Date: 20231115

File: T-1632-19

Citation: 2023 FC 1513

[ENGLISH TRANSLATION]

Ottawa, Ontario, November 15, 2023

PRESENT: Madam Justice Walker

BETWEEN:

GARY FORD

Applicant

And

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Overview

[1] This is a motion by the applicant, Gary Ford, to determine the respondent's objections to the disclosure of certain documents and information requested pursuant to section 317 of the *Federal Courts Rules*, SOR/98-106 (the Motion). The Motion is part of an application for judicial review pursuant to which the applicant is challenging a decision (the Decision) of the Canada Revenue Agency (CRA) dated September 5, 2019. The Decision rejected, on second

review, the applicant's request for relief for the 2000, 2001 and 2002 taxation years under subsection 220(3.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (the Act).

II. **Background**

[2] The background to the applicant's application for judicial review is set out in my Order dated July 20, 2022 (at paras 4–23). This Order allowed the applicant's appeal against an order made by a prothonotary of the Court granting the respondent's motion to strike out the application for judicial review.

[3] To reiterate the relevant information in the Order, in 2006, having failed to receive documentation in support of the claimed rental losses (the supporting documentation"), the CRA issued reassessments against the applicant for the 2000–2002 taxation years. The applicant did not object to the reassessments.

[4] On November 22, 2010, the applicant submitted a request for relief (the Previous Relief Request) to the CRA under subsection 152(4.2) of the Act, requesting reassessments for the years 2000–2002. The CRA denied the request at the first level (on June 28, 2011) and at the second level (on August 20, 2014). On December 29, 2014, the applicant filed an application for judicial review of the CRA's second decision. On September 10, 2015, the Court dismissed the application because the applicant had failed to submit the supporting documentation required to substantiate his claims and had not complied with the CRA's numerous requests for documents (*Ford v Canada (Attorney General)*, 2015 FC 1057). The Federal Court of Appeal dismissed the applicant's appeal of this judgment (*Ford v Canada (Attorney General)*, 2016 FCA 128). Ian Demers represented the respondent in the first application for judicial review.

[5] The applicant then retained new counsel, who submitted an access to information request. Among the documents received in response, the lawyers found documents relating to rental expenses claimed by the applicant for the years 2000–2002, which had been filed with the CRA's Voluntary Disclosure Program ("VDP") in November and December 2004. In the VDP's letter stating that the disclosure file had been accepted, the VDP returned the submitted supporting documentation to the applicant.

[6] On December 4, 2017, the applicant filed a request for relief under subsection 220(3.1) of the Act (the Second Request for Relief), requesting that the Minister exercise her discretion to cancel the penalties and interest imposed for the years 2000–2002. Ms. Stevens was the officer assigned to the first review of the Second Request for Relief and Ms. Groleau was the officer assigned to the second review of the Second Request for Relief.

[7] The CRA denied the applicant's Second Request for Relief at the first level on February 23, 2018. On September 5, 2019, Ms. Cossette, CRA Team Leader, denied the applicant's request for reconsideration at the second level. This is the Decision now being challenged.

[8] In his Notice of Application for Judicial Review of the Decision, in addition to sending a copy to the registry, the applicant asked that the respondent send him the complete contents of the record of the Second Request for Relief. Without limiting the generality of his request for documentation, the applicant listed the documents, types of documents and information required.

[9] The Certified Tribunal Record (the CTR) was communicated to the applicant's representatives and to the registry on October 12, 2022, in accordance with subsection 318(1) of the Rules. The CTR contains the documents corresponding to points 1–4, 5a) and 5b) of the Notice of Application for Judicial Review. On October 19, 2022, additional documents, [TRANSLATION] "Voluntary disclosure program documents consulted as part of globus GB1800 4112 8577", were sent to the registry to go in the CTR.

[10] On October 14, 2022, the respondent sent the applicant a copy of the objection letter under subsection 318(2) of the Rules. The respondent objects to the transmission of the documents requested in items 5c) to g) of the Notice of Application on various grounds: the relevance of the documents, solicitor-client privilege, litigation privilege, and the very existence of certain documents.

