Federal Court Cour fédérale

Date: 20250129

Docket: T-1725-23

Citation: 2025 FC 181

Ottawa, Ontario, January 29, 2025

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

MOBILE TELESYSTEMS PUBLIC JOINT STOCK COMPANY

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant Mobile TeleSystems Public Joint Stock Company [MTS] appeals an Order of Associate Judge John Cotter, made in his capacity as Case Management Judge [CMJ]. The CMJ granted a motion by the Attorney General of Canada [AGC] to strike MTS' Notice of Application without leave to amend.

[2] The CMJ determined that s 8 of the *Regulations Amending the Special Economic Measures (Russia) Regulations*, SOR/2023-163 [Regulations] provided MTS with an adequate alternative remedy that it had yet to exhaust. He therefore concluded that the application for judicial review was bereft of any chance of success.

[3] For the reasons that follow, the CMJ's decision to strike MTS' Notice of Application without leave to amend was factually supported and legally correct. The appeal is dismissed.

II. Background

[4] MTS is Russia's largest civil mobile and fixed telecom operator. It offers a wide range of telecommunications services, both inside and outside of Russia, including telephone services, local voice services, broadband services and wireless services.

[5] The Regulations were enacted pursuant to the *Special Economic Measures Act*, SC 1992, c-17 [SEMA], and came into force on March 17, 2014. The Regulations impose economic sanctions on persons (individuals or entities) listed in Schedule 1 of the Regulations [Sanctions List]. Any person in Canada, and any Canadian outside Canada, is prohibited from engaging in specified financial transactions and activities with persons on the Sanctions List.

[6] Under s 2 of the Regulations, a person can be included in the Sanctions List if the Governor in Council [GIC], on the recommendation of the Minister of Foreign Affairs [Minister], is satisfied that there are reasonable grounds to believe the person falls into one of the

categories listed in s 2. Neither the SEMA nor the Regulations provide persons with a right to advance notice that they will be added to the Sanctions List, or an opportunity to make submissions prior to the decision to list. Instead, s 8 sets out the process by which persons may apply to have their names removed from the Sanctions List.

[7] Sections 2 and 8 of the Regulations provide as follows:

2. A person whose name is listed in Schedule 1 is a person in respect of whom the Governor in Council, on the recommendation of the Minister, is satisfied that there are reasonable grounds to believe is	2. Figure sur la liste établie à l'annexe 1 le nom de personnes à l'égard desquelles le gouverneur en conseil est convaincu, sur recommandation du ministre, qu'il existe des motifs raisonnables de croire qu'elles sont l'une des personnes suivantes :
(a) a person engaged in activities that directly or indirectly facilitate, support, provide funding for or contribute to a violation or attempted violation of the sovereignty or territorial integrity of Ukraine or that obstruct the work of international organizations in Ukraine;	a) une personne s'adonnant à des activités qui, directement ou indirectement, facilitent une violation ou une tentative de violation de la souveraineté ou de l'intégrité territoriale de l'Ukraine ou procurent un soutien ou du financement ou contribuent à une telle violation ou tentative ou qui entravent le travail d'organisations internationales en Ukraine;
(a.1) a person who has participated in gross and systematic human rights violations in Russia;	a.1) une personne ayant participé à des violations graves et systématiques des droits de la personne en Russie;

(b) a former or current senior official of the Government of Russia;	b) un cadre supérieur ou un ancien cadre supérieur du gouvernement de la Russie;
(c) an associate of a person referred to in any of paragraphs (a) to (b);	c) un associé d'une personne visée à l'un des alinéas a) à b);
(d) a family member of a person referred to in any of paragraphs (a) to (c) and (g);	d) un membre de la famille d'une personne visée à l'un des alinéas a) à c) et g);
(e) an entity owned, held or controlled, directly or indirectly, by a person referred to in any of paragraphs (a) to (d) or acting on behalf of or at the direction of such a person;	e) une entité appartenant à une personne visée à l'un des alinéas a) à d) ou détenue ou contrôlée, même indirectement, par elle ou pour son compte ou suivant ses instructions;
(f) an entity owned, held or controlled, directly or indirectly, by Russia or acting on behalf of or at the direction of Russia; or	f) une entité appartenant à la Russie ou détenue ou contrôlée, même indirectement, par elle ou pour son compte ou suivant ses instructions;
(g) a senior official of an entity referred to in paragraph (e) or (f).	g) un cadre supérieur d'une entité visée aux alinéas e) ou f).
[…]	[…]
8 (1) A person may apply in writing to the Minister to have their name removed from Schedule 1, 2 or 3.	8 (1) Toute personne dont le nom figure sur la liste établie aux annexes 1, 2 ou 3 peut demander par écrit au ministre d'en radier son nom.

