Federal Court  Cour fédérale

Date: 20110630

Docket: T-424-10

Citation: 2011 FC 806

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 30, 2011

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

DANIEL JOLIVET

Applicant

and

THE MINISTER OF JUSTICE OF CANADA AND THE CRIMINAL CONVICTION REVIEW GROUP

Respondents

REASONS FOR ORDER AND ORDER

[1] This is an appeal of an order by Prothonotary Morneau dated January 19, 2011, published at 2011 FC 61, by which he allowed the respondents' objections to producing certain documents under Rule 318 of the *Federal Courts Rules*.

[2] The underlying application for judicial review pertains to the respondents' decision to dismiss Mr. Jolivet's application for review of his conviction on the grounds of miscarriage of

justice. He was convicted by judge and jury of four murders. The verdict was upheld by the Supreme Court (*R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751).

[3] The evidence against Mr. Jolivet rests essentially on the testimony of an informant, Claude Riendeau, who stated that Mr. Jolivet had confessed to him that he committed the murders. Mr. Jolivet alleges that his testimony was false.

[4] He therefore claims that he is the victim of a serious miscarriage of justice and was wrongly convicted of the crimes of which he was charged. He applied for a review of his criminal conviction, pursuant to *Part XXI.1– Applications for Ministerial Review – Miscarriages of Justice* of the *Criminal Code*, to the Minister of Justice Canada on the grounds that a miscarriage of justice had occurred. According to section 696.3, the Minister or his delegate may direct a new trial or refer the matter to the appropriate court of appeal if the Minister or his delegate is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred. However, Mr. Jolivet's application for review was rejected on September 24, 2007, at the preliminary assessment stage by the Minister's delegate, the Criminal Conviction Review Group. This decision was upheld again on November 13, 2008, and on December 4, 2009.

[5] Although the decision is not subject to appeal (see subsection 696.3(4) of the *Criminal Code*), Mr. Jolivet is entitled to submit to the Federal Court an application for judicial review of the Minister's decision, made by the Group.

[6] As a preliminary question of law, Mr. Jolivet sought production of documents that he alleges are, were or should have been before the Minister's delegate, the Group.

[7] Even before the notice of application for judicial review was filed, the Group had provided much of the documentation in the form of a CD-ROM, but refused to disclose other documents for various reasons. In his voluminous decision dated January 19, 2011, Prothonotary Morneau allowed the respondents' objection (*Jolivet v. Canada (Le ministre de la Justice)*, 2011 CF 61).

[8] It is well established that any decision concerning the production of documents is discretionary in nature.

[9] As Justice Décary, writing on behalf of the Federal Court of Appeal, indicated in *Merck & Co v. Apotex Inc*, 2003 FCA 488, [2004] 2 F.C.R. 459, at paragraph 19:

> …Discretionary orders of prothonotaries ought not 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 the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

[10] The decision is not vital to the final issue (*Gaudes v. Canada (Attorney General)*, 2005 FC 351, [2005] F.C.J. No. 434 (QL)). However, for the following reasons, I found that Prothonotary Morneau's decision is based on a "misapprehension of the facts". Before going further, it is necessary to briefly discuss the application for ministerial review.

APPLICATION FOR MINISTERIAL REVIEW

[11] In order to give effect to sections 696.1 and following of the *Criminal Code*, as well as the related regulations, it was necessary to establish a well developed structure. As authorized by the regulations, the Minister may delegate his duties to the Group. The main parties involved in Mr. Jolivet's case are Martin Lamontagne and Kerry Scullion. Similarly, Bernard Grenier, the special independent advisor involved in the matter, must be considered. At that point, he was a retired Provincial Court of Quebec judge.

[12] It is important to note that under Part XXI.I of the *Criminal Code*, the Group had all the powers granted to a commissioner under *Part I – Public Inquiries* of the *Inquiries Act*. Consequently, Mr. Jolivet was unable to find out exactly what documents were before the Group.

[13] Under the *Regulations Respecting Applications for Ministerial Review – Miscarriages of Justice*, once the Minister receives an application for review, he must conduct a preliminary assessment to determine whether it is necessary to conduct an investigation. In this case, the Minister, through the Group, found in a lengthy decision dated September 24, 2008, that there was no reasonable basis "to conclude that a miscarriage of justice likely occurred". This decision was forwarded to the special advisor, who could have disregarded it and initiated an investigation, but did not do so.

[14] The Regulations also indicate that the applicant "may provide further information in support of the application within one year after the date on which the notice was sent".

