Federal Court of Appeal | Cour d'appel fédérale

Date: 20211109

Docket: A-138-21

Citation: 2021 FCA 217

Present: **MONAGHAN J.A.**

BETWEEN:

DORA BERENGUER

Appellant

and

SATA INTERNACIONAL - AZORES AIRLINES, S.A.

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 9, 2021.

REASONS FOR ORDER BY: MONAGHAN J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20211109

Docket: A-138-21

Citation: 2021 FCA 217

Present: **MONAGHAN J.A.**

BETWEEN:

DORA BERENGUER

Appellant

and

SATA INTERNACIONAL - AZORES AIRLINES, S.A.

Respondent

REASONS FOR ORDER

MONAGHAN J.A.

[1] The appellant has brought two motions in connection with her appeal of the Federal Court's order in *Berenguer v. SATA Internacional – Azores Airlines, S. A.*, 2021 FC 394 (per Lafrenière J.) [*Berenguer*]. That order both dismissed the appellant's motion to certify her action as a class action and granted the respondent's motion to dismiss the action on the basis that it was outside the Federal Court's statutory jurisdiction. The appellant has appealed both aspects of the order.

I. Motion to Determine Contents of Appeal Book

[2] Under Rule 343(3) of the *Federal Court Rules*, SOR/98-106, the appellant must bring a motion seeking the Court's determination concerning the contents of the Appeal Book if the parties have not agreed on the contents within the prescribed time period.

[3] The parties to this appeal have not agreed. The dispute concerns two affidavits that were part of the motion record before the Federal Court. The appellant's position is that neither affidavit should be included, although she objects to them for different reasons. The respondent's position is that both affidavits should be included in the Appeal Book.

[4] For the reasons that follow, I agree that both affidavits should be included in the Appeal Book.

A. *The De Oliveira Affidavit*

[5] An affidavit sworn by Rodrigo Vasconcelos De Oliveira (the De Oliveira Affidavit) was part of the respondent's motion record before the Federal Court. The respondent engaged Mr. De Oliveira as an expert on matters of foreign law. Before the Federal Court, the appellant objected to the De Oliveira Affidavit on the basis that the expert was biased and that the evidence was not relevant. The Federal Court found the De Oliveira Affidavit did not meet the threshold admissibility requirements and therefore that it should not be taken into account.

(1) Positions of the Parties

[6] The appellant submits the respondent did not appeal the Federal Court ruling that the De Oliveira Affidavit did not meet the threshold admissibility requirements. Moreover, once the appellant appealed, the respondent did not cross-appeal. Having both failed to appeal the Federal Court's ruling on the De Oliveira Affidavit, and not filed a cross-appeal, the respondent cannot use the affidavit on the appeal.

[7] The respondent argues that because its motion to dismiss was successful and the appellant's certification motion was not, it had no reason to appeal. It agrees with the Federal Court's order with regard to both motions. Although the Federal Court decided it should not take the De Oliveira Affidavit into account, that decision did not remove the affidavit from the motion record. The appellant did not bring a motion to have the De Oliveira Affidavit removed from the file, as it was entitled to do under Rule 74. Thus, the De Oliveira Affidavit remains part of the record.

[8] The respondent states that on the appeal it wishes to advance an additional argument in support of the Federal Court's decision on the certification motion. The De Oliveira Affidavit is relevant to that additional argument. Moreover, statements in the Federal Court's reasons reflect information that was found in the De Oliveira Affidavit and not otherwise before the Federal Court. Thus, the respondent argues, the Federal Court must have relied to some extent on the De Oliveira Affidavit.

(2) Analysis

[9] Before the Federal Court issued its order, the respondent was not permitted to appeal the evidentiary ruling. Had it done so, it faced the prospect that the appeal would have been premature: *Saint John Shipbuilding & Dry Dock Co. Ltd. v. Kingsland Maritime Corp*., [1978] 1 FC 523, 24 N.R. 377 (C.A.), and authorities that cite it, including the recent decision of this Court in *Munchkin, Inc.* v. *Angelcare Canada Inc.*, 2021 FCA 169.

