Federal Court of Appeal | Cour d'appel fédérale

Date: 20190516

Docket: A-110-19

Citation: 2019 FCA 149

Present: **STRATAS J.A.**

BETWEEN:

'NAMGIS FIRST NATION

Appellant

and

MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD, and MOWI CANADA WEST LTD. (FORMERLY KNOWN AS MARINE HARVEST INC.)

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 16, 2019.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] The Federal Court dismissed the appellant's application for judicial review of a decision by the Department of Fisheries and Oceans to grant a transfer licence. The appellant appeals to this Court. The appeal is pending.

[2] Within this appeal, the appellant moves for an order settling the contents of the appeal book. The appellant submits that the appeal book should contain materials that were not before the Federal Court.

[3] The written representations before the Court are very good. But, to some extent, they do not clearly identify and articulate all of the operative legal principles that bear upon this issue. Thus, the Court will set out the operative legal principles. This exposition also may be useful to litigants elsewhere: the law in this area is stable and is largely shared by all Canadian jurisdictions.

The administrative decision-maker as fact-finder and merits-decider

[4] It is well-known that, absent a legislative provision to the contrary, evidence relevant to the issues to be decided by the administrative decision-maker is to be adduced before that decision-maker, not before someone else later.

[5] Most legislative regimes, like the one in issue in this case, set up and empower the administrative decision-maker to find the facts, apply the law and make a decision. In short, the administrative decision-maker is the merits-decider. Normally, the first-instance reviewing court is not the merits-decider: *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297 at paras. 17-18; *Delios v. Canada (Attorney General)*, 2015 FCA 117, 100 Admin. L.R. (5th) 301 at para. 41.

[6] In this context, the only time the reviewing court acts in a practical sense as the merits-decider is where *mandamus* lies or where the reviewing court decides as a matter of remedial discretion not to send the matter back to the administrative decision-maker because no use would be served by it: on *mandamus*, see *Canada (Public Safety and Emergency Preparedness) v. LeBon*, 2013 FCA 55, 444 N.R. 93 and *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167 (a power far broader, more powerful and more useful in this Court than the Supreme Court just suggested in *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29 at para. 65); on remedial discretion, see *Maple Lodge Farms Ltd. v. Canada (Food Inspection Agency)*, 2017 FCA 45, 411 D.L.R. (4th) 175 at paras. 51-52 and cases cited therein.

The first-instance reviewing court

[7] Thus, the normal rule, subject to limited exceptions, is that only material that was before the administrative decision-maker, the merits-decider, is admissible on judicial review: see, *e.g.*, *Association of Universities* at para. 17; *Delios* at para. 42; *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, 479 N.R. 189. Attempts in the first-instance reviewing court to file evidence that goes to the merits of the administrative decision and that was not before the administrative decision-maker must be rebuffed.

[8] The normal rule must be applied flexibly, in accordance with its purpose. Material that was not formally filed before the administrative decision-maker but which it nevertheless

considered may properly be in the record placed before the first-instance reviewing court. See *Bell Canada v. 7262591 Canada Ltd. (Gusto TV)*, 2016 FCA 123 at paras. 11-16.

[9] The normal rule admits of exceptions. The exceptions apply where the receipt of evidence by the reviewing court respects the differing roles of the reviewing court and the administrative decision-maker: *Association of Universities* at para. 20.

[10] Specific recognized categories of exception currently include the following:

(a) *General background affidavits*. 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.*, *Association of Universities* at para. 20 and authorities cited therein; and see the important limits to this exception discussed in *Delios* at paras. 44-46. For example, 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.

(b) *Affidavits concerning grounds of review where evidence cannot be found in the record of the administrative decision-maker*. Sometimes affidavits are necessary to bring to the attention of the judicial review court defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can discharge its role of review: *e.g*, *Keeprite Workers' Independent Union v.*

Keeprite Products Ltd. (1980), 29 O.R. (2d) 513 (C.A.). For example, if a party discovers that the opposing party has been bribing the administrative decision-maker and evidence of that is not in the evidentiary record of the administrative decision-maker, the evidence can be placed before the reviewing court to support a ground of bias. Another example of this exception is where the applicant alleges in the reviewing court that the administrative decision cannot stand for a reason that the administrative decision-maker could not legally consider: see, *e.g.*, *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418 and *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 116 (the administrative decision-maker could not consider whether the Crown had complied with its obligation to consult Indigenous peoples and failure to consult would invalidate the administrative decision). Still another is a proper allegation of improper purpose where evidence exists outside of the record: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at para. 99.

(c) *Affidavits to highlight gaps in the record.* 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*, above.

(d) *Affidavits relevant to the reviewing court's remedial discretion*. Sometimes events following the administrative decision may affect the reviewing court's remedial discretion. For example, post-decision events may be such that no practical purpose would be served by quashing and sending the matter back: see, *e.g.*, *Community*

> *Panel of the Adams Lake Indian Band v. Adams Lake Band*, 2011 FCA 37, 419 N.R. 385. In this instance, the evidence is not being used to supplement the record of the administrative decision-maker; rather, it is assisting the reviewing court in formulating an appropriate remedy.