[15] Mr. Jolivet availed himself of this provision to provide the Group with additional documents that he had obtained under the *Access to Information Act*. However, although it was not required to do so, the Group had itself obtained additional documents, specifically documents from the Sûreté du Québec, which it did not share with Mr. Jolivet.

[16] Under the Regulations, the Group issued a second detailed decision dated November 13, 2008. In this decision, the Group confirmed that no new details had changed their opinion. In my view, it is in this regard that Prothonotary Morneau erred. In his reasons, he found that all communications between the parties after 2007 were mere correspondence between them, despite the fact that the second decision of the Group dated November 13, 2008 took the new documentation into consideration (a copy of this decision was inadvertently sent on November 10, 2008, before the final version was even issued). I must therefore exercise my discretion *de novo*.

[17] The Regulations provide for a continuous process. Mr. Jolivet therefore had an additional year to provide further information. He did not avail himself of that right. The process ended when the final notice was issued on December 4, 2009.

RULES 317-318 OF THE *FEDERAL COURTS RULES*

[18] When Mr. Jolivet's application for review is heard on the merits, the issue to be determined will be whether the Group's decisions were reasonable (*Daoulov v. Canada (Attorney General)*, 2008 FC 544, [2008] F.C.J. No. 684 at paras. 19-24, aff'd. by 2009 FCA 12, leave to appeal to the SCC dismissed, [2009] S.C.C.A. No. 108).

[19] To make such a determination, the Court should have available from the beginning the same record that was before the Group when it made its decisions, unless the parties agree otherwise. The record is not automatically produced.

[20] Subsection 317(1) reads as follows:

(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.	(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.

[21] Subsections 318(2), (3) and (4) read as follows:

… (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	(4) La Cour peut, après avoir entendu les observations sur l'opposition, ordonner qu'une copie certifiée

certified copy, or the original, of all or part of the material requested be forwarded to the Registry.	conforme ou l'original des documents ou que les éléments matériels soient transmis, en totalité ou en partie, au greffe.

[22] In his extremely detailed notice of application for judicial review (103 pages excluding annexes), Mr. Jolivet has made a general request for the production of [TRANSLATION] "any undisclosed documents consulted…concerning the supplementary decision dated November 10 and 13, 2008." At pages 99 to 103 of the notice, he has identified some of the documents sought. He is also seeking an order to compel the Group to produce the complete file of the Sûreté du Québec and the complete file of the Crown prosecutor.

[23] Counsel for the respondents acknowledge that he could have misled Prothonotary Morneau, since some of the documents identified at pages 99 to 103 were in fact before the Group. These documents were voluntarily provided later and it is not necessary to list them here.

[24] That being said, the respondents' objection regarding the production of documents to the applicant has not changed. They provided the following reasons, some of which overlap with regard to the documents specifically requested:

a. The documents relating to the Group's decision dated September 2007 were disclosed to the applicant on a CD-Rom.

b. The additional documentation obtained by the Group, such as the information provided by the Sûreté du Québec, is not relevant for the purposes of determining the legality of the Group's decision.

c. Some of the documents obtained by the Group were returned without photocopies being made.

d. Some of the documents referred to in the request for production were never in the Group's possession.

e. If Mr. Jolivet is dissatisfied with the results of his access to information request, his remedies are those provided for in the *Access to Information Act*, and not a request for production filed under Rule 317.

f. Under the *Privacy Act*, some of the information referred to in the request cannot be disclosed because it does not personally concern Mr. Jolivet.

[25] In theory, the reasons for the objection have merit. However, this case involves determining whether these reasons apply to the documentation requested. Since Rules 317 and 318 are not equivalent to the disclosure of documents in an action, the Court is not in a position to order the Group to produce documents that are not in its possession. Moreover, when it comes to determining the merits of Mr. Jolivet's application for judicial review, Mr. Jolivet will have the opportunity to present his case and suggest that the review be allowed on the ground that the Group did not have before it all of the relevant documents needed to make an informed decision. In this regard, Mr. Jolivet alleges a breach of procedural fairness and could possibly obtain, under Rule 313, a Court order that other material be filed if the Court considers that the parties' records are incomplete, or obtain an order to have the application for judicial review converted into an action, or be allowed to examine third parties on discovery.

