Court File No: T-1028-13

FEDERAL COURT

BETWEEN:

MARCUS BRAUER

Applicant

-and-

ATTORNEY GENERAL OF CANADA

Respondent

WRITTEN REPRESENTATIONS OF THE RESPONDENT

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The Deputy Attorney General of Canada, on behalf of the Respondent, submits as follows:

Overview

1. The Applicant is seeking the production of documents pursuant to Rule 317 of the *Federal Courts Rules*. The Respondent objects on the basis that the certified tribunal record as filed, represents a complete set of the documents that were before the decision-maker when she made the July 17, 2012 decision under review.

2. Accordingly, the Applicant's request for further production seeks extraneous documentation that was not before the decision-maker at the time of her decision, and which amounts to an impermissible request for documentary discovery, contrary to the principles of judicial review.

Part I - Issue

3. The fundamental obligation on the Respondent, to send everything that was before the decision-maker at the time the decision was made, has already been satisfied.

Part II – Written Representations

4. The Respondent maintains its objection to the request made by the Applicant for further and additional documents. The documents sought by the Applicant were not before the decision maker when she made the decision under review.

5. The Applicant's request should be examined in light of *Rule 317* of the *Federal Courts Rules*, and the basic principles and scope of judicial review.[1]

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[1] *Federal Courts Rules* SOR/98-106, R. 317; and *Federal Courts Act* (R.S.C., 1985, c.F-7) s. 18.1.

Certified Tribunal Record – What the Law States

6. With respect to obtaining a certified tribunal record, *Federal Courts Rule* 317 allows a party to request what is in effect the record from the tribunal:

> 317.(1) A party may request material relevant to an application that 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.

7. Once a Rule 317 request has been made, Rule 318 obligates the tribunal to transmit the requested material to the Federal Court Registry and to the party making the request within 20 days of receiving the request, or to provide reasons for objecting to the request, in which case the matter may be referred to the Court for further directions.

8. The "material relevant to the application" will be determined by reference to the stated grounds of judicial review. As the Federal Court of Appeal explained in *Canada* v. *Pathak*:

> A document is relevant to an application for judicial review if it may affect the decision that the court will make on the application. As the decision of the court will deal only with the grounds of review invoked by the applicant, the relevance of the documents requested must necessarily be determined in relation to the grounds for review set forth in the originating notice of motion and the affidavit filed by the applicant.[2]

9. However, the limited scope of judicial review means that requests under Rule 317 are not an avenue of discovery, and the limited content of the record applies to Rule 317 requests as well.[3] Therefore, only the material that was actually relied upon by the decision-maker forms part of the material to be produced in response to a request under Rule 317. For example, in a case where the Canadian Human Rights Commission relied on the investigator's final report in deciding not to refer a complaint to a formal inquiry – but

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[2] *Canada* v. *Pathuk*, [1995] 2 F.C. 455 at para 10.
[3] *Ibid.*, at para 4 (footnote 2).

not the documents considered by the investigator in preparing the report – the Federal Court of Appeal held:

> Only the report of the investigator and the representations of the parties are necessary matter for the Commission's decision. Anything else is in the discretion of the Commission. If the Commission, therefore, elects not to call for some document, that document cannot be said to be before it in its decision-making phase, as opposed to its investigation phase. It is therefore not subject to production as a document relied upon by the Commission in its decision, although it may well have been relied upon by the investigator in his report.[4]

10. More recently in *Spidel* v. *Canada (Attorney General)* 2011 FC 602, the Federal Court re-emphasized the law in respect of what constitutes a certified tribunal record for purposes of an application for judicial review. In that case, Justice Pinard stated the following:

> [10] It is settled law that the reviewing court may only take into account evidence that was before the decision maker when reviewing the decision, so as not to transform the review into an appeal by way of trial *de novo* (*Abbott Laboratories Ltd.* v. *Attorney General*, 2008 FCA 354 (CanLII), 2008 FCA 354, [2009] 3 F.C.R. 547, at paras 35-38). Additional evidence may be permitted where it is relevant to an issue concerning the hearing procedure or to allegation of bias (*Abbott* at para 38), but it is submitted that the evidence in this case does not fit within these exceptions.[5]

11. In *Tehrankari* v. *Canada (Attorney General),* 2010 FC 1302, the Federal Court was asked to consider an appeal from an order of Prothonotary Tabib where she determined that the respondent's objection to the applicant's request to certain materials pursuant to Rule 317 of the *Federal Courts Rules* was well founded. The request was made in the context of an application for judicial review pursuant to s. 18.1 of the *Federal Courts Act.*

12. In disposing of the motion, Madam Justice Bédard stated:

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[4] *Ibid.*, at para. 22.
[5] *Michael Aaron Spidel* v. *Canada (Attorney General),* 2011 FC 601 at para. 10.

