Federal Court  Cour fédérale

Date: 20190318

Docket: T-541-10

Citation: 2019 FC 323

Ottawa, Ontario, March 18, 2019

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

RÉGENT BOILY

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

JUDGMENT AND REASONS

I. Overview

[1] This is an appeal filed by the Plaintiff, Mr. Régent Boily, pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106 [Rules] against an order made on August 7, 2018 by Prothonotary Tabib [Order]. In her Order, Prothonotary Tabib granted a motion brought by the Defendant, Her Majesty the Queen, and struck the second expert report of Professor Peter Rosenblum [Second Rosenblum Report] tendered by Mr. Boily in support of his action for

damages. Prothonotary Tabib was of the view that the filing of the Second Rosenblum Report contravened an earlier judgment issued on November 9, 2017 by Justice Gagné, which had itself dismissed a prior iteration of the report [Gagné Judgment].

[2] The issues raised by this appeal are whether Prothonotary Tabib erred in her interpretation of the Gagné Judgment and in striking the Second Rosenblum Report, and whether she erred in concluding that Mr. Boily's actions amounted to an abuse of process.

[3] For the reasons set out below, Mr. Boily's appeal will be dismissed. In my view, Prothonotary Tabib made no reviewable error in striking the Second Rosenblum Report in its entirety and I see no reason to interfere with her Order. Prothonotary Tabib has not misinterpreted the Gagné Judgment, as this judgment clearly struck the entire initial version of the report, rather than only certain parts of it, and declined to order the alternative relief sought by Mr. Boily, namely to be allowed to file a revised report omitting the inadmissible portions. If Mr. Boily was unsatisfied with that decision or any part of it, he could have appealed it. Mr. Boily could not simply elect to ignore it and decide to file a revised version of the report which was substantially similar to its first iteration, save for the subtraction of inadmissible passages, as this alternative relief had been specifically denied by Justice Gagné. Furthermore, I see no palpable or overriding error in Prothonotary Tabib's conclusion that, in the circumstances, the filing of the Second Rosenblum Report constituted an abuse of process.

II. Background

A. *Factual context*

[4] Mr. Boily is a Canadian citizen who was extradited to Mexico, upon Canada's acceptance of diplomatic assurances from the Mexican government to the effect that his physical safety would be protected. Shortly after arriving in Mexico, Mr. Boily was imprisoned and tortured. He subsequently brought an action for damages and breach of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, alleging that the Defendant failed to prepare, monitor, perform necessary follow-ups or take any action to ensure that Mexico would respect its diplomatic assurances and see to his safety. In his action, Mr. Boily is notably seeking $6 million in damages for psychological and physical harm, trouble and inconvenience resulting from his alleged mistreatment by Mexican prison officials.

[5] In February 2017, Mr. Boily filed into evidence an expert report by Professor Rosenblum [First Rosenblum Report] to establish the current state of international law. This report discussed the problem posed by states' reliance on diplomatic assurances when they extradite individuals to countries posing a risk of torture and provided an explanation of the standards, including in relation to monitoring and follow-up by sending states, developed by international and intra-national juridical bodies. The report also commented on the specific case of Mr. Boily and described the human rights situation in Mexico at the time of Mr. Boily's extradition.

[6] In March 2017, the Defendant filed a notice of motion to strike the First Rosenblum Report, contending that the report was a legal opinion on international law and that it touched on one of the issues in litigation, thus rendering it inadmissible. The Defendant also claimed that this expert report would add undue delays and costs in the proceedings. In his responding motion record, Mr. Boily argued that expertise in international law is admissible before the courts and that, in any event, the report not only addressed the contents of Canada's obligations at international law, but also provided a contextual background as well as factual expertise about the human rights situation in Mexico.

[7] In April 2017, Prothonotary Morneau, who was acting at the time as case management judge in this matter, granted the Defendant's motion and struck the First Rosenblum Report in its entirety, on the grounds that it contained both (i) inadmissible opinion on international law; and (ii) improper and inadmissible legal opinion on the specific situation of Mr. Boily. Mr. Boily appealed this order and notably sought, as an alternative relief, that only the offending portions of the First Rosenblum Report be struck.

[8] In November 2017, Justice Gagné dismissed Mr. Boily's appeal (*Boily v Canada*, 2017 FC 1021 [*Boily*]). In her judgment, Justice Gagné held that Prothonotary Morneau had erred in finding that expert opinion evidence about the state of international law was inadmissible. However, she nevertheless declined to interfere with the prothonotary's discretion to strike rather than parse the First Rosenblum Report, as she confirmed that parts of the report contained an inadmissible opinion about the application of international law norms to Mr. Boily's case.

[9] Mr. Boily did not appeal the Gagné Judgment. In March 2018, Mr. Boily instead served and filed a new version of Professor Rosenblum's expert report. As acknowledged by counsel for Mr. Boily at the hearing before this Court, this Second Rosenblum Report is "substantially similar" to the expert opinion contained in the First Rosenblum Report. It is indeed virtually identical. It includes the exact same section on the state of international law with respect to diplomatic assurances as well as a slightly expanded section on the human rights situation in Mexico at the time of Mr. Boily's extradition. The specific, inadmissible portions of the First Rosenblum Report that commented on Mr. Boily's case were however redacted.

[10] In May 2018, the Defendant filed a motion to strike the Second Rosenblum Report, on the basis that it was a repetition of the First Rosenblum Report and that it violated the principle of *res judicata*. In August 2018, Prothonotary Tabib rendered her Order, which is the object of the current appeal.

B. ***Prothonotary Tabib's Order***

[11] In her decision, Prothonotary Tabib struck the Second Rosenblum Report in its entirety, and ordered Mr. Boily to pay a fixed amount of costs forthwith.

[12] Prothonotary Tabib found that the Second Rosenblum Report contained the very same opinions on the state of international law with respect to diplomatic assurances that were included in the First Rosenblum Report, as well as the same opinions about the human rights situation in Mexico, with some enhanced comments about the human rights record of Mexico, but without the inappropriate portions dealing with Mr. Boily's case.

[13] Interpreting the Gagné Judgment, Prothonotary Tabib further observed that Mr. Boily would have been entitled to file this Second Rosenblum Report, had Justice Gagné granted the alternative conclusion sought by Mr. Boily in his appeal from Prothonotary Morneau's order, namely to be allowed to file a revised report omitting the inadmissible portions. However, Justice Gagné specifically denied this relief, and she instead confirmed Prothonotary Morneau's order striking the First Rosenblum Report in its entirety, highlighting the fact that Prothonotary Morneau's decision constituted a proper exercise of his discretion as case management judge. Prothonotary Tabib concluded that the Second Rosenblum Report was filed in "flagrant disregard" of the Gagné Judgment, and thus constituted an abuse of process.

