

Federal Court



Cour fédérale

Date: 20231024

Docket: T-1910-22

Citation: 2023 FC 1410

Ottawa, Ontario, October 24, 2023

PRESENT: Madam Justice Pallotta

BETWEEN:

SHELLEY WHITELAW

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] The applicant, Ms. Whitelaw, brings two motions in writing in the context of an application for judicial review challenging an August 5, 2022 decision of the Canadian Human Rights Commission (Commission). The motions are for (i) an order pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106 [*Rules*] requiring the Commission to produce documents, and (ii) an extension of time allowing Ms. Whitelaw to file her application record after the Court's decision on the production motion, or within 10 days following any production the Commission is ordered to make.

[2] Having reviewed Ms. Whitelaw's motion records, the responding motion records, and Ms. Whitelaw's reply materials, I find Ms. Whitelaw has established that two documents should be produced. Consequently, for the reasons below, the motion for production is allowed in part, and it otherwise dismissed. Ms. Whitelaw's request for an extension of time to file her application record is granted.

I. **Background**

A. *The Application*

[3] This is an application for judicial review of the Commission's decision to dismiss Ms. Whitelaw's complaint, filed in July 2019 and identified as file number 20190828, which alleged that the Royal Canadian Mounted Police (RCMP) took retaliatory action against her contrary to section 14.1 of the *Canadian Human Rights Act*, RSC 1985, c H-6 (Retaliation Complaint) for filing a prior human rights complaint identified as file number 20181106 (Original Complaint).

[4] Ms. Whitelaw filed the Retaliation Complaint after receiving disclosure from Crown counsel in December 2018 (Disclosure), in the context of a court proceeding for three traffic tickets issued on September 20, 2017. The Disclosure contained a report to Crown counsel (RCC) dated October 7, 2017, prepared by the RCMP officer who pulled Ms. Whitelaw over and ticketed her. The RCC provided a synopsis of the traffic stop and included a section about whether Ms. Whitelaw should be charged with personating a peace officer under the *Criminal Code*, RSC 1985, c C-46. Ms. Whitelaw, who is a former RCMP officer, states she never represented herself as an active police officer at any time.

[5] According to Ms. Whitelaw, the Disclosure containing the RCC “gave the appearance that I was charged with a criminal offence”. Ms. Whitelaw states the RCC had not been included in any prior disclosure that she or her lawyer received in connection with the traffic charges, and she was not aware the RCMP was considering a *Criminal Code* charge against her until she received the Disclosure in December 2018. While Ms. Whitelaw was never charged with the *Criminal Code* offence, she believes the RCMP’s actions were retaliatory.

[6] Ms. Whitelaw’s notice of application, filed September 12, 2022, asks this Court to set aside the Commission’s decision on grounds that the Commission did not observe principles of natural justice and procedural fairness, and its decision to dismiss the Retaliation Complaint was also unreasonable. With respect to the first ground, the allegations of procedural unfairness include: (i) that the Commission demonstrated a lack of understanding of the layered complexity of the Retaliation Complaint, and the Disclosure was itself a retaliatory act that revealed previously unknown and unjustified retaliatory actions taken against Ms. Whitelaw; and, (ii) that the Commission failed to address Ms. Whitelaw’s submissions that the Report for Decision prepared by the human rights officer (HRO) who investigated her complaint was not thorough or balanced, because Ms. Whitelaw was not informed about, and did not have an opportunity to address, the RCMP’s defence discussed at paragraph 64 of the Report for Decision that its actions were justified by the RCMP’s operational disclosure policy (Policy).

B. *Procedural Background*

[7] Ms. Whitelaw’s notice of application did not include a Rule 317 request.

[8] The RCMP made a Rule 317 request to the Commission on September 20, 2022. In response, on October 3, 2022, the Commission transmitted to the parties and the Court copies of Ms. Whitelaw's complaint form, a summary of her complaint, the HRO's Report for Decision, and the parties' submissions to the Commission in respect of the Report for Decision. The Commission also prepared a Rule 318 certificate, certifying that the copies were true and complete copies of all the material that was before the Commission when it made its decision to dismiss the Retaliation Complaint.

