Date: 20081117

Docket: T-2032-07

Citation: 2008 FC 1281

Toronto, Ontario, November, 17, 2008

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

DEER LAKE REGIONAL AIRPORT AUTHORITY INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, the Deer Lake Regional Authority Inc., pursuant to Rule 51 of the *Federal Court Rules*, S.O.R. /98-106 has appealed the Order of Prothonotary Morneau made on March 20, 2008, denying the Applicant's request for materials made under Rule 317 of the *Federal Court Rules.* The Applicant's request for materials relates to its application for judicial review of a decision by the Canadian Border Services Agency (CBSA), as delegate of the Minister of Public

Safety and Emergency Preparedness, refusing to designate the Dear Lake Regional Airport as an Airport of Entry (AOE).

[2] For reasons that follow, I conclude that the Applicant's appeal of Prothonotary Morneau's Order must be dismissed.

I. Background

[3] The Applicant owns and operates the aerodrome known as the Deer Lake Regional Airport (the Airport) located at Deer Lake in Newfoundland and Labrador. The Applicant sought to have the Airport designated as an AOE in order to permit international flights to land at the airport. The CBSA had approved the provision of customs services for the Airport for one international flight arrival per week on a cost recovery basis. The Applicant sought full AOE designation to enable more frequent international flight arrivals at the airport.

[4] The CBSA has the responsibility of providing customs office services at designated AOE airports. The Minister of Public Safety and Emergency Preparedness (the Minister), through his delegate, the CBSA, designates sites as customs offices. (*Customs Act* s. 5) Persons entering Canada may do so only at a customs office. (*Customs Act* s. 11) All international aircraft arriving in Canada must arrive at an AOE airport. The level of customs services provided by CBSA at an AOE designation varies but, essentially, an AOE designation for the Airport would enable more frequent international flight arrivals.

[5] The Applicant applied for reconsideration of its request for an AOE designation. On November 16, 2007, Barbara Hébert, Vice President Operations Branch, CBSA, (as the Minister's delegate) wrote to the Applicant refusing the request to reconsider the Deer Lake Regional Airport as an AOE.

[6] On November 21, 2007, the Applicant applied under Section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, for judicial review of the decision of Minister, seeking as remedies:

> (a) a declaration that the decision of the Minister, contained in the letter of the Vice-President of the CBSA dated November 16, 2007, is void and of no effect; and
>
> (b) an order in the nature of mandamus requiring the Minister to designate the Deer Lake Regional Airport as an AOE, or, alternatively, to reconsider the application based on rational criteria without discrimination against the applicant.

[7] The Applicant's grounds for the judicial review application are:

> " . . . that the Minister failed to observe procedural fairness, failed to comply with his implied duty to act fairly in the exercise of statutory powers, and acted contrary to law in that:
>
> (a) the Minister failed to establish any objective criteria which to elevate requests for Airport of Entry status;
>
> (b) the Minister failed to grant Airport of Entry status despite the Airport clearly meeting all of the criteria enunciated by the Respondent;
>
> (c) the Minister has permitted airports, including airports in competition with the Airport, to achieve or maintain Airport of Entry status notwithstanding that such airports do not meet or have ceased, due to changes in circumstances, to meet, the enunciated criteria to the same extent as the Airport does, thereby discriminating against the Applicant;
>
> (d) the Minister has added and re-allocated resources for the provision of customs services to other airports so as to affect negatively the availability of resources to serve the needs of the Airport as an Airport of Entry, thereby discriminating against the Applicant;

(e) the Minister failed to provide any or adequate reasons for his failure to designate the Airport as an Airport of entry;

(f) that the Minister has implemented a system for the designation of Airports of Entry which produces results which bear no rational relationship to the purpose and intent of the *Customs Act* and regulations thereunder."

[8] The Applicant's Notice of Application for Judicial Review included a request for materials as follows:

1. Documents indicating what aerodromes in Canada have been designated as Airports of Entry in the past 10 years;

2. Application documents, internal communications within the Department and the CBSA and all correspondence to the Minister, anyone in the Minister's office and the CBSA relative to the designations identified in item 1 above;

3. For each of the Airports of Entry in the Provinces of Newfoundland and Labrador, Prince Edward Island, New Brunswick and Nova Scotia, provide:

   (a) copies of the document designating the aerodrome as an Airport of Entry, including any concurrent or subsequent document placing any limitation, condition or restriction on the services offered at such aerodrome;

   (b) documents indicating the number of travelers cleared at the Airport of Entry in each of the last five years;

   (c) documents indicating the amounts charged to the aerodrome for special services in each of the past five years, including a general description of the special services provided;

   (d) any document which affects or indicates a change in the services or hours of service offered at the Airport of Entry from those stated on the CBSA website.

