Federal Court  Cour fédérale

Date: 20220826

Docket: T-347-22

Citation: 2022 FC 1232

Ottawa, Ontario, August 26, 2022

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

CANADIAN CONSTITUTION FOUNDATION

Applicant/
Moving Party

and

THE ATTORNEY GENERAL OF CANADA

Respondent/
Responding Party

and

ATTORNEY GENERAL OF ALBERTA

Intervenor/
On Application Only

ORDER AND REASONS

I. Introduction

[1] In this Motion filed on April 1, 2022, the Applicant seeks leave to amend its originating document that challenges a decision of the Governor in Council ("GIC"). They seek the amendment in order to obtain information regarding another decision of the GIC which the Applicant does not challenge. The Applicant concedes that the motion is based on a theory for which they have no evidence. They hope to obtain evidence in support of the judicial review of the decision which they do challenge should the Court grant leave to expand their request for documentary production. This Motion is, therefore, a classic "fishing expedition." It is improper and must be dismissed.

II. Background

[2] On February 14, 2022, the GIC issued the *Proclamation Declaring a Public Order Emergency*, P.C. 2022-0106, SOR/2022-20 (the "Proclamation"), pursuant to s. 17(1) of the *Emergencies Act*, RSC 1985, c 22 (4th Supp) (the "Act"), declaring that a public order emergency existed throughout Canada which necessitated special temporary measures for dealing with the emergency. In addition to the Proclamation and on the recommendation of the Minister of Public Safety and Emergency Preparedness, on February 15, 2022, the GIC made the *Emergency Measures Regulations*, P.C. 2022-0107 SOR/2022-21 (the "Regulations") and the *Emergency Economic Measures Order*, P.C. 2022-0108, SOR/2022-22 (the "Order"). The Proclamation, the Regulations and the Order collectively constitute the decision under review as the two instruments issued on February 15, 2022 flow from the Proclamation to give it operational effect.

[3] The Applicant began the underlying proceeding by way of a Notice of Application dated February 22, 2022. The application for judicial review seeks, among other relief, orders to quash the Proclamation, the Regulations, and the Order on the basis that they are unconstitutional or otherwise unlawful. Pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106, the original application requests records before the GIC in relation to the Proclamation, the Regulations, and the Order (the "Rule 317 Request"). The adequacy of the Respondent's response to the Rule 317 Request is the subject of a separate motion. The Court's decision in relation to that motion can be found at *Canadian Constitution Foundation v Attorney General of Canada*, 2022 FC 1233.

[4] On February 23, 2022, the GIC issued the *Proclamation Revoking the Declaration of a Public Order Emergency*, SOR/2022-26 (the "Revocation Proclamation") which revoked the declaration of a state of emergency under the Act. Pursuant to s. 15(2) of the Act, all orders and regulations made pursuant to the prior declaration were thus revoked.

[5] By way of a letter dated March 15, 2022, the Respondent responded to the Applicant's Rule 317 Request with a letter from the Assistant Clerk of the Privy Council objecting to disclosure of some of the record that was before the GIC on the basis of Cabinet Confidentiality. On April 1, 2022, the Applicant was served with a certificate signed by the then-interim Clerk of the Privy Council respecting the application of s. 39 of the *Canada Evidence Act* R.S.C., 1985, c. C-5 to the documents.

[6] Also on April 1, 2022, the Applicant brought the present Motion for an Order pursuant to Rule 75 of the *Federal Courts Rules* granting leave to file an Amended Notice of Application for Judicial

Review and, pursuant to Rule 317, for an Order to produce certified copies of the record of material before the GIC in respect of the Revocation Proclamation.

[7] The Attorney General of Alberta was granted Intervenor status on May 4, 2022, limited to addressing constitutional questions at the hearing of the underlying application. The Intervenor took no part in this motion.

III. Issues

[8] The sole issue on this motion is whether to grant leave to the Applicant to amend its Notice of Application in order to allow it to expand its request under Rule 317 for the production of records regarding the Revocation Proclamation.

IV. Legal Framework

[9] Rule 75 governs amendments.

Amendments with leave	*Modifications avec autorisation*
75 (1) Subject to subsection (2) and rule 76, the Court may, on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties.	**75 (1)** Sous réserve du paragraphe (2) et de la règle 76, la Cour peut à tout moment, sur requête, autoriser une partie à modifier un document, aux conditions qui permettent de protéger les droits de toutes les parties.
Limitation	*Conditions*
(2) No amendment shall be allowed under subsection (1) during or after a hearing unless	**(2)** L'autorisation visée au paragraphe (1) ne peut être accordée pendant ou après une audience que si, selon le cas :
(a) the purpose is to make the document accord with the issues at the hearing;	**a)** l'objet de la modification est de faire concorder le document avec les questions en litige à l'audience;

(b) a new hearing is ordered; or **(c)** the other parties are given an opportunity for any preparation necessary to meet any new or amended allegations.	**b)** une nouvelle audience est ordonnée; **c)** les autres parties se voient accorder l'occasion de prendre les mesures préparatoires nécessaires pour donner suite aux prétentions nouvelles ou révisées.