[9] Ms. Whitelaw states she was not aware of the RCMP's Rule 317 request. She states that when she filed her notice of application, she had decided to make her Rule 317 request at a later date.

[10] On March 10, 2023, Ms. Whitelaw served a Rule 317 request. In that request, Ms. Whitelaw asked the Commission to produce documents she believed to be relevant to the grounds of review in her notice of application. In addition to all documents that were before the Commission in making its decision in the Retaliation Complaint, Ms. Whitelaw requested (i) documents related to the Original Complaint, (ii) all communications from the RCMP to the Commission relating to the RCMP's representations on its Policy, as referred to in the HRO's Report for Decision; and (iii) any documents of communication between the Commission and the HRO relating to the RCMP's representations on the Policy. The Commission objected to the request, pursuant to Rule 318(2), on the basis of relevance. The Commission stated it would be open to reconsidering its position if further particulars were provided.

[11] On March 17, 2023, Ms. Whitelaw wrote to the Commission with additional information relating to the requested documents and asked the Commission to reconsider. The points Ms. Whitelaw made in her letter included:

Request (i): the request relates to her allegation that the Commission breached procedural fairness when it referred the Original Complaint to the Canadian Human Rights Tribunal (Tribunal) without referring the Retaliation Complaint with it, because the Retaliation Complaint alleges retaliation based on the Original Complaint, and the two complaints are intertwined and involve the same RCMP officer whose credibility led to the Commission's decision to refer the Original Complaint to the Tribunal; the Original Complaint documents are in her possession and could have been included in her Rule 306 Affidavit, but it would be preferable to have all the documents together in a certified Rule 318 disclosure, and it would be unfair to a self-represented litigant to refuse to produce the documents under Rule 317/318 when she could have submitted them as part of her affidavit.

Requests (ii) and (iii): the requests relate to her allegation that the Commission breached procedural fairness by failing to consider and give reasons for rejecting her submissions about the RCMP's Policy; the Policy was a new, additional defence of justification that the RCMP raised in response to the Retaliation Complaint, she had no opportunity to rebut the defence during the course of the investigation and only learned about it after reading the HRO's Report for Decision, and although her submissions to the Commission rebutted the new defence, the Commission failed to address her submissions.

[12] The Commission responded on March 28, 2023. The Commission's position was that the relevant documents for the judicial review were those that were before the Commission when it made its decision, and they were already part of the Commission's Rule 318 response to the RCMP's Rule 317 request.

[13] On March 29, 2023, Ms. Whitelaw wrote to the Court, stating that the Commission had not provided a proper reason for objecting to requests (ii) and (iii). She sought the Court's direction and asked for an order requiring the Commission to provide a reason for objecting to the requests. On March 30, 2023, the Court directed that Ms. Whitelaw could either accept the Commission's objection or bring a motion challenging it.

[14] Ms. Whitelaw did not file a motion. Instead, on May 16, 2023, Ms. Whitelaw wrote to inform the Court that after preparing and compiling all the documents for the motion record, she realized that the procedural fairness ground of judicial review may be sufficiently argued without the materials that the RCMP provided to the Commission. For efficiency, she decided it may be best to simply file her application record.

[15] Ms. Whitelaw's May 16, 2023 letter also asked for leave to file an additional affidavit pursuant to Rule 312. According to the letter, Ms. Whitelaw wanted to file an additional affidavit, related to what was in her Rule 306 affidavit, to provide a clear statement that the HRO did not notify her about the RCMP's defence of following the Policy. She sought a further extension of the deadline to file her application record, to May 31, 2023.

[16] The respondent informed the Court that it would not consent to Ms. Whitelaw's requests to file an additional affidavit and extend the application record deadline.

[17] On May 18, 2023, the Court directed that, since the respondent did not consent to Ms. Whitelaw's requests, a formal motion would be required. The Court directed Ms. Whitelaw to file her Rule 312 motion for leave to file an additional affidavit and the related request for an extension of time to file her application record, by May 31, 2023. Ms. Whitelaw did not file the motion.