[14] According to Prothonotary Tabib, Justice Gagné was aware and clearly intended that the consequences of her decision would be to deprive Mr. Boily of the opportunity of relying on expertise that was included in the First Rosenblum Report even though it was otherwise admissible. Thus, stated Prothonotary Tabib, the Gagné Judgment "clearly shut the door to allowing [Mr. Boily] to file, for presentation at trial, otherwise admissible expertise on international law or the human rights situation in Mexico at the time of [Mr. Boily's] extradition" (Order at pp 5-6).

[15] In her decision, Prothonotary Tabib specifically referred to the paragraphs of the Gagné Judgment which considered Mr. Boily's request to solely strike the offending passages of the First Rosenblum Report. Justice Gagné had indicated that, "in submitting an expert opinion containing a legal conclusion on international law as it applies to the facts of the case, Mr. Boily submitted inadmissible expert evidence and consequently, assumed the risk of having the Report

struck in its entirety" (*Boily* at para 49). Prothonotary Tabib also mentioned the comments of Justice Gagné recognizing that, once he had determined that the First Rosenblum Report contained inadmissible expert evidence, Prothonotary Morneau had the discretion to strike the report as a whole or in part, or to leave that decision to the trial judge (*Boily* at paras 46, 48).

C. *Standard of Intervention*

[16] Since the Federal Court of Appeal's [FCA] decision in *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira*], it is well-established that the standard of intervention on appeals of discretionary orders by prothonotaries is the standard enunciated by the Supreme Court of Canada [SCC] in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*]. On questions of law, questions of legal principle and questions of mixed fact and law where there are extricable questions of law or legal principle, the prothonotaries' orders shall be reviewed for correctness. On all other questions, particularly questions of fact or mixed fact and law and inferences of fact, the Court may only interfere if the prothonotaries made a "palpable and overriding error" (*Maximova v Canada (Attorney General)*, 2017 FCA 230 [*Maximova*] at para 4; *Hospira* at paras 64-66, 79; *Housen* at paras 19-37).

[17] The FCA has repeatedly affirmed that the "palpable and overriding error" standard is a "highly deferential standard" (*Figueroa v Canada (Public Safety and Emergency Preparedness)*, 2019 FCA 12 at para 3; *Montana v Canada (National Revenue)*, 2017 FCA 194 at para 3; *1395804 Ontario Ltd (Blacklock's Reporter) v Canada (Attorney General)*, 2017 FCA 185 at para 3; *NOV Downhole Eurasia Limited v TLL Oil Field Consulting Ltd*, 2017 FCA 32 at para 7; *Revcon Oilfield Constructors Incorporated v Canada (National Revenue)*, 2017 FCA 22 at para

2). As Justice Stratas metaphorically stated in *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 [*Mahjoub*] and in *Canada v South Yukon Forest Corporation*, 2012 FCA 165 [*South Yukon*], in order to meet this standard, "it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall" (*Mahjoub* at para 61; *South Yukon* at para 46). Describing what "palpable" and "overriding" mean, Justice Stratas further wrote in *Mahjoub*:

> [62] "Palpable" means an error that is obvious. Many things can qualify as "palpable." Examples include obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received in accordance with the doctrine of judicial notice, findings based on improper inferences or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence.
>
> [63] But even if an error is palpable, the judgment below does not necessarily fall. The error must also be overriding.
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> [64] "Overriding" means an error that affects the outcome of the case. It may be that a particular fact should not have been found because there is no evidence to support it. If this palpably wrong fact is excluded but the outcome stands without it, the error is not "overriding." The judgment of the first-instance court remains in place.

[18] A palpable and overriding error has also been described by the FCA as an error which is obvious, plainly seen and apparent, the effect of which is to vitiate the integrity of the reasons (*Madison Pacific Properties Inc v Canada*, 2019 FCA 19 at para 26; *Maximova* at para 5). In *Groupe Maison Candiac Inc c Canada (Procureur général)*, 2017 CAF 216 [*Candiac*], the FCA further noted that the palpable and overriding error standard is particularly hard to meet when the decision that is being reviewed is a procedural one (*Candiac* at para 50).

[19] The SCC has recently echoed these principles in *Salomon v Matte-Thompson*, 2019 SCC 14 [*Salomon*]: "[w]here the deferential standard of palpable and overriding error applies, an

appellate court can intervene only if there is an obvious error in the trial decision that is determinative of the outcome of the case" (*Salomon* at para 33, citing *Benhaim v St-Germain*, 2016 SCC 48 at para 38). The SCC also referred to another metaphor used by the Quebec Court of Appeal in *JG v Nadeau*, 2016 QCCA 167, at paragraph 77, where the Court affirmed that [TRANSLATION] "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye". Put simply, palpable means an error that is obvious and apparent while overriding refers to an error that goes to the core of a case's outcome and has the effect of changing the result (*Maximova* at para 5; *South Yukon* at para 46).

[20] The admissibility of affidavit evidence is a question of law, and is therefore reviewed on a standard of correctness (*O'Grady v Canada (Attorney General)*, 2016 FCA 221 at para 2). However, a decision to strike an affidavit or an expert report is generally reviewable under the standard of palpable and overriding error, except where there is an extricable question of law (*CBS Canada Holdings Co v Canada*, 2017 FCA 65 at para 15; *Boily* at para 44). Here, Prothonotary Tabib did not have to make a legal determination on the Second Rosenblum Report and to assess whether it was admissible according to the four criteria established by the SCC in *R v Mohan*, [1994] 2 SCR 9 [*Mohan*]. She instead had to decide whether the Second Rosenblum Report effectively complied with the Gagné Judgment and could be accepted. To determine whether Prothonotary Tabib erred in striking the Second Rosenblum Report thus requires an analysis as to whether she erred in her interpretation of the Gagné Judgment and in its application to this specific expert report, whether Mr. Boily in fact complied with the Gagné Judgment, and whether the principle of *res judicata* was contravened. These issues raise

questions of mixed fact and law, and can therefore only be reviewed by this Court in the presence of a palpable and overriding error.

[21] Similarly, whether Mr. Boily committed an abuse of process constitutes a question of mixed fact and law, to be assessed under the "palpable and overriding error" standard of intervention, unless there is an extricable question of law or legal principle (*Hinse v Canada (Attorney General)*, 2015 SCC 35 at para 180; *Mahjoub* at paras 73-74). Here, Prothonotary Tabib's finding of abuse of process raises no extricable question of law or legal principle and as such, the "palpable and overriding error" standard applies.