[8] On July 19, 2023, the Regulations were amended to add MTS to the Sanctions List. MTS commenced an application for judicial review on August 18, 2023, asserting that its addition to the list was procedurally unfair, unreasonable, and *ultra vires* the powers conferred on the Minister and GIC by the SEMA. MTS did not apply under s 8 to remove its name from the Sanctions List.

[9] On October 31, 2023, the AGC filed a motion to strike MTS' Notice of Application on the ground that it was premature.

[10] On August 8, 2024, the CMJ granted the AGC's motion and struck MTS' Notice of Application without leave to amend, because MTS had not yet availed itself of the process provided by s 8 of the Regulations [CMJ Order].

III. Issue

[11] The sole issue raised by this appeal is whether the CMJ Order was factually supported and legally correct.

IV. Analysis

[12] A discretionary order of an associate judge is subject to appeal in accordance with the standards articulated by the Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33 (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira*] at para 2). Questions of law are reviewed against the standard of correctness, and

findings of fact or mixed fact and law may be revisited only where there is palpable and overriding error (*Hospira* at paras 66, 79).

[13] The palpable and overriding error standard is highly deferential. “Palpable” means an obvious error, while an “overriding” error is one that affects the decision-maker’s conclusion (*Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at paras 61-64).

[14] In the context of an appeal under Rule 51, “a case management judge is assumed to be very familiar with the particular circumstances and issues in a proceeding”, and their “decisions are afforded deference, especially on factually-suffused questions” (*Hughes v Canada (Human Rights Commission)*, 2020 FC 986 at para 67).

[15] The CMJ applied the legal test for striking a notice of application on a preliminary motion described in *JP Morgan Asset Management (Canada) Inc v Canada (National Revenue)*, 2013 FCA 250 [*JP Morgan*] and *Iris Technologies Inc. v Canada*, 2024 SCC 24 [*Iris Technologies*]. In *JP Morgan* the Federal Court of Appeal (*per* Stratas JA) said the following at paragraph 47:

> The Court will strike a notice of application for judicial review only where it is “so clearly improper as to be bereft of any possibility of success” [footnote omitted]: *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, 1994 CanLII 3529 (FCA), [1995] 1 F.C. 588 (C.A.), at page 600. There must be a “show stopper” or a “knockout punch”—an obvious, fatal flaw striking at the root of this Court’s power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117, at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286, at paragraph 6; *Hunt v. Carey Canada Inc*., 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959.

[16] In *Iris Technologies*, the Supreme Court of Canada (*per* Kasirer J) observed at paragraph 26:

> […] A court seized of a motion to strike assumes the allegations of fact set forth in the application to be true and an application for judicial review will be struck where it is bereft of any possibility of success (*JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557, at para. 47). It is understood to be a high threshold and will only be granted in the "clearest of cases" (*Ghazi v. Canada (National Revenue)*, 2019 FC 860, 70 Admin L.R. (6th) 216, at para. 10).

[17] MTS challenges the CMJ Order on numerous grounds. None of these is persuasive.

A. *The Kanargelidis Affidavit*

[18] The parties filed three affidavits in the motion to strike: the affidavit of Rabia Chauhan on behalf of the AGC [Chauhan Affidavit], the affidavit of Greg Kanargelidis on behalf of MTS [Kanergelidis Affidavit], and the responding affidavit of Antonella Gullia [Reply Affidavit]. Mr. Kanargelidis is a lawyer for MTS in these proceedings, but did not represent MTS in the motion.

[19] The CMJ noted that, while affidavits are generally not admissible on motions to strike, they may be permitted when "the justifications for the general rule of inadmissibility are not undercut, and the exception is in the interests of justice" (citing *JP Morgan* at paras 51-53).

[20] The CMJ held that the Kanargelidis Affidavit was "replete with opinion, argument and irrelevant information" (CMJ Order at para 10). He also noted that the use of evidence on

matters of substance from a member of a party's law firm was cause for concern (citing *Subway IP LLC v Budway, Cannabis & Wellness Store*, 2021 FC 583 at para 15).

