Federal Court  Cour fédérale

Date: 20211231

Docket: T-773-20

Citation: 2021 FC 1488

Ottawa, Ontario, December 31, 2021

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

MOSAIC FOREST MANAGEMENT CORPORATION, TIMBERWEST FOREST COMPANY AND ISLAND TIMBERLANDS LIMITED PARTNERSHIP

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicant, Mosaic Forest Management Corporation [Mosaic] is the timberland manager for the Applicants, Timberwest Forest Company and Island Timberlands Limited Partnership. Mosaic sought export permits for the export of Douglas Fir logs, harvested in British Columbia, to Japan and China. On July 3, 2020, the Minister of Foreign Affairs [Minister]

denied the export permits [Decision] under subsection 7(1) of the *Export and Import Permits Act*, RSC 1985, c E-19 [*EIPA*].

[2] By their application, the Applicants (i) challenge the Decision, and (ii) seek to have the inclusion of "logs of all species of wood" on the Export Control List declared *ultra vires* subsection 3(1) of the *EIPA* [Application].

[3] The Respondent brought a motion to strike eight affidavits [Impugned Affidavits] that the Applicants filed in support of their Application.

[4] By his order dated August 20, 2021, the Case Management Judge, Prothonotary Aalto, disallowed portions of four of the affidavits but otherwise allowed their remainder, as well as the entirety of the other four affidavits [Order]. Prothonotary Aalto stipulated that the Order is without prejudice to the Respondent to argue before the hearings judge the irrelevance or inadmissibility of, or the weight to be given to, any of the affidavits, or any other grounds the Respondent would like to advance. Because of the mixed success, costs were ordered in the cause.

[5] The Respondent and the Applicants now move under Rule 51 of the *Federal Courts Rules*, SOR/98-106 [*FCR*] to appeal, and cross-appeal respectively, the Order, and seek their costs of these motions.

[6] See Annex "A" for applicable provisions.

[7] Having reviewed the parties' motion records, heard their oral submissions, and considered the matter, I am not persuaded that Prothonotary Aalto made any palpable and overriding errors. For the more detailed reasons that follow, I dismiss the parties' motions.

II. Additional Background

(1) Export Permits

[8] Export permits are required to allow log producers to export logs to foreign countries. The process for obtaining export permits is contained in Notice to Exporters No. 102 [Notice 102] issued by Global Affairs Canada [GAC]. Notice 102 also sets out the criteria to determine whether or not an export permit will be issued. Mosaic followed the process and submitted to the Minister, on December 11, 2019, 35 applications to export 26,200 cubic meters of Douglas Fir logs, and on May 6, 2020, a further 28 applications for an additional 23,372 cubic metres of Douglas Fir logs [collectively, Log Applications]. In support of the Log Applications, Mosaic made substantial submissions to the Minister in various letters.

[9] The process under Notice 102 involves advertising for sale logs that are the subject of the export permit applications, meaning logs already harvested from federally regulated lands. Canadian log processors then can submit offers to purchase the logs. The Federal Timber Export Advisory Committee [FTEAC] decides whether offers to purchase are "fair" based on domestic market value. The FTEAC determines logs to be "not surplus" for domestic purposes if the offer received is fair. The FTEAC deems logs to be surplus if no fair offer is received. The FTEAC allegedly does not take into account any other factors.

[10] The FTEAC provides its recommendation to the Minister as to whether an export permit should be issued. Neither the Minister nor GAC undertakes any other investigation as to whether the advertised logs are necessary to ensure an adequate supply of logs for Canadian needs. The Minister makes a decision, which GAC then communicates to the exporter by letter advising whether the logs have been deemed “surplus” or “not surplus.”

[11] In this case, all of the logs that were the part of the Log Applications were deemed “not surplus,” and the Log Applications were denied.

[12] In its submissions to the Minister, Mosaic outlined many aspects of the logging industry in British Columbia and, in particular, that “blocking” pressure by domestic mills had reduced prices to an “unsustainably unprofitable level.” As part of its proceeding before the Court, Mosaic alleges that the Notice 102 process, indeed the entire approach to the export of logs, is used for an improper purpose, that is, to depress prices being paid to domestic producers resulting in decreased incentives to harvest logs.

