

Federal Court of Appeal



Cour d'appel fédérale

Date: 20240321

Docket: A-333-23

Citation: 2024 FCA 56

Present: LOCKE J.A.

BETWEEN:

S. ROBERT CHAD

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on March 21, 2024.

REASONS FOR ORDER BY:

LOCKE J.A.

Federal Court of Appeal



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REASONS FOR ORDER

LOCKE J.A.

I. Background

[1] This decision comes in the context of an appeal from a decision of the Federal Court (2023 FC 1481, *per* Justice Martine St-Louis) that struck, without leave to amend, an amended notice of application filed by the appellant, S. Robert Chad. The Federal Court found that the application was so clearly improper as to be bereft of any possibility of success.

[2] Mr. Chad now moves for an Order determining the content of the appeal book. He proposes a list of several documents, including (i) an affidavit in his name affirmed on May 10, 2023 (the Chad Affidavit) and relied on as his affidavit evidence pursuant to Rule 306 of the *Federal Courts Rules*, S.O.R/98-106, in the now-struck application before the Federal Court, and (ii) a certified transcript of the hearing before the Federal Court held on October 30, 2023 that led to the decision under appeal (the Transcript).

[3] The respondent, the Minister of National Revenue (the Minister), opposes Mr. Chad's motion only in respect of the Chad Affidavit and the Transcript. The Minister argues that the Transcript should be excluded as a whole, and the Chad Affidavit should likewise be excluded, but with the exception of Exhibit 7 thereof, which is a demand letter from Mr. Chad dated November 1, 2022 (the Demand Letter).

[4] The parties appear to agree that the content of the appeal book is to be determined in accordance with Rules 343(2) and 344(1), and jurisprudence related thereto. Rule 343(2) provides that the appeal book should include "only such documents, exhibits and transcripts as are required to dispose of the issues on appeal." Rule 344(1) provides as follows:

344 (1) An appeal book shall contain, on consecutively numbered pages and in the following order,	344 (1) Le dossier d'appel contient, sur des pages numérotées consécutivement, les documents ci-après dans l'ordre suivant :
(a) a table of contents describing each document;	a) une table des matières désignant chaque document;
(b) the notice of appeal and any notice of cross-appeal;	b) l'avis d'appel et, le cas échéant, l'avis d'appel incident;
(c) the order appealed from, as signed and entered, and any	c) l'ordonnance portée en appel, telle qu'elle a été signée et inscrite

reasons, including dissenting reasons, given in respect of that order;

(d) the originating document, any other pleadings and any other document in the first instance that defines the issues in the appeal;

(e) subject to subsection (2), all documents, exhibits and transcripts agreed on under subsection 343(1) or ordered to be included on a motion under subsection 343(3);

(f) any order made in respect of the conduct of the appeal;

(g) any other document relevant to the appeal;

(h) an agreement reached under subsection 343(1) as to the contents of the appeal book or an order made under subsection 343(3); and

(i) a certificate in Form 344, signed by the appellant's solicitor, stating that the contents of the appeal book are complete and legible.

ainsi que les motifs, le cas échéant, y compris toute dissidence;

d) l'acte introductif d'instance, les autres actes de procédure et tout autre document déposé dans la première instance qui définit les questions en litige dans l'appel;

e) sous réserve du paragraphe (2), les documents, pièces et transcriptions énumérés dans l'entente visée au paragraphe 343(1) ou dans l'ordonnance qui en tient lieu;

f) toute ordonnance relative au déroulement de l'appel;

g) tout autre document pertinent;

h) l'entente visée au paragraphe 343(1) ou l'ordonnance qui en tient lieu;

i) le certificat établi selon la formule 344, signé par l'avocat de l'appellant et attestant que le contenu du dossier d'appel est complet et lisible.

II. The Transcript

[5] The Minister objects to the inclusion of the Transcript in the appeal book because it contains only legal argument, and is not required to dispose of the issues on appeal: *Collins v. Canada*, 2010 FCA 128 at para. 2. Mr. Chad argues that the Minister tendered evidence at the hearing during her submissions, to which Mr. Chad objected, and that the Transcript is therefore

not limited to legal argument. The Minister counters that the alleged evidence was simply submissions in reply to Mr. Chad's argument that a request for information under the *Access to Information Act*, R.S.C. 1985, c. A-1, would not be an adequate alternative remedy.