[21] The CMJ held that the affidavit was written in the style of an expert report, but without adherence to the Code of Conduct prescribed by Rule 52.2 of the *Federal Courts Rules*, SOR/98-106. The CMJ found the Kanargelidis Affidavit to be largely inadmissible, with the exception of Exhibits "D" and "E" that were also contained in the Chauhan Affidavit. He also found the use of a Senate Committee report to be irrelevant and inadmissible (citing *Mohr v National Hockey League*, 2022 FCA 145, leave to appeal to SCC ref'd, 2023 CanLII 31588 (SCC) [*Mohr*]). The CMJ struck the Kanargelidis Affidavit, and gave no weight to the Reply Affidavit.

[22] MTS maintains that the CMJ should not have struck the Kanargelidis Affidavit in its entirety. The AGC did not bring a motion to strike the affidavit, and instead filed an affidavit in reply. According to MTS, Mr. Kanargelidis testified about facts he had observed in the course of his professional experience, and his opinions were admissible in this context. In the alternative, MTS argues that the CMJ should have struck only certain portions of the Kanargelidis Affidavit, or given less weight to any contentious expressions of opinion.

[23] MTS notes that a fact witness can give admissible opinion evidence in certain circumstances (citing *Graat v The Queen*, [1982] 2 SCR 819 [*Graat*] at 835; *Toronto Real Estate Board v Canada (Commissioner of Competition)*, 2017 FCA 236 [*Toronto Real Estate Board*] at para 79).

[24] In his affidavit, Mr. Kanargelidis states that:

(a) the lack of reasons provided in the GIC's decision to add a person to the Sanctions List prevents applicants from being able to effectively apply for delisting;

(b) based on his years of experience, "it is not possible to legitimately challenge a sanction where, like here, the bases for the sanction are unknown"; and

(c) "the procedures followed by the Minister in considering delisting applications are cloaked in secrecy", and therefore "problematic".

[25] Opinion evidence from lay witnesses is acceptable in limited circumstances: where the witness is in a better position than the trier of fact to form the conclusions; the conclusions are ones that a person of ordinary experience can make; the witnesses have the experiential capacity to make the conclusions; or where giving opinions is a convenient mode of stating facts too subtle or complicated to be narrated as facts (*Toronto Real Estate Board* at para 79; *Graat* at 835, 840). However, as the evidence approaches the central issues the court must decide, resistance to admissibility increases (*R v Kruk*, 2024 SCC 7, concurring reasons at para 149). Here, the Kanargelidis Affidavit was concerned primarily with the adequacy of the alternative remedy prescribed by legislation.

[26] Questions of law fall within the purview of the Court's expertise. The admission of opinion evidence on these matters has the potential to usurp the role of the judge (*International Air Transport Association v Canadian Transportation Agency*, 2022 FCA 211 at para 52).

[27] The conclusions in the Kanargelidis Affidavit are not ones that a person of ordinary experience can express. Mr. Kanargelidis reviews his qualifications and experience at some length before providing the assurance that he has the requisite "experiential capacity to prove the evidence" discussed in the affidavit. An opinion that is premised on professional qualifications or specialized knowledge is not a lay opinion.

[28] While the Court may accept affidavits from members of parties' law firms on non-controversial matters, it will be reluctant to accept or give weight to evidence where an affidavit addresses matters in dispute or expresses opinions (*Ab Hassle v Apotex Inc*, 2008 FC 184 at para 46, aff'd, 2008 FCA 416; see also *Cross-Canada Auto Body Supply (Windsor) Ltd v Hyundai Auto Canada*, 2006 FCA 133 at paras 5-7).

[29] In addition, the evidence in the Kanargelidis Affidavit regarding delay in other proceedings under s 8 of the Regulations was irrelevant. As the CMJ determined, evidence of delay may undermine the effectiveness of a remedy only where that evidence relates to the particular case before the Court (CMJ Order at para 13, citing *Xanthopoulos v Canada (Attorney General)*, 2020 FC 401 at paras 20-21; aff'd, 2022 FCA 79).

[30] The Kanargelidis Affidavit refers to a report by the Senate Standing Committee on Foreign Affairs and International Trade [Senate Report]. MTS says the CMJ was wrong to find that the Senate Report was irrelevant and inadmissible. I disagree.

[31] While records of parliamentary committee proceedings may help to inform the evolution and legislative history of a law, the testimony of witnesses may be aspirational, disputable or of arguable relevance (*Mohr* at para 63). As the CMJ found, the Senate Report was not provided to help the Court discern legislative intent, but only to criticize s 8 of the Regulations.