[26] I will begin by examining the concept of relevance. In *Maax Bath Inc. v. Almag Aluminum Inc.*, 2009 FCA 204, [2009] F.C.J. No. 725 (QL), Justice Trudel, on behalf of the Federal Court of Appeal, stated the following at paragraph 9 of her reasons: "The relevant documents for the purposes of Rules 317-318 are those documents that may have affected the decision of the Tribunal or that may affect the decision that this Court will make on the application for judicial review…" (reference omitted).

[27] Objectively speaking, we may be able to state that in this case some of the documents that were available to the Group were totally irrelevant, but it is not up to the Group to make that determination. As the reasons of the Federal Court of Appeal in *Maax Bath*, above, and *Telus Communications Inc. v. Canada (Attorney General)*, 2004 FCA 317, [2004] F.C.J. No. 1587 (QL) indicate, it is up to this Court to determine the relevance of the documentation before the Group. I will begin by saying that if a document was before the Group when it made its decision, this document must be presumed relevant (*Access Information Agency Inc. v. Canada (Transport)*, 2007 FCA 224, [2007] F.C.J. No.184 (QL) at paragraphs 7, 21). These documents should therefore be produced, unless one of the above-mentioned exceptions applies.

[28] In my view, it is fair to assume, even though I cannot be entirely certain, that a number of the documents requested were not part of the record when the decision was made. For example, Mr. Jolivet is asking for the report prepared by the special advisor, Mr. Grenier, even though this report could only have been prepared after the decision dated September 24, 2007. Whether this report was before the Group when it made its second decision in November 2008 is an entirely different question.

[29] Mr. Jolivet is asking for the exchanges between Mr. Lamontagne and Ms. Scullion to be produced. These exchanges seem to be subject to solicitor-client privilege.

[30] In fact, it appears that the request for production is as general is that in *Agency Inc.*, above. In that case, documents were requested

> [1] …whether these documents were entered into evidence or not, and all correspondence documents, in any format whatsoever, from all individuals who participated directly or indirectly in drafting the decision and orders made in the matter.

The Canadian International Trade Tribunal had voluntarily produced all material evidence except that which was deemed confidential.

[31] In that case, as in *Canada (Canadian Human Rights Commission) v. Pathak*, [1995] 2 F.C. 455 (CA), [1995] F.C.J. No. 555 (QL), the Court had available to it affidavits setting out exactly which documents were available to the decision-makers when the decision was made. What concerns me in this case is that the Court, in *Access Information Agency Inc.*, above, and *Pathak*, above, had at that time affidavit evidence of the documents that were before the tribunal when the decision was made. At this stage of the case, the information I have seems too vague. Therefore, I will issue a direction that an informed person in the Group serve and file an affidavit modelled on "Form 223 –Affidavit of Documents" in order

a. to confirm that all documents that were before the Group when it made its decision on September 24, 2007, have already been disclosed to Mr. Jolivet and, if certain

documents were not disclosed, to identify them and (unless they are subject to a privilege) to give a copy to Mr. Jolivet;

b. to identify the documents that were before the Group when it made its decision dated November 13, 2008 and, if it has not yet been done (and unless they are subject to a privilege), to give a copy to Mr. Jolivet;

c. to identify, without limiting the generality of the following, which documents listed on pages 99 to 103 of the notice of application were before the Group when they made their decisions in 2007 and 2008;

d. to identify and list the documents that were before the Group when it made the decisions but that are no longer in its possession;

e. to identify and list the documents that were before the Group and that the Group refused to disclose on account of privileges, by giving sufficient reasons to understand why the privileges in question are being raised; and

f. to identify and list the documents that the Group refuses to disclose because of the restrictions imposed by the *Privacy Act*.

[32] As I mentioned at the hearing, I rely on Rule 384 to order that this application continue as a specially managed proceeding.

ORDER

FOR THE REASONS SET OUT ABOVE;

THE COURT ORDERS that:

1. The appeal from the prothonotary's order dated January 19, 2011, be allowed with costs.

2. The respondents, through one or more informed members of the Criminal Conviction Review Group, file and forward to the Court an affidavit of documents in accordance with the Court's directions and modelled on Form 223 of the *Federal Courts Rules.*

3. This application continue as a specially managed proceeding under Rule 384 of the *Federal Courts Rules*.

"Sean Harrington"
Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-424-11
STYLE OF CAUSE:	DANIEL JOLIVET v. THE MINISTER OF JUSTICE CANADA ET AL
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	JUNE 21, 2011
REASONS FOR ORDER AND ORDER:	HARRINGTON J.
DATED:	JUNE 30, 2011

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