Federal Court  Cour fédérale

Date: 20170207

Docket: T-1190-16

Citation: 2017 FC 147

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 7, 2017

PRESENT: Madam Prothonotary Mireille Tabib

BETWEEN:

HABITATIONS ÎLOT ST-JACQUES INC.

Applicant

and

ATTORNEY GENERAL OF CANADA
AND
THE MINISTER OF THE ENVIRONMENT

Respondents

ORDER AND REASONS

[1] In the context of an application for judicial review of an emergency order issued under the *Species at Risk Act*, SC 2002, c. 29 (the SARA), the applicant requested the transmission of the record associated with the order, pursuant to rule 317 of the *Federal Courts Rules*. The respondents disputed two aspects of the request to forward the record, namely, first, the request for the documents that were before the Governor in Council when the order was adopted, and,

second, the request for the entire record compiled by the Minister of the Environment, which the Minister relied on to recommend the emergency order.

[2] The respondents object to the transmission of the documents consulted by the Governor in Council on the grounds that they contain confidences of the Queen's Privy Council for Canada within the meaning of section 39 of the *Canada Evidence Act*, RSC, 1985, c. C-5. Despite the absence of the formal certification in writing by the Clerk of the Privy Council referred to in section 39, the applicant withdrew that part of its request, satisfied by the evidence submitted by the respondents that the documents do indeed fall under the purview of section 39.

[3] With respect to the record compiled by the Minister in support of her own decision, the respondents submit that rules 317 and 318 do not apply, since the documents were not in the possession of the Governor in Council, the only tribunal whose decision is concerned by the application. Despite the valiant efforts of counsel for the applicant, I agree with the respondents' position.

[4] Counsel for the applicant invested a lot of time and effort in attempting to persuade the Court that the Minister's record is relevant to the application for review, even though the Governor in Council did not consult it. It is true that the relevance of the Minister's record is not apparent in this case, and that relevance issues are at the heart of the majority of the Court's case law regarding rules 317 and 318. However, we must not lose sight of the fact that rule 317 sets out two criteria for its application, namely possession and relevance (*Detorakis v. Canada (Attorney General)*, 2009 FC 144). Both criteria must be met to trigger the obligation to forward material.

[5] Having found that the documents sought are not in the decision-maker's possession, I do not have to determine whether those documents would otherwise be relevant to the application and will not elaborate any further on the applicant's arguments on this subject.

[6] The wording of rules 317 and 318 is clear: documents or materials that can be requested by a party under subsection 317(1) of the Rules and that the Court can order to be forwarded under subsection 318(4) of the Rules, are those "in the possession of a tribunal whose order is the subject of the application":

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 serve the request on the other parties.	(3) Si le demandeur n'inclut pas sa demande de transmission de documents dans son avis de demande, il est tenu de signifier cette demande aux autres parties
318 (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit (a) a certified copy of the	318 (1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral

requested material to the Registry and to the party making the request; or (b) where the material cannot be reproduced, the original material to the Registry.	transmet : a) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause; b) au greffe les documents qui ne se prêtent pas à la reproduction et les éléments matériels en cause.
(2) Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.	(2) Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent par écrit toutes les parties et l'administrateur des motifs de leur opposition.
(3) The Court may give directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2).	(3) La Cour peut donner aux parties et à l'office fédéral des directives sur la façon de procéder pour présenter des observations au sujet d'une opposition à la demande de transmission.
(4) The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of all or part <u>of the material requested</u> be forwarded to the Registry.	(4) La Cour peut, après avoir entendu les observations sur l'opposition, ordonner qu'une copie certifiée conforme ou l'original <u>des documents ou que les éléments matériels</u> soient transmis, en totalité ou en partie, au greffe.
(Emphasis added)	(soulignés ajoutés)

[7] Counsel for the applicant unequivocally reiterated many times at the hearing that the one and only decision that is targeted by the application for judicial review is that of the Governor in Council, in this case, the *Emergency Order for the Protection of the Western Chorus Frog (Great Lakes / St. Lawrence — Canadian Shield Population)* SOR/2016-211. More specifically,

counsel for the applicant stated that the application for review does not apply to the Minister of the Environment's decision dated December 5, 2015, establishing that the Western Chorus Frog was facing an imminent threat to its recovery in the Bois de la Commune and recognizing the Minister's duty to recommend that the Governor in Council issue an emergency protection order for the species and its habitat. Counsel for the applicant recognized that the Minister's decision is a decision that stands alone, which itself could be subject to judicial review, but that the applicant is not seeking its review.

