Federal Court  Cour fédérale

Date: 20190418

Docket: T-1620-17

Toronto, Ontario, April 18, 2019

PRESENT: Case Management Judge Kevin R. Aalto

BETWEEN:

DR. DAVID KATTENBURG

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

ORDER

UPON motion in writing filed by the Applicant, pursuant to Rule 369 of the *Federal Courts Rules*, for an Order allowing the Applicant to serve and file an additional affidavit in support of the Application;

AND UPON reading the motion record of the Applicant, the responding motion record of the Respondent and the Reply submissions of the Applicant; and upon considering the matter;

As the hearing of this matter is pending in May, it is essential to provide a decision to the parties. The motion is granted in part for the brief reasons herein.

This application concerns country-of-origin labelling as it relates to certain wine products produced on the West Bank which have been labelled as "Product of Israel". The decision by the Canadian Food Inspection Agency (CFIA) that the wines could be labelled as "Product of Israel". The application engages issues regarding food labelling, the Canada/Israel Free Trade Agreement (CIFTA), the *Canada Food and Drug Act,* and the *Canadian Consumer Packaging and Labelling Act*.

The Applicant seeks to file a supplementary affidavit attaching a number of documents obtained through an Access to Information request (ATIP). The ATIP request was made on August 18, 2017 and sought documents and communications as described in the notice of motion for the timeframe June 1, 2016 to the "present time". At the time of the ATIP request, the present time was August 18, 2017. Exhibits A and B to the supplementary affidavit are copies of the request and the covering letters in reply.

It was not until January 22, 2019 that the Applicant received a letter responding to the ATIP request and enclosing a CD containing numerous documents. There was no explanation as to why it took approximately 17 months to reply to the ATIP request. As in almost all Notices of Application for Judicial Review, an applicant makes a request for the production of documents in the possession of the respondents which are not in the possession of the applicant and which documents will form the Certified Tribunal Record. The documents received pursuant to the ATIP request are not contained in the Certified Tribunal Record. Only a select few are attached as exhibits to the proposed supplementary affidavit.

In extensive written submissions, the Applicant argues that the documents received pursuant to the ATIP request are directly relevant to the issues in this judicial review. The

Respondent, on the other hand, argues the documents were not before the decision-maker. What is apparent however from the documents themselves is that there are email exchanges dealing with the interpretation with the CIFTA which all goes to the question of the labelling of wines and spirits. It is also evident from a consideration of documents already produced that individuals who may have been copied on the documents now produced pursuant to the ATIP request were engaged in providing advice which resulted in the decision. In my view, those documents which are email exchanges, are relevant and should form part of the record before the hearings judge.

It is well known in judicial review proceedings that only documents before the decision-maker should form part of the record before the reviewing Court. There are, however, exceptions to that rule. The most useful summary of the evidence that should be before a reviewing Court and the exception is *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)* 2012 FCA 22 wherein the Honourable Mr. Justice David Stratas made the following observations:

> [19] Because of this demarcation of roles between this Court and the Copyright Board, this Court cannot allow itself to become a forum for fact-finding on the merits of the matter. Accordingly, as a general rule, the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the Board. In other words, evidence that was not before the Board and that goes to the merits of the matter before the Board is not admissible in an application for judicial review in this Court. As was said by this Court in *Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135 at pages 144-45 (C.A.), "[t]he essential purpose of judicial review is the review of decisions, not the determination, by trial *de novo*, of questions that were not adequately canvassed in evidence at the tribunal or trial court." See also *Kallies v. Canada*, 2001 FCA 376 at paragraph 3; *Bekker v. Canada*, 2004 FCA 186 at paragraph 11.

> [20] There are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review, and the list of exceptions may not be closed. These exceptions exist only in situations where the receipt of evidence by this Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker (described in paragraphs 17-18, above). In fact, many of these exceptions tend to facilitate or advance the role of the judicial review court without offending the role of the administrative decision-maker. Three such exceptions are as follows:
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> (a) Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review: see, *e.g.*, *Estate of Corinne Kelley v. Canada*, 2011 FC 1335 at paragraphs 26-27; *Armstrong v. Canada (Attorney General)*, 2005 FC 1013 at paragraphs 39-40; *Chopra v. Canada (Treasury Board)* (1999), 168 F.T.R. 273 at paragraph 9. Care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider. In this case, the applicants invoke this exception for much of the Juliano affidavit.
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> (b) Sometimes affidavits are 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 fulfil its role of reviewing for procedural unfairness: *e.g, Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980) 29 O.R. (2d) 513 (C.A.). For example, if it were discovered that one of the parties was bribing an administrative decision-maker, evidence of the bribe could be placed before this Court in support of a bias argument.
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> (c) Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding: *Keeprite*, *supra*.

In this case, at a minimum, the email exchanges provide general background information relating to a central issue in this judicial review. As noted by the Applicant in his written representations, the current record before the Court indicates that the decision-maker relied upon

information that was received from Global Affairs Canada (GAC). The email chains found at Exhibits C through M involve information and advice provided by GAC and other government departments. Those documents are allowed.

The document at Exhibit N post-dates the decision and in any event is for the most part a news report. It is not allowed. Exhibit O on the other hand, while post-dating the decision provides background to the issue. It is allowed. With respect to the remaining two Exhibits, being Exhibit P and Q, they clearly post-date the decision and relate to a charitable organization that was engaged in activities not recognized as charitable under Canadian law and therefore had their charitable status revoked by the Canada Revenue Agency (CRA). Exhibit Q is a letter from CRA dated March 18, 2018 regarding an audit of the charitable organization. It may be that these documents provide information about the interpretation of the *Income Tax Act* and charitable causes in Israel, but they are not relevant to the wine labelling issue which is the subject of this proceeding. They are not allowed.

At the hearing of this judicial review, it remains open to the Respondent to argue that the Exhibits which have been allowed are irrelevant and should not be considered. The Respondent also argued that given the lateness of the availability of these documents, there would be prejudice to allow any of them into the record. However, the Respondent has had these documents for many months. In order to be ready for the hearing, the Applicant indicated in its written submissions that it could provide supplementary written submissions on these documents within five days of the date of this Order. That would provide sufficient time for the Respondent to reply and to be ready for the hearing in May.

THIS COURT ORDERS that:

1. Exhibits A and B to the proposed affidavit of Dr. David Kattenburg are allowed.

2. Exhibits C through M and Exhibit O to the proposed affidavit of Dr. David Kattenburg are allowed without prejudice to the Respondent to be able to argue that the documents are irrelevant and should not be considered.

3. Exhibits N, P and Q are disallowed.

4. The Applicant, on or before April 29, 2019, shall provide any additional written submissions in respect of these documents which written submissions are limited to five (5) pages. The Respondent may reply to those written representations on or before May 7, 2019 which submissions shall also be limited to five (5) pages.

5. There shall be no costs of this motion.

"Kevin R. Aalto"
Case Management Judge