[13] The Applicants’ Notice of Application [NOA] details the production/marketing of logs in Canada and British Columbia and enumerates a wide range of grounds for the relief sought, including allegations of: “blocking” by domestic processors resulting in below-cost domestic market prices; oversupply of logs for Canadian supply; the use of export restrictions by domestic producers to force a wealth transfer; forced subsidies from producers to processors; the curtailment of Mosaic’s operations by virtue of below cost domestic prices and export blocking; and breaches by Canada of international obligations.

[14] According to the NOA, “blocking” occurs when domestic processors submit bids for logs that have been advertised pursuant to Notice 102, resulting in logs being deemed non-surplus, and thus, preventing their export. The Applicants alleges that because of processors engaging in blocking and related “blockmail” activities, producers such as Mosaic are significantly disadvantaged in negotiating a price for their logs and are compelled to sell their logs at below world market prices.

[15] The NOA also points to the English and French versions of para 3(1)(e) of the *EIPA* in connection with the Applicants’ *vires* challenge. More specifically, the Applicants contend that the inclusion of logs on the Export Control List is *ultra vires* the enabling statute because of the overbroad meaning ascribed to the words “other needs” in the *EIPA* s 3(1)(e).

(2) Impugned Affidavits

[16] Prothonotary Aalto was of the view that a substantial part of the Impugned Affidavits, except one, are sufficiently relevant to the Applicants’ case to be allowed, with their weight and ultimate admissibility to be left to the hearings judge. He acknowledged in this regard the Applicants’ point that export logs are a perishable commodity and, thus, the export permit process is short with no opportunity for producers to make submissions to the FTEAC or the Minister regarding the market for logs and pricing. Prothonotary Aalto also observed that the FTEAC recommendation is sparse, stating simply “in a conclusory way that ‘fair offers were submitted’ and ‘these logs are not surplus to domestic needs’.” Further, he noted the Applicants’ position that the *vires* challenge “take[s] the proceeding outside the traditional judicial review and allow[s] for an expanded record before the Court.”

[17] Below is a summary of each Impugned Affidavit (based substantially on the summaries found at pages 5-6 of the Order) and Prothonotary Aalto's findings, followed by a table summarizing his conclusions.

(a) *Affidavit of Benjamin Lee dated September 11, 2020 [Lee Affidavit]*

[18] Mr. Lee is Mosaic's Vice President of Business Development, General Counsel and Corporate Secretary. His affidavit sets out the narrative relating to the applications for export permits that were denied by the Minister. He also attaches statistical data related to lumber exports from BC between 2010 and 2019, obtained by Mosaic's counsel in this litigation.

[19] Prothonotary Aalto found the Lee Affidavit provides background information regarding the Log Export Applications and allowed that portion of the affidavit (Parts A and B at paragraphs 3-16). He further found, however, that the Lee Affidavit ventures into opinion evidence in Part C that deals with Statistics Canada export data, and thus, he disallowed that portion (paragraphs 17-22) of the Lee Affidavit.

(b) *Affidavit of Kenneth Kaps dated September 11, 2020 [Kaps Affidavit #1]*

[20] Mr. Kaps is Mosaic's Director – Business Development and Asset Management. In this affidavit he describes, among other topics, the timber industry in coastal BC, "tenures" (renewable form of licence) and the annual allowable cut [AAC], tree farm licences, replaceable forest licences, the BC Timber Sales Program, timber supply analyses, cut control periods, undercutting, and stumpage. He estimates that less than 30% of lumber produced in the BC coast

is sold domestically. According to the Respondent, most of the information contained in the Kaps' affidavits is not within the personal knowledge of this affiant, and is in the nature of opinion evidence. No certificate in Form 52.2 (further to the *FCR* Rule 52.2(c)) accompanies this affidavit.

[21] Prothonotary Aalto held that a substantial portion of the Kaps Affidavit #1 verges on, if not in fact is, opinion evidence on the state of the BC lumber industry. In Prothonotary Aalto's view, however, there is information that can be considered background information for the Court because it describes how the industry operates which is well within the knowledge of the affiant given his responsibilities and role within Mosaic. In addition, Prothonotary Aalto observed that the affiant's analysis of the history of harvesting is based on his knowledge of the process, and the methodology commencing at paragraph 43, is his direct work used to conduct valuation work for Mosaic.

[22] Prothonotary Aalto found that Sections 3 and 4 of Part E (Undercutting relative to AAC), dealing with Teal-Jones (paragraphs 70-75) and CIPA Lumber Co. Ltd. [CIPA] (paragraphs 76-81) respectively, however, appear to be speculative to a large extent and are pure opinion which do not fall within the knowledge of the affiant. He therefore disallowed those portions. The remainder of the Kaps Affidavit #1 is allowed.