[11] In certain circumstances, the doctrines of *res judicata*, issue estoppel, abuse of process and judicial notice and legislative provisions that deem facts to exist can have the practical effect of placing certain facts before the first-instance reviewing court: on *res judicata*, issue estoppel and abuse of process, see *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; and on judicial notice, see *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458.

[12] Sometimes parties in the first-instance reviewing court try to add issues that should have been raised first before the administrative decision-maker and then try to adduce evidence in support of the new issues. For good reason, reviewing courts are very reluctant to entertain new issues: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; and for new constitutional issues, see *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16, [2005] 1 S.C.R. 257 and *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 F.C.R. 75 at paras. 43-47. In part, this is due to the normal rule, explained above, that the reviewing court normally cannot receive evidence other than what was before the administrative decision-maker. This also respects the law the

legislature has set out: it has assigned the responsibility of deciding the issues to the administrative decision-maker, not us.

The appellate court

[13] The evidentiary record in the appellate court is the record that was before the first-instance court. That is the normal rule—one that admits of few exceptions. As for new issues, they cannot be introduced into an appeal if they need a factual record: *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678.

[14] Evidence excluded or not admitted by the first-instance reviewing court does not form part of the record before the appellate court and should not appear in the appeal book. But if on appeal the appellant is challenging the first-instance court's decision to exclude or not admit the evidence, the evidence can be placed in the appeal book. Such evidence is admissible only to show the appellate court the nature of the evidence over which there is a challenge. If the appellate court rules on the admissibility issues and decides that the first-instance court should have admitted the evidence, it may consider the evidence for all purposes before it.

[15] Suppose evidence arises after the first-instance reviewing court has made its decision. And suppose the evidence would have been admissible in the reviewing court (under the principles discussed above) had it existed at the time and had it been presented to the reviewing court? What should the appellate court do with this late evidence?

[16] As usual, first principles must be kept front of mind. The first-instance reviewing court was the forum for building the record for the application for judicial review. The appellate court is not such a forum. Thus, any new evidence presented to the appellate court that is meant to supplement the record for judicial review purposes is fresh evidence that can be admitted only under the relevant test in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212.

[17] It must be remembered, though, that evidence can be offered to the appellate court for purposes other than building the record for judicial review. Take, for example, evidence that goes to a procedural flaw in the first-instance reviewing court's hearing or decision, such as procedural unfairness or bias in that court. This sort of evidence is relevant not to whether the administrative decision should be set aside, nor is it being used to supplement the judicial review record. Rather, it goes to whether the first-instance reviewing court did its job in a procedurally fair or unbiased way. For this sort of evidence, the difficult *Palmer* test for the admission of fresh evidence does not apply: see *Mediatube Corp. v. Bell Canada*, 2018 FCA 127; *R. v. McKellar* (1994), 19 O.R. (3d) 796 at p. 799, 34 C.R. (4th) 28 at p. 31 (C.A.); *R. v. Barbeau* (1996), 110 C.C.C. (3d) 69, 50 C.R. (4th) 357 (Que. C.A.).

[18] Except in the most exceptional circumstances permitted by an appellate court, interveners in the appellate court must take the case as they find it and not add new issues or add to the evidentiary record: *Corbière v. Canada (Minister of Indian & Northern Affairs)* (1996), 206 N.R. 122 (Fed. C.A.); *York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2018 FCA 81; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 174 at para. 55.

[19] A motion to settle the contents of the appeal book, including difficult questions on the admissibility of evidence, need not be determined on an interlocutory basis: *Collins v. Canada*, 2014 FCA 240, 466 N.R. 127; *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, 479 N.R. 189 at paras. 9-11, *MediaTube Corp. v. Bell Canada*, 2018 FCA 127 at paras. 9-14, *McKesson Canada Corporation v. Canada*, 2014 FCA 290, 466 N.R. 185 at paras. 9-10, and cases cited therein. The admissibility of materials can be left for the appeal panel to decide.

[20] Whether the issues should be left for the appeal panel is a discretionary call governed by several factors: see the above authorities, *Association of Universities* at para. 11 and *SNC-Lavalin Group Inc. v. Canada (Public Prosecution Service)*, 2019 FCA 108 at paras. 16-17. These factors include whether determining the motion on an interlocutory basis will allow the hearing to proceed in a more timely and orderly fashion and whether the result of the motion is clear-cut or obvious. Overall, Rule 3 governs the exercise of this discretion: we are to adopt the course of action that "will secure the just, most expeditious and least expensive determination of every proceeding on its merits."

Agreements made by the parties concerning the admissibility of evidence

[21] In any level of court, the parties can agree that certain evidence can be admitted and considered. Or they can stipulate to certain facts.

