Federal Court of Appeal | Cour d'appel fédérale

Date: 20221102

Docket: A-135-22

Citation: 2022 FCA 186

Present: LOCKE J.A.

BETWEEN:

KARSON MACKIE

Applicant

and

TEAMSTERS CANADA RAIL CONFERENCE

Respondent

and

VIA RAIL CANADA INC.

Intervener

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 2, 2022.

REASONS FOR ORDER BY: LOCKE J.A.

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REASONS FOR ORDER

LOCKE J.A.

[1] The respondent, Teamsters Canada Rail Conference, moves to strike portions of the affidavit of the applicant, Karson Mackie, sworn on July 27, 2022. The applicant relies on his affidavit to support his application for judicial review of a decision of the Canadian Industrial Relations Board (CIRB), which summarily dismissed his complaint that the respondent had failed in its duty of fair representation of the applicant, as contemplated in section 37 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the DFR complaint).

[2] The respondent takes issue with every paragraph of the applicant's affidavit, and several of the exhibits thereto. The respondent argues that the text of the applicant's affidavit includes information that (i) was not before the CIRB when it ruled on the applicant's DFR complaint (and therefore should not be considered in judicial review of its decision), (ii) constitutes opinion or argument rather than facts, (iii) is hearsay, and/or (iv) is not relevant to the present application. The respondent's written representations in support of its motion address each paragraph of the applicant's affidavit individually. With regard to the exhibits in dispute (Exhibits B, D, G, H, I, J and K), the respondent argues that these documents were not before the CIRB when it ruled on the applicant's DFR complaint.

[3] The respondent correctly cites authorities for the general principle that evidence that was not before a tribunal should not be considered in judicial review of its decision. This Court described the principle as follows in the context of a judicial review of a decision of the Copyright Board in *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297 (*Access Copyright*):

> [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* [R.S.C. 1985, c. F-7] 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 *Gitxsan 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.

[4] The respondent acknowledges that there are exceptions to this general principle, but argues that none applies in this case. The exceptions were discussed in *Access Copyright* at paragraph 20 and in *Sharma v. Canada (Attorney General)*, 2018 FCA 48, 288 A.C.W.S. (3d) 790 at paragraph 8:

> … New evidence may be admitted where (1) it provides general background in circumstances where that information might assist in understanding the issues relevant to the judicial review but does not add new evidence on the merits (2) it highlights the complete absence of evidence before the administrative decision-maker on a particular finding, or (3) it brings to the attention of the judicial review court defects that cannot be found in the evidentiary record of the administrative decision-maker: *Access Copyright* at para. 20; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 116. As this Court explained in *Access Copyright* at paragraph 20, "[i]n 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".

[5] The respondent also acknowledges that a motion for an advance ruling on the admissibility of evidence in the context of an application for judicial review is discretionary, and this Court should exercise its discretion in this regard only where it is clearly warranted to allow

the hearing to proceed in a timelier and more orderly fashion: *Access Copyright* at paragraphs 10–12.

[6] For his part, the applicant acknowledges that some portions of his evidence were not before the CIRB when it rendered its impugned decision, but he argues that such evidence should nevertheless not be struck. The gist of his argument is that the evidence in question is relevant to the issues in dispute and should be considered. He cites the decision of the Supreme Court of Canada in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at page 775, 106 D.L.R. (3d) 212 (*Palmer*), to support his argument that additional evidence may be admitted based on the following principles:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen* [[1964] S.C.R. 484, 46 D.L.R. (2d) 372].
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (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 evi-dence adduced at trial, be expected to have affected the result.

[7] It is important to note, however, that *Palmer* concerned an appeal of criminal convictions under the *Criminal Code*, R.S.C. 1985, c. C-46. *Palmer* does not apply in the circumstances of the present judicial review. Also, the provision in issue in *Palmer* specifically contemplated new evidence. In the present case, Parliament has assigned to the CIRB the task of assessing the merits of the applicant's DFR complaint. It is not the role of this Court on judicial review to redo

that work. Moreover, there is no provision in the legislation applicable in this case for the introduction of new evidence.

[8] The same distinction applies in respect of the applicant's reliance on the decision of the Court of Appeal for Ontario in *Sengmueller v. Sengmueller*, 1994 CanLII 8711, [1994] O.J. No. 276 (Q.L.). That decision admitted new evidence on the basis of fairness, but in the context of an appeal, not a judicial review. Again, the legislation explicitly contemplated the introduction of new evidence.

[9] The applicant's discussion of the various exhibits in issue (Exhibits B, D, G, H, I, J and K) does not take issue with the respondent's submission that they were not before the CIRB. The applicant also does not argue that these exhibits meet any of the exceptions to exclusion of new evidence in an application for judicial review as contemplated in the jurisprudence. I am convinced that it is clearly warranted for me to exercise my discretion to strike these exhibits from the applicant's affidavit. Doing so now will allow the hearing to proceed in a timelier and more orderly fashion.

[10] I reach the same conclusion with regard to all of the paragraphs of the applicant's affidavit that discuss Exhibits B, D, G, H, I, J or K. These are paragraphs 3, 5, 8, 9, 10 (as identified by the respondent, beginning with "Mr. Stead never provided…"), 11 (as identified by the respondent, beginning with "Another incident related to Exhibit I…"), 12, 13 and 15. These paragraphs discuss and rely on new evidence that is inadmissible.

[11] I also agree with the respondent's argument that paragraphs 1 and 16 (incorrectly marked "13") should be struck. The content of these paragraphs is entirely argumentative, and argument does not belong in an affidavit.

[12] I will not exercise my discretion to strike paragraphs 2, 4, 6, 7 and 14. I disagree with the respondent's argument that paragraph 14 contains opinion. The other paragraphs discuss exhibits that have not been struck. In my view, striking these paragraphs, or parts thereof that constitute opinion or argument (as argued by the respondent), would not allow the hearing to proceed in a timelier and more orderly fashion.

[13] An Order will issue requiring the applicant to submit an amended affidavit in compliance with these reasons. Since the applicant's application record has already been filed, an amended application record incorporating the amended affidavit will be required.

"George R. Locke"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-135-22
STYLE OF CAUSE:	KARSON MACKIE v. TEAMSTERS CANADA RAIL CONFERENCE and VIA RAIL CANADA INC.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	LOCKE J.A.
DATED:	NOVEMBER 2, 2022

WRITTEN REPRESENTATIONS BY:

Karson Mackie	FOR THE APPLICANT (On his own behalf)
Michael A. Church	FOR THE RESPONDENT

SOLICITORS OF RECORD:

CaleyWray Toronto, Ontario	FOR THE RESPONDENT
McCarthy Tétrault LLP Montréal, Quebec	FOR THE INTERVENER