[10] Once the Federal Court issued its order, the respondent had no reason or need to appeal the evidentiary ruling. It was the successful party on both motions. While the respondent may dispute the Federal Court's treatment of the De Oliveira Affidavit, it does not seek a different order than the one the Federal Court made. It takes no issue with the result of the two motions.

[11] This is also why a cross-appeal is not appropriate. A notice of cross-appeal is appropriate where the respondent "seeks a different disposition of the order appealed from": Rule 341(1)*(b)*. The respondent seeks to uphold the appealed order, not a different disposition of it: *Froom v. Canada (Minister of Justice,)* 2004 FCA 352, [2005] 2 F.C.R. 195, at para. 11, leave to appeal to SCC refused, 2005 CarswellNat 685 (SCC) [*Froom*]; *Kligman v. Minister of National Revenue*, 2004 FCA 152, [2004] 4 F.C.R. 477, at para. 10; and *Teva Canada Limited v. Canada (Health)*, 2012 FCA 106, [2013] 4 F.C.R. 391, at paras. 43-47.

[12] Does the Federal Court's determination that the De Oliveira Affidavit should not be taken into account mean it should not be included in the Appeal Book?

[13] Rule 343(2) limits what may be included in an Appeal Book to documents required to dispose of the issues on appeal. As has been observed by this Court before, it is difficult for a motion judge to assess what might be relevant and material to the issues on appeal: *West Vancouver v. British Columbia*, 2005 FCA 281 [*West Vancouver*], at para. 4. If relevancy is in doubt, it is preferable to include the material and ask the panel hearing the appeal to determine the relevance: *Loba Limited v. Canada (National Revenue)*, 2007 FCA 317, [2008] 2 C.T.C 38, at para.5.

[14] On the certification motion, the respondent argued there are two preferable procedures for addressing the claims of the class: a specially designated enforcement body in Portugal (ANAC) and the facilitative and adjudicative processes of the Canadian Transportation Agency (the CTA). The Federal Court did not accept ANAC as preferable, but agreed that the CTA procedure is. On the appeal, the appellant challenges that conclusion. The respondent seeks to advance ANAC as an alternative in the event this Court agrees that the CTA procedure is not preferable. It may do so: *Froom*, at para. 11, and *TPG Technology Consulting Ltd v. Canada*, 2016 FCA 279, at para. 30.

[15] From the motion record, I cannot determine the source of the information about ANAC leading the Federal Court to conclude ANAC was not a preferable procedure. Notably the Federal Court does not appear to ground that conclusion on evidence from the appellant but rather on a finding that “ANAC's opinions are not final or enforceable the way a Portuguese court's order would be”: *Berenguer*, at para.115. This exact phrase is found in paragraph 49 of

the De Oliveira Affidavit, which describes ANAC in paragraphs 41-53. This may suggest that the Federal Court relied on that affidavit for a limited purpose.

[16] The appellant cites *Mcue Enterprises Corp. v. Entral Group International Inc.*, 2006 FCA 289, 354 N.R. 29 [*Mcue*], as a complete answer to the respondent's submission that the De Oliveira Affidavit should be in the Appeal Book. *Mcue* is distinguishable. The document in question there was not part of the motion record filed with the Federal Court. Moreover, the Court excluded it on the basis of relevance.

[17] *West Vancouver*, cited in *Mcue*, also is distinguishable. There the appellant sought to include affidavits that were not before the decision maker whose decision was challenged on judicial review. The application judge excluded them from consideration in coming to his decision to dismiss the application for judicial review. The appellant appealed that decision but not the application judge's decision to exclude the affidavits. The Court agreed they should not be included in the Appeal Book because they were not before the decision maker or applications judge and the Court saw nothing in the reasons or notice of appeal that raised the matters dealt with in the affidavits—again the affidavits were not relevant: *West Vancouver*, at paras. 6-7.