4. Documents indicating the amounts charged in each of the past five years for special services and a general description of the services provided to the aerodromes at Bathurst, NB, Churchill Falls, NL, Miramichi, NB and Wabush, NL.

[9] The Respondent filed a Certified Record of documents which related to the Minister's decision not to designate the Airport as an AOE. The Respondent objected to the production of the remainder materials as requested in the Applicant's Notice of Application.

[10] On Court direction, representations were filed by Applicant and Respondent and the matter came to Prothonotary Moreau who issued his decision on March 20, 2008. The Prothonotary's Order upheld the objections of the Respondent and did not order further production except for an unredacted version of one document to which both parties consented.

[11] The Applicant appeals the Prothonotary's Order dismissing the request for additional documents.

II. The Decision Under Appeal

[12] Prothonotary Morneau was satisfied that the Certified Record was a complete record of all the documents that were before the decision maker, Barbara Hébert, when she made the decision to deny the reconsideration request for AOE status for the Airport.

[13] The Prothonotary found the Applicant's request for materials exceeded the parameters of a permissible Rule 317 request. He found that the Applicant was attempting to engage in a discovery process not permissible with regard to the Federal Court of Appeal decision in *Access Information Agency Inc. v. Canada (Transport*), 2007 FCA 224. The Prothonotary considered the Applicant's request could not be characterized as an attempt to obtain specific documents that could have had

bearing on the decision under review. The Applicant had not justified a broadening of the scope of Rule 317 exercise. Finally, the Prothonotary likened the Applicant's approach to the remarks made by Justice Blais in *Bradley-Sharpe v. Royal Bank of Canada*, 2001 FCT 1130, "…The applicant's purpose … is to scour for any information within the file or files of the Commission because she is dissatisfied or displeased with the decision of the Commission."

[14] The Prothonotary upheld the Respondent's objections and ordered that no further material was required under Rule 317 and 318 with the exception of the one unredacted document.

III. Issues

[15] The issues in this appeal are:

1. *What is the standard of review on appeal from a Prothonotary's Order determining the scope of production of materials pursuant to Rule 317?*
2. *Did the Prothonotary err in deciding the scope of production of materials pursuant to Rule 317?*

IV. Applicant's Submissions

[16] The Applicant submits that the issues affecting a determination under Rule 317 are possession and relevance. The Applicant submits that the issue of relevance is one of law, and thus the standard of review is correctness.

[17] In the alternative, should there be an element of discretion in the making of the Prothonotary's Order; the Applicant submits that the Rule 317 determination raises questions vital to the final issue in this case. The Applicant further submits that the learned Prothonotary is clearly wrong in that the decision is based on both the application of an incorrect test or a misapprehension of fact. The Applicant submits that the Court must approach the application of Rule 317 in this case *de novo.*

[18] The Applicant's argument is difficult to follow. The argument, as I understand it, is as follows:

[19] In determining whether material ought to be disclosed on a Rule 317 motion, the prothonotary must embark on a two stage inquiry. The first is possession, the second is relevance. *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans),* [1997] F.C.J. No. 557.

[20] First, the prothonotary must be satisfied the material was available to the decision maker. The material need not be limited to the material relied on by the decision maker, rather it is the material that was or should have been available to the decision maker. Further, where an applicant alleges lack of procedural fairness and consideration of irrelevant factors in a judicial review application, the applicant is entitled to all material that may have affected the outcome of the decision. *Gagliano v. Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities – Gomery Commission),* 2006 FC 720*; Deh Cho First Nations v. Canada*

(Minister of the Environment), 2005 FC 374*; Friends of West Country;* and *Telus Communications Inc. v. Canada (Attorney General),* 2004 FCA 317.

[21] The Applicant argues that where the decision maker plays a dual role of information gatherer and decision maker the material required to be produced under Rule 317 goes beyond just the material before the decision maker. The materials to be produced should be bound only by relevance to the applicant, and in possession of the decision maker in the broad sense of constructive possession. *Friends of West Country,* and *Pathak v. Canada (Human Rights Commission)(re Royal Bank of Canada),* [1995] 2 F.C. 455 (CA).

[22] Second, if the prothonotary is satisfied that the material was available to the decision maker, then he or she must consider whether the material is relevant in that it could affect the decision of the reviewing court with regard to the grounds of review in the judicial review application.