[18] On May 19, 2023, Ms. Whitelaw served an application record on the respondent and tendered it for filing with the Court. The application record contained an irregularity at pages 91 to 94 and was not accepted for filing.

[19] On May 31, 2023, Ms. Whitelaw filed these motions for production pursuant to Rule 317 and an extension of time to file her application record. A case management conference was scheduled for June 20, 2023. Following the case management conference, the Court set a schedule for filing responding and reply motion materials on the Rule 317 and extension motions.

[20] Ms. Whitelaw was unable to meet her deadline for filing reply and asked for an extension, which was granted on consent. Ms. Whitelaw tendered reply materials for both motions by the extended deadline; however, on August 11, 2023, the respondent objected to Ms.

Whitelaw’s reply because it included affidavit evidence. Ms. Whitelaw responded to the objection by letter dated October 10, 2023, asking for “leeway with respect to Rule 369(3)”.

[21] Due to the objection, the Registry did not accept the reply materials for filing, and asked for directions from the Court.

[22] Ms. Whitelaw’s reply on the Rule 317 motion does not include evidence, and the Registry may accept it for filing. The reply materials on the motion for an extension of time include a supplementary affidavit (Affidavit #2 of Shelley Whitelaw). I will address this reply in the context of the extension motion, below.

II. **Rule 317 Motion**

A. *Parties’ Positions*

[23] As noted above, the Commission has transmitted copies of the materials that were before it when it dismissed the Retaliation Complaint. On this motion, Ms. Whitelaw seeks further production. She seeks an order that would require the Commission to produce:

- i) the Commission’s decision and documents the Commission reviewed in the Original Complaint, file 20181106, and the “20181106 Supplementary Rule 318 Certificate” (which will be explained below); and
- ii) all documents and records that pertain to the RCMP’s “additional Policy defence at paragraph 64 in the Report” (paragraph 64 of the HRO’s Report for Decision summarizes the RCMP’s arguments about the Policy), and considerations,

communications with the HRO and Commission, and omissions concerning that Policy justification defence.

[24] Ms. Whitelaw submits the requested documents are relevant to her allegations that the Commission did not observe principles of natural justice, impartiality, and procedural fairness.

[25] Ms. Whitelaw argues that the materials from the Original Complaint are relevant because the Original Complaint and the Retaliation Complaint stem from the same initial incident, when Ms. Whitelaw was retained at roadside by an RCMP officer for a traffic violation on September 20, 2017, and the facts and evidence are intertwined. She states she had asked the Commission to review the complaints together, based on materials relevant to both of them, and instead the Commission “divided” the complaints, issuing separate decisions by the same Commissioner on the same day. As noted above, the Original Complaint was referred to the Tribunal. Ms. Whitelaw argues it was unfair to divide the complaints and dismiss the Retaliation Complaint prematurely, when the Tribunal will decide credibility issues in the Original Complaint and those findings may be relevant to the Retaliation Complaint.

[26] Ms. Whitelaw submits the requested documents are also relevant to show that the Commission demonstrated bias and procedural unfairness in 2018, when it referred her Original Complaint to the RCMP’s Civilian Review and Complaints Commission (CRCC). (The Commission later reopened the Original Complaint, after the CRCC referred the matter back.) Ms. Whitelaw states her application for judicial review of the Commission’s 2018 decision raised procedural fairness grounds (including an allegation that she had not been afforded an

opportunity to respond to the RCMP's inaccurate submissions about the CRCC process), and in the context of that proceeding the Commission delivered a Supplementary Rule 318 Certificate providing documents "that may relate to the applicant's procedural fairness allegation". This is the "20181106 Supplementary Rule 318 Certificate" that Ms. Whitelaw requests on this motion. Ms. Whitelaw states the Supplementary Rule 318 Certificate and documents produced with it show that the RCMP had provided two responses to the previous HRO's report, one of them after receiving Ms. Whitelaw's submissions, and this demonstrates unfairness in the process that led to the Commission's 2018 decision.