[18] I acknowledge that in *West Vancouver* the Court appears to have been influenced by the fact that the decision to exclude the affidavits was not appealed. However, there the appellant sought to include the affidavits while not challenging the application judge's decision to exclude them in its notice of appeal. In this case, it is the respondent who seeks to include the De Oliveira

Affidavit. I have already explained why it could not appeal the Federal Court's decision to treat it as inadmissible.

[19] I am satisfied the De Oliveira Affidavit meets the relevancy test in Rule 343(2): it is relevant to the Federal Court's conclusion about ANAC and to an argument in support of the Federal Court's order that the respondent wishes to advance. It was in the respondent's motion record before the Federal Court.

[20] A decision to include a document in an Appeal Book does not by itself make the document evidence to be considered on an appeal. That decision is left to the panel hearing the appeal: *Athabasca Chipewyan First Nation v. British Columbia Hydro & Power Authority*, 2001 FCA 20, 267 N.R. 133, at para. 3. The appellant can raise her concerns about the De Oliveira Affidavit before the panel.

[21] Accordingly, I agree with the respondent that the De Oliveira Affidavit should be included in the Appeal Book.

B. *The Romano Affidavit*

[22] The respondent's motion record before the Federal Court included an affidavit sworn by Emma Romano (the Romano Affidavit), a lawyer employed by respondent's counsel in the appeal. The Romano Affidavit contains information from the CTA website.

(1) Positions of the Parties

[23] The appellant asserts that the Romano Affidavit should be excluded because it was not admissible before the Federal Court by virtue of Rules 82 and 334.15(5). She raised this objection in a footnote in her written memorandum at the Federal Court. Moreover, the appellant suggests that because the Federal Court did not cite it in its reasons, the Romano Affidavit may be irrelevant and may be excluded on that basis.

[24] The respondent argues the Federal Court did not exclude the Romano Affidavit. Moreover, the two Rules cited by the appellant do not have the effect suggested by the appellant. Rule 82 is not an absolute bar to a solicitor deposing an affidavit; the information in the Romano Affidavit is not controversial. As to Rule 334.15(5), the respondent agrees that the requirements of Rule 334.15(5) must be met, but not in every affidavit. The respondent complied with those requirements in the affidavits deposed by its employees and so has satisfied the requirements of Rule 334.15(5).

(2) Analysis

[25] The appellant's position that the Romano Affidavit should be excluded is quite surprising, given her position that the De Oliveira Affidavit should be excluded because the respondent did not appeal the Federal Court's ruling on its admissibility. She seeks to exclude the Romano Affidavit although the Federal Court did not rule it inadmissible, and the appellant's notice of appeal does not expressly challenge the admissibility of the Romano Affidavit.

[26] The appellant further suggests the Romano Affidavit should be excluded because it is not clearly relevant. I disagree. One of the appellant's grounds of appeal is that there "was no evidentiary founding for the Federal Court to find that the CTA could be a viable alternative to resolving the common issues or […] could, or would actually inquire into the claims". The Romano Affidavit contains information from the CTA website, which may have been the evidentiary basis for the Federal Court's finding. How can it be said the Romano Affidavit is not relevant to the issues in appeal? While the Federal Court does not expressly cite the Romano Affidavit, citation does not determine relevance to the issues under appeal and the Romano Affidavit was evidence before the Federal Court.

[27] My comments on the De Oliveira Affidavit apply equally here—inclusion in the Appeal Book is not a determination of admissibility. The appellant can raise any concerns about the Romano Affidavit before the panel hearing the appeal.

[28] Accordingly, I agree with the respondent that the Romano Affidavit should be included in the Appeal Book.

