Federal Court of Appeal | Cour d'appel fédérale

Date: 20221209

Docket: A-25-22

Citation: 2022 FCA 216

CORAM: **GLEASON J.A.**
MACTAVISH J.A.
MONAGHAN J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

MOSAIC FOREST MANAGEMENT CORPORATION, TIMBERWEST FOREST COMPANY and ISLAND TIMBERLANDS LIMITED COMPANY

Respondents

Heard at Toronto, Ontario, on October 4, 2022.

Judgment delivered at Ottawa, Ontario, on December 9, 2022.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: MACTAVISH J.A.
MONAGHAN J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] The appellant, the Attorney General of Canada (the AGC), appeals and the respondents, collectively termed Mosaic, cross-appeal from the Order of the Federal Court in *Mosaic Forest Management Corporation v. Canada (Attorney General)*, 2021 FC 1488, 342 A.C.W.S. (3d) 348. In that Order, Fuhrer J. (the Federal Court Judge) dismissed an appeal from an unreported

speaking Order issued on August 20, 2021, in Federal Court File T-773-20 by Associate Judge Aalto, who was acting as a case management judge (the Case Management Judge). In his speaking Order, the Case Management Judge granted in part the AGC's motion to strike certain affidavits filed by Mosaic in support of its application to review a decision of the Minister of Foreign Affairs that denied Mosaic's applications for permits to export logs to China and Japan.

[2] The Case Management Judge found that the portions of the affidavits in respect of which Mosaic has cross-appealed before this Court constituted opinion evidence but were not proffered by an expert in conformity with the requirements governing expert evidence contained in the *Federal Courts Rules*, S.O.R./98-106 (the Rules). The Case Management Judge therefore concluded that these portions of the affidavits should be struck out.

[3] While the reasons of the Case Management Judge are not as clear as they might have been, I am satisfied that he declined to strike the remaining portions of the affidavits impugned by the AGC because their admissibility was best left to the judge hearing the judicial review application on the merits. Thus, the Case Management Judge's comments on the admissibility of these portions of the affidavits should be read as non-binding *obiter dicta*.

[4] The Federal Court Judge found no basis to interfere with the Case Management Judge's speaking Order, which she characterized as being discretionary in nature. She accordingly applied the review standard of palpable and overriding error, found that the Case Management Judge made no such error, and dismissed the appeal.

[5] Before this Court, the normal appellate standard of review applies. As such, we must determine whether the Federal Court Judge erred in law or otherwise made a palpable and overriding error in refusing to interfere with the Case Management Judge's speaking Order: *Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras. 83–84, 402 D.L.R. (4th) 497.

[6] Insofar as concerns the AGC's appeal, I am of the view that the Federal Court made no such error. The Federal Court correctly characterized as discretionary the Case Management Judge's decision to defer the admissibility of portions of the impugned affidavits to the application judge hearing the merits of the judicial review application (*Bernard v. Canada (Revenue Agency)*, 2015 FCA 263 at para. 10, 261 A.C.W.S. (3d) 441). The Federal Court Judge thus selected the correct standard of review to be applied to this part of the Case Management Judge's speaking Order.

[7] Nor do I see any palpable and overriding error in the Case Management Judge's declining to strike portions of the affidavits that the AGC says ought to have been struck out or any error in the Federal Court Judge's declining to interfere with this part of the Case Management Judge's speaking Order.

[8] The issues in the underlying application in this matter involve not only a review of the ministerial decision but also an allegation that the listing of all species of logs on the Export Control List, established pursuant to the *Export and Import Permits Act*, R.S.C. 1985, c. E-19, is *ultra vires* the provision pursuant to which the listing is authorized. Much of the impugned

evidence relates to Mosaic's *vires* argument. The AGC's position is that the *vires* of the listing is to be assessed as of the time it was made. For this reason, among others, he contests the admissibility of the impugned evidence, which post-dates the listing. Mosaic disagrees. The merits of the *vires* argument are thus closely intertwined with the admissibility of the evidence the AGC impugns.

[9] Given the deferential nature of the standard of review applicable to this portion of the Case Management Judge's decision, how closely the admissibility issue is tied to the merits of Mosaic's judicial review application, and the frequent preference for leaving these sorts of issues to an application judge (as noted, for example, in *Gravel v. Telus Communications Inc.*, 2011 FCA 14, 218 A.C.W.S. (3d) 478), I see no palpable and overriding error in declining to strike the portions of the affidavits that the AGC impugns. The AGC will be able to make admissibility arguments related to the proper scope of evidence relevant to the *vires* issue or otherwise admissible on a judicial review application before the application judge, charged with hearing the merits of Mosaic's application.

[10] Since the admissibility of evidence relevant to the *vires* issue was left to be decided by the application judge, contrary to what the AGC asserts, the Case Management Judge was not required to analyze whether the impugned affidavits are admissible in respect of Mosaic's *vires* argument.