> Rule 317 and 318 of the FCR are intended to ensure that the record that was before the tribunal when it made its decision is before the Court on judicial review (1185740 *Ontario* v. *Canada (Minister of National Revenue)* (1999), 247 NR 287, 91 ACWS (3d) 922 (FCA)). As Justice Rothstein indicated in *Ominayak* v. *Lubicon Lake Indian Nation* (2000), 267 NR 96, 102 ACWS (3d) 5 (FCA) at para 5:
>
> > In the absence of other evidence submitted by the parties in appropriate circumstances, a judicial review proceeds on the basis of the record before the tribunal whose decision is under review. It is generally not appropriate to order the tribunal to produce information beyond what was before it when it made its decision.
>
> There is no evidence to indicate that the CTR provided by the respondent is in any way incomplete in this regard.[6]

13. Similarly, in *Warren McDougall* v. *The Attorney General of Canada*, the Applicant appealed the order of Prothonotary Lafrenière denying his request to be provided with all of the requested material in the notice of application pursuant to section 317 of the *Federal Courts Rules*. In reaching its decision denying the Applicant's request for additional documents, Justice Mosley had this to say about the certified tribunal record:

> There is no evidence that the requested documents were before the SDC when he rejected the applicant's grievance.
>
> The applicant's document request amounts to a discovery of documents. This is not the purpose of a Rule 317 request. I agree with the respondent that the purpose of Rule 317 and Rule 318 is to limit discovery to documents which were before the decision-maker when the decision was made and which are not in the possession of the person making the request.
>
> This is consistent with the summary nature of judicial review. I find that the prothonotary correctly applied the above principles relating to Rule 317 in his order: *Access Information Agency Inc.* v. *Canada (Transport)*, 2007 FCA 224 (CanLII), 2007 FCA 224, [2007] F.C.J. No. 814, at paras. 20-21; *Beno* v. *Canada (Commission of Inquiry into the Deployment of Canadian Forces in Somalia - Letourneau Commission)*, 1997 CanLII 5116 (FC), (1997), 130 F.T.R. 183, [1997] F.C.J. No. 535, at paras. 15-17.[7]

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[6] *Allen Tehrankari* v. *The Attorney General of Canada*, 2010 FC 1302 at para. 16.
[7] *Warren McDougall* v. *The Attorney General of Canada*, 2009 FC 1286 at paras. 23-25.

Applying the Law

14. The documents before the decision-maker on July 17, 2012 when she made the decision under review were certified by Leslie S. C. Jones, Senior Policy and Program Analyst, Treasury Board of Canada Secretariat, and provided to this Honourable Court and the Applicant on July 2, 2013.

15. The Applicant is seeking the disclosure of additional documents that were not before the decision-maker at the time of the July 17, 2012 decision. It is generally not appropriate to order a decision-maker to produce information above and beyond that which was before it when the decision under review was made.

16. There is no evidence that the requested documents were before the decision-maker on July 17, 2012 when she made the decision. In the absence of other evidence, the material before the decision-maker on July 17, 2012, when she made the decision, is the certified tribunal record pursuant to Rule 317 of the *Federal Courts Rules*.

17. The fundamental obligation on the decision-maker, to include in a certified record all documents that were before the decision-maker at the time the decision was made, has already been satisfied.

Part III - Relief Sought

18. The Respondent respectfully requests that its objection to producing additional documents, beyond those that were before the decision maker when she made the decision under review, be sustained.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Halifax, Nova Scotia, this 20th day of September, 2013.

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Part IV - List of Authorities

Statues & Regulations

A. *Federal Courts Act* (R.S.C., 1985, c.F-7), section 18.1

B. *Federal Courts Rules* SOR/98-106, Rule 309, 310, 317 & 318.

Jurisprudence

C. *Allen Tehrankari v. The Attorney General of Canada*, 2010 FC 1302.

D. *Canada v. Pathuk*, [1995] 2 F.C. 455.

E. *Michael Aaron Spidel v. Canada (Attorney General)*, 2011 FC 601.

F. *Warren McDougall v. The Attorney General of Canada*, 2009 FC 1286.