[11] The respondent explains the reasons for its opposition to the transmission of these documents:

Point	Description of requested document(s)	Reason given by the respondent in the letter of opposition
5c)	All communications between Caroll Stevens, Janie Groleau and any other CRA employee or representative in connection with the processing of the applicant's Second Request for Relief.	The respondent objects because he has not found the communication(s) requested in points 5c) and 5d). The respondent has no proof of their existence.
5d)	All communications between other CRA employees or representatives in connection with the processing of the applicant's Second Request for Relief.	
5e)	All documents sent by CRA employees or representatives to Ian Demers or another Justice Canada representative referring to documents that the applicant or one of his representatives had provided to the CRA since 2000	The respondent objects to the transmission of any document that has not been analyzed by the Minister's delegate for reasons of relevance, solicitor-client privilege and litigation privilege.
5f)	The identities and positions of the CRA employees or representatives who provided the documents referred to in item 5e).	The respondent objects to the transmission of any document that has not been analyzed by the Minister's delegate for reasons of relevance.
5g)	The identities and positions of the CRA employees or representatives who instructed Ian Demers or another representative of Justice Canada in connection with the judicial review proceedings initiated by the applicant following the refusal of his first request for relief.	The respondent objects to the transmission of any document that has not been analyzed by the Minister's delegate for reasons of relevance, solicitor-client privilege and litigation privilege.

[12] In the Motion, the applicant responds to the respondent's objection. He asks the Court to order the respondent (1) to complete the CTR by adding the undelivered documents; and (2) to produce, under seal, for the Court's record and review, all documents over which the respondent asserts litigation privilege and solicitor-client privilege.

III. **Legislative provisions**

[13] Section 317 of the Rules provides "a means by which a party can request a record to support its application for judicial review", and section 318 of the Rules "sets out the process for objecting to such a request" (*GCT Canada Limited Partnership v Vancouver Fraser Port Authority*, 2021 FC 624 at para 21 (*GCT Canada*)). Section 317 of the Rules refers to documents that are (1) in the possession of the decision-maker, and (2) relevant to the application before the Court. The relevant passages of sections 317 and 318 of the Rules are as follows:

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	**(3)** La Cour peut donner aux parties et à l'office fédéral des

a tribunal as to the procedure for making submissions with respect to an objection under subsection (2).	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.

IV. **Issues**

[14] The determinative question for the Court is whether the documents and information requested in points 5c) to 5g) are relevant material in the tribunal's possession within the meaning of section 317 of the Rules.

V. **Analysis: Are the documents requested in points 5c) to 5g) relevant material in the tribunal's possession within the meaning of section 317 of the Rules?**

(1) *The documents referred to in points 5c) and 5d)*

[15] The documents requested by the applicant in points 5c) and 5d) are communications between CRA employees and representatives during the processing of the applicant's Second Request for Relief, including communications with Ms. Stevens (the officer assigned to the first review) and Ms. Groleau (the officer assigned to the second review).

[16] The applicant maintains that he cannot rely on the respondent's statements as to the non-existence of the communications referred to in points 5c) and 5d).

> [TRANSLATION]
> It is unthinkable to conclude that the first and second levels of a decision-making process leading to the decision challenged in this judicial review had no communication.

[17] The applicant's argument is not convincing. Ms. Stevens issued a report that led to Ms. Martel's first-level decision. In her decision, Ms. Martel stated that, if the applicant wished to contest the decision, he could request a second independent review at the second level. The applicant filed his application at the second level, and Ms. Groleau issued the recommendation that led to the decision under review: Ms. Cossette's decision.

[18] Tab 5 of the CTR contains communications from Ms. Stevens and Ms. Groleau. In support of its opposition to the Motion, the respondent filed an affidavit from Ms. Marsolais, a Taxpayer Relief Officer with the CRA. Ms. Marsolais stated that she conducted an exhaustive search of CRA records and sent all documents relevant to the applicant's application for judicial review in October 2022. She responded to the applicant's request in points 5c) and 5d), explaining that she contacted Ms. Groleau in September 2022 to request all the communications mentioned. Ms. Groleau confirmed that all documents and correspondence relating to the request are already in the CTR.

[19] The applicant is convinced that both categories of documents (points 5c) and 5d)) exist, but neither the CTR nor his application file contain any indication of their existence. The first-level decision maker stated that the second-level review is an independent review. I agree with the respondent's argument that the impartiality of the second-level review is an important principle. The CRA's Information Circular states that the second review of a request for relief is an independent review of the first decision conducted by officials who were not involved in the

first level (*Taxpayer Relief Provisions*, IC07-1R1 (August 18, 2017) at para 104). It is then not "unthinkable", until proven otherwise, that the officer assigned to the second-level review (Ms. Groleau) would not contact the officer who conducted the first-level review (Ms. Stevens) (and vice versa). Furthermore, the CRA has undertaken a search for the requested documents, and Ms. Marsolais stated that the CTR contains all the documents described in points 5c) and 5d).

[20] I conclude that the applicant has not demonstrated that the documents requested in points 5c) and 5d) of his Notice of Application for Judicial Review exist and "are in the possession of a tribunal whose order is the subject of the application" (subsection 317(1) of the Rules).