[10] On a motion to amend under Rule 75, the applicable test is "whether it is more consonant with the interests of justice that the withdrawal or amendment be permitted or that it be denied": *Janssen Inc v Abbvie Corporation*, 2014 FCA 242 at para 3 [*Janssen*], citing *Continental Bank Leasing Corp v. R*, [1993] TCJ No 18, (1993) 93 DTC 298 at 302 [*Continental Bank*]; *Merck & Co Inc v Apotex Inc*, 2003 FCA 488, leave to appeal to SCC refused, 30193 (6 May 2004). The Federal Court of Appeal recently reformulated the general rule in the following manner in *McCain Foods Limited v JR Simplot Company*, 2021 FCA 4 at para 20, leave to appeal to SCC refused, 39600 (8 July 2021) [*McCain*]:

> The general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice: *Canderel Ltd. v. Canada*, 1993 CanLII 2990 (FCA), [1994] 1 F.C. 3, 157 N.R. 380 (C.A.); *Enercorp* at para. 19. [,..]

V. Analysis

[11] The Court may consider several factors in assessing whether an amendment will serve the interests of justice, including: (i) the timeliness of the motion to amend; (ii) the extent to which the proposed amendments would delay the expeditious trial of the matter; (iii) the extent to

which the amending party's initial position has led another party to follow a course of action in litigation that would be difficult or impossible to alter; and (iv) whether the amendments sought will facilitate the court's consideration of the true substance of the dispute on its merits: *Janssen* at para 3 citing *Continental Bank*. In assessing the above factors, "no single factor predominates nor is its presence or absence necessarily determinative. All must be assigned their proper weight in the context of the particular case. Ultimately, it boils down to a consideration of simple fairness, common sense and the interest that the courts have that justice be done": *Continental Bank* at 302.

[12] However, an amendment must yield a sustainable pleading that has a reasonable prospect of success: *Farmobile, LLC v Farmers Edge Inc*, 2022 FC 22 at para 21; *McCain* at para 20; *Teva Canada Limited v Gilead Sciences Inc*, 2016 FCA 176 at paras 29-32 [*Teva*]. Thus, "a proposed amendment will be refused if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action": *McCain* at para 20, citing *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17 [*Imperial Tobacco*]. The prospect of success of an amendment "must be examined in the context of the law and the litigation process, and a realistic view must be taken": *McCain* at para 21, citing *Teva* at para 30 and *Imperial Tobacco* at para 25. Consequently, the Court must determine whether the amendment, if it were already part of the proposed pleadings, would be struck out: *McCain* at para 22, citing *VISX Inc v Nidek Co*, 1996 CanLII 11534 (FCA), [1996] FCJ No. 1721 (FCA) at para 16. The applicable thresholds are whether the proposed amendment contains "an obvious, fatal flaw striking at the root of this Court's power to entertain the application": *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250, at para 47.

[13] The proposed amendment contains an obvious, fatal flaw. The requested expansion of the scope of the request under Rule 317 to include materials concerning the Revocation Proclamation is bereft of any reasonable prospect of success as it contravenes well-established principles about what constitutes the record before the tribunal (in this case, the GIC).

[14] Rule 317 embodies the principle that "judicial review is premised on review of the record before the tribunal": *Canadian National Railway Company v Canada (Transportation Agency),* 2019 FCA 257 at para 12. A request for the certified tribunal record under Rule 317 is restricted to those documents that were before the decision-maker at the time of making of the impugned decision and nothing more: *Tsleil-Waututh Nation v Canada (Attorney General),* 2017 FCA 128 at para 112 [*TWN*]; *Canada (Human Rights Commission) v Pathak*, 1995 CanLII 3591 (FCA), [1995] 2 FC 455 (FCA) at 460 [*Pathak*]; *Gagliano v Canada (Commission of Inquiry),* 2006 FC 720 at para 50, aff'd 2007 FCA 131 [*Gagliano*]. Thus, the Court cannot order a decision-maker to produce material that was not in its possession when it made its decision. Relevance for the purpose of Rule 317 is determined by having regard to the notice of application, the grounds of review invoked by the applicant, and the nature of judicial review: *Gagliano* at para 49, citing *Pathak*.