(c) *Affidavit of Kenneth Kaps dated November 11, 2020 [Kaps Affidavit #2]*

[23] This affidavit addresses the impact of a strike at Western Forest Products between July 1, 2019 and February 15, 2020 on the supply of logs for domestic processors. It also addresses the

relationship between log prices and log harvesting in Coastal BC. As with the Kaps Affidavit #1, much of this second affidavit is in the nature of opinion evidence (as submitted by the Respondent). No certificate in Form 52.2 accompanies this affidavit either.

[24] Prothonotary Aalto found the Kaps Affidavit #2 is a rebuttal of comments made in a document that forms part of the certified tribunal record [CTR], which was before the Minister. While in Prothonotary Aalto's view there is some opinion evidence in the Kaps Affidavit #2, he found it puts in issue the correctness of the evidence before the Minister and goes to issues of procedural fairness and alleged misinformation upon which the decision is based. He therefore allowed the Kaps Affidavit #2.

(d) *Affidavit of Richard Jaccard dated September 10, 2020 [Jaccard Affidavit]*

[25] Mr. Jaccard was Mosaic's Chief Commercial Officer, until his retirement in May 2020. His affidavit addresses Mosaic's practices as a log producer, its domestic customers (which include Teal-Jones and CIPA, information that Prothonotary Aalto disallowed in the Kaps Affidavit #1), the practice of "blocking" and "blockmail" engaged in by log processors under the Notice 102 process, how Mosaic has responded to these practices by making long term deals with log processors, and specific instances of "blocking and blockmail" that occurred in 2014, 2015, 2018, 2019 and 2020.

[26] Prothonotary Aalto found that because Mr. Jaccard is a retired executive of Mosaic, his evidence comes directly from his personal knowledge of Mosaic's forestry business. He also found that, for the most part, although some opinions are expressed, the Jaccard Affidavit

focuses on relevant background of logging operations. It also describes in detail, for the benefit of the Court and the issues in the application, the concepts of “blockmail” and “blocking.” The discussion relating to CIPA and Jones-Teal is from his knowledge of dealing with them and examples of blocking. Prothonotary Aalto was of the view that in all, the Jaccard Affidavit is background, which puts some of the issues in perspective, and thus, he allowed this affidavit.

(e) *Affidavit of Serge Moresi dated September 11, 2020 [Moresi Affidavit #1]*

(f) *Affidavit of Serge Moresi dated November 11, 2020 [Moresi Affidavit #2]*

[27] Mr. Moresi is an Assistant Professor of Economics at Georgetown University, who specializes in bidding and bargaining models, search markets, network effects, and two-sided markets. His two affidavits above [Moresi Affidavits] attach expert reports on the impact of the export process for logs produced in BC on domestic prices for logs harvested in coastal BC. His opinion is that the export restrictions have the effect of reducing domestic prices for logs harvested in coastal BC.

[28] Prothonotary Aalto observed that the Moresi Affidavits are from an expert economist and deal with the pricing of logs harvested in BC and reach conclusions regarding the effects of the export log process. He acknowledged that this evidence was not before the decision maker. In Prothonotary Aalto’s view, however, the Moresi Affidavits have relevance to issues put in play by Mosaic in this Application, namely, the depressed prices for BC logs and the improper purpose for which Notice 102 is being utilized. He therefore allowed the Moresi Affidavits.

(g) *Affidavit of Robert Gough dated September 10, 2020 [Gough Affidavit]*

[29] Mr. Gough is Mosaic's Chief Commercial Officer. He asserts that the prices paid by log processors in coastal BC are lower than those paid by Mosaic's overseas customers, and that the difference in price is due to market distortions caused by the log export permitting process. His affidavit also addresses Mosaic's decision to curtail its operations in November 2019 due to the "blocking and blackmail [*sic*]" tactics of domestic log processors. The latter part of his affidavit describes the process for obtaining log export permits.

[30] In Prothonotary Aalto's view, the Gough Affidavit reads like an expert report for the most part without the necessary qualifications required by the *FCR*. Notwithstanding this viewpoint, he found there are portions of the Gough Affidavit that provide useful background to the Court including Parts D (Mosaic's lost revenue due to depressed domestic prices), E (Mosaic Ceases Harvesting Operations) and F (The process for obtaining log exports). Prothonotary Aalto thus disallowed paragraphs 9 – 35 (Part C that deals with log prices in BC) but allowed the balance of the Gough Affidavit.