[22] I pause to add that, further to many decisions of the FCA, no distinction needs to be made in the standard of intervention applicable to a prothonotary's decision simply because it is a discretionary one (*Ader v Canada (Attorney General)*, 2018 FCA 105 at para 14; *Canada (Attorney General) v Liang*, 2018 FCA 39 at para 9; *Bygrave v Canada*, 2017 FCA 124 at para 10; *Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 at para 6; *Barkley v Canada*, 2017 FCA 7 at para 6; *Hospira* at para 79). In all instances, the "palpable and overriding error" standard applies. I acknowledge that, in cases involving an exercise of discretion, an appellate court "must show great deference" and refrain from intervening if the discretion was not exercised in an "abusive, unreasonable or non-judicial manner" (*Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26 [*Jodoin*] at para 52). However, as rightly argued by counsel for Mr. Boily, the *Jodoin* decision does not stand for the proposition that a prothonotary's discretionary decision commands a more exacting standard than the already "highly deferential" palpable and overriding error standard.

III. Analysis

[23] Mr. Boily submits that Prothonotary Tabib's Order must be reversed for three reasons. First, he claims that the Order is based on a misinterpretation of the Gagné Judgment that is not supported by the decision itself, the Rules or the law on admissibility of expert evidence. Second, Mr. Boily contends that Prothonotary Tabib failed to address part of his submissions and that the principle of *res judicata* does not apply to his case, as the Gagné Judgment did not foreclose his right to file another expert report. Third, Mr. Boily submits that he did not commit an abuse of process as he attempted in good faith to conform to the reasons of the Gagné Judgment with the filing of the Second Rosenblum Report.

[24] Each of these arguments will be addressed in turn.

A. *The Gagné Judgment Clearly Prohibited Mr. Boily from Filing the Second Rosenblum Report*

[25] Mr. Boily first claims that Prothonotary Tabib's Order relies on an interpretation of the Gagné Judgment that is neither supported by the text of that judgment, nor consistent with the Rules or the state of the law on admissibility of expert evidence. According to Mr. Boily, Justice Gagné did not prevent him from filing an expert report on international law and the human rights situation in Mexico that conformed with the rules for admissibility on expert evidence. Nor did Justice Gagné issue any direction with respect to Mr. Boily's right to file another expert report once the First Rosenblum Report was struck. Mr. Boily submits that Prothonotary Tabib's

conclusions add a significant substantive consequence to the Gagné Judgment that Justice Gagné's reasons do not support.

[26] More specifically, Mr. Boily contends that Prothonotary Tabib misread paragraph 48 of the Gagné Judgment, when she concluded, at page 5 of her Order, that "the Judge was aware and clearly intended that the consequence of her decision would be to deprive the Plaintiff of the opportunity of relying on expertise that was included in the first Rosenblum report and was otherwise admissible." Mr. Boily claims that, in concluding as she did, Prothonotary Tabib interpreted the Gagné Judgment as barring Mr. Boily from submitting any otherwise admissible expertise on any of the subjects contained in the First Rosenblum Report, regardless of the expertise or author. This, says Mr. Boily, is an error. Mr. Boily pleads that Prothonotary Tabib could not simply infer that Justice Gagné intended to deprive him of the ability to make his case by calling expert evidence, a right expressly provided for by the Rules: the right to make one's case and to call admissible evidence constitutes a pillar of procedural fairness which, while not unlimited, should not be interfered with lightly (*Porto Seguro Companhia De Seguros Gerais v Belcan SA*, [1997] 3 SCR 1278 at paras 29-30). Mr. Boily adds that, to the extent that the Court may impose a categorical limit on a party's use of expert evidence, any such limit must be stated in the clearest of terms, which are not found in the Gagné Judgment.

[27] Moreover, Mr. Boily further submits that, contrary to Prothonotary Tabib's reasons, he was never denied "leave to rely on an amended version" of the First Rosenblum Report (Order at p. 6), as such leave was never sought. He pleads that, while Justice Gagné refused to step into the shoes of Prothonotary Morneau to independently parse the expert report deemed to contain some

inadmissible evidence, she did not prevent him from ever completing his proof by adducing admissible evidence on topics contained in the report.

[28] I am not convinced by Mr. Boily's arguments.

[29] The main problem with Mr. Boily's submissions and the grounds of appeal he is raising before this Court is that they are erected on a fundamental mischaracterization of Prothonotary Tabib's Order and repeatedly misrepresent the scope of that decision. Without this flawed foundation which, regrettably, distorts the decision under appeal and muddles Mr. Boily's analysis, any appearance of a potential reviewable error in Prothonotary Tabib's Order quickly vanishes away. The recurring complaint of Mr. Boily is that Prothonotary Tabib interpreted the Gagné Judgment as permanently depriving him of the fundamental right to make his case by filing relevant, admissible expert evidence in support of his claim, more specifically on international law with respect to diplomatic assurances and on the human rights situation in Mexico at the time of his extradition. With respect, Prothonotary Tabib's Order does not say that.

[30] Contrary to what Mr. Boily argues, the Order does not conclude that "Mr. Boily's right to serve and file *any* expert report on the international law of diplomatic assurances and on the human rights situation in Mexico had been 'exhausted' as a result of the Gagné judgment" [emphasis in original] (Written Representations of Mr. Boily, at para 4). This is not what Prothonotary Tabib was asked by the Defendant in its underlying motion to strike; this is not what she had to decide; and this is not what she indeed decided. This matter does not relate to <u>any expert report</u>. It solely relates to the Second Rosenblum Report as Mr. Boily elected to

submit it. The Order did not conclude nor imply that Mr. Boily was forever barred "from submitting *any* otherwise admissible expertise on *any* of the subjects contained in the First Rosenblum Report – regardless of what that expertise looks like or who authors it" [emphasis in original] (Written Representations of Mr. Boily, at para 21). Indeed, the conclusions of Prothonotary Tabib's Order strictly refer to the "expert report of Peter Rosenblum dated March 13, 2018" being struck. Nothing more. The word "any" does not even appear anywhere in the Order in reference to the expert reports; it is an addition made by Mr. Boily which certainly injects flavor in his arguments attacking the Order, but which incorrectly and improperly imports into the decision an emphatic term and a dimension that are absent from it.

[31] The issue before Prothonotary Tabib (and before this Court) is not whether the Gagné Judgment prohibits the filing of a new, elusive expert report; it is whether the Gagné Judgment precludes the filing of the Second Rosenblum Report. Prothonotary Tabib simply had to determine whether Mr. Boily's attempt to file this Second Rosenblum Report contravened the conclusions of the Gagné Judgment. By expanding the Order and portraying it as a general and permanent prohibition of his fundamental right to file any expert report on international law and the human rights situation in Mexico, Mr. Boily simply misreads the content and conclusions of Prothonotary Tabib's Order.

[32] When the Second Rosenblum Report is looked at and considered in light of the Gagné Judgment, I have no hesitation to conclude that Mr. Boily was clearly prohibited from filing it and that Prothonotary Tabib made no error in striking it.