[6] Mr. Chad argues that the limitation on the content of the appeal book contemplated in Rule 343(2) is a flexible one, and a document should be included if a party "has a reasonable basis for believing that it may wish to rely on that document to support one of its argument on appeal." Mr. Chad cites *Bojangles' International, LLC v. Bojangles Café Ltd.*, 2006 FCA 291 at para. 6, in support of this argument, but he takes the quoted passage further than was intended. It was not intended to override the principle that the document in question must be required to dispose of the issues on appeal. The mere fact that a party may wish to rely on a document cannot be sufficient.

[7] I agree with the Minister that the Minister's submissions in question at the hearing were not evidence. Moreover, there is no indication that they were treated as such by the Federal Court. The issue of whether a request for information under the *Access to Information Act* would be an adequate alternative remedy is a question of law. The Transcript is not required to decide that issue; nor am I convinced that it is required to decide any other issue on appeal.

[8] I accept Mr. Chad's argument that doubt as to whether a document should be included in the appeal book should be resolved in favour of inclusion (*West Vancouver v. British Columbia*, 2005 FCA 281 at para. 4), but I have no doubt that the Transcript should not be included.

III. The Chad Affidavit

[9] The Minister objects to the inclusion of the Chad Affidavit in the appeal book, with the exception of the Demand Letter, because it was not put before the Federal Court by either party in its motion record, and was not relied on as evidence. The Minister acknowledges that Mr. Chad referred to his affidavit in his written submissions before the Federal Court, but notes that he did not include it in his motion record. The Minister also notes that Mr. Chad's counsel acknowledged explicitly at the hearing before the Federal Court that he was not relying on the Chad Affidavit as evidence.

[10] Moreover, the Minister notes that, in the context of a motion to strike a notice of application, the facts therein are taken to be true: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at para. 52. Therefore, no evidence is required to support those facts, either before the Federal Court or before this Court.

[11] Mr. Chad argues that his affidavit is required to counter the Minister's submission, which was accepted by the Federal Court, that the amended notice of application "largely includes bald and speculative allegations and conclusory statements which cannot support the relief sought". Mr. Chad argues that he relies on his affidavit not for the truth of its contents, but as proof that the allegations were not unsupported.

[12] In my view, Mr. Chad's argument cannot overcome the following facts (i) evidence is not required on a motion to strike, (ii) the Chad Affidavit was not submitted as evidence in the

parties' motion records, and (iii) Mr. Chad explicitly acknowledged that he was not relying on the Chad Affidavit as evidence.

[13] The Minister acknowledges that the Demand Letter should be included in the appeal book because it is referred to in the amended notice of application in issue. In reply, Mr. Chad argues that the Minister's acknowledgement of the relevance of the Demand Letter to the present appeal must operate as an acknowledgement of the relevance of the rest of the Chad Affidavit. As he puts it, "[w]hat is sauce for the goose is sauce for the gander." I find that expression misplaced in this context. It might apply if somehow the Minister's case would be favoured by the inclusion of the Demand Letter in the appeal book, but I see no indication of that. In my view, the inclusion of the Demand Letter in the appeal book is not in dispute, but the inclusion of the rest of the Chad Affidavit is.

[14] I agree with the Minister that the bulk of the Chad Affidavit should be excluded from the appeal book because it is not in evidence. The Demand Letter should be included because its inclusion is not in dispute and because it is referred to in the amended notice of application.

IV. Conclusion

[15] For the foregoing reasons, I will order that the appeal book include the documents proposed by the Minister as listed in Schedule A to her responding motion record. I will also order that Mr. Chad pay the Minister's costs of this motion in any event of the cause.

"George R. Locke"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-333-23

STYLE OF CAUSE:

S. ROBERT CHAD v. MINISTER
OF NATIONAL REVENUE

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES:

REASONS FOR ORDER BY:

LOCKE J.A.

DATED:

MARCH 21, 2024

WRITTEN REPRESENTATIONS BY:

Dov Whitman
Shara Sullivan

FOR THE APPELLANT
S. ROBERT CHAD

Justice Malone
Jason Stober

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