(h) *Affidavit of Wendy Thompson dated November 12, 2020 [Thompson Affidavit]*

[31] Ms. Thompson is a legal assistant with Cassels Brock & Blackwell LLP, Mosaic's counsel in this proceeding. Her affidavit attaches documents from "the softwood lumber proceeding in the United States Department of Commerce that resulted in countervailing duties being applied to Canadian softwood lumber by the United States." It also attaches an affidavit sworn by Lynne Sabatino on June 6, 2008, filed by the respondent Minister of Foreign Affairs in

a Federal Court application brought by Island Timberlands (Court File No. T-549-08), which provides background on the federal export control regime for logs, including the Notice 102 process.

[32] Prothonotary Aalto noted the Respondent's acknowledgement that one of the documents attached to the Thompson Affidavit as Exhibit D, namely, the "Sabbatini [*sic*] Affidavit," provides background on the Notice 102 process and may be relevant. He therefore allowed this document. Prothonotary Aalto found that the remaining documents, however, are not directly relevant nor do they fall within the various exceptions (contemplated in *Bernard*, below). He thus disallowed them.

(3) Prothonotary Aalto's Conclusions

[33] The following table summarizes Prothonotary Aalto's conclusions regarding the Impugned Affidavits:

Affidavit	Allowed	Disallowed
Lee Affidavt	Yes (Parts A and B at paragraphs 3-16), except for the disallowed Part C	Part C that deals with Statistics Canada export data (paragraphs 17-22)
Kaps Affidavit #1	Yes, except for the disallowed sections	Sections 3 and 4 of Part E (Undercutting relative to AAC) dealing with Teal-Jones (paragraphs 70-75) and CIPA Lumber Co. Ltd. [CIPA] (paragraphs 76-81) respectively
Kaps Affidavit #2	Yes, in its entirety	Not applicable
Jaccard Affidavit	Yes, in its entirety	Not applicable
Moresi Affidavit #1	Yes, in its entirety	Not applicable
Moresi Affidavit #2	Yes, in its entirety	Not applicable

Gough Affidavit	Yes, except for the disallowed Part C	Part C that deals with log prices in BC (paragraphs 9 – 35)
Thompson Affidavit	Exhibit D comprised of a copy of the Affidavt of Lynne C. Sabatino dated June 6, 2008	Yes, except for the allowed Exhibit D

III. Nature of the Parties' Motions

(1) The Respondent's Motion

[34] The Respondent seeks to have the Order set aside in part, with the end result that the following affidavits would be struck in their entirety:

- Both Moresi Affidavits;
- Both Kaps Affidavits;
- The Jaccard Affidavit; and
- The Thompson Affidavit.

[35] In respect of the Gough Affidavit, the Respondent seeks to have Parts D and E (paragraphs 36-43) struck, in addition to Part C (paragraphs 9-35) that Prothonotary Aalto disallowed. If granted, this would result in only Parts A (Mosaic) and B (My Background) (together, paragraphs 1-8), and Part F (paragraphs 44-66) of the Gough Affidavit allowed in this matter.

[36] The Respondent does not challenge the Order insofar as it relates to the Lee Affidavit.

(2) The Applicants' Motion

[37] The Applicants challenge the Order insofar as it disallows or strikes the following:

- Part C of the Lee Affidavit;
- Sections 3 (Teal-Jones) and 4 (CIPA Lumber Co. Ltd.) of Part E (Undercutting relative to AAC) of the Kaps Affidavit #1; and
- Paragraphs 9-35 of the Gough Affidavit containing Parts C ("Log prices in British Columbia"), D ("Mosaic's lost revenue due to depressed domestic prices") and E ("Mosaic Ceases Harvesting Operations").

IV. Standard of Review

[38] The standard of review applicable to a Rule 51 motion appealing a Prothonotary's decision is the appellate standard described by the Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*] at paras 7-36: *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira*] at paras 63-65, 79 and 83, leave to appeal refused, leave to appeal refused, [2017] 1 SCR xi.