[23] If the applicant alleges a breach of procedural fairness, the reviewing court will also determine the relevance of the materials requested by reference to the grounds for review in the judicial review application.

[24] The Applicant submits that the prothonotary failed to embark on the above two stage inquiry by failing to turn his mind to whether the documents were available to the decision maker and whether the requested material may have otherwise affected the reviewing court even though the materials may not have necessarily been before it.

[25] The Applicant submits that the prothonotary misapprehended the significance of the material concerning other AOE's in the possession of the CBSA. The Applicant argues that since the CBSA was both information gatherer and decision maker, with no line of division that separates the information held by the CBSA and the information before the decision maker that the CBSA must have made its decision in the context of all the information it possessed concerning other AOE designations.

[26] The Applicant also submits that the prothonotary had to deal with the issue of procedural fairness. The CBSA has an implied duty to act fairly in the exercise of its statutory powers. Given the lack of a definition of an AOE, the lack of established criteria for AOE designations, and the suitability of the Airport for international flights, the comparative data must have been vital to the decision. Therefore, the information relative to other airports is necessarily part of the CBSA's consideration and should be required to be produced pursuant to Rule 317.

V. Analysis

[27] Rule 317 states:

> 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.(underlining added)

[28] The purpose of Rule 317 production was discussed in *Access*. Justice Pelletier stated at paragraph 21:

> "It is in this context that we find section 317 of the Rules dealing with the request for disclosure of material. The purpose of the rule is to limit discovery to documents which were in the hands of the decision-maker when the decision was made and which were not in the possession of the person making the request and to require that the requested documents be described in a precise manner."

[29] While the authority on the production of documents in judicial review applications generally holds that only documents that are actually before the decision maker are subject to production, in *Access* at paragraph 7, some specific exceptions to the Rule 317 limit have been recognized.

[30] In *Pathak*, Justice Pratte stated that documents are relevant for the purposes of Rule 317 if they may affect the decision of the reviewing court. He decided that only the documents that were actually before the decision maker had to be produced but not other documents relied upon by the investigator unless inaccurately summarized in any report.

[31] In *Friends of the West Country,* Justice Muldoon departed from the general rule in *Pathak* and held that the test for relevancy is how a document relates to the grounds in the application for judicial review. A document may be relevant even if not relied upon or considered by the decision maker. Justice Muldoon departed from the general rule in *Pathak* because the Minister had a supervisory role with no distinction between the investigation and the decision making stages. However, the broad scope of production in *Friends of the West Country* has not been applied in subsequent cases.

[32] In *118540 Ontario Ltd. v. Canada (Minister of Natural Resources)*, [1999] F.C.J. No. 1432, Justice Sexton of the Federal Court of Appeal followed *Pathak* and found that only documents actually before the decision maker had to be produced, but held that if attachments to a document were also before the decision maker, they should also be produced.

[33] In *Telus*, Justice Linden held that the material before the Board ought to be produced. He departed from the view of Chief Justice Thurlow in *Trans Quebec & Maritime Pipeline v. National Energy Board*, [1984] 2 F.C. 432, that while staff memoranda containing evidence should be disclosed, memoranda which did not contain evidence were irrelevant to a board's decision. Justice Linden decided that the material should be produced because the Board's reasons were skimpy and did not disclose all the considerations taken into account.

[34] In *Deh Cho*, the applicants sought judicial review of the Minister's decision to establish a Joint Review Panel. Prothonotary Hargrave found, on affidavit evidence, that the Minister, his predecessors in office, and staff, had supervised the process leading to the decision. Prothonotary Hargrave decided that the descriptions of the documents sought came close to being overly general but did not cross the line because the documents requested were in relation to specific steps or phases in the process leading to the Minister's decision.

[35] In *Gagliano*, Justice Teitelbaum stated that when a party alleges a breach of procedural fairness, the Court still determines relevancy of the materials by reference to the notice of application for judicial review, the grounds of review, and the nature of judicial review. The

materials at issue involved specific unsolicited emails sent to the Commission. The Commission had acknowledged the existence of materials not on the public record but had specifically stated that they were not taken into cognizance in writing its Phase I Report. Justice Teitelbaum was of the view that the possible use of the emails by the Commission may pose questions of procedural fairness. The emails were relevant in respect of the issues of procedural fairness and reasonable apprehension of bias and therefore were required to be produced. On appeal, Justice Décary, of the Federal Court of Appeal, held there were enough elements on the record to justify a perception that the Commissioner was aware of the materials and thus the materials in issue should be left to the reviewing court to assess.

