

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20120523

Docket: A-74-12

Citation: 2012 FCA 152

Present: PELLETIER J.A.

BETWEEN:

BELL HELICOPTER TEXTRON CANADA LIMITÉE

Appellant

and

EUROCOPTER

Respondent

Dealt with in writing without appearance of parties.

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

REASONS FOR ORDER BY:

PELLETIER J.A.

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REASONS FOR ORDER

PELLETIER J.A.

[1] This is a motion to settle the contents of the appeal book, one of the first steps in an appeal from a judgment of the Federal Court in a patent action. As frequently occurs in actions where there is a large volume of documents, the parties prepared a joint book of documents for use at the trial. The question raised by this motion is whether documents included in the joint book of documents but not marked as exhibits at the trial should be included in the appeal book.

[2] The practice of preparing joint books of documents is intended to simplify document management in complex trials. It helps everyone in the courtroom - lawyers, judge, registry agents - to manage a large number of documents by assembling them in one place and providing a uniform

system for identifying those documents. Large trials would be unmanageable without a system of this kind.

[3] Difficulty arises however when parties do not clearly address their minds to the use to be made of those documents in the trial.

[4] There are two issues to be addressed in dealing with documentary evidence. The first is the authenticity of the document. With rare exceptions, proof of authenticity is fairly routine. A witness is called to testify that he or she prepared the document and that the signature which appears on the document is their signature. In the electronic age, slightly different considerations arise but they are no more contentious than in the case of written documents. As a result, it is not unusual for parties to agree that the documents in a joint book of documents were made by the purported maker on or about the date they bear.

[5] The troublesome issue is the use of the documents as proof of the truth of their contents. This issue is inherently bound to the rule against hearsay, and to the various exceptions to that rule such as business records. This process can be simplified if parties agree that a document is evidence of the truth of its contents. But, as this case shows, a further step is necessary. The fact that a document appears in a joint book of documents and that authenticity and truth of contents are admitted does, not without more, make that document evidence in the trial. The compilation of documents into a joint book of authorities is a matter of convenience and document management, not a matter of evidence.

[6] The use to which those documents may be put in the course of the proceedings can be left to be decided as each document is tendered in evidence, or it can be the subject of agreement between the parties, or some combination of the two.

[7] In this case, the parties filed a joint book of documents containing 540 documents plus various pleading and orders. Of the 540 documents, authenticity was admitted by both parties in almost all cases. However, only 14 of those documents were admitted to be evidence of the truth their contents by both parties. One of the parties, Bell Helicopter Textron Canada Limitée (Bell Helicopter), admitted that 93 of the documents were evidence of the truth of their contents, while the other party, Eurocopter, made the same admission with respect to 6 of the 541 documents in the joint book of documents.

[8] As noted earlier, the issue in the motion is whether only those documents which were marked as exhibits in the trial are to be included in the appeal book. The moving party, Bell Helicopter, takes that position. The respondent, Eurocopter, wishes to include in the appeal book the balance of the documents in the joint book of documents, some 231 documents. Fifty one of those documents come from the group which Bell Helicopter agreed could be used as proof of their contents whereas the other 182 are not caught by that admission. In addition, Eurocopter seeks to include in the appeal book a document which was made an exhibit at trial but which was struck out by the trial judge in the course of the trial.

[9] At the trial, the issue of the status of the documents in the joint book of documents was raised. The trial judge's ruling is reproduced in full below:

MS. ROBINSON: Our understanding, My Lord, of the Joint Book is that this is a vehicle for the convenience of the parties and the Court, but a document is not tendered into evidence until it is tendered in through a witness or another means, certification and the like.

So my ---

THE COURT: Well, I would put it subject to what the parties have stated in their table.

MS. ROBINSON: Fair enough.

THE COURT: So there are elements which are, in my opinion, already before the Court; that is, all the exhibits whose authenticity and their content, as the case may be, were admitted. So they don't need to be filed formally by a witness. That is my understanding.

On the contrary, elements of the evidence whose authenticity is admitted but their content is not admitted unless they are filed just to prove the existence of the document, well, this poses no problem.

But if they are filed to prove the existence of their content which is not admitted, well then it would turn on the burden of proof of the party who wants to use that document with respect to its content to have a witness testify before the Court, which he may or maybe not, depending on the content of the document, state that everything that's in the document is true to his knowledge. It could be just a sketch.

So on that reserve, well, yes, they are going to be witnesses that will have to be produced and at the end of the day, if a document was announced to be a document that was needed for the purpose of its content and no witness came to testify on its content, well it can only be used probably with respect to chronology or did you receive that "mise en demeure" for instance.