[27] With respect to the request for documents that relate to the RCMP's Policy arguments, Ms. Whitelaw submits the documents are relevant because they concern omissions that demonstrate bias by the HRO and the Commission and unfair procedure leading to the Commission's negative decision in the Retaliation Complaint, including: failure to notify Ms. Whitelaw of the additional Policy justification, failure to assess the Policy justification using established criteria, and failure to address Ms. Whitelaw's submissions about the Policy justification defence.

[28] Ms. Whitelaw submits she was not aware of the RCMP's Policy arguments and did not have a chance to refute them during the investigation. She was aware of the RCMP's position that its officers acted in accordance with "normal policy", but she was not aware of the arguments based on a formal RCMP Policy that relates to disclosure. In this regard, Ms. Whitelaw points out that the HRO's Report for Decision sets out the arguments she made in response to the RCMP submissions she received—namely, that the RCMP did not provide an

explanation as to why a Disclosure related to traffic violations included the RCC and a transcript of a recording from the traffic stop containing information about the *Criminal Code* charge. Ms. Whitelaw states the HRO made her recommendation to the Commission based on an explanation the RCMP had provided (based on the Policy) that Ms. Whitelaw did not know about and did not have an opportunity to refute, and did so without assessing the Policy explanation in accordance with the applicable legal criteria.

[29] Ms. Whitelaw argues that documents in the possession of a decision maker may be relevant if they may have affected the decision, or if they may affect the Court's decision on an application for judicial review: *Maax Bath Inc v Almag Aluminum Inc*, 2009 FCA 204 at para 9; *Gagliano v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2006 FC 720 at para 7 [*Gagliano*]. She submits that documents in addition to those that were before the decision maker may be considered relevant and subject to disclosure where there is an allegation of procedural fairness or an allegation of a reasonable apprehension of bias, although allegations of that nature do not entitle the requesting party to engage in a fishing expedition: *Humane Society of Canada Foundation v Canada (National Revenue)*, 2018 FCA 66; *Gagliano* at paras 48-50. Ms. Whitelaw states her request cannot be a fishing expedition when the HRO who investigated her complaint set out the RCMP's Policy arguments in the Report for Decision.

[30] Ms. Whitelaw also relies on *Davidson v Canada (Attorney General)*, 2019 FC 997 at paragraph 19 [*Davidson*], which reproduced several paragraphs of a Rule 317 order made in that proceeding. The Rule 317 order in *Davidson* compelled the Commission to provide documents,

even though the documents in question were not before the Commission when it made its decision. The Court found the documents had been clearly identified in the applicant's request, they were before the investigating HRO, and they were expressly relied on by the HRO to reach the conclusions in the investigation report.

[31] Ms. Whitelaw submits that although the HRO in her case did not expressly rely on the Policy to reach the conclusions in the Report for Decision, the Report for Decision includes details about materials that were submitted by the RCMP to advance the Policy justification defence, the details align with the HRO's conclusion, and indicate a predetermined outcome. Ms. Whitelaw states she raised the issue in her submissions to the Commission, explaining that the RCMP had selected provisions from the Policy that were not applicable and made in bad faith, and that the Disclosure was also contrary to the stated Policy. Ms. Whitelaw contends that production of the requested materials would assist the hearing judge to decide the issues of bias and procedural unfairness she has advanced on the application for judicial review.

[32] Ms. Whitelaw submits the Supplementary Rule 318 Certificate that the Commission produced in the context of the prior judicial review proceeding, challenging the 2018 decision to refer the Original Complaint to the CRCC, disclosed documents that related to the procedural fairness allegations in that proceeding. She argues the certificate and documents show that the Commission was biased and followed an unfair procedure when it decided to refer the Original Complaint to the CRCC, by relying on misleading information in a second response from the RCMP about the CRCC process. Ms. Whitelaw states that the Commission's bias and unfair

procedure in the Retaliation Complaint followed the bias and unfair procedure that led to the 2018 decision.

[33] The respondent submits Ms. Whitelaw’s motion should be dismissed. The Commission has already provided everything that was before it when it made its decision in the Retaliation Complaint: *Access Information Agency Inc v Canada (Attorney General)*, 2007 FCA 224 at para 7 [*Access Information Agency*]. The respondent argues this is a complete answer to Ms. Whitelaw’s requests, and the remainder of her requests “exceed by a wide margin the parameters of a permissible Rule 317 request”. The respondent submits Ms. Whitelaw’s motion is an attempt to obtain discovery of a large volume of irrelevant documents that are beyond the scope of the issues to be decided on judicial review.

