Federal Court of Appeal  Cour d'appel fédérale

Date: 20190530

Docket: A-249-18

Citation: 2019 FCA 165

CORAM: **GAUTHIER J.A.**
WEBB J.A.
RIVOALEN J.A.

BETWEEN:

DAN PELLETIER

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on May 22, 2019.

Judgment delivered at Ottawa, Ontario, on May 30, 2019.

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

CONCURRED IN BY: GAUTHIER J.A.
WEBB J.A.

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REASONS FOR JUDGMENT

RIVOALEN J.A.

[1] Dan Pelletier appeals from an order of the Federal Court (2018 FC 805) in which Justice Ahmed denied him leave to admit the affidavit of Dr. J. Marvin Herndon as expert evidence to form part of his motion record in response to a motion to strike his amended statement of claim and motion for summary judgment.

[2] For the reasons set out below, I would dismiss the appeal without costs.

I. History of Proceedings

[3] The appellant was granted leave to file an amended statement of claim after Justice Leblanc (the Case Management Judge) struck his initial statement of claim (2016 FC 1356). The respondent, Her Majesty the Queen, moves to strike the amended statement of claim under Rule 221(1)(*a*), (*c*) and (*f*) of the *Federal Courts Rules*, S.O.R./98-106 for failure to disclose any reasonable cause of action and for being vexatious and an abuse of process. The respondent also moves for summary judgment under Rules 213 and 215.

[4] The Judge aptly describes the proposed action in paragraphs 2 to 4 of his Order and Reasons. To provide context to these reasons, it is useful to summarize some of the underlying proceedings from the amended statement of claim. The appellant asserts "a mass-tort and environmental proposed class proceeding" arising in respect of the respondent spraying toxic and destructive chemicals and particulates into the atmosphere. The appellant blames the "Canadian military" for being involved in the release of these aerial discharges into Canadian air space as part of a joint U.S.-Canadian military project called Project Cloverleaf. The appellant alleges that the release of these aerial discharges contravenes section 15 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c. 11, and he is seeking various forms of punitive damages and declaratory and injunctive relief.

[5] The Case Management Judge set a litigation schedule with the consent of the parties for the management of the respondent's motion to strike the amended statement of claim and motion for summary judgment. The appellant was granted extensions of time for filing his motion record. By the time the appellant attempted to introduce Dr. Herndon's affidavit as part of his motion record, more than eighteen months had passed since he had been made aware of the respondent's motions and more than twelve months had passed since the respondent's motion record was served and filed.

[6] The Judge did not allow the affidavit to be filed as part of the motion record. He found that the requirements for expert affidavit evidence under Rule 52.2 had not been met, that Dr. Herndon was not a properly qualified expert and that the proposed affidavit was not relevant to the points in issue in the motion (Order and Reasons, at paras. 17-19).

[7] At the outset of this appeal, the appellant brought an oral motion under Rule 351 requesting leave to adduce an additional article written by Dr. Herndon in 2018. The article was referenced in footnotes 12 and 15 of the appellant's memorandum of fact and law, but was not included in the appeal book. In addition, no affidavit was provided in support of the motion. The motion was dismissed at the hearing.

II. Position of the Parties

[8] The appellant's main argument is that the Judge erred in law and that the expert evidence should be admitted as proof of the factual allegations set out in the amended statement of claim. Any concerns regarding the absence of a certificate in Form 52.2 represent an oversight which

has now been remedied. He relies on this Court's decision in *Saint Honore Cake Shop Limited v. Cheung's Bakery Products Ltd.*, 2015 FCA 12, 132 CPR (4th) 258) [*Saint Honore*].

[9] The respondent argues that the Judge committed no error in denying the appellant leave to introduce the affidavit into the record. He submits that the Judge committed no errors when he found that Dr. Herndon was not a properly qualified expert and did not pass the test set out in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182 [*White Burgess*].

III. Standard of Review

[10] In this appeal, this Court must apply the standards of review set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Questions of law are reviewable for correctness, whereas findings of fact or mixed fact and law from which a legal issue cannot be extricated are reviewable only if they disclose a palpable and overriding error. The applicable standard of review on discretionary procedural matters is set out in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, 402 D.L.R. (4th) 497, at paras. 28, 71-72. The Judge's decision can only be reversed for palpable and overriding error, absent an extricable error of law.

[11] The appellant has not demonstrated such an error in this case.

IV. Analysis

[12] Rule 52.2(1) describes the requirements of an expert's affidavit. In this case, Dr. Herndon did not sign the certificate in Form 52.2 acknowledging that he has read the Code of Conduct for Expert Witnesses and agrees to be bound by it. The appellant says that this error has been remedied and the certificate has now been signed. He argues that the Judge's comments in paragraph 18 and 19 are *obiter*. He relies on the decision of *Saint Honore* as authority to admit the expert affidavit in the record. I disagree.

[13] The decision of this Court in *Saint Honore* is clearly distinguishable. In that case, the expert affidavit was filed on time, and the expert signed and served the certificate prior to the hearing.

[14] In the present case, unlike in *Saint Honore*, the Judge's concerns are not limited to the absence of a signed certificate. The comments made by the Judge are not *obiter* but rather part of his overall analysis and conclusions. When reviewing the entire affidavit and noting its tenor and categorical opinions, the Judge was concerned that Dr. Herndon did not understand his obligations under the Code of Conduct for Expert Witnesses. The Judge was not prepared to accept in such unqualified terms the scientific opinions expressed by Dr. Herndon where he drew conclusions about the chemical make-up of the aerial discharges based on a simple review of photographs (Order and Reasons, at para. 18). As a whole, the Judge found that Dr. Herndon's affidavit failed the test for admissibility set out the by the Supreme Court of Canada in *White Burgess*.

[15] The Judge found that Dr. Herndon's affidavit failed the first step of the two-step test for the admissibility of expert evidence outlined in paragraphs 23 and 24 of *White Burgess*. It is useful to be reminded of the first step to be undertaken:

> [23] At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose: *J.-L.J.*, at paras. 33, 35-36 and 47; *Trochym*, at para. 27; Lederman, Bryant and Fuerst, at pp. 788-89 and 800-801. Relevance at this threshold stage refers to logical relevance: *Abbey* (ONCA), at para. 82; *J.-L.J.*, at para. 47. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement: *D.D.*, at para. 57; see D. M. Paciocco and L. Stuesser, *The Law of Evidence* (7th ed. 2015), at pp. 209-10; *R. v. Boswell*, 2011 ONCA 283 (CanLII), 85 C.R. (6th) 290, at para. 13; *R. v. C. (M.)*, 2014 ONCA 611 (CanLII), 13 C.R. (7th) 396, at para. 72.

[16] After finding that Dr. Herndon was not a properly qualified expert, the Judge turned to the relevance factor. He found that Dr. Herndon's experience and research did not focus on aerial spraying in Canada and were therefore not relevant to the allegations made in the amended statement of claim. The Judge did not err when he found that Dr. Herndon's affidavit failed to meet the threshold requirements of admissibility.

V. Costs

[17] The appellants submit that no costs should be awarded as Rule 334.39(1) applies to this class action proceeding. Awards of costs in class proceedings, including preliminary motions and appeals, are to be exceptional. No costs shall be awarded.

VI. Conclusion

[18] The appeal is dismissed without costs.

"Marianne Rivoalen"
J.A.

“I agree.
Johanne Gauthier J.A.”

“I agree.
Wyman W. Webb J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DATED:	MAY 30, 2019

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