(1) Comparative analysis of the two Rosenblum reports

[33] The Order first concludes that the two versions of the Rosenblum report are alike. A comparative analysis of the First and Second Rosenblum Reports confirms that Prothonotary Tabib committed no error in making this crucial finding of fact and in determining that the Second Rosenblum Report amounted to a slightly revised version of the same report. For all intents and purposes, the two reports are virtually identical.

[34] The First Rosenblum Report contained four sections over 12 pages: (1) an overview of the expert's qualifications; (2) an overview of his opinion; (3) a discussion section comprising four subsections dealing with problems and issues of diplomatic assurances and a fifth subsection on "Heightened Obligations Flowing from the Assurances"; and (4) a conclusion. The subsection entitled "Heightened Obligations Flowing from the Assurances" spread over three pages and dealt with specific elements of Mr. Boily's case and the human rights situation in Mexico at the time of his extradition. This is the section that contained the passages rightly found to be inadmissible expert evidence by Prothonotary Morneau and Justice Gagné as they provided legal conclusions on issues to be decided by the Court.

[35] Turning to the Second Rosenblum Report, it contained exactly the same structure and also had the same four sections. It had: (1) an overview of Professor Rosenblum's qualifications; (2) an overview of his opinion; (3) a discussion section comprising the same four subsections dealing with problems and issues of diplomatic assurances and a fifth subsection now entitled "Evaluating the Assurances in light of credible human rights reporting and research"; and (4) a

conclusion. The subsection "Evaluating the Assurances in light of credible human rights reporting and research" spread over three pages and dealt with the human rights situation in Mexico, without the specific offending references to Mr. Boily's case. It, however, repeated several passages from the First Rosenblum Report dealing with the human rights situation in Mexico, intertwined with new and expanded comments on the conditions prevailing in Mexico at the time of Mr. Boily's extradition.

[36] The differences between the reports are marginal and are summarized in the following table:[1]

First Rosenblum Report	Second Rosenblum Report
I. OVERVIEW OF EXPERT'S QUALIFICATIONS I have been asked to provide an opinion on the standards that should be respected by a state that chooses to rely to rely [sic] on diplomatic assurances in extradition.	I. OVERVIEW OF EXPERT'S QUALIFICATIONS I have been asked to provide an opinion on the standards that, <u>according to international law</u>, should be respected by a state that chooses to rely on diplomatic assurances in extradition <u>and on the human rights situation in Mexico as known in the international community throughout the 1990s and 2000s</u>.
II. OVERVIEW OF OPINION It is my opinion, as elaborated below, that there are real and continuing obligations on sending states that rely on diplomatic assurances…	II. OVERVIEW OF OPINION It is my opinion, as elaborated below, that <u>under international law</u>, there are real and continuing obligations on sending states (<u>i.e. extraditing states</u>) that rely on diplomatic assurances…

[1] The extracts in bold reflect the passages included in the First Rosenblum Report but deleted from the Second Rosenblum Report. The underlined extracts reflect the passages included in the Second Rosenblum Report but absent from the First Rosenblum Report.

[…]	[…]
(ii) sending states must take concrete action to ensure that assurances are complied with **The [sic] final sections of the opinion reviews certain flags raised by the actual assurances offered by the Government of Mexico in the present case.**	(ii) sending states must take concrete action to ensure that assurances are complied with. International obligations must be assessed in light of the specific assurances as evaluated in light of the most credible information available. The final section of the opinion discusses the human rights situation in Mexico as known in the international community throughout the 1990s and 2000s in light of widely available and highly respected human rights research. The opinion does not offer any conclusions on how international law applies specifically to Mr. Boily's case.
III. DISCUSSION	III. DISCUSSION
[Note: Sections a. to d. are identical]	[Note: Sections a. to d. are identical]
e. Heightened Obligations Flowing From the Assurances	e. Evaluating the Assurances in light of credible human rights reporting and research
The safeguards that have been discussed so far, including those proposed by Professor Van Boven represent 'frame of reference' and a 'minimum', (A/59/324/para 41) that has to be adapted to individual circumstances. Those circumstances include **the conditions in the country and the particular concerns posed by the transferee.** […]	The safeguards that have been discussed so far, including those proposed by Professor Van Boven represent 'frame of reference' and a 'minimum', (A/59/324/para 41) that has to be adapted to individual circumstances. Those circumstances include: (i) the conditions in the receiving state and (ii) the particular concerns posed by the transferee. [Note: Section e. removes legal opinions on Mr. Boily's case and adds some details on the human rights situation in Mexico]

IV. CONCLUSION In this light, and based on the jurisprudence discussed above, the sending state is obligated to fulfill substantive requirements regarding monitoring, including… […] Based on the jurisprudence and work of the Special Rapporteur on Torture, the sending state, **particularly one with Canada's level of engagement in international human rights** would be aware that the risk of torture is greatest in the early…	IV. CONCLUSION In this light, and based on the jurisprudence discussed above, the sending state is obligated by international law to fulfill substantive requirements regarding monitoring, including… […] Based on the jurisprudence and work of the Special Rapporteur on Torture, the sending state would be aware that the risk of torture is greatest in the early…

[37] This summary can only lead to one conclusion: the two reports are essentially identical, save for subsection e. of the "Discussion" section, where Professor Rosenblum's inadmissible legal opinion on Mr. Boily's case is excluded and some elements dealing with the human rights situation in Mexico are added in the Second Rosenblum Report, thereby expanding on what was already discussed in the First Rosenblum Report. Professor Rosenblum's opinion and conclusion remain the same in both reports. The whole section on diplomatic assurances is identical. I further observe that even the additional, enhanced comments on the human rights situation in Mexico do not stand alone and are neither isolated nor separated from the portions of the First Rosenblum Report which dealt with that issue; they are rather convoluted with them into one single analysis. It is thus clear from this summary that, by filing the Second Rosenblum Report, Mr. Boily did not simply attempt to file just another expert report. He chose to file what was substantially the same report as the First Rosenblum Report reviewed by Prothonotary Morneau and Justice Gagné in their respective decisions, and which had been struck in its entirety. In

essence, the Second Rosenblum Report dealt with the same subjects and repeated the same expertise as the First Rosenblum Report.

[38] I underline that the Gagné Judgment did not only strike the comments that were held to be inadmissible legal opinion. It confirmed the exercise of discretion by Prothonotary Morneau to strike the First Rosenblum Report in its entirety, meaning that the various components of the expertise contained in the First Rosenblum Report were all removed from the record, whether they dealt with the international law of diplomatic assurances, the inadmissible legal opinion on Mr. Boily's case or the human rights situation in Mexico. That decision was not appealed and there was therefore *res judicata* in respect of all elements of that decision.

[39] In light of the foregoing, Prothonotary Tabib made no palpable and overriding error in concluding that the Second Rosenblum Report was essentially a reincarnation of the first one. Throughout his submissions, Mr. Boily loses sight of what the Second Rosenblum Report actually contained and how closely similar it was to the First Rosenblum Report struck by the Gagné Judgment. It was plain and obvious that the Second Rosenblum Report did not comply with the Gagné Judgment, as it essentially incorporated the components and the very expertise already struck by the Court.