II. Motion to Admit New Evidence

[29] The appellant seeks to admit two pieces of evidence that were not before the Federal Court (the new evidence): an article from the CBC website dated May 31, 2020 (the Article) and a document described as the CTA's "response on May 25, 2020 to an order paper tabled by a member of Parliament, which details and describes the number of complaints received" by the CTA (the CTA Response). The impetus for the Article appears to be the CTA Response.

[30] The parties agree that the relevant criteria for the admission of new evidence are derived from *Palmer v. R.*, [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212, at para. 22:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial, although this general principle is applied less strictly in a criminal case.
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

(1) Position of the Parties

[31] The appellant argues the new evidence meets the *Palmer* criteria. She submits that because it did not exist at the conclusion of the oral hearing, it "would be implausible to require the appellant to exercise due diligence in finding a non-existent exhibit."

[32] The appellant also argues the new evidence is credible and "potentially decisive of the third ground of appeal."

[33] The respondent disagrees. The respondent does not suggest the CTA Response is not credible but does object to it on the basis that it is not relevant and does not contain any explanation of the significance or meaning to be drawn from the information in it. Its objection to the CBC Article goes further—it is hearsay and cannot be adduced for the truth of its contents.

[34] The respondent also argues that the appellant has not demonstrated that with due diligence the new evidence could not have been adduced before the Federal Court. The respondent points out that the appellant has not explained how or when she discovered the new evidence. While the Federal Court heard the motions in October 2019, it did not issue its order until May 3, 2021. During the intervening period, the appellant made additional written submissions, including one on February 19, 2021 that advanced reasons why the CTA could not provide a reasonable alternative procedure. Yet neither that submission, nor another made on March 2, 2021, referred to the new evidence that arose the prior May.

[35] The appellant submits that there is a difference between bringing new evidence and new jurisprudence to the attention of the Federal Court following the hearing and before the final decision; the respondent has confused the "standard practice of providing further legal submissions to the court upon release of a new case, versus the formal reopening of the evidence on a motion (or trial) after the hearing concluded."

[36] The respondent has a further objection to the new evidence. The appellant made assertions before the Federal Court regarding the suitability of the CTA but led no evidence to substantiate them, although she knew the respondent intended to raise the CTA as one of two alternative available procedures. The respondent submits that the appellant now seeks to put in evidence "to make up for the fact that she led no evidence relating to the CTA on the motion" before the Federal Court. The respondent argues that permitting the appellant to adduce new evidence in these circumstances suggests parties are free to continue to search for and adduce new evidence after the hearing, rather than make their case at the hearing.

(2) Analysis

(a) *The Palmer Criteria*

[37] The Article and the CTA Response (the new evidence) came into existence almost a full year before the Federal Court's order dismissing the motion to certify the action as a class proceeding.

[38] Until the Federal Court issued its order on May 3, 2021, the decision on certification was not final. Nothing precluded the appellant from bringing a motion to the Federal Court to submit the new evidence as relevant to the suitability of the CTA as an alternative process to the class action. Rule 312 permits a party to seek the Federal Court's permission to file additional affidavits and a supplementary record. The appellant could have done so between June 1, 2020 and May 2, 2021.

[39] While a motion to admit new evidence before the Federal Court might have required a more formal process than seeking leave to make further legal submissions, the appellant cites no authority for the proposition that that difference is relevant to the due diligence criteria. Frankly, I am not sure how it could be. I agree that "the only reasonable way to interpret the first part of the *Palmer* test is that it requires an examination of whether the proposed evidence could have, with due diligence, been adduced prior to the time at which the presiding judge was *functus officio* […] when the order was issued and entered": *Slmsoft.Com.Inc. v. Rampart Securities Inc.* 78 OR (3d) 521, [2005] O.J. No 4847, (OSCJ), at para. 56.