[10] As I understand the judge's ruling, documents whose authenticity was admitted and in respect of which both parties agreed that they could be used as proof of their contents, were to be considered as evidence without more. Where it was sought to use documents in proof of their contents, and there was no agreement, the party seeking to use the document would have the onus of establishing the admissibility of the document as proof of the truth of its contents. I conclude from

this that the mere fact that a document was included in the joint book of documents was not determinative of its evidentiary status.

[11] In *Bojangles' International, LLC v. Bojangles Café Ltd.*, 2006 FCA 291, [2006] F.C.J. No.

1306 (*Bojangles*), Madam Justice Sharlow of this Court had before her a similar motion.

Eurocopter relies upon the following passage from my colleague's reasons:

The test in Rule 343(2) is a flexible one. For example, it may be appropriate to exclude from the appeal book a document that was presented in the court below to prove a particular fact that will not be in dispute on appeal; on the other hand, that document ought to be included if it is reasonable to suppose the appellate court may require it to gain a full appreciation of the facts. Similarly, it may be appropriate to exclude a document adduced by a party who does not intend to rely on it to support any of its arguments on appeal; on the other hand, it ought to be included if the opposing party has a reasonable basis for believing that it may wish to rely on that document to support one of its argument on appeal. Generally, an evidentiary document should be excluded if its only foreseeable use is to enable one party to emphasize a general weakness in the evidentiary foundation presented by the other party in the court below.

[12] *Bojangles* was a case about the exclusion from the appeal book of documents which were before the decision-maker. *Bojangles* was a case of an appeal in the form of an application where the Court takes the affidavits and attached exhibits as it finds them, unless some objection is raised. As a result, there was no *viva voce* evidence and no issue of the admissibility of documents. The question was whether certain affidavits, or certain exhibits to affidavits, that were before the Federal Court had to be included in the appeal book merely because they were evidence in the Federal Court.

[13] This case is different because, here, the trial judge directed his mind to the process by which a document in the joint book of documents would become evidence in the trial. This case would be analogous to *Bojangles* if the issue was whether to exclude from the appeal book documents which had been marked as exhibits at the trial. In fact we are confronted with the opposite issue, which is whether to include in the appeal book documents which were not marked as exhibits at the trial.

[14] I am of the view that only those documents which the trial judge accepted as evidence on the basis of admissions, or those which were marked as exhibits at the trial should be included in the appeal book. The documents which are accepted in evidence on the basis the parties' admissions are limited to the 14 documents on which both parties were able to agree. As for the documents in respect of which only one party made an admission as to the truth of its contents, it is fundamental that one party's admission that a document is evidence of the truth of its contents does not make that document evidence of its contents as against the adverse party. The use to which such a document is used in the course of the trial varies with the circumstances. The document could be tendered as evidence against the party who made the admission. Or it could be used to cross-examine the witnesses called by the party who made the admission. But those are all matters which would play out during the trial itself. Once the trial is over, the evidentiary record is settled.

[15] The fact that the trial judge indicated in his Reasons that he had considered all 540 "exhibits" is puzzling since only 349 documents were marked as exhibits. Had he considered all of the documents in the joint book of documents plus all the other documents marked as exhibits, he would have had to consider approximately 707 documents, since the plaintiff tendered 91

documents which were not included in the joint book of documents while the respondent tendered 76 additional documents.

[16] It is a sound practice, at the close of evidence in a trial where the parties have used a joint book of documents, to remove all documents which have not been marked as exhibits from the document book so that the trial judge does not have to constantly consult his notes to see whether a document has been introduced in evidence or not. This eliminates the possibility of an inadvertent reference to a document which is not properly before the Court.

[17] In my view, the parties were entitled to conduct the trial on the basis of the trial judge's evidentiary ruling at the beginning of the trial. If the trial judge departed from his own ruling without advising the parties, then they have their remedies in this court. However, in order to ensure that the panel hearing the appeal has before it the documents which it may require, I will authorize the respondent to prepare a compendium containing only those documents which were not marked as exhibits and to which the trial judge made reference in his decision. It will be for the panel hearing the appeal to decide what use is to be made of those documents.

[18] Bell Helicopter is entitled to its costs to be assessed.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-74-12

STYLE OF CAUSE: Bell Helicopter Textron Canada
Limitée v. Eurocopter

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: PELLETIER J.A.

DATED: May 23, 2012

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