[39] The Federal Court of Appeal more recently reminds us that the *Housen* standard is the following: "questions of fact and mixed questions of fact and law are subject to the palpable and overriding error standard while questions of law, and mixed questions where there is an extricable question of law, are subject to the standard of correctness": *Worldspan Marine Inc. v Sargeant III*, 2021 FCA 130 at para 48; see also *Canada (Attorney General) v Iris Technologies Inc.*, 2021 FCA 244 at para 33.

[40] The palpable and overriding error standard of review is highly deferential. “Palpable” means an obvious error, while an “overriding” error is one that affects the decision-maker’s conclusion: *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 [*Mahjoub*] at paras 61-64; see also *NCS Multistage Inc. v Kobold Corporation*, 2021 FC 1395 at paras 32-33. Deference means acknowledging the institutional expertise and experience of the administrative decision maker: *Shahzad v Canada (Citizenship and Immigration)*, 2017 FC 999 at para 26.

[41] In contrast, the reviewing court owes no deference to the decision maker in a correctness review. The reviewing court will undertake its own analysis to determine whether it agrees with the challenged decision or whether it will “substitute its own view and provide the correct decision”: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, [2008] 1 SCR 190.

[42] Exercises of discretion, such as the discretion exercised by Prothonotary Aalto in disposing of the Respondent’s motion, involve questions of mixed fact and law: *Mahjoub*, above at para 72. Unless the party advocating a correctness review establishes an error on an extricable question of law or legal principle, the high standard of palpable and overriding error applies: *Mahjoub*, at paras 73-74.

[43] Further, on an appeal from a Prothonotary’s decision, a lack of detailed reasons, in itself will not justify a *de novo* or correctness review or invite the Court to deviate from the principle of deference owed to the Prothonotary’s findings: *Maximova v Canada (Attorney General)*, 2017 FCA 230 at para 11; *Apotex Inc. v Canada (Health)*, 2016 FC 776 paras 81-84; *Apotex Inc. v Merck & Co. Inc.*, 2007 FC 250 at para 13.

[44] The Supreme Court has signalled that it no longer recognizes jurisdictional questions as subject to the correctness standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 65.

V. Analysis

[45] Neither party has persuaded me that Prothonotary Aalto made any palpable and overriding error in his Order warranting the Court's intervention. The submissions made by the parties at the hearing to a large degree were tantamount to the submissions they likely will present to the hearings judge in that they focused on the merits of the Applicants' application in an effort to overturn or vary the Order.

[46] The Federal Court of Appeal cautions against motions to strike all or parts of affidavits becoming routine: *Canadian Tire Corp. Ltd. v P.S. Partsource Inc.*, 2001 FCA 8 (CanLII). Further, "the discretion to strike an affidavit or part of it should be exercised sparingly and only in exceptional circumstances": *Canada (Board of Internal Economy) v Canada (Attorney General)*, 2017 FCA 43 [*BIE*] at para 29. Further, motions to strike all or parts of affidavits at an early stage should be "granted only in cases where it is in the interest of justice to do so, for example or in cases where a party would be materially prejudiced, where not striking an affidavit or portions of an affidavit would impair the orderly hearing of the application for judicial review": *Armstrong v Canada (Attorney General)*, 2005 FC 1013 [*Armstrong*] at para 40. In addition, "the need for there to be exceptional circumstances before evidence filed in an application will be struck on an interlocutory basis apples to all applications and not merely to judicial review applications": *Avon Products Inc. v Moroccanoil Israel Ltd.*, 2013 FC 1137

[*Avon*] at para 10. Prothonotary Aalto referred to the *Armstrong* decision in determining that the Impugned Affidavits were exceptionally voluminous and, thus, warranted review to assist the orderly progress of this matter.

[47] There is no dispute that the Impugned Affidavits contain information that, for the most part, was not before the Minister. The Respondent premises his arguments for striking the Impugned Affidavits, or portions of them, on the rule against admitting new evidence on judicial review that was not before the administrative decision maker: *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 [*Bernard*] at para 13. This rule in turn is based on the principle that the record before the decision maker should not be supplemented, to maintain the demarcation between the different roles of the administrative decision maker at first instance and the court on judicial review: *Bernard*, at paras 17-18.

