of Justice Tannenbaum in response to the 2009 Motion, the evidence is that the Respondents do not possess the material requested by Mr. Yeager.

[35] Furthermore, the documents now sought by Mr. Yeager are, by his own admission, the documents forming the tribunal record supporting the decision denying Mr. Yeager's ATIP Request. Mr. Yeager's Application challenges the "decision" that there were no relevant records available in response to his ATIP Request. In deciding on this Application, the Court will examine the tribunal record and how Ms. Seguin-Brant came to the conclusion that there were no relevant documents available, and will determine whether or not it should intervene based on the applicable standard of review. The Respondents have indicated, through the affidavit of Ms. Seguin-Brant and the various exhibits filed with it, that the contents of the tribunal record have already been produced.

[36] In the context of judicial reviews, Rule 317 provides the means for parties to request material in the possession of a federal office whose order is the subject of an application, by serving and filing a written request on the relevant "tribunal", identifying the material requested. Rule 318 then requires the tribunal to transmit a certified copy of the requested material within 20 days of service. I note that in his decision, when questioning whether Rule 41 is the correct procedure in an application, Prothonotary Lafrenière also observed that it is under Rule 317 that Mr. Yeager may obtain documents from a tribunal on judicial review.

[37] Rule 317 is not a means of obtaining discovery of all documents that may be in the tribunal's possession. The documents must be relevant to the application for the judicial review. This Court has held that Rule 91 regarding the production of documents cannot be used to expand the scope of a demand for production of documents under Rule 317, as it is not like a discovery of documents in an action (*Bristol-Myers Squibb Co. v Canada (Attorney General)*, 2002 FCT 208; *Stanfield v Minister of National Revenue*, 2004 FC 584).

[38] In this case, Mr. Yeager did bring his 2009 Motion under Rules 317 and 318, but it was found to be for the wrong materials and was denied by the Court. Instead of requesting all relevant records that the decision-maker relied upon in order to come to the decision on his ATIP Request, Mr. Yeager had requested records that were similar to the records he was asking for in the ATIP Request itself. This strategy had been discouraged by this Court in *Stubicar*, where it was determined that Rules 317 and 318 "cannot be used to provide to the applicant the very documents withheld under the Privacy Act" (at para 12). The same reasoning would apply to documents under the *AIA*.

[39] I therefore conclude that, even if the production of documents requested by Mr. Yeager in this matter is not exactly the same as in the 2009 Motion, his motion should be dismissed as the requested documents constitute the tribunal record for which a specific process is provided at Rules 317 and 318. This is the process that Mr. Yeager should have followed to obtain such documents. I observe that it is not clear from the Court's record in the underlying Application whether Mr. Yeager has sent a proper request pursuant to Rule 317 asking for the "tribunal record". I am however mindful of the fact that the 2009 Motion was filed pursuant to Rule 317,

though the documents requested through that motion were not the tribunal record but the same documents as in the original ATIP Request. Furthermore, the Respondents have stated that, in any event, they have already responded to that issue and that they have provided the contents of the tribunal record with Ms. Seguin-Brant's affidavit.

(2) The direction to attend

[40] Turning now to Prothonotary Lafrenière's conclusion on the Rule 91 direction to attend, I do not find that it was based upon a wrong principle or upon a misapprehension of the facts.

[41] It is not disputed that Mr. Yeager failed to issue a direction to attend in advance of the cross-examination on affidavit of Ms. Seguin-Brant. This is a requirement established by Rule 91 in order to compel the production of documents and other materials in the affiant's possession in the context of a cross-examination on affidavit. Rule 91 provides that a production of documents may only be enforced where they have been listed or sufficiently identified through a duly served direction to attend. As stated in *IPL Inc v Hoffman Plastics Canada Inc*, 2006 FC 1085 at para 19, a cross-examination on affidavit is not the equivalent of a discovery of the party.

[42] This prescribed process has not been followed by Mr. Yeager and it was therefore not clearly wrong for Prothonotary Lafrenière to raise that as a ground to dismiss Mr. Yeager's motion for the issuance of a subpoena under Rule 41. Mr. Yeager cannot try to do indirectly through Rule 41, after the cross-examination has been completed, what he has failed to do under Rule 91.

[43] The comment made afterwards by Prothonotary Lafrenière, suggesting that the Respondents would have moved to strike the direction if Mr. Yeager had included a request for production of the same documents previously denied, does not render incorrect or wrong the prothonotary's conclusion on the failure to follow Rule 91. This remark was hypothetical but it does not change the fact that Mr. Yeager has omitted to provide a direction to attend, despite the request of the Respondents' counsel and the reminder sent to him to that effect. Whether the documents claimed are considered essentially the same as those denied in the 2009 Motion or whether they amount to the tribunal record for which Rule 317 establishes a process, I do not find that, in the circumstances of this case, Prothonotary Lafrenière was clearly wrong in his conclusion on the failure to issue a direction to attend and on relying on this as a ground to dismiss Mr. Yeager's motion.