(2) The impact of the denied alternative remedy

[40] The Order then referred to the fact that, as drafted, the Second Rosenblum Report amounted to the alternative remedy denied by the Gagné Judgment. Here again, I am satisfied that Prothonotary Tabib made no error, much less a palpable and overriding one, in analyzing the

effects of the Gagné Judgment and in concluding that the Second Rosenblum Report was nothing less than the alternative relief expressly sought by Mr. Boily in his appeal of Prothonotary Morneau's order, which was specifically considered and ultimately refused by Justice Gagné. It was, once again, the right interpretation of the Gagné Judgment.

[41] In his submissions to Justice Gagné, Mr. Boily had clearly asked her to consider the alternative relief of striking only the inadmissible portions of the First Rosenblum Report, as opposed to striking the entire report. This relief was not granted to him as Prothonotary Morneau and Justice Gagné opted for striking the entirety of the report. It is useful to reproduce the relevant paragraphs of the Gagné Judgment in that regard. At paragraphs 46 and 49-50 of her decision, Justice Gagné stated:

> [46] However, that argument misconstrues the determinations that Prothonotary Morneau was required to make upon assessing the Crown's motion to strike. Once Prothonotary Morneau made the legal determination that the Report contains inadmissible expert evidence, he had a discretionary decision to make as to whether to strike the Report in whole, in part or to leave that decision to the trial judge. His ultimate decision to strike the Report at a preliminary stage before trial and in its entirety was a proper exercise of his discretion as case manager in this case.
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> […]
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> [49] Had pages 10 to 12 been omitted from the Report, I am respectfully of the view that Prothonotary Morneau would have made a legal error in striking the Report. However, in submitting an expert opinion containing a legal conclusion on international law as it applies to the facts of the case, Mr. Boily submitted inadmissible expert evidence and consequently, assumed the risk of having the Report struck in its entirety.
>
> [50] Mr. Boily submitted strong arguments for why the Report should be merely struck in part or why the decision on the Report's admissibility should be left to the trial judge. However, the procedure before this Court is an appeal of a prothonotary's decision, which must be reviewed for legal error or for palpable

> and overriding error as to findings of fact or mixed fact and law. Prothonotary Morneau's Order contains no such errors. Consequently, Mr. Boily's motion for an appeal of the Order is dismissed.
>
> [emphasis added]

[42] In view of these statements, I can detect no error in Prothonotary Tabib's conclusion that the Second Rosenblum Report is no different from the alternative remedy denied to Mr. Boily in the Gagné Judgment: it is the First Rosenblum Report relieved of its inadmissible portions, and it effectively replicates Mr. Boily's request made to Justice Gagné. Upon review of both versions of the Rosenblum reports, Prothonotary Tabib has not committed any palpable and overriding error, nor any error of law, in observing that the Second Rosenblum Report "is what the Plaintiff would have been entitled to serve and file had the Court granted the alternative conclusion sought in his appeal from [Prothonotary Morneau's] order: a revised expert report of Dr. Rosenblum from which the offending conclusions have been removed" (Order at pp 3-4). I pause to note that the peripheral additions made to the discussion of the human rights situation in Mexico were merely a continuation and an extension of the expert analysis already contained in the First Rosenblum Report on that topic and struck by the Gagné Judgment.

[43] Since the Gagné Judgement highlighted the reasonable exercise of Prothonotary Morneau's discretion to strike the entire report, including its admissible parts, in the context of preventing further delay "for an action that has already been drawn out over several years" (*Boily* at para 48), it cannot be said that Prothonotary Tabib has misinterpreted the text of the Gagné Judgment, nor the context in which it was drafted, when she determined that it precluded Mr. Boily from filing the Second Rosenblum Report. I am ready to acknowledge that the Gagné

Judgment does not explicitly prohibit Mr. Boily from filing "any" new expert report but, as stated above, this is not the issue that Prothonotary Tabib had to determine or that she ruled upon. However, it was certainly a correct interpretation for Prothonotary Tabib to conclude that the Gagné Judgment prevented Mr. Boily from filing the Second Rosenblum Report, as it encapsulated what Justice Gagné had specifically denied as an alternative relief.

[44] I would add that, when this Court or the FCA finds an expert report inadmissible because it does not abide with one or more of the four *Mohan* factors, it is not unusual to strike the report in its entirety, without leave to file an amended version. For example, in *Canada (Board of Internal Economy) v Canada (Attorney General),* 2017 FCA 43, cited by the Defendant, the FCA reversed a decision of this Court confirming a prothonotary's decision to defer the question of admissibility to the judge hearing the matter on the merits. The affidavit in issue, which was considered an expert affidavit despite not having been filed properly as an expert report, was struck entirely by the FCA on the ground that it contained inadmissible legal opinion. It is not disputed that a case management judge clearly has the discretion to strike an expert report in totality or in part if it fails to meet the *Mohan* criteria for the admissibility of expert evidence. Mr. Boily has not referred the Court to any decision reversing a ruling striking an expert report in its entirety, on the basis that it was unfair or an abuse of discretion to do so (as opposed to simply striking the problematic portions).

[45] In some cases, this may look as a draconian measure. Mr. Boily could have appealed the Gagné Judgment if he disagreed with the First Rosenblum Report being struck in its entirety. He did not, and he must live with the consequences of his choice and the fact that all components of

the expertise contained in the report have now been struck from the record and cannot be re-entered indirectly or through the back door. When a prothonotary finds that a party is "making an 'end run' around the appeal process by attempting to obtain from [him or her] the very relief which it was seeking in [another] proceeding", he or she commits no error in refusing the amended expert report (*Apotex Inc v Abbott Laboratories*, 2006 FCA 294 at paras 5-7).

(3) The scope of Prothonotary Tabib's Order

[46] Mr. Boily takes particular exception to some statements contained in the reasons of Prothonotary Tabib which, in his view, suggest that the Order went beyond the Second Rosenblum Report and implied that any expert report on international law with respect to diplomatic assurances and on the human rights situation in Mexico would be inadmissible. More specifically, Mr. Boily refers to two passages where Prothonotary Tabib writes that Justice Gagné's conclusions "clearly shut the door to allowing the Plaintiff to file, for presentation at trial, otherwise admissible expertise on international law or the human right situation in Mexico at the time of the Plaintiff's extradition", and that "[t]he Plaintiff's right to serve and file an expert report in this matter is thus effectively exhausted […]" [emphasis added].