[22] As long as there are no legislative provisions or other legal reasons against admissibility that cannot be shunted aside by agreement, courts at any level can receive such facts and

evidence. See *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161, 400 D.L.R. (4th) 723 at paras. 79-80. In the end, though, it is always for the court to determine the weight, if any, to be accorded to the facts and evidence. And in the area of judicial review, despite agreements and stipulations by the parties on a certain issue, the first-instance reviewing court and the appellate court may still have to decline to determine the issue because the administrative decision-maker is the merits-decider.

Recourse back to the administrative decision-maker for revised fact-finding

[23] At any time, if new facts relevant to the administrative decision have arisen while the matter is before the first-instance reviewing court or the appellate court, one potential recourse is to go back to the administrative decision-maker and seek a variation or a reconsideration of the decision, assuming the decision-maker has that power.

[24] Whether the administrative decision-maker has that power and in what circumstances depends on the legislation governing the administrative area: *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, 62 D.L.R. (4th) 577. Administrative decision-makers only have the powers granted to them explicitly or implicitly by legislation: *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513 at para. 16; *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394, 92 D.L.R. (4th) 609; and for a recent discussion and application of this, see *Hillier v. Canada (Attorney General)*, 2019 FCA 44 at para. 10.

Rule 351 of the *Federal Courts Act*

[25] The parties have cited Rule 351. This Rule empowers the Court, on motion, in "special circumstances" to grant leave to a party to present evidence on a question of fact. Rule 351 does not broaden the bases for admissibility discussed above.

Application of these principles to this case

[26] The appellant moves to add certain new documents to the evidentiary record of this Court: the Svanvik Affidavit, the Further Further Amended Certified Tribunal Record from another judicial review, a Policy JR Notice, an Amended Policy JR Notice, and a group of documents known as the "G2G Recommendations".

[27] This list is found in the appellant's written representations. It does not appear to be exactly the same as the relief sought in the notice of motion.

[28] Legally speaking, the Court can only give the relief sought in the notice of motion. To the extent that the relief sought in the written representations is different from that sought in the notice of motion, the appellant should have amended his notice of motion. This being said, in this instance I am prepared to consider the list found in the appellant's written representations.

[29] The new documents shall not be added to the appeal book in this Court: they cannot form any part of the evidentiary record in this Court.

[30] In the Federal Court, there was another judicial review among the parties (T-430-18) but it was not joined or consolidated with this judicial review (T-744-18). The documents from the other judicial review (T-744-18) were never before the Federal Court in the judicial review in this case (T-430-18). Therefore, the documents from the other judicial review (T-430-18) are not admissible in the record before this Court. And the appellant has not satisfied the test for fresh evidence: all of these documents were either available through the exercise of due diligence at the time of the first-instance judicial review proceedings or are not significant enough to have a determinative effect upon the outcome of the appeal.

[31] The Federal Court's decision in the other judicial review (T-744-18) has not been appealed and, thus, is final. It might contain factual findings among these parties on the issue before this Court that are admissible in this court as a result of the operation of *res judicata* and issue estoppel. But this does not affect the content of the appeal book in this appeal, which is the issue currently under consideration.

[32] The respondent, the Minister of Fisheries, Oceans and the Canadian Coast Guard, is prepared to allow into the appeal book the notice of application and the amended notice of application in the other judicial review (file T-430-18). But there is no agreement here: the respondent, Mowi Canada West Ltd., opposes their inclusion into the appeal book. It submits that the documents are from a different case, a case that is not under appeal. It terms them "distracting" and "unnecessary to dispose of any issue under appeal." I agree.

[33] The appellant seeks to include a Further Further Amended Certified Tribunal Record from another judicial review (T-1710-16). This stands in the same position as the documents sought to be included from T-430-18, above. For the same reasons, they too cannot be admitted into the appeal book.

[34] The appellant also wishes to add into the appeal book a group of documents called the "G2G Recommendations". The appellant submits that these provide evidence that the federal Crown can achieve practical consultation and accommodations for introductions of farmed Atlantic salmon. The documents postdate the judgment of the Federal Court.

[35] I have not been persuaded that they are admissible as fresh evidence. Under the *Palmer* test, they are not of such significance that they could have a determinative effect on the appeal, *i.e.*, whether the Federal Court was wrong not to set aside the administrative decision in issue. For example, one of the documents in the group called the "G2G Recommendations" provides that it and any acts performed in connection with it are not "to be used, construed or relied on by anyone as evidence or admission of the nature, scope or content of any Aboriginal Rights or Title and Crown Rights or Title".

[36] The appellant also wishes to add an affidavit, known as the Svanik Affidavit, into the appeal book. The Federal Court struck this affidavit from the record on the ground that it was not before the administrative decision-maker whose decision it was reviewing. The appellant is not appealing the Federal Court's ruling. Therefore, there is no basis for including this document into the appeal book.

Disposition

[37] I will make an order settling the contents of the appeal book in accordance with these reasons. The appeal book will not include the new evidence the appellant wishes to include.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-110-19
STYLE OF CAUSE:	'NAMGIS FIRST NATION v. MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD and MOWI CANADA WEST LTD. (FORMERLY MARINE HARVEST INC.)

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	MAY 16, 2019

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