

FEDERAL COURT

BETWEEN:

MARCUS BRAUER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

RESPONDENT'S WRITTEN REPLY SUBMISSIONS

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RESPONDENT'S WRITTEN REPLY SUBMISSIONS

The Deputy Attorney General of Canada, on behalf of the Respondent, submits the following in reply to the Applicant's Written Submissions dated October 2, 2013:

PART I – OVERVIEW

1. It is the Respondent's position that the Applicant's Written Submissions have mischaracterized the nature of the evidence presently contained in the certified record. In particular, the Respondent states that there is no evidence to suggest that any documents other than those provided in the certified tribunal record were before the decision maker and thus no basis upon which to order further document production in the present case.

PART II – LAW AND ARGUMENT

2. Paragraph 11 of the Applicant's Written Submissions states that the certified tribunal record as provided by the Respondent is only sufficient "if there were no other documents before the decision-maker." It is evident that other documents were before the decision-maker. The Respondent states that the assertion other documents beyond those provided in the certified tribunal record were before the decision-maker is incorrect on the face of the evidence and ignores case law regarding the nature of documents that are considered to be before the decision-maker.
3. It is a well established principle of administrative law that decision-makers are entitled to delegate work related to the decision at issue. This includes delegation

to researchers.¹

4. Furthermore, the fact that a decision-maker could access documents is not in and of itself proof that the documents in question were actually before the decision-maker. Instead, the onus is on the Applicant to provide some evidence that the supporting documentation was either incorrectly summarized or otherwise attached to the documentation that was provided to the decision-maker.²
5. At paragraph 10 of the written submissions, the Applicant indicates that the documentation provided in the certified record is “paltry”. The Applicant then goes on at paragraph 13 to review the contents of the certified record and refers extensively to documentation summarized in the recommendation Memo of May 31, 2012 as well as the letter dated July 17, 2012 which communicates the decision in question.
6. A review of the evidence in the certified tribunal record clearly shows that the decision-maker relied on summaries of the documentation in question. Nevertheless, there is absolutely no evidence that this documentation was in any way attached to the Memo, or the letter, or otherwise before the decision-maker at the time the decision at issue was actually made.
7. Furthermore, the Applicant has not provided the Court with any evidence upon which it can say that these summaries are incorrect.
8. As a result, the Applicant has failed to adduce any evidence that indicates the supporting documentation was either incorrectly summarized or was actually before the decision-maker at the time the decision in question was made. The

¹ *Canada v. Pathak*, [1995] 2 F.C. 455 at para 18 (quoting from *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879) [Hereinafter «*Pathak* »]; *Access to Information Agency Inc. v. Canada (Transport)*, 2007 FCA 224 at para 18.

Respondent therefore submits that, contrary to the Applicant's submissions, there is no evidence upon which to conclude that the certified tribunal record is incomplete.

PART III – CONCLUSION

9. In conclusion, the Respondent respectfully repeats the request contained in its original Written Representations, that this Honourable Court sustain the Respondent's objection to producing additional documents, beyond those that were before the decision-maker when she made the decision at issue in the present application for judicial review.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Halifax, Province of Nova Scotia, this 7 day of October, 2013.



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² *Pathak, ibid.* at para 21; *1185740 Ontario Ltd. v. Minister of National Revenue*, 1999 CarswellNat 1738 at para 5 (F.C.A.).

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