[11] I would therefore dismiss the AGC's appeal because he has failed to demonstrate a palpable and overriding error in the Orders below.

[12] As concerns Mosaic's cross-appeal, the issue is different and, contrary to what the Federal Court Judge found, raises, at least in part, a question of law because Mosaic submits that the Case Management Judge erred in striking portions of the affidavits as being inadmissible opinion evidence when they are not.

[13] I agree with the parties that the issue of whether evidence is inadmissible opinion evidence raises a question of law, reviewable for correctness, where what is at issue is the legal test for delineating inadmissible opinion evidence. As recently noted by my colleague de Montigny J.A. in *Sweet Productions Inc. v. Licensing LP International S.À.R.L.*, 2022 FCA 111 at para. 22, [2022] F.C.J. No. 862 (QL), "[…] the standard of review for admissibility of evidence is generally correctness, to the extent that the alleged error relates to the applicable legal test and principles."

[14] I turn now to consideration of the applicable legal principles and their application to the case at hand.

[15] Opinion evidence may be characterized as evidence where a witness offers an inference from observed facts as opposed to evidence of the witness' own first-hand factual observations. The following excerpt from Paciocco, Paciocco & Stuesser, *The Law of Evidence*, 8th ed. (Toronto: Irwin Law, 2020) at 233–34, provides a useful discussion of the difference between factual and opinion evidence:

> An inference from observed fact is different than the observed fact itself. A witness who says a wound was life-threatening, for example, is drawing an

> inference from an observed fact and is therefore offering an opinion. If that same witness merely describes the wound by saying either "the victim had a wound in his neck" or "the carotid artery was severed," that witness is simply reporting an observed fact.

[16] There are two exceptions to the general rule that opinion evidence is inadmissible.

[17] First, non-expert witnesses may offer their observations in the form of opinion where: (1) they are in a better position than the trier of fact to form a conclusion; (2) the conclusion is one that a lay person can make; (3) the witness has the necessary experience to draw the conclusion; and (4) the opinion is a "compendious mode of stating facts that are too subtle or complicated to be narrated as effectively without resort to conclusions" (*The Law of Evidence* at 239; *Graat v. The Queen*, [1982] 2 S.C.R. 819 at 837, 840, 144 D.L.R. (3d) 267 [*Graat*]; *Toronto Real Estate Board v. Commissioner of Competition*, 2017 FCA 236 at para. 79, 286 A.C.W.S. (3d) 369; *Hunt (Litigation guardian of) v. Sutton Group Incentive Realty Inc.* (2002), 162 O.A.C. 186 at para. 17, 215 D.L.R. (4th) 193 (ONCA)).

[18] Second, properly qualified experts may offer opinions as to certain matters where they possess the specialized training or expertise required to provide inferences beyond the ability of the trier of fact to draw. In the Federal Court, as noted by the Case Management Judge, rule 52.2 of the Rules requires, among other things, that an affidavit of an expert witness set out the expert's qualifications and be accompanied by a certificate confirming the expert's agreement to conform to the Code of Conduct for Expert Witnesses set out in the Schedule to the Rules.

[19] Turning to the paragraphs struck out from the affidavit of Mr. Lee, these paragraphs are not opinion evidence at all but rather merely attach and provide a summary of data drawn from a report from Statistics Canada that is attached to Mr. Lee's affidavit as an exhibit. No opinion whatsoever is proffered in the impugned paragraphs. As in *The Owners, Strata Plan NES 97 v. Timberline Developments Ltd.*, 2011 BCCA 421 at paras. 45–46, 24 B.C.L.R. (5th) 234, and in *R. v. Ajise*, 2018 ONCA 494 at para. 23, 428 D.L.R. (4th) 586, aff'd on other grounds, 2018 SCC 51, [2018] 3 S.C.R. 301, upon which Mosaic relies, compilations or explanations of data drawn from exhibits—like those contained in the impugned paragraphs of Mr. Lee's affidavit—do not constitute opinion evidence.

[20] The AGC made the suggestion before us that the Statistics Canada report appended to the Lee affidavit that Mr. Lee summarizes is inadmissible on the additional ground of being inadmissible hearsay evidence. It is unclear whether the hearsay objection was pursued before the Case Management Judge. That said, it is clear that the hearsay issue was not pursued before the Federal Court Judge, since there is no mention of any error in respect of hearsay in the AGC's Notice of Motion to the Federal Court Judge seeking to set aside the Case Management Judge's speaking Order. Nor is it dealt with by the Federal Court Judge in her reasons. In light of the AGC's failure to raise the hearsay issue before the Federal Court Judge, the issue cannot be revived on appeal before this Court.

[21] I therefore conclude that the Case Management Judge erred in striking paragraphs from Mr. Lee's affidavit.

[22] As concerns the paragraphs struck out from the affidavit of Mr. Gough, in paragraphs 25 to 29 of his affidavit, Mr. Gough provides evidence of Mosaic's own sales data that he offers as Mosaic's Chief Commercial Officer. As Mosaic rightly notes, this is not opinion at all but rather first-hand factual evidence with which the affiant presumably is familiar. The Case Management Judge thus erred in holding that these paragraphs constituted opinion evidence.

