

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20120123

Docket: A-395-11

Citation: 2012 FCA 22

Present: STRATAS J.A.

BETWEEN:

**ASSOCIATION OF UNIVERSITIES AND COLLEGES OF CANADA
and THE UNIVERSITY OF MANITOBA**

Applicants

and

**THE CANADIAN COPYRIGHT LICENSING AGENCY
operating as "ACCESS COPYRIGHT"**

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on January 23, 2012.

REASONS FOR ORDER BY:

STRATAS J.A.

Federal Court
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REASONS FOR ORDER

STRATAS J.A.

[1] The applicants have filed the affidavit of Gregory L. Juliano in support of their application for judicial review of a decision of the Copyright Board. The respondent, Access Copyright, moves to strike it out.

A. The nature of the proceedings before the Copyright Board

[2] The Copyright Board has been conducting proceedings into a proposed tariff sought by Access Copyright for the reproduction of published works by post-secondary institutions located outside Quebec.

[3] In the course of its proceedings, the Copyright Board issued an interim tariff. This interim tariff is to remain in place until the Copyright Board decides upon Access Copyright's proposed tariff.

[4] The Association of Universities and Colleges of Canada was unhappy with the interim tariff. It requested the Copyright Board to amend it by forcing Access Copyright to grant transactional licences to the Association's members. This would permit them to copy published works in Access Copyright's repertoire. On September 23, 2011, the Copyright Board denied the Association's request.

B. The applicants' judicial review

[5] The applicants have brought an application for judicial review of the Copyright Board's decision to deny the Association's request. Broadly speaking, the applicants allege that the Copyright Board acted in a manner contrary to or inconsistent with the *Copyright Act*, R.S.C. 1985,

c. C-42, the proper principles for awarding interim relief, and its earlier decisions. They do not allege bias, a denial of natural justice, or lack of procedural fairness.

[6] In support of their application, the applicants filed two affidavits. The first affidavit provides the complete record before the Copyright Board when it made its decision. It is the second affidavit, that of Gregory L. Juliano, that is under attack.

C. The affidavit under attack

[7] Broadly speaking, the body of the Juliano affidavit asserts that transactional licences are needed from Access Copyright and that the absence of transactional licences causes adverse effects on the University of Manitoba. It offers evidence in support of these propositions.

[8] The need for transactional licences from Access Copyright was the very issue raised by the Association and rejected by the Copyright Board. The evidence in the Juliano affidavit could have been provided in the hearing before the Board on this issue.

[9] The Juliano affidavit appends ten exhibits. With a small exception, none of these exhibits were provided to the Copyright Board. The small exception concerns certain emails that were before the Board. The other affidavit filed by the applicants includes these emails and will be before this Court.

D. Analysis

(1) Should the admissibility of the affidavit be determined now?

[10] At the outset, the applicants suggest that the issue of the admissibility of the Juliano affidavit should be determined by the panel hearing the application, not by way of advance ruling.

[11] Whether the Court should provide an advance ruling is a matter of discretion. This discretion is constrained by the instruction in subsection 18.4(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, that applications for judicial review be “heard and determined without delay and in a summary way.” As a result, the Court will only exercise its discretion to provide an advance admissibility ruling where it is clearly warranted. Those embarking upon an interlocutory foray to this Court to seek such a ruling will not often find a welcome mat when they arrive.

[12] Consistent with the instruction in subsection 18.4(1), one matter to consider is whether an advance ruling would allow the hearing to proceed in a timelier and more orderly fashion: *McConnell v. Canada (Canadian Human Rights Commission)*, 2004 FC 817, aff’d 2005 FCA 389. Another consideration is whether the issue of admissibility turns on discretionary matters over which reasonable minds may differ, rather than a clear question of law. Finally, and related to that, the Court is more likely to make an advance ruling where the issue is relatively clear cut or obvious: *Canadian Tire Corp. Ltd. v. P.S. Partsource Inc.*, 2001 FCA 8.

[13] As shall be seen, the issue of admissibility in this case is mainly one of law and is not discretionary. It is relatively clear cut. An advance ruling on admissibility would allow the hearing to proceed in a timelier and more orderly fashion. The admissibility of the Juliano affidavit should be determined now.

(2) The merits of the motion to strike the affidavit

(a) Applicable principles

[14] Judicial review courts are often confronted with procedural questions such as the one posed in this case. The answers to these questions often rest in an appreciation of the different roles played by judicial review courts and the administrative decision-makers they review.