[40] Moreover, the appellant's affidavit does not explain how or when she learned of the new evidence. The appellant has chosen to rely solely on the new evidence coming into existence after the oral argument on the motions. That is not sufficient. I have no information to suggest the appellant was duly diligent or about her reasons for failing to bring the new evidence to the attention of the Federal Court. Thus, the appellant has not satisfied the due diligence criteria for admission of the new evidence.

[41] The appellant argues the CTA Response is potentially decisive to her third ground of appeal. I find little merit to this position.

[42] The appellant's third ground of appeal is that the Federal Court erred in not concluding that the class action was the preferable procedure for resolving the common issues. In support of that proposition, the appellant advances four arguments.

[43] The first is that the Federal Court did not consider all the relevant factors under Rule 334.16(2), but rather considered only one, *i.e.*, whether the other means of resolving the claims are less practical or efficient as required by Rule 334.16(2)*(d)*. The CTA Response has no relevance to a submission that relevant factors were not considered, and in her written submission on the motion the appellant has not suggested it does.

[44] The appellant's second argument in support of the third ground is that the respondent did not meet the evidentiary burden required in presenting the CTA as a preferable procedure for resolving claims. In her written submissions, the appellant asserts that Federal Court's

conclusion that the class procedure was not the preferable one is mainly premised on the appellant bearing the onus to prove some basis in fact for her position that the CTA would not act on complaints. The appellant proposes to argue that the respondent, not the appellant, bore this onus. Again, if the appellant is correct, and the onus is on the respondent, the CTA Response has no relevance. It has nothing to do with who bears the onus of proof.

[45] Similarly, the CTA Response has no relevance to the appellant's third argument: that there was no evidentiary foundation at the Federal Court for concluding that the CTA could be a viable alternative, and specifically no evidence the CTA would or could make inquiries about the claims. It is obvious that an argument there was no evidentiary foundation for a finding must be grounded in the evidence before the Federal Court, not new evidence the Federal Court never saw.

[46] Finally, in support of the third ground, the appellant submits that the Federal Court should have exercised its discretion under Rule 60 to allow the appellant to address potential gaps in the evidence. Rule 60 is entirely discretionary. The motion record does not suggest the appellant asked the Federal Court to permit her to address potential gaps. Indeed, the motion record is clear that the appellant made additional submissions on the suitability of the CTA after the hearing, albeit based on jurisprudence; she did not raise the CTA Response. However, even if she had sought an opportunity to address potential gaps, and the Federal Court denied it, the CTA Response is not relevant to whether the Federal Court erred in failing to exercise a discretion.

[47] It goes without saying that the Article is on shakier ground than the CTA Response because it is obviously hearsay. While hearsay evidence that meets the tests of reliability and necessity may be admissible, the Article clearly meets neither test.

[48] The Article reports on the CTA Response and contains statements of opinion about the CTA process made by a small number of people. It might be said to raise more questions than answers. How were the people whose opinions are expressed chosen? What questions were posed to elicit the comments? Were other inquiries made that were not reported? What other comments did those interviewed make that might be relevant? The Article expresses a viewpoint about the CTA process; it is not reliable in the sense required to be admissible.

[49] Necessity is founded on the need to get at the truth; in substance, it is a form of the "best evidence" rule. "[T]he rule against hearsay is intended to enhance the accuracy of the court's findings of fact, not impede its truth-seeking function": *R. v. Khelawon* 2006 SCC 57, [2006] 2 SCR 787, at para. 2. How can an article reporting on the CTA Response be the best evidence of what is found in the CTA Response itself?

(b) Should new evidence nonetheless be admitted?

[50] While I agree with the respondent that the appellant has not met the criteria in *Palmer* for admission of the new evidence, that does not end the matter. The Court has the residual discretion to admit the new evidence, although it does so "only in the clearest of cases", where

the interests of justice so require: *Shire Canada Inc. v. Apotex Inc.*, 2011 FCA 10, 414 N.R. 270 [*Shire*], at para. 18; and *Coady* v. *Canada (Royal Mounted Police)*, 2019 FCA 102, at para. 3.