[44] This failure to follow the requirements of the direction to attend under Rule 91 in the context of the cross-examination on affidavit would, in and of itself, be sufficient to dismiss Mr. Yeager's motion for the issuance of a subpoena to compel Ms. Seguin-Brant to produce the documents.

(3) Rule 41

[45] I also do not find that Prothonotary Lafrenière was clearly wrong in questioning whether the subpoena procedure under Rule 41 is available in the context of an application. There was no misapprehension of facts nor was he wrong in principle in concluding so.

[46] Prothonotary Lafrenière was rather right to point out that, on judicial review, the procedure to obtain documents from a tribunal is to make a request pursuant to Rule 317. There was nothing wrong in that statement nor in his statement to the effect that Mr. Yeager was not entitled to obtain documentary discovery or to go on a fishing expedition for information because the Respondents have filed an affidavit in the context of the Application.

[47] Rules 41 to 45 govern the summoning of witnesses and other persons at a hearing. But the process to obtain documents from a decision-maker in an application for judicial review is not Rule 41 but Rules 317 and 318.

(4) Adoption of the Respondents' representations

[48] Finally, I do not find that Prothonotary Lafrenière was wrong in principle or made a misapprehension of the facts in adopting the Respondents' written representations as his. These representations essentially related to Mr. Yeager's request being a fishing expedition, to the deliberative secrecy of the decision-maker process and to the lack of a direction to attend.

[49] On the issue of qualifying Mr. Yeager's request as a fishing expedition, the evidence indicates that Mr. Yeager has been informed that the materials he is seeking are not in the possession of Public Service Canada. This came out in the initial response from Ms. Seguin-Brandt in June 2007, in the letter from the Commissioner in December 2008, as well as in the affidavit of Ms. Seguin-Brant and in her cross-examination. Furthermore, the decision on the 2009 Motion denied Mr. Yeager's request for the production of documents that are the object of his ATIP Request. Mr. Yeager has also been told that the documents he is seeking might lay

elsewhere but he continues to reformulate requests for documents in the context of his underlying Application.

[50] Even though Mr. Yeager claims that his request for documents is now very specific and only targets the Firman Note and the ATIP File, it is nonetheless asking for the "entire" ATIP File, something which on its face appears very large in scope and which overlaps (at least in part) with the documents requested in the 2009 Motion. In this case, the Court has already dismissed Mr. Yeager's request for documents further to his 2009 Motion, and the affiant Ms. Seguin-Brant has stated that she does not possess the ATIP File and does not work for the relevant department any more. In such a context, I do not find that it was clearly wrong for the prothonotary to adopt the Respondents' representations on Mr. Yeager's current motion amounting to a fishing expedition in the circumstances of this case.

[51] On the issue of deliberative secrecy, there is no doubt that the administrative process leading to a decision-maker's final determination forms part of the deliberative secrecy, and that this privilege may defeat a subpoena seeking evidence into the tribunal's processes (*Ellis-Don Ltd. v Ontario (Labour Relations Board)*, 2001 SCC 4 at paras 52-56). Documents cannot be claimed on mere speculation that an administrative process may have not been followed properly. In this case, the Firman Note requested by Mr. Yeager refers to an event which was part of the process leading to the decision on Mr. Yeager's ATIP Request. Furthermore, Mr. Yeager has been repeatedly told that the tribunal in question has no control or possession over the documents he is seeking.

[52] The legal test for quashing a subpoena recognizes that one ground to do so is the existence of an applicable privilege or other legal rule pursuant to which a witness should not be compelled to testify (*Mahjoub (re),* 2010 FC 1193; *Merck & Co v Apotex Inc*. (1998) 145 FTR 303, 80 CPR (3d) 103). In those circumstances, I am again satisfied that there was nothing clearly wrong in Prothonotary Lafrenière adopting the Respondents' representations on deliberative secrecy as a ground to support the dismissal of Mr. Yeager's motion for a subpoena.

[53] With respect to the written representations on the lack of a direction to attend, they have been addressed above.

[54] Therefore, I am satisfied that, after looking at the various grounds identified in the decision, the order issued by Prothonotary Lafrenière was not clearly wrong. In addition, even if I exercised my discretion *de novo*, I would arrive at the same conclusion and deny Mr. Yeager's motion for the issuance of a *subpoena duces tecum*.