[47] I do not share Mr. Boily's interpretation and concerns regarding these extracts of the Order. First, these remarks have to be read in the context of the whole decision issued by Prothonotary Tabib. And when they are properly considered in their context, I find that they do not carry the universal reach and scope that Mr. Boily valiantly tries to ascribe to them. I again underscore that Prothonotary Tabib's final conclusions and Order do no go beyond what was requested by the Defendant: they are expressly limited to striking the Second Rosenblum Report,

and nothing else. Moreover, I note that the first extract singled out by Mr. Boily was preceded by the following words: "[i]n the context where the Plaintiff had specifically asked for the alternative relief of the first Rosenblum report being only struck in parts […]". The "otherwise admissible expertise" is thus obviously tied to the First Rosenblum Report. As to the second extract, it was part of a paragraph referring specifically to the expert report tendered by Mr. Boily and to the reliance on an amended version of the report having been denied. Again, it is manifestly linked to the First Rosenblum Report, not to *any* indeterminate report.

[48] I concede that the reasons could perhaps have used more precise wording to avoid the confusion apparently created by the references to "otherwise admissible expertise" and to "an" expert report, and that a clearer choice of words may have been preferable. However, when considered in the overall context of the decision and in light of the actual Order being limited to the Second Rosenblum Report, I am satisfied that these passages must be read as being limited to the First Rosenblum Report and its contents. In my view, the Order cannot be interpreted as containing conclusions going beyond the Second Rosenblum Report or circumscribing the general right that Mr. Boily might still have to file another expert report different from the First Rosenblum Report.

[49] Second, even if I were to assume that Prothonotary Tabib's Order extended to all potential expert reports and not only to the Second Rosenblum Report, this would mean that Prothonotary Tabib's decision would have ruled *ultra petita* and beyond what was sought by the Defendant. The *ultra petita* principle means that a court will not make a ruling beyond what is requested by the parties (*Planification-Organisation-Publications Système (POPS) Ltée v 9054-*

8181 Québec Inc, 2014 FCA 185 [*POPS*] at para 34; *Canadian Private Copying Collective v Canadian Storage Media Alliance*, 2004 FCA 424 at para 173). In such a case, the Court could "read down" the decision and reformulate it so that it no longer exceeds what the parties applied for (*POPS* at para 35). Moreover, since the problematic statements singled out by Mr. Boily are in the reasons of Prothonotary Tabib but are not reflected in the actual conclusions of her Order, they should rather be characterized as non-binding *obiter* and not be qualified as being *ultra petita* (*Olymel - Société en commandite c Union internationale des travailleurs et travailleuses uni(e)s de l'alimentation et de commerce*, [2002] RJQ 658 (QCCA) at para 48; *Association patronale des entreprises en construction du Québec c Association de la construction du Québec*, 2009 QCCS 3236 at para 92).

[50] Mr. Boily also complains about Prothonotary Tabib stating that "[l]eave to rely on an amended version of the report was denied", affirming that it is incorrect. Once again, this statement has to be read in context. It was made in relation to the alternative relief sought by Mr. Boily to which the Order refers. Mr. Boily had specifically asked Justice Gagné to solely strike the paragraphs addressing the application of Canada's international obligations to Mr. Boily, a remedy ultimately refused by Justice Gagné. In other words, Justice Gagné did not accede to Mr. Boily's request to be granted permission to file a revised expert report from which the inadmissible evidence would be expunged. This, in my view, is what Prothonotary Tabib referred to when she mentioned the fact that "leave to rely on an amended version" of the report was denied. It was not leave to file any amended expert report, as described by Mr. Boily in his submissions.

[51] In light of the foregoing, I am not persuaded that Prothonotary Tabib has erred in her interpretation of the Gagné Judgment and its effects on the Second Rosenblum Report. Her interpretation is clearly supported by the text of that judgment, and no issue regarding the Rules or the state of the law on admissibility of expert evidence arises in the circumstances. These would only arise if the Order had dealt with Mr. Boily's more general right to file any expert report. This was not the case.

B. *The Principle of Res Judicata Prohibits Mr. Boily from Filing the Second Rosenblum Report*

[52] As a second ground of appeal, closely tied to the first one, Mr. Boily argues that the doctrine of *res judicata* does not apply to bar him from filing the Second Rosenblum Report. Relying on article 2848 of the *Civil Code of Québec*, he submits that, for a judgment to constitute *res judicata*, three identities must exist between that judgment and the subsequent disputed matter: (1) identity of cause; (2) identity of parties; and (3) identity of object, referring to the benefit or right that the successful party in the existing judgment wishes to retain (*Ungava Mineral Exploration Inc c Mullan*, 2008 QCCA 1354 at para 77 [*Ungava*] at para 77, citing *Pesant c Langevin*, (1926) 41 BR 412, at pp 421-422). Mr. Boily claims that, in this case, the object refers to the denial of Mr. Boily's right to file the First Rosenblum Report on the basis that it contained inadmissible evidence, not to any and all subsequent expert evidence on international law or the human rights situation in Mexico at the time of his extradition.

[53] I disagree with Mr. Boily's suggestion that the Gagné Judgment and his attempt to file the Second Rosenblum Report somehow do not share the same object.

[54] Further to my analysis of the Second Rosenblum Report and of the principle of *res judicata*, I conclude there was indeed *res judicata* with respect to the Second Rosenblum Report and that Prothonotary Tabib committed no error in striking it. Again, I accept that the Gagné Judgment may not have barred Mr. Boily from filing any and all potential expert evidence on international law or the human rights situation in Mexico, and that the object of the Gagné Judgment is not the denial of any expert evidence. However, the Gagné Judgment certainly struck the First Rosenblum Report in its entirety, and its object certainly is the denial of Mr. Boily's right to file the First Rosenblum Report, including all components and elements of the expertise contained in the report. The benefit that the Defendant retained from the Gagné Judgment is the fact that it prevented Mr. Boily from refiling, whether separately or as part of a new, revised report, each and every constituent of the expertise covered in the First Rosenblum Report. As stated above, the Gagné Judgment did not solely strike the offending inadmissible portions; it confirmed Prothonotary Morneau's exercise of discretion to strike the First Rosenblum Report in its entirety, and this encompasses all its components and subjects as they were discussed and analyzed in the report.

[55] This is exactly what Mr. Boily attempted to refile with the Second Rosenblum Report as this revised report boils down to a repetition of the First Rosenblum Report. Mr. Boily could have attempted to file a distinct or different expert report, clearly excluding all elements of the First Rosenblum Report which had been struck by the Gagné Judgment. In such a case, there might have been no identity of object. However, instead of attempting to do this, Mr. Boily elected to file the Second Rosenblum Report which was virtually identical to the first report and essentially repeated *verbatim* what had been struck. There was certainly *res judicata* with respect

to the specific contents of the Second Rosenblum Report as they related to international law of diplomatic assurances and to comments made on the human rights situation in Mexico which were compounded with portions already struck out by the Gagné Judgment. Stated differently, the doctrine of *res judicata* did apply to prevent Mr. Boily from filing the Second Rosenblum Report to the extent that such report was virtually a carbon copy of the First Rosenblum Report struck out by the Gagné Judgment.