What is the standard of review on appeal from a Prothonotary's Order determining the scope of production of materials pursuant to Rule 317?

[36] The standard of review of on an appeal of a Rule 51 appeal from a prothonotary's order was stated by Justice Décary of the Federal Court of Appeal in *Merck & Co. v. Apotex Inc.*, 2003 FCA 488, at paragraph 19:

> Discretionary orders of prothonotaries ought not to be disturbed on appeal to a Judge unless:
>
> a) the questions raised in the motion are vital to the final issue of the case, or
>
> b) the orders are clearly wrong, in the sense that the exercise of discretion by a prothonotary was based on a wrong principle or upon a misapprehension of the facts.

[37] Justice Snider, in *Gaudes v. Canada (Attorney General),* 2005 FC 351, found that the decision of a prothonotary concerning a request for documents was not a matter vital to any final

issue. On the facts of this appeal, I see no reason here to depart from Justice Snider's conclusion. Therefore, I conclude that this matter is not vital to the final issue, and accordingly, the Prothonotary's Order should be assessed on whether the order is clearly wrong: as set out in the second part of the test in *Merck*.

Did the Prothonotary err in deciding the scope of production of materials pursuant to Rule 317?

[38] The Prothonotary found that all material facts were before the decision maker. He found that the Applicant's request for documents exceeded the permissible bounds of Rule 317 and relied on *Access* for his interpretation of the bounds of Rule 317.

[39] I cannot fault with the Prothonotary's interpretation of Rule 317.

[40] The Applicant argued that when there is no separation of investigative and decision making stages, the scope of production of materials under Rule 317 should increase. This was their strongest argument. However, *Friends of the West*, being a singular case which has not been followed, does not help the Applicant. Furthermore, *Deh Cho* referred to *Friends of West Country* but only to extend the scope of materials to those leading to the decision.

[41] My reading of the Applicant's Notice of Application and Affidavit leads me to conclude that the Applicant is requesting materials at best surrounding, but not leading to, the decision. I do not see any error on the part of the Prothonotary in his reasoning.

[42] The Applicant submitted that the Prothonotary did not turn his mind to the question of relevance as he was obligated to do given that the Applicant alleged procedural unfairness.

[43] I find that neither the Applicant's Notice of Application nor Affidavit link the request for additional materials to a claim of procedural unfairness and the failure to act fairly in the making of the decision. The only specific ground in the Notice of Application that relates to procedural unfairness is the claim that the CBSA's reasons were insufficient and consideration of that ground does not require the production of further materials.

[44] I find that the Prothonotary did not err in deciding that the Applicant had not brought itself within the exceptions that exist to the general rule of production in *Access.*

[45] The Applicant is not only challenging the decision to refuse its application for AOE designation; it is also challenging CBSA's system of designating AOE's. In its submissions, the Applicant stated:

> "This Application challenges the system whereby Airports of Entry are designated and alleges it is substantially unfair and arbitrary. These are valid grounds for attack on the decision and, in order to rule on those grounds, the reviewing Court needs to access information as to how competing facilities having been treated and whether CBSA has taken into account all of the appropriate factors that it ought to take into account in making its determination."

[46] The Applicant was dissatisfied with the CBSA's decision. It chose to challenge the CBSA's decision making process instead of limiting its challenge to the CBSA decision. It chose to commence a judicial review instead of commencing an action.

[47] In *Access*, Justice Pelletier discussed the nature of judicial review. He stated:

> "Judicial review does not proceed on the same basis as an action; it is a procedure that is meant to be summary. There is therefore a series of limits on the parties as a result of this distinction. Evidence is brought by affidavit and not by oral testimony. There is less leeway for preliminary procedures such as discovery of evidence in the hands of the parties and examination on discovery. If such proceedings do prove to be necessary, the Rules provide that a judicial review may be transformed into an action." (para. 20)

[48] Given the broad sweep of the Applicant's challenge to the CBSA decision making process on AOE designations, this teaching of the Federal Court of Appeal is appropriate.

[49] The Applicant's appeal of the Prothonotary's Order is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The Appeal from the Order of Prothonotary Morneau, dated March 20, 2008, is dismissed.

2. Costs of this motion are awarded to the Respondent in any event of the cause.

"Leonard S. Mandamin"
Judge

SOLICITORS OF RECORD

DOCKET:	T-2032-07
STYLE OF CAUSE:	DEER LAKE REGIONAL AIPORT AUTHORITY INC. v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Halifax, NS
DATE OF HEARING:	May 7, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	MANDAMIN J.
DATED:	November 17, 2008

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