[15] A good example can be seen in the Supreme Court's recent consideration of whether a judicial review court can entertain new arguments on the merits (*i.e.*, arguments that were not made to the administrative decision-maker): *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61. In that case, the Supreme Court adopted a restrictive approach to new arguments because of the differing roles played by the judicial review court and the administrative decision-maker under review. It noted that the former was limited to its judicial review powers while the latter was the forum for arguments on the merits, including the fact-finding necessary for those arguments (paragraphs 23-28). In the case before it, the Supreme Court held that

an exception applied, finding that “the rationales for the general rule have limited application [in this case]” (at paragraph 28).

[16] In my view, the Supreme Court’s approach in *Alberta Teachers’ Association* is a useful analytical tool for deciding a number of procedural issues in judicial review courts, such as the one before this Court in this case: whether the Juliano affidavit should be admitted. As we shall see, the Supreme Court’s approach is really nothing new in this Court: it is embodied in this Court’s existing case law on the admissibility of affidavits. This Court’s case law shows that concerns about the differing roles played by judicial review courts and administrative decision-makers have shaped the law in this area.

[17] In determining the admissibility of the Juliano affidavit, the differing roles played by this Court and the Copyright Board must be kept front of mind. Parliament gave the Copyright Board – not this Court – the jurisdiction to determine certain matters on the merits, such as whether to make an interim tariff, what its content should be, and any permissible terms associated with it. As part of that task, it is for the Board – not this Court – to make findings of fact, ascertain the applicable law, consider whether there are any issues of policy that should be brought to bear on the matter, apply the law and policy to the facts it has found, make conclusions and, where relevant, consider the issue of remedy. In this case, the Copyright Board has already discharged its role, deciding on the merits to make an interim tariff and to refuse to amend it.

[18] Now before the Court is an application for judicial review from this decision on the merits. In such proceedings, this Court has only limited powers under the *Federal Courts Act* to review the Copyright Board's decision. This Court can only review the overall legality of what the Board has done, not delve into or re-decide the merits of what the Board has done.

[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 *Gitksan 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:

- (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.
- (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.

- (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*.

(b) Applying these principles

[21] In defending Access Copyright's motion to strike the Juliano affidavit, the applicants submit that the affidavit is necessary to support the standing of the University of Manitoba as an applicant in the application for judicial review and to provide necessary context and background for the issues before the Court. They add that the information supplied in the Juliano affidavit is consistent with information already before the Copyright Board and does not prejudice Access Copyright.

[22] I reject these submissions.

[23] For the most part, as I have explained in paragraphs 7 to 9, above, the Juliano affidavit offers evidence that was not before the Copyright Board and that goes to the merits of the matter before the Board. It does not raise matters that fall into any of the exceptions identified above. It would offend the demarcation of roles between this Court as a judicial review court, and the Board as a fact-finder and merits-decider.

[24] In the record before me, no objections have ever been made to the standing of the University of Manitoba. Indeed, University of Manitoba is one of the moving parties on this motion and Access Copyright does not object.

[25] Assuming without deciding that Access Copyright can launch an objection at a later time to the University's standing, the University of Manitoba may then seek leave to file an affidavit showing that it is sufficiently affected by the Copyright Board's decision to have standing. However, such an affidavit will not be necessary if the proper record placed before this Court is sufficient to deal with the issue.

[26] Finally, in my view, the Juliano affidavit does not supply necessary context and background that would be useful for this Court when it reviews the Copyright Board's decision. Much of the Juliano affidavit that is said to be "context and background" is really evidence that goes to the merits of the matter before the Board. The parties' memoranda of fact and law can supply much context and background by relying upon the Board's decision, the applicable legal framework, and the complete record that was before the Board.

E. Disposition of the motion

[27] Therefore, Access Copyright's motion shall be granted. The Juliano affidavit shall be struck. That affidavit and any transcript of cross-examinations conducted thereon shall not appear in the records filed before this Court. Access Copyright shall have its costs of the motion.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-395-11

STYLE OF CAUSE: Association of Universities and
Colleges of Canada and The
University of Manitoba v. The
Canadian Copyright Licensing
Agency, Operating as “Access
Copyright”

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: Stratas J.A.

DATED: January 23, 2012

WRITTEN REPRESENTATIONS BY:

Patricia J. Wilson
Glen A. Bloom

FOR THE APPLICANT

Nancy Brooks

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Osler, Hoskin & Harcourt LLP
Ottawa, Ontario

FOR THE APPLICANT

Blake, Cassels & Graydon
Ottawa, Ontario

FOR THE RESPONDENT