[23] The remaining paragraphs struck out from the affidavits of Mr. Gough and from the first affidavit of Mr. Kaps contain two sorts of statements.

[24] On one hand, some of these paragraphs are similar to the impugned paragraphs in Mr. Lee's affidavit. They attach and summarize data drawn from reports or industry subscriptions: the *Madison's BC Coastal Log Prices* report and the subscription from RSI Inc. known as Fastmarkets RSI, in the case of Mr. Gough, and a series of reports generated from the B.C. Ministry of Forests, Lands, Natural Resource Operations and Rural Development and WoodX.com, in the case of Mr. Kaps' first affidavit.

[25] On the other hand, other paragraphs or portions of paragraphs express opinions. For example, in paragraph 17 of his affidavit, Mr. Gough offers the view that the prices for both the domestic and export markets for logs harvested in the Pacific Northwest region of the United States are comparable. Similarly, in paragraph 81 of his first affidavit, Mr. Kaps provides an estimate of the cost another company would incur in cutting and engaging in certain processing operations for the logs it cuts in British Columbia. Mr. Kaps provides the estimate based on his 29 years' experience in the forestry industry. Other expressions of opinion are interspersed

through paragraphs 70 to 81 of the first Kaps affidavit and paragraphs 9 to 24 and 30 to 35 of the Gough affidavit.

[26] Arguably, these sorts of opinions are the sort of evidence witnesses with many years experience in the forestry industry, like Messrs. Gough and Kaps, may be entitled to offer as lay opinion evidence. They are perhaps similar to the views, for example, of a police officer about matters within police training and expertise, such as opining on the practices of drug couriers, which were found to be admissible as non-expert lay opinion evidence in *R. v. MacKenzie*, 2013 SCC 50 at paras. 55–65, 363 D.L.R. (4th) 381; and *R. v. Nolet*, 2010 SCC 24 at para.48, 320 D.L.R. (4th) 1.

[27] In *Graat*, the Supreme Court of Canada noted at pages 839 to 840 that it is for the trier of fact to decide whether to admit lay opinion evidence and to determine what weight to give it.

[28] Many of the paragraphs struck out from the affidavits of Mr. Gough and the first affidavit of Mr. Kaps are similar in kind to other evidence that the Case Management judge declined to strike. In this regard, there is no meaningful difference between paragraphs 40 to 69 of the first Kaps affidavit (that the Case Management Judge declined to strike) and paragraphs 70 to 81 of the same affidavit and paragraphs 9 to 24 and 30 to 35 of the Gough affidavit (that the Case Management Judge struck out).

[29] Given the disparate treatment afforded to evidence of similar ilk, as well as the nature of the lay opinion evidence at issue, it is my view that the Case Management judge erred in ruling

on the admissibility of paragraphs 70 to 81 in the first Kaps affidavit and of paragraphs 9 to 24 and 30 to 35 of the Gough affidavit. The issue of their admissibility should have been left to the application judge, who will be better placed to draw the line between admissible and inadmissible lay opinion evidence, as, by then, the affiants presumably will have been cross-examined and responding materials will have been filed.

[30] I accordingly conclude that the Case Management Judge made a reviewable error in striking out paragraphs from the affidavits of Messrs. Lee and Gough and from the first affidavit of Mr. Kaps. Thus, these portions of the Case Management Judge's Order must be set aside.

[31] For sake of clarity, however, I note that it remains open to the AGC to contest the admissibility of these paragraphs before the application judge on the basis that they are inadmissible opinion evidence. In addition, as already noted, it remains open to the AGC to renew before the application judge his motion to set aside all the evidence the AGC impugns on the broader grounds that it is inadmissible on an application for judicial review, because it was not before the Minister, or irrelevant to the *vires* argument.

[32] Consequently, I would dismiss the appeal and grant the cross-appeal, set aside the Order of the Federal Court and vary the speaking Order of the Case Management Judge to dismiss the AGC's motion, without prejudice to him to renew it before the application judge in accordance with these Reasons.

[33] On the issue of costs, the costs award of the Case Management Judge stipulated that costs were in the cause, and I see no reason to vary that part of the Case Management Judge's speaking Order, which is highly discretionary. As Mosaic did not seek its costs before the Federal Court and none were awarded by the Federal Court, I would award none in respect of the appeal to the Federal Court Judge. Before this Court, I would rule that costs in respect of the AGC's appeal and Mosaic's cross-appeal are in the cause as most issues remain to be decided by the application judge.

"Mary J.L. Gleason"
J.A.

"I agree.
MACTAVISH J.A."

"I agree.
MONAGHAN J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-25-22
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CONCURRED IN BY:	MACTAVISH J.A. MONAGHAN J.A.
DATED:	DECEMBER 9, 2022

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