Federal Court Cour fédérale

Date: 20250623

Docket: T-1310-24

Citation: 2025 FC 1126

Montréal, Quebec, June 23, 2025

PRESENT: Associate Judge Trent Horne

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] This application for judicial review is brought by the Public Service Alliance of Canada, the certified bargaining agent for several bargaining units of federal public servants. It challenges a decision of the Treasury Board Secretariat ("Board"), a federal cabinet committee with authority over human resources management in the federal public service.

[2] On December 16, 2022, the Board issued a Direction on Prescribed Presence in the Workplace ("Direction"). The Direction mandated the approach to hybrid working to be adopted across the federal public administration; employees in the core public administration were

required to attend the workplace for a minimum of 2-3 days per week, or 40-60% of a regular work schedule.

[3] On May 1, 2024, the Board's internal Office of the Chief Human Resources Officer amended the Direction. The amended Direction required employees in the core public administration to attend the workplace a minimum of three days per week, or 60% of a regular work schedule. The amendments also altered the objectives of the Direction and narrowed approved exceptions. The amended Direction was to be fully implemented by September 9, 2024.

[4] Among other things, the notice of application alleges that the amendments to the Direction were an ongoing abuse of the employer's authority.

[5] A certified tribunal record ("CTR") was served on October 1, 2024. It was accompanied by a certificate stating that it included "materials that were in the file before the final-level decision-maker."

[6] After reviewing the contents of the CTR, the applicant has brought a motion for leave to amend the notice of application, and for production of further documents. The respondent consents to the amendments and opposes the production request.

[7] The principles guiding Rule 317 disclosure were summarized by Justice Pentney in *GCT Canada Limited Partnership v Vancouver Fraser Port Authority*, 2021 FC 624 ("*GCT Canada*"):

> [21] Rule 317 provides a means by which a party can request a record to support its application for judicial review, and Rule 318 sets out the process for objecting to such a request. The relevant portions of these rules for the purposes of this decision are:
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> |---|---|
> | **Material from tribunal** | **Matériel en la possession de l'office fédéral** |
> | **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. |
> | … | […] |
> | **Objection by tribunal** | **Opposition de l'office fédéral** |
> | **318 (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. | **318 (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. |

Directions as to procedure	**Directives de la Cour**
(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.
Order	**Ordonnance**
(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 of the material requested 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 des documents ou que les éléments matériels soient transmis, en totalité ou en partie, au greffe.

[22] The general principles governing the extent of the decision-maker's obligation to disclose under Rule 317 are well-established. These were summarized by the Federal Court of Appeal in *Tsleil-Waututh First Nation v Canada (Attorney General)*, 2017 FCA 128 at paras 86-115 [*Tsleil-Waututh*], and more recently in *Lukács v Swoop Inc*, 2019 FCA 145 [*Lukács*] and *Canadian National Railway Company v Canada (Transportation Agency)*, 2019 FCA 257 [*Canadian National*].

[23] Decisions of the Federal Court of Appeal confirm four core elements of the disclosure obligation set out in Rule 317:

(i) it only requires disclosure of material that is "relevant to an application" defined with reference to the wording of the application for judicial review (*Tsleil-Waututh* at paras 106-10; *Canadian National* at para 14);

(ii) it only requires disclosure of material that is "in the possession" of the administrative decision-maker, not others (*Tsleil-Waututh* at para 111);

(iii) in most cases, it is limited to material that was before the decision-maker when it made the decision under review. There are certain exceptions to this, including where a party claims a denial of procedural fairness or bias, which may require greater disclosure to enable a court to assess the merits of the claim (*Humane Society of Canada Foundation v Canada (National Revenue)*, 2018 FCA 66 at paras 4-6 [*Humane Society*]); and

(iv) it does not serve the same purpose as documentary discovery in an action and cannot be used on a fishing expedition (*Tsleil-Waututh* at para 115).

[24] The decision in *Canadian National* reminds us that the interpretation of Rule 317 must be grounded in the fundamental role that the evidentiary record plays in ensuring that courts can conduct meaningful review of administrative decision-makers:

> [12] Rule 317 embodies the principle that judicial review is premised on review of the record before the tribunal; certiorari means to bring forth the record. It entitles a party to receive everything that the decision maker had before it when it made its decision. The requirement that a tribunal produce, without hesitation, the entire record has long been central to judicial review. This is tempered by the pragmatic consideration that frequently large portions of the tribunal record, particularly in the case of standing, highly specialized agencies, may not be pertinent to the disposition of the issues on appeal.
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> [Citations omitted.]