[34] While allegations of procedural unfairness will sometimes require production of documents that were not before the decision maker, the respondent states Ms. Whitelaw’s request cannot succeed because she admitted in correspondence to the Court that she may sufficiently argue her case without further materials from the Commission, and she already has some of the requested materials in her possession. The respondent submits that the broad scope of production Ms. Whitelaw has requested is not germane to the Court’s role on judicial review—it is not the Court’s role to decide the question before the Commission on the merits: *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at para 17; *Nunavut Tunngavik Inc v Canada (Minister of Fisheries and Oceans) (CA)*, [1998] FC 405 at paras 18-19, 1998 CanLII 9080 (FCA). It is not the purpose of Rule 317 to provide disclosure of any document that could be relevant in the hopes of later establishing relevance (*Access Information Agency* at paragraphs

20-21), and a tribunal is only required to provide relevant documents that are not in the applicant's possession (*Girouard v Canadian Judicial Council*, 2019 FCA 252 at paragraph 17).

B. *Analysis*

[35] 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.

[36] It is important to emphasize that Rule 317 does not serve the same purpose as documentary discovery in an action: *Access Information Agency* at para 17. The purpose of the rule is to limit production to documents that were in the hands of the decision maker when the decision was made and not in the possession of the person making the request, and to require that the requested documents be described in a precise manner: *Access Information Agency* at para 21.

[37] It is well established that, as a general rule, the evidentiary record on judicial review is restricted to the record that was before the decision maker: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at para 19 [*Access Copyright*]. There are exceptions to the general rule, one of which relates to evidence that explains procedural defects that cannot be found in the record, so the Court can fulfill its role of reviewing an administrative decision for procedural unfairness: *Access Copyright* at para 20. However, an applicant is not entitled to requested materials merely because they have alleged a breach of procedural fairness: *Gagliano* at paras 50-52. When an applicant alleges a breach of

procedural fairness, the Court still determines whether requested materials are relevant in view of the grounds of review in the notice of application: *Gagliano* at para 52, citing *Canada (Canadian Human Rights Commission) v Pathak*, [1995] 2 FC 455 (FCA); see also *Ron W Cameron Charitable Foundation v Canada (National Revenue)*, 2023 FCA 175.

[38] Ms. Whitelaw has already received all material that was before the Commission when it rendered its decision. The question on this motion is whether she is entitled to the further documents she requests.

[39] I find Ms. Whitelaw has not established that she is entitled to production of all the requested documents. I agree with the respondent that Ms. Whitelaw's request is more in the nature of a request for discovery (and even then, the request is overbroad in terms of its relevance).

[40] With respect to documents from the Original Complaint, I am not satisfied that they are relevant to the issues on this application. While there is overlap, the Retaliation Complaint is a separate complaint. Ms. Whitelaw states that the Commission "divided" her complaints and it was unfair to do so, but the complaints were always separate, and I am not satisfied the Commission was required to deal with them together. I am not persuaded that documents from the Original Complaint are relevant to any of the procedural fairness allegations Ms. Whitelaw has raised in her notice of application.

[41] Similarly, I am not satisfied that the Supplementary Rule 318 Certificate is relevant. It relates to the Commission's decision to refer the Original Complaint to the CRCC, a decision that has since been overtaken by the Commission's decision to refer the Original Complaint to the Tribunal. Ms. Whitelaw's submissions suggest that the documents will show a pattern of bias or procedural unfairness. There is no allegation of this nature in the notice of application, and I am not persuaded by Ms. Whitelaw's argument. Even if the Commission accepted a second set of submissions from the RCMP about the CRCC process when it should not have (and I note there was no finding by the Court in this regard, as the judicial review proceeding was discontinued), Ms. Whitelaw does not allege that the Commission did a similar thing in this case. Ms. Whitelaw has not established that the certificate or attached documents produced in the prior judicial review proceeding are relevant to the issues in this application.