[48] Further, the Respondent's arguments centre on the judicial review. The Applicants argue that the *vires* challenge is a complete answer to the Respondents' arguments against admissibility. I have some sympathy for the Applicants' argument but in the end, I am satisfied that the question of which Impugned Affidavits or portions of them are admissible and for which grounds of application (i.e. judicial review or *vires* declaration) should be left to the determination of the hearings judge. As the Federal Court of Appeal observes, "[j]udges are seasoned in the task of ignoring testimony and opinion that they have excluded in the course of a proceeding, and at weighing evidence which, even if found to be admissible, is of little relevance, reliability or credibility": *BIE*, above at para 31.

[49] While the Respondent argues that Prothonotary Aalto was "taken to" the principles that apply to a *vires* challenge, his lack of commentary on these principles does not represent a palpable and overriding error. In my view, Prothonotary Aalto considered Impugned Affidavits with respect to both the judicial review application and the application for an *ultra vires* declaration. He noted, for example, the Applicants' argument that, "[t]hese issues take the proceeding outside the traditional judicial review and allow for an expanded record before the Court."

[50] Further, I find unpersuasive the Respondent's argument that the Order, as it currently stands, will result in a lengthier, more complex hearing on the merits and ought to be avoided by deciding the admissibility issue in advance. For example, there is no suggestion that the Respondent plans to file a responding affidavit to the Moresi Affidavits, resulting in a redundant debate: *BIE*, above at para 32. In my view, delay and inefficiency are more likely to result from motions and appeals like those here, rather than by proceeding with the Application so that the hearings judge can rule on the admissibility or weight of the Impugned Affidavits, as contemplated by the Order (at page 13): *Avon*, above at para 24.

[51] Issues such as whether the Applicants framed the *vires* issue properly (by pointing to alleged abuse of the Notice 102 permit process by log processors, as opposed to an improper purpose of the Minister), or the relevant date as of which the *vires* issue must be assessed, are examples of issues that, in my view, are best left to the hearings judge to consider. A recent decision of the Federal Court of Appeal reinforces my view by signalling a significant shift in the assessment of the *vires* of regulations occasioned by the *Vavilov* pronouncement that

jurisdictional issues no longer are governed by the correctness standard: *Portnov v Canada (Attorney General)*, 2021 FCA 171 [*Portnov*] at paras 19-20, 22. As observed by Justice Stratas, "[m]ore fundamentally, *Vavilov* instructs us to conduct reasonableness review of all administrative decision-making unless one of three exceptions leading to correctness review applies. **This applies to regulations as a species of administrative decision-making**" (citations omitted; emphasis added): *Portnov*, at para 27.

[52] The Respondent argues that the Impugned Affidavits all speak to unintended consequences or whether the Notice 102 permit process is effective in practice, neither of which is relevant to the *vires* inquiry: *Katz Group Canada Inc. v Ontario (Health and Long-Term Care)*, 2013 SCC 64 [*Katz Group*] at paras 27-28. Nor does *Portnov* displace *Katz Group* insofar as the latter decision describes what is not involved in challenging the validity of regulations, asserts the Respondent. Again, in my view, the extent to which *Portnov*, with reference to *Vavilov*, impacts the presumption of validity to which regulations are entitled (*Katz Group*, at para 25) is best left for the hearings judge to consider on a complete record (as ultimately determined by that judge) with comprehensive, directed submissions.

[53] The Applicants are in the unenviable position of arguing in response to the Respondent's appeal motion that Prothonotary Aalto is owed deference regarding the exercise of discretion not to strike, while at the same time arguing in their appeal motion that no deference is owed the determination to strike parts of the Impugned Affidavits. Regarding their motion, the Applicants assert that Prothonotary Aalto misconstrued fact and opinion evidence regarding the struck portions of the Impugned Affidavits.

[54] For his part, the Respondent argues that the Applicants have misconstrued the nature of a judicial review application and that the Impugned Affidavits represent an attempt by the Applicants to bolster their submissions to the Minister, citing *Bernard*, above at para 26, in support. While I am not unsympathetic to these arguments, the Application is not just a judicial review application. Rather, it also involves a *vires* challenge. In my view, the issue of whether the Applicants have misconstrued the case they have to make regarding their *vires* challenge, as asserted by the Respondent, and hence, the admissibility of their evidence, is an issue best left to the hearings judge to determine.

VI. Conclusion

[55] For the foregoing reasons, I therefore dismiss the parties' motions.

VII. Costs

[56] Because neither the Applicants nor the Respondent succeeded in their respective motions, I exercise my discretion to decline to award costs in either motion.