[15] It is only in exceptional cases that documents not before the decision-maker at the time of the impugned decision may be ordered. However, such exceptions to the general principle are narrow and limited only to allegations of a breach of procedural fairness or allegations of a reasonable apprehension of bias: *Air Passenger Rights v Canada (Attorney General),* 2021 FCA 201 at para 21; *Humane Society of Canada Foundation v Canada (National Revenue),* 2018

FCA 66 at para 6; *Gagliano* at para 50. The Applicant makes no such allegations in the present motion.

[16] The Applicant's proposed amendment does not challenge the legality of the Revocation Proclamation. Indeed, it would be surprising if that were the case given the Applicant's position that the Emergency Proclamation was illegal and should not have been declared. The Applicant acknowledges this incongruity in their written argument.

[17] Contrary to what is asserted by the Applicant, the record for the Revocation Proclamation does not fall within the scope of the Rule 317 Request arising from the application for judicial review of the declaration of the emergency and the related regulations and order. Counsel for the Applicant argued strenuously that the two Proclamations and associated instruments formed a single decision or continuum. This is, the Applicant contends, because the Act speaks of "temporary measures" (s. 17) and requires that any declaration of an emergency expires at the end of thirty days unless previously revoked or continued in accordance with the Act. (s. 18(2)). In the Court's view, neither provision makes the declaration and revocation of the proclamation a single continuous decision.

[18] Regardless of whether the two Proclamations are temporally proximate or thematically related, the two Proclamations are distinct legal instruments: each are a product of separate GIC decisions and each has its own distinct record.

[19] The Applicant argues that the two Proclamations are functionally interconnected, as the purpose of the Revocation Proclamation was to pre-empt the potential defeat of the motion to confirm the Emergency Proclamation that was scheduled to come to a vote in the Senate Chamber within hours. The Court is invited by the Applicant to draw the inference that this was the reason why the Revocation Proclamation was issued and that the record before the GIC for revocation would support their case on judicial review of the Emergency Proclamation.

[20] An inference is a conclusion reached by considering other facts and deducing a logical consequence from them. But there must be an evidentiary basis upon which the Court may reasonably draw the inference. In the present matter, there is none. The Applicant's bald assertion is unsupported by any evidence before the Court. It in no way demonstrates that the record of the Revocation Proclamation is integrally connected to the record of the Emergency Proclamation.

[21] By utilizing Rule 317 in the hope of establishing the veracity of its speculative theory, the Applicant is attempting to fashion Rule 317 into a means of discovery, which courts have consistently cautioned against. Rule 317 is limited in scope and does not serve the same function on judicial review as documentary discovery does in an action: *TWN*, at paras 106, 115; *Access Information Agency Inc v Canada (Attorney General)*, 2007 FCA 224 at para 17 [*Access Information Agency Inc*]. A moving party may not request the production of materials that could possibly be relevant in the hopes of later establishing relevance, as the Applicant seeks to do in the present motion, as such a course of action is tantamount to an "impermissible 'fishing expedition'": *Athletes 4 Athletes Foundation v Canada (National Revenue)*, 2020 FCA 41 at

paras 17, 24; *TWN* at para 108*; Access Information Agency Inc* at para 21; *Maax Bath Inc v Almag Aluminum Inc*, 2009 FCA 204 at para 15.

[22] Thus, given that the proposed amendment is at odds with the principle that only those documents before the decision-maker at the time of the impugned decision may be requested under Rule 317, the proposed amendment of the Notice of Motion is bereft of any reasonable chance of success. As colourfully noted by the Court in *Khadr v Canada (Minister of Foreign Affairs)*, 2005 FC 135, at para 21, "it would be Kafkaesque to order the production of materials on the grounds that they were relevant to a decision, if the materials did not exist at the time the decision was made."

VI. Costs

The Respondent has requested costs on the motion in any event of the cause. The Applicant has asserted public interest standing in bringing the underlying Application for Judicial Review. While that issue remains to be determined on the hearing of the application, the Court considers that it is appropriate to exercise its discretion not to award costs on this motion.

ORDER IN T-347-22

THIS COURT ORDERS that:

1. The Motion for leave to amend the Applicant's Notice of Application is dismissed; and

2. No costs are awarded.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-347-22
STYLE OF CAUSE:	CANADIAN CONSTITUTION FOUNDATIN V THE ATTORNEY GENERAL OF CANADA V THE ATTORNEY GENERAL OF ALBERTA
PLACE OF HEARING:	HEARD VIA VIDEOCONFERENCE AT OTTAWA
DATE OF HEARING:	AUGUST 8, 2022
ORDER AND REASONS:	MOSLEY J.
DATED:	AUGUST 26, 2022

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