(2) *The documents and information referred to in points 5e), 5f) and 5g)*

[21] The applicant requests at point 5e) the documents sent by a representative of the CRA to Mr. Demers or to another representative of the Department of Justice [TRANSLATION] "which listed the documents that the applicant or one of his representatives had provided to the CRA since 2000". The applicant also requests the identities and positions of (1) the CRA representatives who sent these documents (at 5f)) and (2) those who gave instructions to Mr. Demers or another representative of the Department of Justice during the proceedings for the first application for judicial review (at 5g)).

[22] Section 317 of the Rules enshrines the principle that judicial review is based on an examination of the record before the decision maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19

(*Access Copyright*)) and "entitles a party to receive everything that the decision maker had before it when it made its decision" (*Canadian National Railway Company v Canada (Transportation Agency)*, 2019 FCA 257 at para 12). The general principles governing the scope of the disclosure obligation imposed on the decision-maker by section 317 of the Rules are well established. My colleague, Justice Pentney, recently summarized the four essential requirements of the rule (*GCT Canada* at para 23, citing a number of recent Federal Court of Appeal decisions (citations omitted)):

> (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 . . . ;
>
> (ii) it only requires disclosure of material that is "in the possession" of the administrative decision-maker, not others . . . ;
>
> (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 . . . ;
>
> (iv) it does not serve the same purpose as documentary discovery in an action and cannot be used on a fishing expedition . . . .

[23] If a party objects to the transmission of a document under section 318 of the Rules, the Court must take care to reconcile, as far as possible, the following three objectives: (1) 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; (2) procedural fairness; and (3) 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).

[24] The documents and information requested in points 5e), 5f) and 5g) were not part of the record before Ms. Cossette (the decision-maker). The burden is therefore on the applicant to present evidence that justifies his request (*Access Information Agency v Canada (Attorney General)*, 2007 FCA 224 at para 21 (*Access Information Agency*); *GCT Canada* at para 29). In this case, the applicant is invoking the aforementioned exception, which applies when additional disclosure is necessary to identify breaches of procedural fairness.

[25] The applicant acknowledges that the Decision under review is the decision rendered by Ms. Cossette on September 5, 2019 addressing his Second Request for Relief under subsection 220(3.1) of the Act. However, by requesting the documents and information listed in items 5e), 5f) and 5g), the applicant seeks to establish a defect in fairness during his earlier Request for Relief under a separate section of the Act (subsection 152(4.2)) and his separate application for judicial review filed on December 29, 2014. He explains that the issue of whether the CRA and Department of Justice officials knew that he had forwarded the supporting documentation to the VDP in 2004 is relevant to this judicial review.

[26] In his Notice of Application for Judicial Review, the applicant simply alleges that the Decision [TRANSLATION] “demonstrates the CRA’s blatant disregard for fairness and the law”. In his oral argument, the applicant stated that Ms. Groleau and Ms. Cossette violated his right to procedural fairness in their review and processing of his Second Request for Relief. He states that the two CRA representatives erred in failing to undertake research to determine the knowledge that the CRA and Department of Justice representatives had in 2014–2016 of the receipt of supporting documentation by the VDP in late 2004. The applicant argues that the judge on the merits of the present application for judicial review needs to know the steps Ms. Cossette

took with regard to the past conduct of the CRA. According to the applicant, the decision-maker in an equitable relief program cannot look the other way when the CRA makes submissions that do not line up with the facts.

[27] I disagree and dismiss the applicant's arguments. His main argument that a second breach of procedural fairness occurred during the consideration of his Second Request for Relief is not convincing.

[28] Section 317 of the Rules is not intended to facilitate the disclosure of documents and information in the hands of a decision-maker (*Canada (Health) v Preventous Collaborative Health*, 2022 FCA 153 at para 10). Even if a party alleges a procedural defect, this does not allow it "to engage in a fishing expedition in the hopes of discovering some documents to establish the claim" (*Humane Society of Canada Foundation v Canada (Minister of National Revenue)*, 2018 FCA 66 at para 8 (*Humane Society of Canada*); *Maax Bath Inc. v Almag Aluminum Inc.*, 2009 FCA 204 at para 15).

[29] The applicant states in his motion record that the documents requested in points 5c) to 5g) [TRANSLATION] "allow procedural defects to be raised" because they show [TRANSLATION] "the knowledge that the respondent's representatives had" of the documentation transmitted by the applicant. However, he offers no evidence to support his allegations of procedural defects in the second-level review of his Second Request for Relief. He relies entirely on his opinion that Ms. Groleau and Ms. Cossette should have conducted an additional investigation into the actions of the CRA and its representatives in 2014–2016. The jurisprudence is consistent: the burden is

on the party seeking fuller disclosure to present evidence that justifies its request (*Access Information Agency* at para 21).

