Federal Court of Appeal | Cour d'appel fédérale

Date: 20210208

Docket: A-132-19

Citation: 2021 FCA 23

CORAM: **GAUTHIER J.A.**
DE MONTIGNY J.A.
LOCKE J.A.

BETWEEN:

RÉGENT BOILY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard by online video conference hosted by the registry on November 25, 2020.

Judgment delivered at Ottawa, Ontario, on February 8, 2021.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] This is an appeal from a decision of Gascon J. of the Federal Court (2019 FC 323), dismissing Mr. Boily's appeal from an Order of Prothonotary Tabib striking out the expert report filed by Mr. Boily on March 16, 2018 (hereinafter the Second Rosenblum Report). The Second Rosenblum Report was an amended version of a report by the same expert (First Rosenblum

Report) dated February 27, 2017, which was struck in its entirety by the case manager (Prothonotary Morneau) in this action in damages against the Crown instituted back in 2010.

[2] The decision of Prothonotary Morneau was confirmed by Gagné J. (the Gagné Judgment), who dismissed Mr. Boily's appeal, including his specific request that the First Rosenblum Report only be struck in part; that is, that he be entitled to the benefit of all the admissible parts of the said report (2017 FC 1021). Even though it appears that Mr. Boily took the position before us that he considered the Gagné Judgment to be wrong, at least insofar as the judge rejected his request to strike only the inadmissible parts of the said report, he did not appeal it.

[3] This appeal does not involve any new law or the protection of some fundamental right despite Mr. Boily's able arguments to convince us to the contrary. It only calls for the application of the well-established doctrines established in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (*CUPE*) – particularly abuse of process — to the somewhat unusual and specific circumstances of this matter.

[4] I have little doubt that this Court might eventually have to engage with the decision on the merits of Mr. Boily's 2010 action in damages against the Crown. Even though this action was instituted more than 10 years ago, the theory of the case is not entirely clear to me on the record before this Court. From the pleadings, it appears that Mr. Boily seeks to convince the Federal Court that a breach of an international convention to which Canada is a party is a fault under article 1457 of the *Civil Code of Quebec (CCQ*), on the basis that standards applied in other

forums such as the European Court of Human Rights (ECoHR), the Council of Europe or the UN Committee against Torture (CAT), should be applied to evaluate the Crown's acceptance of the diplomatic assurances received from the Mexican government before extraditing Mr. Boily.

[5] However interesting and important the issues raised in the action or the question of whether one can file expert evidence on international law, whatever the role such international law is meant to play in a particular proceeding, these are not the subject of this appeal.

[6] What is before us is whether the Federal Court made a reviewable error that justifies our intervention, in confirming that either on the basis of *res judicata* (article 2848 *CCQ*) or as an abuse of process, the Second Rosenblum Report should be struck.

[7] For the reasons below, my answer to this question is no, and I propose to dismiss the appeal.

I. Background

A. *The Federal Court Decision*

[8] Prothonotary Tabib issued a speaking Order (Tabib Order), which by its very nature, describes her reasoning in a summary fashion. She concluded that the filing of the Second Rosenblum report constituted an abuse of process because Mr. Boily was essentially trying to do indirectly what he would have been entitled to do if his appeal had not been dismissed in the Gagné Judgment.

[9] The Federal Court agreed with the conclusion of Prothonotary Tabib. However, at the prompting of Mr. Boily, the Federal Court addressed in more detail all of his legal arguments and case law on the application of article 2848 *CCQ* and on the application of the abuse of process doctrine in this case. The Federal Court's purpose was to determine whether the Prothonotary's ultimate conclusion that the Second Rosenblum Report be struck out could stand.

[10] This resulted in the 37-page decision that is before us, and a full opportunity for Mr. Boily to address all of the issues in play. There were three main arguments before the Federal Court. First, that Prothonotary Tabib misinterpreted the Gagné Judgment. Second, that the principle of *res judicata* did not apply in this case. Third, that the Prothonotary could not find an abuse of process because Mr. Boily attempted in good faith to conform to the reasons of the Gagné Judgment in filing his second report. The Federal Court rejected all three arguments.

[11] On the first issue, the Federal Court found that Mr. Boily mischaracterized Prothonotary Tabib's Order as permanently depriving him of his right to make his case by filing any admissible expert evidence on international law and the human rights situation in Mexico. According to the Federal Court, she correctly interpreted the Gagné Judgment as only limiting Mr. Boily's ability to file the Second Rosenblum Report (FC Reasons at paras. 29-30), which was pretty much the same report that he would have been entitled to rely upon, had his appeal to Gagné J. succeeded. In that respect, the Federal Court went even further, holding that even if the Tabib Order could be interpreted as extending to all potential expert reports dealing with international law, that decision would be *ultra petita* and the Federal Court could read it down.

[12] With respect to the issue of *res judicata*, the test is set out in article 2848 *CCQ* and the Federal Court relied on the main authority submitted by Mr. Boily (*Ungava Mineral Exploration Inc. c. Mullan*, 2008 QCCA 1354) to assess whether the applicable criteria (three identities) were met. As there was no dispute with respect to the identity of the parties and of the cause, the only matter to be determined was the object of the Gagné Judgment. The Federal Court defined the object in respect of the overall motion before Gagné J. as the denial of "Mr. Boily's right to admit into evidence all the admissible and inadmissible parts" of the First Rosenblum Report (FC Reasons at para. 56).