[42] In addition, Ms. Whitelaw has not established that the Original Complaint documents and Supplementary Rule 318 Certificate and documents are not in her possession.

[43] Ms. Whitelaw also requests production of all documents, records, considerations, communications, and omissions pertaining to the RCMP's "additional policy defence". I agree with the respondent that this request is an attempt to obtain a large volume of documents, akin to documentary discovery. I am also mindful that Ms. Whitelaw stated in her May 16, 2023 correspondence to the Court that she may sufficiently argue her case without any further materials from the Commission, and that Ms. Whitelaw addressed the RCMP's Policy in her submissions to the Commission. Nonetheless, in my view the Policy itself and RCMP

submissions on the Policy appear to have been before the HRO, and not provided to Ms. Whitelaw.

[44] Ms. Whitelaw acknowledges that the HRO did not expressly rely on the Policy in reaching the conclusion in the Report for Decision, and this is a point of distinction from the reasons for granting the production order in *Davidson*. However, I accept that the Report for Decision sets out the RCMP's arguments about the Policy, and Ms. Whitelaw contends that the HRO's conclusion "aligns" with the arguments. Ms. Whitelaw's argument about the HRO's failure to assess the "Policy defence" in accordance with the legal criteria (or at least an aspect of that argument) as I understand it, is that the HRO did not make an express finding about the "Policy defence" and it could have been a factor in the HRO's conclusion. For these reasons, I am satisfied that the Policy and the RCMP's submissions to the HRO on the Policy may be relevant to the procedural fairness grounds Ms. Whitelaw raised in the notice of application, and the documents would assist the hearing judge to decide the issues in this application.

[45] Apart from the Policy and the RCMP's submissions, I agree with the respondent that Ms. Whitelaw's general request for all documents and records that pertain to the "Policy defence", and considerations, communications with the HRO and Commission, and omissions concerning that defence, is overbroad. Ms. Whitelaw has not established that any other documents falling within this general description exist, are relevant, and not in her possession.

[46] In conclusion, the Commission will be ordered to transmit copies of the Policy and the RCMP's submissions to the HRO on the Policy to the parties and the Court's Registry.

III. Extension of Time Motion

A. *Preliminary Issue*

[47] As noted above, Ms. Whitelaw served and sought to file a supplementary affidavit as part of her reply materials. Rule 369 allows a moving party to file written representations in reply after being served with a respondent's motion record. Rule 369 does not include a provision for reply evidence. Accordingly, Ms. Whitelaw requires leave of the Court to file her supplementary affidavit.

[48] Ms. Whitelaw's supplementary affidavit is a short affidavit that relates strictly to the request for an extension of time. It introduces minimal evidence that is not already in her motion record. The exhibits are two letters between Ms. Whitelaw and the respondent's counsel, and a written note from a doctor that repeats information that was already in Ms. Whitelaw's first affidavit.

[49] The additional evidence is not necessary, and makes no difference to the result on the motion for an extension of time; however, I have decided to admit the supplementary affidavit. Ms. Whitelaw is self-represented. The affidavit is part of a reply record, and no purpose would be served by removing the affidavit from the reply record or requiring Ms. Whitelaw to submit a new one without the affidavit. I see no prejudice to the respondent by allowing the reply record to be filed in its current form. The Registry is directed to accept the reply record for filing.

B. *Analysis*

[50] The Court should consider four factors in deciding whether to grant an extension of time: i) a continuing intention to pursue the application; ii) that the application has some merit; iii) that no prejudice to the respondent arises from the delay; and iv) that a reasonable explanation for the delay exists: *Canada (Attorney General) v Hennelly* (1999), 167 FTR 158, 1999 CanLII 8190 at para 3 (FCA) [*Hennelly*]. It is not always necessary to satisfy all four factors: *Whitefish Lake First Nation v Grey*, 2019 FCA 275 at para 3. The overriding consideration is whether it is in the interests of justice that the extension of time be granted.