ORDER in T-773-20

THIS COURT ORDERS that:

1. The parties' motions are dismissed;

2. No costs are awarded.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

Export and Import Permits Act (R.S.C., 1985, c. E-19)
Loi sur les licences d'exportation et d'importation (L.R.C. (1985), ch. E-19)

Establishment of Control Lists **Export control list of goods and technology** **3 (1)** The Governor in Council may establish a list of goods and technology, to be called an Export Control List, including therein any article the export or transfer of which the Governor in Council deems it necessary to control for any of the following purposes: … **(e)** to ensure that there is an adequate supply and distribution of the article in Canada for defence or other needs; …	**Établissement de listes de contrôle** **Liste : exportation contrôlée** **3 (1)** Le gouverneur en conseil peut dresser une liste des marchandises et des technologies dont, à son avis, il est nécessaire de contrôler l'exportation ou le transfert à l'une ou plusieurs des fins suivantes : … **e)** s'assurer d'un approvisionnement et d'une distribution de cet article en quantité suffisante pour répondre aux besoins canadiens, notamment en matière de défense; …
Permits and Certificates **Export permits** **7 (1)** Subject to subsection (2), the Minister may issue to any resident of Canada applying therefor a permit to export or transfer goods or technology included in an Export Control List or to export or transfer goods or technology to a country included in an Area Control List, in such quantity and of such quality, by such persons, to such places or persons and subject to such other terms and conditions as are described in the permit or in the regulations.	**Licences et certificats** **Licences d'exportation** **7 (1)** Sous réserve du paragraphe (2), le ministre peut délivrer à tout résident du Canada qui en fait la demande une licence autorisant, sous réserve des conditions prévues dans la licence ou les règlements, notamment quant à la quantité, à la qualité, aux personnes et aux endroits visés, l'exportation ou le transfert des marchandises ou des technologies inscrites sur la liste des marchandises d'exportation contrôlée ou destinées à un pays inscrit sur la liste des pays visés.

Federal Courts Rules, SOR/98-10
Règles des Cours fédérales, DORS/98-10

Appeals of Prothonotaries' Orders Appeal **51 (1)** An order of a prothonotary may be appealed by a motion to a judge of the Federal Court	**Appel des ordonnances du Protonotaire Appel** **51 (1)** L'ordonnance du protonotaire peut être portée en appel par voie de requête présentée à un juge de la Cour fédérale
Expert's affidavit or statement **52.2 (1)** An affidavit or statement of an expert witness shall **(a)** set out in full the proposed evidence of the expert; **(b)** set out the expert's qualifications and the areas in respect of which it is proposed that he or she be qualified as an expert; **(c)** be accompanied by a certificate in Form 52.2 signed by the expert acknowledging that the expert has read the Code of Conduct for Expert Witnesses set out in the schedule and agrees to be bound by it; and **(d)** in the case of a statement, be in writing, signed by the expert and accompanied by a solicitor's certificate.	**Affidavit ou déclaration d'un expert** **52.2 (1)** L'affidavit ou la déclaration du témoin expert doit : **a)** reproduire entièrement sa déposition; **b)** indiquer ses titres de compétence et les domaines d'expertise sur lesquels il entend être reconnu comme expert; **c)** être accompagné d'un certificat, selon la formule 52.2, signé par lui, reconnaissant qu'il a lu le Code de déontologie régissant les témoins experts établi à l'annexe et qu'il accepte de s'y conformer; **d)** s'agissant de la déclaration, être présentée par écrit, signée par l'expert et certifiée par un avocat.
Failure to comply **(2)** If an expert fails to comply with the Code of Conduct for Expert Witnesses, the Court may exclude some or all of the expert's affidavit or statement.	**Inobservation du Code de déontologie** **(2)** La Cour peut exclure tout ou partie de l'affidavit ou de la déclaration du témoin expert si ce dernier ne se conforme pas au Code de déontologie.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-773-20
STYLE OF CAUSE:	MOSAIC FOREST MANAGEMENT CORPORATION, TIMBERWEST FOREST COMPANY AND ISLAND TIMBERLANDS LIMITED PARTNERSHIP and THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	DECEMBER 1, 2021
ORDER AND REASONS:	FUHRER J.
DATED:	DECEMBER 31, 2021

APPEARANCES:

W. Michael G. Osborne Brenda C. Swick Jessica Lewis Shayna Clark	FOR THE APPLICANTS
Sean Gaudet Roger Flaim	FOR THE RESPONDENT

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