[56] I agree with Mr. Boily that, in considering the similarity of object under the principle of *res judicata*, the Court must consider the object of the judgment and not the object of the underlying report. Given Justice Gagné's decision confirming that the First Rosenblum Report was struck in its entirety, the object of that judgment is best characterized as denying Mr. Boily's right to admit into evidence all the admissible and inadmissible parts of this expert report. This is the right that was denied in the Gagné Judgment. And before Prothonotary Tabib, Mr. Boily was trying to enter into evidence the otherwise admissible parts of the expertise contained in the First Rosenblum Report. The debate before Prothonotary Tabib with respect to the Second Rosenblum Report thus concerned the same contents and issues debated before Justice Gagné regarding the First Rosenblum Report and the alternative remedy. As the Québec Court of Appeal stated in *Ungava*, this undoubtedly amounts to an identity of object and *res judicata*:

> […] En d'autres termes, si deux objets sont tellement connexes que les deux débats qui se font à leur sujet soulèvent la même question concernant l'accomplissement de la même obligation, entre les mêmes parties, il y a chose jugée.
>
> (*Ungava* at para 77)
>
> [TRANSLATION]

> […] In other words, if two objects are so closely related that the two debates in their respect raise the same question relating to the same obligation, between the same parties, there is *res judicata*.

[57] Again, the main problem with Mr. Boily's argument on the principle of *res judicata* lies in the fact that he reads the Order as applying to any expert report and ignores the very substantial similarity between the First Rosenblum Report and the Second Rosenblum Report. As was the case for Prothonotary Tabib, this Court is not asked to rule on the admissibility of any expert evidence relating to international law and human rights in Mexico; instead, it is asked to determine whether it was an error for Prothonotary Tabib to conclude that the Gagné Judgment specifically precluded Mr. Boily from filing what Justice Gagné did not allow as an alternative relief, namely the same report without the impugned inadmissible portions. Whether the Gagné Judgment precludes Mr. Boily from filing any expert report on international law matters or on the human rights situation in Mexico is not the issue raised by this appeal. But the Gagné Judgment and the principle of *res judicata* certainly preclude Mr. Boily from filing the Second Rosenblum Report, as it repeats the expert evidence already struck by the Court and attempts to re-enter it in the record indirectly.

[58] Mr. Boily submits that courts in Québec and across the country have accepted that parties may file new or revised versions of expert reports when the original version is struck by the court (*Paillé c Lorcon Inc*, [1985] RDJ 421 (QCCA) [*Paillé*]; *Anderson v Canada (Attorney General)*, 2015 NLTD(G) 181 (NLSC) [*Anderson*]; *Maras v Seemore Entertainment Ltd*, 2014 BCSC 1109 [*Maras*]; *Mitsui & Co (Point Aconi) Ltd v Jones Power Co Limited et al*, 2001 NSSC 178 [*Mitsui*]). Similarly, he claims that parties are permitted to commence a new proceeding if an older one is discontinued or dismissed on procedural grounds, provided that other barriers such

as a prescription period do not stand in the way (*Envireen Construction (1997) Inc v Canada*, 2007 FC 70 [*Envireen*]; *Arbutus Environmental Services v Stewart*, 2000 BCCA 261; *Automated Tank Manufacturing Inc v Bertelsen*, 2012 FCA 307).

[59] The cases relied on by Mr. Boily are easily distinguishable from the case at bar, as they relate to situations where specific directions that the report at stake could be modified or replaced by a new one had been issued by the courts. No such direction exists in the Gagné Judgment and, in fact, Justice Gagné specifically refrained from ordering this in her decision. In *Paillé*, the Québec Court of Appeal concluded that an expert report was admissible evidence and that its weight was to be determined when this evidence would be heard. Evidently, the case at bar does not concern a trial judge's error of not distinguishing between the admissibility of evidence as opposed to the weight to be given to it. The *Anderson* case is also distinguishable given that the plaintiffs in that matter were afforded the alternative remedy that Mr. Boily was explicitly denied in the Gagné Judgment, namely the possibility of removing only the inadmissible parts of the expert report. In *Maras*, the court explicitly allowed a party the opportunity to file a revised report, under specific conditions and directions. Similarly, in *Mitsui*, the case management judge determined that the report in the form in which it was written was not admissible and ordered that the report had to be modified or replaced by a new one. No similar express permission or direction to file another expert report can be found in the Gagné Judgment.

[60] Mr. Boily is now wondering what he can file in terms of expert evidence and his counsel indicated at the hearing that Mr. Boily is looking to this Court to get some direction. With respect, this is not what I have to determine on this appeal. I do not have to decide, and indeed I

cannot decide, whether Mr. Boily could be allowed to file another expert report which, for example, would clearly not borrow from the expertise expressly struck further to the Gagné Judgment. This is a highly fact-specific question, which would depend on the actual contents of any further expert report that Mr. Boily might attempt to submit. This is a matter that would be for the case management judge in this matter to decide in the exercise of his or her discretion, in light of the particular expert report contemplated and the procedural context of the proceedings at the time.

[61] One thing is clear though. Mr. Boily could not file expert evidence repeating the components and contents expressly discussed in the First Rosenblum Report. With the Gagné Judgment and his decision not to appeal it, Mr. Boily has already played his cards on this front and he has lost the opportunity to file the expert evidence contained in the First Rosenblum Report. This is what Prothonotary Tabib's Order rightly confirmed and established by striking the Second Rosenblum Report.

C. *There Was No Error in Finding that Mr. Boily Committed an Abuse of Process*

[62] As a third argument against the Order, Mr. Boily submits that he did not commit an abuse of process by attempting, in good faith, to conform to the reasons of the Gagné Judgment. He claims that the doctrine of abuse of process as defined by the SCC is focused on preventing fundamental unfairness to a party in litigation (*Toronto (City) v CUPE, Local 79*, 2003 SCC 63 [*Toronto (City)*] at para 37), and that Prothonotary Tabib misapplied it. He concedes that a party using a procedural mechanism to disregard or circumvent the consequences of a court order may be found to have abused the judicial process but notes that, in those instances, it is because doing

so causes prejudice to the other party to the proceeding (*Jazz Air LP v Toronto Port Authority*, 2007 FC 624 [*Jazz*] at paras 35-36, aff'd 2007 FCA 304; *Envireen* at para 14).