[51] Ms. Whitelaw submits she meets the criteria set out in *Hennelly*. She served an application record on the respondent on May 19, 2023, but was unable to file it with the Court due to technical issues. Ms. Whitelaw submits her case has merit because she was denied procedural fairness and faced bias. She submits the respondent would not suffer any prejudice if an extension of time is granted, and she has explained that the delay was caused by stress and an exacerbation of her chronic illness.

[52] The respondent submits Ms. Whitelaw has not satisfied the test for an extension of time according to the *Hennelly* criteria. While Ms. Whitelaw has demonstrated a continuing intention to pursue the application, there is no reasonable explanation for the delay. The respondent states Ms. Whitelaw has taken a cavalier approach to meeting the deadlines in this proceeding, with multiple last-minute requests for extensions of time, and she has failed to establish that she has acted diligently.

[53] Despite not satisfying the *Hennelly* test, the respondent states its position is as follows: (i) if the Rule 317 motion is dismissed, the respondent does not oppose an extension of time to allow Ms. Whitelaw to file the application record that she served on May 19, 2023; (ii) if the Rule 317 motion is granted, the respondent does not oppose an extension of time to allow Ms. Whitelaw to amend, serve, and file a new application record.

[54] In my view, the respondent raises a legitimate concern about Ms. Whitelaw's multiple extension requests. Ms. Whitelaw's deadline to file her Rule 306 affidavit was extended twice, and prior to this motion, Ms. Whitelaw's deadline to file her application record was extended three times. The respondent consented to these requests, including a 45-day extension that Ms. Whitelaw requested specifically for the purpose of filing a Rule 317 motion. Ms. Whitelaw did not file the Rule 317 motion within that window because she decided to file a Rule 312 motion instead. Ms. Whitelaw was granted a further extension of time in order to file a Rule 312 motion, and then did not file it.

[55] While Ms. Whitelaw provides evidence that the cause of her delay relates to stress, her health, and the sale of her house, I am not satisfied this reasonably explains the repeated extension requests and the full period of the delay, particularly since Ms. Whitelaw chose the extension deadlines. Nonetheless, Ms. Whitelaw's motion for production has been successful in part, and it will be necessary to extend the application record deadline. Ms. Whitelaw will be granted the extension she has requested. The application record will be due 10 days after the Commission complies with the order to transmit documents.

[56] For the benefit of the parties, I would add that when a decision maker transmits materials to the parties and to the Court, those materials do not automatically form part of the record on judicial review. The parties should note that they must take affirmative steps to place material before the Court, as part of the application record or the responding record: *Canadian Copyright Licensing Agency (Access Copyright) v Alberta*, 2015 FCA 268 (see especially paras 7-8 and 17).

[57] In view of the multiple extensions that have already been granted, further extensions of the deadline to file Ms. Whitelaw's application record should not be necessary, and will not be granted absent special and extraordinary circumstances.

[58] In accordance with the *Rules*, the respondent's record will be due 20 days after Ms. Whitelaw serves her record.

[59] The success on the motions was divided. Exercising my discretion, I find the parties should bear their own costs of the motions.

ORDER in T-1910-22

THIS COURT ORDERS that:

1. Ms. Whitelaw's reply materials are accepted for filing.
2. The Rule 317 motion is granted in part. The Commission shall, by no later than November 7, 2023, transmit to the parties and the Registry a certified copy of the Policy and the RCMP's submissions regarding the Policy that were before the HRO, referred to in paragraph 64 of the Report for Decision.
3. The application record shall be served and filed within 10 days after the Commission has complied with paragraph 2 above. Further extensions of the application record deadline will require special and extraordinary circumstances.
4. Subsequent steps in the application will follow the timelines set out in the *Rules*.
5. No costs are awarded in respect of these motions.

"Christine M. Pallotta"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1910-22

STYLE OF CAUSE: SHELLEY WHITELAW v ATTORNEY GENERAL OF CANADA

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS: PALLOTTA J.

DATED: OCTOBER 24, 2023

WRITTEN REPRESENTATIONS BY:

Shelley Whitelaw

FOR THE APPLICANT
(ON HER OWN BEHALF)

Ely-Anna Hidalgo-Simpson

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada
Vancouver, British Columbia

FOR THE RESPONDENT