[30] The CTR shows us that Ms. Groleau prepared a detailed report in which she described the long history of Mr. Ford's file for the 2000–2002 tax years. She addressed the arguments of Mr. Ford's representative in support of his Second Request for Relief, including his insistence that the CRA and its representatives misled the Federal Courts by claiming that the applicant never filed supporting documentation regarding his rental losses. Ms. Groleau also noted the comments of the applicant's counsel on this subject. She informed counsel that the review of the Second Request for Relief was limited to interest arrears and did not extend to the circumstances or conduct of the persons involved in the earlier Request for Relief.

[31] In turn, Ms. Cossette considered Ms. Groleau's notes and recommendation. She also consulted the VDP documents. Ms. Cossette was well aware of the applicant's concern about the alleged conduct of the CRA and Justice Department officials.

[32] What is more, both the CRA and Ms. Cossette acknowledged that the VDP had received the supporting documentation in 2004. Ms. Cossette addresses the issue of supporting documentation and its relevance to the Second Request for Relief in the Decision :

> [TRANSLATION]
> In the Federal Court's decision dated September 10, 2015, it is mentioned that the audit section repeatedly contacted you and the person representing you to have you provide the requested supporting documents. No response has been forthcoming. Even though the documents were previously forwarded to the Voluntary Disclosure Program, they were returned to you. The audit section needed these and other supporting documents to approve the requested changes to your tax returns. You were again asked to

> provide us with these documents so that we could process your first and second requests for relief, but once again we received no response from you or your representative. Since you have not provided the documents requested by the Agency to support your requests, the amendments in question are denied. [Emphasis added.]

[33] The exception invoked by the applicant is based on the need to ensure meaningful judicial review, such that "[s]ometimes an affidavit is necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can engage in meaningful review for procedural unfairness" (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at para 98 (*Tsleil-Waututh*)). The applicant alleged a specific breach of fairness: the overly narrow scope of the reviews of the CRA record undertaken by Ms. Groleau and Ms. Cossette. Despite this excerpt from the Decision, the applicant does not explain why he believes that the disclosure of documents showing the CRA representatives' knowledge of the documentation transmitted in 2004 is relevant and necessary in order to ensure a valid judicial review.

[34] I also note that the request for documents under 5e) contains no details. The applicant is requesting all documents that refer to the documentation he has provided to CRA for almost 20 years. The request does not identify specific documents related to his request. Being too general and too specific, the request imposes an unreasonable burden on the CRA.

[35] Finally, the information requested in points 5f) and 5g), i.e. the identities and positions of certain representatives of the CRA and the Department of Justice, are not material provided for in section 317 of the Rules. These requests are, on face value, a fishing expedition and a misuse of the rule. Section 317 of the Rules cannot be used for exploratory purposes.

[36] In summary, I conclude that the applicant seeks to use section 317 of the Rules to serve the same purpose as discovery in an action (*Tsleil-Waututh* at para 115). A mere allegation of procedural defect does not justify a production order that would allow the applicant to go on a fishing expedition to see if something can be found to support this allegation (*Humane Society* at para 12). Moreover, the applicant has not submitted any evidence to support its claim. I am not persuaded by the applicant's argument that this is one of those exceptional cases where it is necessary to disclose documents that have not been consulted by the decision-maker in order to detect procedural flaws. The scope of the research undertaken by Ms. Groleau and Ms. Cossette is clear from the CTR. The judge hearing this application for judicial review already has the necessary evidence to consider the applicant's argument challenging the sufficiency of Ms. Cossette's research.

VI. **Conclusion**

[37] For all the above reasons, I dismiss the Motion.

[38] The applicant also disputes the respondent's argument that the documents referred to in points 5e) and 5g) are protected by solicitor-client privilege and litigation privilege. It is not necessary for me to address this second issue in light of my conclusions that the documents sought in points 5e) to 5g) are not relevant to this application for judicial review and that the applicant has not demonstrated that the documents referred to in points 5c) and 5d) exist.

[39] With the consent of the parties, the style of cause is amended to correctly identify the respondent as the Attorney General of Canada.

[40] The respondent has not requested costs and none are awarded.

ORDER in T-1632-19

THE COURT ORDERS as follows:

1. The applicant's motion to set aside the respondent's objections to the disclosure of certain documents and information requested under section 317 of the Rules is dismissed.

2. The style of cause is amended to identify the Attorney General of Canada as the respondent.

3. Without costs.

"Elizabeth Walker"
Judge

Certified true translation
Janna Balkwill

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1632-19
STYLE OF CAUSE:	GARY FORD v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	APRIL 12, 2023
ORDER AND REASONS:	WALKER J.
DATED:	NOVEMBER 15, 2023

APPEARANCES:

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