(5) Change of Prothonotary

[55] Mr. Yeager also contends that the assignment of Prothonotary Lafrenière to hear this motion runs contrary to the Rules since another prothonotary had been assigned as the case management judge in this matter. I do not agree and find that this argument is without any merit.

[56] Rule 385 does not support the proposition that, once a prothonotary is assigned to a case, no other can be involved. Rule 385 was not intended to limit the flexibility of the Court, quite the contrary. In fact, even the case cited by Mr. Yeager, *Trevor Nicholas Construction Co Ltd v*

Canada (Minister of Public Works), 2004 FC 238 [*Trevor*], supports the conclusion that Prothonotary Lafrenière was perfectly able and entitled to hear the motion for subpoena, even if he was not the case management judge assigned to the case. The rule does not eliminate jurisdiction of other judges and prothonotaries when it would facilitate the work of the Court for them to deal with certain matters (*Trevor* at paras 13-14).

[57] This was the situation in the present case.

(6) Costs

[58] With respect to the order on costs, Mr. Yeager argues that Prothonotary Lafrenière ignored the question of whether the public interest in having the proceeding litigated justified such punitive costs, citing *Bielli v Canada (Attorney General)*, 2013 FC 953. He submits that his Application is a public interest case where there is no pecuniary interest other than access to documents.

[59] The issue of awarding costs is a matter within the discretion of the prothonotary and, as the Supreme Court of Canada stated in *Sun Indalex Finance v United Steelworkers*, 2013 SCC 6, cost awards are quintessentially discretionary and should only be set aside if the court below "has made an error in principle or if the costs award is plainly wrong" (at para 247).

[60] In this case, Prothonotary Lafrenière saw no reason why costs should not follow the event, and added that he found Mr. Yeager's motion to be ill-founded and abusive and that it should not have been brought. In light of the prior proceedings in the underlying Application, the

dismissal of Mr. Yeager's previous request for the production of documents and the repeated statements made by the Respondents and Ms. Seguin-Brant to the effect that the requested documents are not in their possession, I do not find any ground that would allow me to conclude that Prothonotary Lafrenière made an error in principle. I shall not intervene in his exercise of discretion on costs.

IV. Conclusion

[61] In this appeal, it is not the merits of Mr. Yeager's Application that are at issue, but whether there was anything clearly wrong with Prothonotary Lafrenière's order. I note that, in his written and oral representations on this motion, Mr. Yeager has made a number of submissions that relate to the substance of his underlying Application, but the Court does not have to deal with those in the context of this appeal.

[62] For the reasons detailed above, Mr. Yeager's appeal of Prothonotary Lafrenière's order is dismissed. I do not find that the motion raises an issue vital to the final outcome of the case and, except on the issue of *res judicata*, I am satisfied that Prothonotary Lafrenière's decision is not based upon a wrong principle or upon a misapprehension of the facts. This is sufficient to dismiss the appeal. In addition, while the evidence suggests that the documents requested by Mr. Yeager in this motion do not completely overlap with those covered by his previous 2009 Motion rejected by this Court, in exercising my discretion *de novo*, I would reach the same conclusion as Prothonotary Lafrenière and dismiss Mr. Yeager's motion as, in the circumstances of this case, a subpoena shall not be issued to obtain what is in fact the tribunal record in the

context of his Application. The proper procedure to obtain the tribunal record is through Rule 317, not through a *subpoena duces tecum*.

[63] In the present case, Mr. Yeager has already filed his unsuccessful 2009 Motion under Rule 317, and the Respondents have indicated that, in any event, the tribunal record has already been produced with the affidavit of Ms. Seguin-Brant. It is now time to move to the next steps of Mr. Yeager's Application.

[64] Given the timing constraints expressed by Mr. Yeager in his oral representations before the Court, the time provided in Prothonotary Lafrenière's order to file his record is extended to 45 days.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The appeal of the January 29, 2015 order of Prothonotary Lafrenière is dismissed;

2. The Applicant shall however have 45 days from the date of this judgment to serve and file his Applicant's Record;

3. The Respondents shall be entitled to their costs.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-91-09
STYLE OF CAUSE:	MATTHEW G. YEAGER v STOCKWELL DAY, MINISTER, (AS HE THEN WAS), DEPARTMENT OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS, AND MINISTER, DEPARTMENT OF, PUBLIC SAFETY, AND, ATTORNEY GENERAL OF CANADA
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DATED:	AUGUST 17, 2015

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Mr. Derek Edwards	FOR THE RESPONDENTS

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