[63] Mr. Boily therefore argues that, in assessing whether he has committed an abuse of process, the Court should focus on whether he attempted to circumvent the real consequences of the Gagné Judgment and whether the filing of the Second Rosenblum Report causes the Defendant any prejudice. Mr. Boily maintains that this is not the case here. He claims that, far from trying to sidestep the consequences of the Gagné Judgment, he instead attempted in good faith to ensure that the Second Rosenblum Report conformed to the Court's determination of which material was admissible and which was not. Mr. Boily adds that filing the Second Rosenblum Report does not negate the real effects of the Gagné Judgment: even if he is successful on the merits, he has lost his right to claim costs associated with the First Rosenblum Report and was ordered to pay costs on the first motion to strike, despite the Court having rejected the Defendant's main argument that expert evidence on international law is *prima facie* inadmissible. In addition, Mr. Boily has incurred additional costs for the preparation of the Second Rosenblum Report.

[64] I am not convinced by Mr. Boily's arguments and I am not persuaded that Prothonotary Tabib committed a palpable and overriding error in finding an abuse of process in the circumstances.

[65] A court's power to strike pleadings or improper evidence stems from its inherent jurisdiction to terminate litigation in order to prevent and sanction abusive proceedings and

abuses of the court's process (*Toronto (City)* at para 35; *Mazhero v Fox*, 2014 FCA 219 [*Mazhero*] at para 34; *Canada (National Revenue) v RBC Life Insurance Company*, 2013 FCA 50 [*RBC Life Insurance*] at paras 33, 36). Mr. Boily argues that the doctrine of abuse of process is focused on preventing fundamental unfairness to a party in litigation. This is true. However, this only partially reflects what the doctrine of abuse of process embraces.

[66] The abuse of process doctrine is a discretionary and flexible doctrine that notably bars the relitigation of issues already determined by the courts, where doing so would undermine the finality of a judgment and bring the administration of justice into disrepute (*Toronto (City)* at para 37; *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 40). It is directed at preventing relitigation of the same issues and the attendant mischief of inconsistent decisions which, in turn, would undermine the doctrines of finality and respect for the administration of justice.

[67] As stated by the SCC in *Toronto (City)*, "Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel […] are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice" (*Toronto (City)* at para 37; see also *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 at para 33). In that sense, it can be seen as a complementary or adjunctive doctrine to issue estoppel and *res judicata* which also prevents relitigation in appropriate circumstances in order to preserve the integrity of the court process (*Toronto (City)* at paras 38, 42). The SCC further emphasized that, if the result in the subsequent proceeding is

different from the conclusion reached in the first on the very same issue, the inconsistency will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality: "relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole" (*Toronto (City)* at paras 51-52). In other words, the doctrine of abuse of process is also concerned with the integrity of the adjudicative process, and the parties' interests or their motives are not necessarily or always the decisive factors (*Toronto (City)* at paras 45-46, 51).

[68] In this context, a motion judge's determination as to whether the relitigation of issues and material facts constitutes an abuse of process is a discretionary matter (*Toronto (City)* at para 35).

[69] In addition, it has been recognized that attempts to bypass a procedural order can constitute an abuse of process (*Jazz* at paras 24, 35-37). In *Mazhero*, Justice Stratas held that non-compliance with procedural orders, which concerned for example the date by which to file written submissions and the content of an index, could constitute an abuse of process (*Mazhero* at paras 30, 32, 34). Similarly, in *RBC Life Insurance*, the FCA confirmed the Court's decision to cancel authorizations previously obtained by the Minister of National Revenue because it was an abuse of process for the Minister to fail to make full and frank disclosure of relevant information on an *ex parte* application (*RBC Life Insurance* at paras 2-3, 31, 38). Even more to the point, it has also been recognized that a breach of the principle of *res judicata* can constitute an abuse of process (*Beattie v Canada*, 197 FTR 209 at para 19, aff'd 2001 FCA 309). As pleaded by the

Defendant, getting around the *res judicata* principle by subsequent procedures has been considered contrary to the interests of justice (*Brandt Plumbing Co Ltd c Nozetz*, [1984] RDJ 219 (QCCA) at paras 12, 15; *2625-8277 Québec Inc c Henuset*, [1995] RDJ 486 (QCCA) at para 16).

[70] I am mindful of the fact that the abuse of process doctrine has been construed restrictively and should only be invoked in the clearest cases (*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 120). That said, in the case at bar, there is no doubt that the substance of the Second Rosenblum Report essentially reproduced the contents of the First Rosenblum Report which had been struck in its entirety, that it amounted to the alternative relief sought by Mr. Boily before Justice Gagné and denied, and that it violated the principle of *res judicata*. In this case, it is manifest that, by attempting to file the Second Rosenblum Report, Mr. Boily was essentially relitigating what he argued before Justice Gagné and was decided in the Gagné Judgment. I agree with the Defendant that Mr. Boily was doing indirectly what he had been directly prohibited from doing in the Gagné Judgment.

[71] The finding of abuse of process made by Prothonotary Tabib was anchored in her conclusion that the matter had been decided and it was closely connected to her finding that Mr. Boily had disregarded the Gagné Judgment and its effects. In the present situation, Prothonotary Tabib was entitled to use the inherent and discretionary power of the Court to sanction this violation of the *res judicata* principle. In light of the principles set out by the SCC in *Toronto (City)*, it cannot be said that Prothonotary Tabib exercised her discretion in an abusive, unreasonable or non-judicial manner or made an improper inference. I see no palpable and overriding error in her finding that coming back with the same expert report was an abuse of

process. Another case management judge might have exercised his or her discretion differently and may not have qualified Mr. Boily's conduct as "disingenuous or specious", but there is no error justifying the intervention of the Court. In the circumstances of this case, it was certainly open to Prothonotary Tabib, in the exercise of her discretion, to see in the Second Rosenblum Report an attempt by Mr. Boily to circumvent and turn a blind eye to the clear consequences of the Gagné Judgment as, on its face, it contains and repeats the expertise and extracts struck by both Prothonotary Morneau and Justice Gagné.

[72] I appreciate that Mr. Boily has now incurred costs pertaining to his two motions to strike and to the preparation of the two Rosenblum reports. But these are unfortunately part of the consequences of having opted to file an expert report containing inadmissible evidence.

IV. Conclusion

[73] For the foregoing reasons, Mr. Boily's appeal is dismissed. If Mr. Boily was unsatisfied with Justice Gagné's decision confirming that the First Rosenblum Report was struck in its entirety, rather than only striking the inadmissible parts, the proper recourse would have been an appeal of this judgment. Prothonotary Tabib committed no reviewable error in granting the Defendant's motion and in striking the Second Rosenblum Report. Nor has she made a palpable or overriding error in finding that, in the circumstances, Mr. Boily's actions amounted to an abuse of process.

JUDGMENT in T-541-10

THIS COURT'S JUDGMENT is that:

1. The Plaintiff's motion for an appeal of Prothonotary Tabib's Order dated August 7, 2018 is dismissed;
2. Costs are awarded to the Defendant.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-541-10
STYLE OF CAUSE:	RÉGENT BOILY v HER MAJESTY THE QUEEN
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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APPEARANCES :

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