[51] I share the respondent's concern that the appellant is attempting to admit evidence on appeal that she chose not to present before the Federal Court. The following passage from the Federal Court's reasons is informative:

> [116] In terms of the CTA procedure, the Plaintiff submits as follows:
>
> > 121. With respect to SATA's assertion for making a CTA complaint, there is also no evidence that the CTA will review all 176 flights in question, which again raises concerns whether there can be effective behavioural modification. There is also no evidence that they will adjudicate the claims for all passengers on the same flight, and there will be no access to justice. Furthermore, the CTA is not equipped to handle 28,000 individual complaints brought by the Class, and would overwhelm the CTA.
> >
> > …
>
> [117] For the reasons that follow, I am not satisfied that a class action would be a preferable to the informal facilitation process and formal adjudicative process offered by the CTA.
>
> [118] <u>First, the Plaintiff bears the onus to prove some basis in fact for her position that the CTA will fail to act on complaints. She cannot rely on the absence of evidence to prove a fact; facts without evidence are bald assertions. The Plaintiff engages in speculation and conjecture when she claims that the CTA will be overwhelmed and is not equipped to handle voluminous complaints.</u> [Emphasis added.]

[52] I accept that the appellant disagrees with the Federal Court's opinion on onus, but it is clear the appellant presented no evidence to support her claims that "the CTA is not equipped to handle 28,000 individual complaints brought by the Class, and would overwhelm the CTA." She now seeks to present that evidence in the form of the new evidence. This Court has previously

refused to exercise its discretion to admit new evidence where the alleged facts for which the new evidence is presented are not new and where the appellant, like this one, provided no explanation as to why she could not present evidence of the alleged facts at the time the motion was made: *Shire*, at paras. 18-22.

[53] This is not a case where the interests of justice warrant admitting the new evidence.

(3) Judicial Notice

[54] The appellant suggests that the CTA Response is a document of which a Court may take judicial notice. I disagree. The Supreme Court of Canada described the doctrine of judicial notice in *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 48, as follows:

> Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy [...]

R. v. Spence 2005 SCC 71, [2005] 3 S.C.R. 458, is to the same effect (at para. 65):

> When asked to take judicial notice of matters […], I believe a court ought to ask itself whether such "fact" would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute *for the particular purpose for which it is to be used*, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the "fact" to the disposition of the controversy.

[55] Here the ability of the CTA to address the complaints is something about which the parties disagree, and is close to the issues in dispute. So it appears both controversial and not so generally accepted as to be something about which reasonable people may not disagree. But more importantly, the CTA Response is a document that requires explanation before the Court could safely interpret it or draw reasonable inferences from it: *Bell v. Canada*, 2000 CanLII 15330, 54 DTC 6363, at paras. 25 and 31.

[56] For the above reasons, the motion to admit the new evidence is dismissed.

III. Conclusion

[57] The De Oliveira Affidavit and the Romano Affidavit shall be included in the appeal book. The appellant shall file the appeal book within 30 days of today's date. The appellant's motion to admit new evidence is dismissed. There shall be no costs of the motions.

"K. A. Siobhan Monaghan"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-138-21
STYLE OF CAUSE:	DORA BERENGUER v. SATA INTERNACIONAL - AZORES AIRLINES, S.A.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	MONAGHAN J.A.
DATED:	NOVEMBER 9, 2021

WRITTEN REPRESENTATIONS BY:

Simon Lin	FOR THE APPELLANT
Jérémie John Martin Sébastien A. Paquette	
Carlos P. Martins Andrew Macdonald Emma Romano	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Evolink Law Group Burnaby, British Columbia	FOR THE APPELLANT
Champlain Avocats Montreal, Québec	
WeirFoulds LLP Toronto, Ontario	FOR THE RESPONDENT