[32] Furthermore, offering the Senate Report as evidence on a disputed issue is incompatible with parliamentary privilege. As Justice Jocelyne Gagné held in *Thompson v Canada*, 2024 FC 1414 (at para 13):

> The impugned documents are arguably proceedings of the Senate and, as such, would be protected by parliamentary privilege. […] by admitting into evidence Senate proceedings in an attempt to establish controversial facts in litigation, courts could impeach and question those proceedings. […] parliamentary privilege serves to protect the integrity of committee work by protecting senators and witnesses against any liability for what they say in committee proceedings and by ensuring that outside bodies such as the courts do not impeach or question their work […]

[33] The CMJ did not err in striking the Kanargelidis Affidavit from the record.

B. *The Strickland Decision*

[34] MTS says the CMJ should have applied the legal framework established in *Strickland v Canada (Attorney General)*, 2015 SCC 37 [*Strickland*], but instead undertook "a contrived analysis focused solely on the purported efficacy" of the process prescribed by s 8 of the Regulations. According to MTS, the Supreme Court of Canada's decision in *Yatar v TD Insurance Meloche Monnex*, 2024 SCC 8 [*Yatar*] confirms that *Strickland* remains good law.

[35] *Strickland* and *Yatar* concerned circumstances where a court declined to exercise judicial review altogether, either in favour of another forum (*Strickland*) or in favour of another remedy (*Yatar*). Neither case addresses the Court's discretion to strike a notice of application on the ground of prematurity.

[36] The Federal Court of Appeal confirmed in *Gupta v Canada (Attorney General)*, 2021 FCA 202 that *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 [*CB Powell*] continues to be the governing authority for assessing the adequacy of an alternative remedy that has yet to be exhausted, notwithstanding *Strickland*. *Yatar* may be distinguished for the same reason.

[37] The CMJ did not err in applying *CB Powell* rather than *Strickland* to decline jurisdiction on the ground of prematurity.

C. *Reconsideration as an Inadequate Remedy*

[38] MTS disputes the CMJ's finding that the remedy provided by s 8 of the Regulations does not amount to the GIC's reconsideration of its previous decision. Both the initial decision to add a person to the Sanctions List and the Minister's recommendation under s 8 involve determinations by the GIC. According to MTS, in both instances the *de facto* decision maker is the Minister.

[39] MTS emphasizes the "burden" of the initial decision on the manner in which the s 8 process is likely to unfold (citing *Harelkin v University of Regina* [1979] 2 SCR 561 at 564;

Ellis-Don Ltd v Ontario (Labour Relations Board), 2001 SCC 4 at paras 57, 94; *Rogers Communications Canada Inc v Metro Cable TV Maintenance*, 2017 FCA 127 at para 17).

[40] The CMJ found that the power to make a decision under s 2 of the Regulations is explicitly conferred upon the GIC. Pursuant to s 8, the Minister must decide whether to make a recommendation to the GIC that a person's name be removed from the Sanctions List. These are separate decisions by different decision makers.

[41] Under s 8(3) of the Regulations, the Minister "must" render a decision. The power to reconsider recognized in the jurisprudence is typically more restrained and exceptional (*Buenaventura v Telecommunications Workers Union*, 2012 FCA 69 [*Buenaventura*] at para 31). Furthermore, an applicant under s 8 of the Regulations may submit new evidence and information. This fundamentally distinguishes the decision made by the Minister under s 8 from the initial decision of the GIC to add a person to the Sanctions List, which is done without notice or an opportunity to respond.

[42] As the Federal Court of Appeal held in *Buenaventura* (*per* Sharlow JA at para 30):

> […] a statutory right of appeal may be a robust remedy if the appeal must be heard by a body that is separate from the initial decision maker and the mandate of the appeal body is to consider the matter *de novo*. In such a case it could be said that the burden of the initial decision is small […]

[43] The CMJ did not err in finding that the remedy provided by s 8 of the Regulations does not amount to the GIC's reconsideration of its own previous decision.

D. *The Essential Character of the Dispute*

[44] The CMJ said the following about the essential character of the dispute (CMJ Order at paras 27-28):

> As stated in *JP Morgan* "in considering a motion to strike, the Court must read the notice of application with a view to understanding the real essence of the application" and the "Court must gain 'a realistic appreciation' of the application's 'essential character' by reading it holistically and practically without fastening onto matters of form" (see paragraphs 49 and 50). The essence of the application is reflected in paragraph 31 of the notice of application:
>
> > 31. As a result of the deficiency of the Decision, including its lack of justiciability and reasonableness, as well as the significant breaches of MTS PJSC's right to natural justice and procedural fairness, the only proper and appropriate outcome in this case is to quash the Decision and remove MTS PJSC from Schedule 1 of the Regulations on an immediate basis.
>
> Put succinctly, the essence of the applicant's complaint is that it should not be on the Sanctions List. The procedure provided for in section 8 addresses that issue. As a result, and for the reasons set out below, it is an adequate and effective remedy.