[25] The Court of Appeal in *Tsleil-Waututh* sets the rule regarding disclosure of the record into the wider context of the constitutional foundations of judicial review:

> [78] In judicial review, the reviewing courts are in the business of enforcing the rule of law, one aspect of which is "executive accountability to legal authority" and protecting "individuals from arbitrary [executive] action". Put another way, all holders of public power are to be accountable for their exercises of power, something that rests at the heart of our democratic governance and the rule of

> law. Subject to any concerns about justiciability, when a judicial review of executive action is brought the courts are institutionally and practically capable of assessing whether or not the executive has acted reasonably, *i.e.*, within a range of acceptability and defensibility. That assessment is the proper, constitutionally guaranteed role of the courts within the constitutional separation of powers. But, at least in the situation where the evidentiary record of the administrative decision-maker is not before the reviewing court in any way whatsoever—*i.e.*, there is not even a summary or hint of what was before the administrative decision-maker—or the record is completely lacking on an essential element, concerns about immunization of administrative decision-making can come to the fore.
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> [Citations omitted.]

> [26] The overarching consideration is whether the disclosure will permit meaningful judicial review of the decision, and "[i]t is important that neither party's ability to advance arguments… be constrained or prejudiced by an inadequate record. There is also an interest in ensuring that the Court has the necessary evidence, or lack of evidence, to decide the matter" (*Canadian National* at para 23). This will generally tip the balance in favour of production, if the material is relevant to a ground of review.
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> [27] In reviewing an objection to disclosure under Rule 318, a court must seek to balance, as much as possible, three objectives: (i) providing meaningful review of administrative decisions, which the reviewing court will be unable to engage in without being satisfied that the record before it is sufficient to proceed with the review; (ii) procedural fairness; and (iii) the protection of any legitimate confidentiality interests while ensuring that court proceedings are as open as possible (*Girouard v Canadian Judicial Council*, 2019 FCA 252 at para 18, citing *Lukács* at para 15 [*Girouard*]).

[8] Where there is an allegation of breach of procedural fairness, reasonable apprehension of bias, or bias, in a notice of application, the general rule that only relevant material before the decision-maker must be produced is broadened. Additional documents relevant to the allegation

may be subject to disclosure. That said, the greater scope of disclosure does not permit a party to embark on a fishing expedition in the hope of discovering material to establish their claim (*Jewish National Fund of Canada Inc v Canada (National Revenue)*, 2025 FCA 114 ("*JNF*") at paras 13-14).

[9] The notice of application does not allege bias or procedural unfairness, but does allege abuse of authority:

> (g) The amendment of the Direction is therefore an ongoing abuse of the employer's authority as it was:
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> i. undertaken for reasons unrelated or contrary to the authorized use of the employer's statutory authority, for an unauthorized or ulterior purpose, or on the basis of irrelevant considerations;
>
> ii. was not reasonably necessary to the achievement of any employment- and workplace-related purpose or any other purpose relevant to an authorized exercise of the employer's statutory authority;
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> iii. was undertaken arbitrarily and based on inadequate material, including based on no evidence or without consideration of relevant matters; and
>
> iv. was otherwise unreasonable; […]

[10] I do not agree with the respondent's argument that expanded Rule 317 production is limited to circumstances where bias or procedural fairness are raised. The normal rule that only material that was before the administrative decision-maker is admissible on judicial review must be applied flexibly, and in accordance with its purpose (*'Namgis First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 149 at paras 7-8). The applicant's abuse of authority allegations are similar in nature to an allegation of bias, and do not close the door to the possibility of disclosure of materials beyond what was before the decision-maker.

[11] The notice of motion requests an order that "the administrative body shall transmit in electronic format to the Registry and the Applicant complete copies of all records required under Rules 317-318 of the Rules, including but not limited to those documents further particularized below." The grounds for the motion refer to an October 23, 2024 letter from the applicant to the respondent, which requests "all email discussions and meeting records, including but not limited to all notes and minutes, pertaining to any discussions or meetings held in the decision-making process, or which related to the decision-making process, leading to the amendment of the Direction," which is defined in the motion as the "Requested Material."

[12] The applicant's request for Requested Material will not be granted. The request is not limited to those documents that may support the allegations of abuse of authority, rather any and all documents created in or related to the decision-making process. The request is too broad and vague and constitutes a fishing expedition. Rules 317 and 318 are limited in effect and do not serve the same purpose as an examination for discovery, and do not require a tribunal (by contrast to a defendant in an action) to engage in an extended and exhaustive search for material whose relevance may at best be marginal and whose selection will necessarily involve an exercise of judgment (*Access Information Agency Inc v Canada (Attorney General)*, 2007 FCA 224 ("*Access*") at para 17). I also note that in *Access*, the Court of Appeal expressed its disapproval for vague document requests (para 20).