[8] That said, the applicant submits that, since the Minister's decision is an essential condition for the Governor in Council to exercise the discretion conferred under section 80 of the SARA, the Minister's decision is an integral part of the same decision-making continuum as the order. Thus, relying on the analysis in the decision *Canada (Human Rights Commission) v. Pathak*, [1995] 2 FC 455, the applicant submits that the Minister's duties are akin to those of the Governor in Council and that the documents in the Minister's possession are therefore in the Governor in Council's possession and could be forwarded under rules 317 and 318.

[9] The applicant's argument is without merit. I do not have to determine whether a positive decision by the Minister pursuant to subsection 80(2) of the SARA is an essential condition for issuing an emergency order under subsection 80(1). However, even if the Court, on the merits of the request, were to arrive at that conclusion, it could not lead to the results the applicant is seeking.

[10] Note that *Pathak* involved a decision of the Canadian Human Rights Commission that was based on an investigation report prepared by an investigator appointed pursuant to the

Canadian Human Rights Act, RSC, 1985, c. H-6. The trial judge had ordered that the documents consulted by the investigator to prepare his report be forwarded, having determined that those documents were part of the Commission's record. The judge's analysis was based on a statement in *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 SCR 879, to the effect that the investigator is not independent from the Commission, but rather, an extension of the Commission. On appeal, the majority of the Court of Appeal recognized that, according to that analysis, what was in the investigator's possession was actually in the Commission's possession, but it also determined that, in that case, the documents had not been consulted by the Commission and were not relevant to the grounds raised in the judicial review.

[11] The Supreme Court's finding in *Syndicat des employés de production du Québec et de l'Acadie*, repeated in *Pathak*, to the effect that the inspector is not independent and acts as an extension of the Commission, is based on a complete analysis of the structure of the *Canadian Human Rights Act*. It is helpful to note that the position of inspector as well as the Commission itself are created and governed by that Act and that, for the sole purposes of its application, it is the Commission that appoints the investigator, and the investigator's authorities are, according to the Supreme Court's analysis, delegated by the Commission.

[12] By contrast, there is nothing in the SARA that would liken the relationship between the Minister and the Governor in Council to the relationship between an investigator and the Canadian Human Rights Commission. On the contrary, it is apparent that the Minister is independent from the Governor in Council and that they fill different roles. A cause-and-effect relationship between the decisions of two independent decision-makers does not mean that one

can be presumed to be the extension of the other, or that it can be found that one is in possession of the other's documents.

[13] At the hearing, counsel for the applicant relied on *Gagliano v. Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2006 FC 720, as a basis for the proposition that the Court has jurisdiction to order that material that was not before the decision-maker be forwarded, if the application alleges a breach of procedural fairness or a reasonable apprehension of bias and if it is established that the material sought is relevant to the allegations raised. However, that decision does not help the applicant in this case. A careful reading of that decision demonstrates that the issue was limited to determining whether the obligation to forward extended to material which, although it was in the decision-maker's possession, was supposedly not considered by the decision-maker. In fact, all the controversy in that case was based on the fact that the Commissioner had stated that he did not "take cognizance" of certain material, even though the evidence submitted to the Court suggested that he was aware of its existence and that it was unclear whether it had been submitted to him. It was not disputed that the material was "in the possession" of the decision-maker, in the sense that it was accessible him.

[14] The situation here is entirely different: the Governor in Council and the Minister are independent, even though their roles under the SARA are interrelated. There is no reason to believe or to find that the Governor in Council is "in possession" or has access to the documents compiled by the Minister, other than those that were forwarded with the recommendation that the order be adopted. Relevant or not, the Minister's records simply cannot be subject to a request or

an order under rules 317 and 318, because they are not in the possession of the Governor in Council, the tribunal that issued the order that is the subject of the judicial review.

ORDER

THE COURT ORDERS that:

1. The respondents' objection to the transmission of documents is upheld, and the applicant's request for an order to have the documents forwarded is dismissed;

2. With costs in the cause.

"Mireille Tabib"
Prothonotary

Certified true translation
This 1st day of October 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

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