[45] MTS argues that the CMJ misconstrued the essential character of the dispute, and removal of its name from the Sanctions List was only one of the reasons for commencing an application for judicial review. MTS says it was also interested in vindicating its position that it should never have been listed in the first place, and obtaining a declaration that the decision was *ultra vires* the powers of the Minister and GIC. According to MTS, the only way in which it could challenge the lack of procedural fairness that preceded the listing was by judicial review.

[46] The AGC notes that any procedural defects in the original listing decision may be raised in an application to be delisted pursuant to s 8 of the Regulations. While perhaps not the most prudent approach, MTS could simply take the position that there were never any grounds to add its name to the Sanctions List, and for this reason alone its name should be removed.

[47] Furthermore, the grounds upon which the GIC added MTS to the Sanctions List were disclosed in correspondence from the Minister's delegate to Mr. Kanargelidis dated October 13, 2023:

> MTS was designated under Schedule 1 of the Russia Regulations on July 19, 2023, pursuant to paragraph 2(a). An entity listed pursuant to paragraph 2(a) is one which the Governor in Council, on the recommendation of the Minister of Foreign Affairs, is satisfied there are reasonable grounds to believe is engaged in activities that directly or indirectly facilitate, support, provide funding for or contribute to a violation or attempted violation of the sovereignty or territorial integrity of Ukraine or that obstruct the work of international organizations in Ukraine. The department has reasonable grounds to believe that MTS facilitates donations to Russian military and paramilitary groups fighting in Ukraine.

[48] The AGC says it was open to MTS to request additional information before applying to be delisted pursuant to s 8 of the Regulations (citing *Makarov v Canada (Foreign Affairs)*, 2024 FC 1234 at paras 31-45). Instead, MTS commenced an application for judicial review.

[49] As the Supreme Court of Canada held in *Strickland*, which concerned a challenge by way of judicial review to the lawfulness of federal child support guidelines (at para 48):

> First, the appellants' position that they are entitled to a ruling on the legality of the *Guidelines* through a judicial review is fundamentally at odds with the discretionary nature of judicial

> review and with the broad grounds on which that discretion may be exercised. As Brown and Evans put it, "the discretionary nature of [judicial review] reflects the fact that unlike private law, its orientation is not, and never has been, directed exclusively to vindicating the rights of individuals": topic 3:1100. The appellants thus do not have a right to have the Federal Court rule on the legality of the *Guidelines*; the Federal Court has a discretion to do so, which it has decided not to exercise.

[50] An associate judge's characterization of the essential character of a dispute may be overturned only if it betrays a palpable and overriding error (*Murphy v Canada (Attorney General)*, 2023 FC 57 at para 97; *Fraser Point Holdings Ltd. v Vision Marine Technologies Inc*, 2023 FC 738 at para 34; *David Suzuki Foundation v Canada (Health)*, 2018 FC 380 at paras 127-128). I find no palpable and overriding error in the CMJ's determination that the essence of the MTS' complaint is that it should not be on the Sanctions List. I agree with the CMJ that the procedure provided for in s 8 of the Regulations addresses that issue.

[51] Section 8 of the Regulations provides MTS with an adequate and effective remedy that it has yet to exhaust. Should the Minister decline to recommend to the GIC that MTS' name be removed from the Sanctions List, that decision may be challenged by judicial review in this Court. Until then, MTS' application for judicial review is premature.

V. Conclusion

[52] The CMJ's decision to strike MTS' Notice of Application without leave to amend was factually supported and legally correct. The appeal is therefore dismissed.

[53] By agreement of the parties, costs in the all-inclusive sum of $4,500 are awarded to the successful party, the AGC.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The appeal is dismissed.

2. Costs are awarded to the Attorney General of Canada in the all-inclusive sum of $4,500.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1725-23
STYLE OF CAUSE:	MOBILE TELESYSTEMS PUBLIC JOINT STOCK COMPANY v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	DECEMBER 16, 2024
JUDGMENT AND REASONS:	FOTHERGILL J.
DATED:	JANUARY 29, 2025

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