[13] Arguments that seek to infuse Rule 317 with discovery-like attributes are inconsistent with the historical underpinning of judicial review. Requests for all documents that could potentially bear on a matter in hopes of establishing relevance have no place under Rule 317

(*China Mobile Communications Group Co Ltd v Canada (Attorney General)* 2023 FCA 202 at para 39). Attempts to use Rule 317 for a fishing expedition are common and the Court must never permit it (*Canadian National Railway Company v Canada (Transportation Agency)*, 2023 FCA 245 at para 15).

[14] While not expressly framed as a request for alternative relief, the applicant refers to 11 meetings that are referenced in the CTR. Seven of these meetings were between the Public Service Management Advisory Committee and Board of Management and Renewal. The other four are described by the applicant as "discussions and meetings with departments and separate agencies." The applicant points in particular to 16 slide decks and calendar invitations in the CTR.

[15] I am not satisfied that a generally phrased allegation of abuse of authority, combined with evidence of meetings and slide decks that may have been presented at those meetings, are sufficient to depart from the general principle that only the materials before the decision-maker are subject to Rule 317 production. As the moving party, the onus is on the applicant to demonstrate that production should be ordered.

[16] In *Access*, the applicant made a broad request for documents hoping to support a finding that there was interference in the decision-making process; it wanted to be satisfied that the case was decided by the individual who heard it. The Court of Appeal found that there was an absence of a factual basis to justify such a concern (para 19) and dismissed the motion in this respect.

[17] Similarly, in *Ron W Cameron Charitable Foundation v Canada (National Revenue)*, 2023 FCA 175, the Federal Court of appeal found that an allegation of disability discrimination or breach of procedural fairness may warrant broader disclosure under Rule 317. Where these arguments are raised, documents that are relevant to the allegations – even if not before the decision-maker – are subject to disclosure. There must, however, be some evidence to support the claim. In that case, the appellant did not provide any evidence that discrimination or breach of procedural fairness occurred, and further production was not ordered (paras 26-29).

[18] Recently, in *JNF*, the appellant challenged a decision that would revoke its registration as a charity. The notice of appeal alleged that the Minister was biased and acted in part in response to significant public pressure. The appellant set out examples of public and media pressure (commentary, petitions, letters, emails, press releases) on CRA reflected in internal communications and documents among CRA personnel, including personnel who were not involved in CRA's audit of the appellant (para 15). The Minister was ordered to disclose further materials, including relevant material in the possession of CRA relating to communications from and to the public (para 18).

[19] I am not satisfied that the applicant has demonstrated a sufficient factual basis to compel production of documents that were not before the decision-maker, particularly those related to the 11 meetings referred to in the motion materials.

[20] The applicant's evidence and argument does not discuss the slide decks and meeting invitations in any detail, or provide particulars that would lead to a conclusion that abusive

conduct may have occurred during these meetings. In *JNF*, the appellant was able to connect the dots between alleged public pressure and what was found in the CTR. Here, that is not the case. I note that the allegations of abuse of authority are general in nature. It gives the impression that the applicant is hoping that a broad disclosure request will turn up evidence to support its theory of the case.

[21] The burden is always on the party asserting a proposition or fact that is not self-evident (*Voltage Holdings, LLC v Doe #1*, 2023 FCA 194 at para 40). I have reviewed the slide decks and meeting invitations that are mentioned in the applicant's written representations. I cannot conclude it is self-evident that there are likely to be further documents that would support a claim of abuse of authority.

[22] The applicant's motion is therefore dismissed.

[23] As the successful party, the respondent is entitled to costs. With reference to the middle of Column III of Tariff B, costs are fixed at $900.00, payable in any event of the cause.

ORDER in T-1310-24

THIS COURT ORDERS that:

1. The applicant is granted leave to serve and file an amended notice of application in the form attached as schedule “A” to the notice of motion dated February 12, 2025.

2. An amended notice of application shall be served and filed within 10 (ten) days of the date of this order.

3. The applicant’s motion is otherwise dismissed.

4. Costs of the motion are payable by the applicant to the respondent, fixed at $900.00, payable in any event of the cause.

"Trent Horne"
Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1310-24
STYLE OF CAUSE:	PUBLIC SERVICE ALLIANCE OF CANADA v ATTORNEY GENERAL OF CANADA

MATTER CONSIDERED IN WRITING, WITHOUT THE PERSONAL APPEARANCE OF THE PARTIES

ORDER AND REASONS:	HORNE A.J.
DATED:	JUNE 23, 2025

WRITTEN REPRESENTATIONS BY:

Andrew Astritis Morgan Rowe Emily McBain-Ashfield Sasha Hart	FOR THE APPLICANT
Richard Fader Brenden Carruthers	FOR THE RESPONDENT

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