[13] After a comparative analysis of the two Rosenblum reports, the Federal Court stated that they were essentially identical. It is appropriate here to reproduce paragraph 37 dealing with this finding:

> [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. (see also Reasons at paras. 36-39)

[14] In the opinion of the Federal Court, 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.

[15] Finally, the Federal Court confirmed that Prothonotary Tabib did not make any reviewable error that would allow it to interfere with her decision to strike the Second Rosenblum Report on the basis that its filing constituted an abuse of process.

[16] First, the Federal Court discussed in some detail the general principles relating to the doctrine of abuse of process, and how it is not limited by the strict technical requirements applicable to other complementary or adjunctive doctrines, such as issue estoppel and *res judicata* (FC Reasons at paras. 65-70). It noted that the doctrine has been recognized as applicable to attempts to bypass procedural orders (FC Reasons at para. 69). It then concluded that, in this case, the Prothonotary could indeed use her inherent and discretionary power to sanction what in the Federal Court's view was a violation of the *res judicata* principle. It added that it could not be said that the discretion was exercised in an abusive, unreasonable or non-judicial manner, or that the Prothonotary made an improper inference as alleged by Mr. Boily.

[17] The Federal Court found no palpable and overriding error in qualifying Mr. Boily's conduct as "disingenuous or specious" and that "it was certainly open [to her] 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" (FC Reasons at para. 71).

In its conclusion, the Federal Court noted that the proper recourse here for Mr. Boily would have been an appeal of the Gagné Judgment.

[18] Because the proper interpretation of the Gagné Judgment is at issue before us, it is appropriate to deal with it in some detail before I start my analysis. Also, according to Mr. Boily, it is essential to consider her reasons for dismissing his appeal.

B. *The Gagné Judgment*

[19] In the motion for the appeal before Gagné J., and in his memorandum, Mr. Boily expressly asked that Prothonotary Morneau's decision be quashed in respect of the entirety of the report, but in the alternative, that it be quashed and that the Federal Court strike only the parts of the First Rosenblum Report that are inadmissible.

[20] The formal judgment (*le dispositif*) of the Gagné Judgment is very brief: the plaintiff's motion for an appeal of Prothonotary Morneau's Order dated April 25, 2017 is dismissed. Considering the remedies sought in the motion, it is plain and obvious that the judgment dismissed Mr. Boily's request that, at this stage, the admissible parts of the First Rosenblum Report not be struck and thus remain on the record subject only to the trier of fact's determination that it is indeed proper expert evidence.

[21] Turning now to the reasons, Gagné J. characterized the decision before her as follows:

> [12] Prothonotary Morneau concluded that the Report ought to be struck on the basis that, although it does not expressly dictate this Court's conclusion on the questions of domestic law raised in the action, it is clear and evident that its

> essential character is a legal opinion on international law as it applies to the facts of the case.

[22] Gagné J. then mentions that Prothonotary Morneau raised two distinct grounds for finding the report inadmissible on this motion to strike. First, international law *per se* cannot be made the object of expert evidence because it is within the expertise and experience of this Court (Gagné Judgment at para. 14). Second, Prothonotary Morneau also concluded that even if international law could be the subject of expert evidence, the First Rosenblum Report "goes beyond mere presentation of international law as it opines directly on Mr. Boily's case". Gagné J. highlighted Prothonotary Morneau's comment that "where testimony contains 'masked legal conclusions' or 'when [it is] nothing more than the reworking of the argument of counsel', it is rendered inadmissible" (Gagné Judgment at para. 16).

[23] Gagné J. then reproduced paragraph 23 of *Canada (Board of Internal Economy) v. Canada (Attorney General)*, 2017 FCA 43 (*Board of Internal Economy*) which the Prothonotary applied *mutatis mutandis* to the First Rosenblum Report (Gagné Judgment at para. 18). This paragraph underlines that expert evidence on historical development or background must be in the nature of a factual brief providing neutral information, and it must not draw from Canadian and foreign sources to offer a conclusion which happens to support the respondent's argument.

[24] This paragraph is also relevant as it clearly states that the gist of an expert report containing arguments that offer conclusions to support the plaintiff's case, could very well be integrated in a memorandum of fact and law or even reformatted into an article for publication in

a legal journal. But it clearly does not provide evidence that is necessary for the trier of fact to appreciate the issues due to their technical nature.

[25] The Gagné Judgment then deals only briefly with the issue of whether it is plain and obvious that expertise on international law *per se* is inadmissible (Gagné Judgment at paras. 26-31). In her view, the law was not sufficiently clear to be a proper basis to exclude the report on a motion to strike, as it must be assessed on a case-by-case basis, and is better left to the trier of fact. The Gagné Judgment did not determine that in this case even a neutral opinion on international law would ultimately be admissible: it simply indicates that such determination should be made by the trier of facts.

[26] At paragraph 25, Gagné J. held that whether the law is domestic, foreign or international, Prothonotary Morneau, Mr. Boily and the Crown all agree that pages 10 to 12 of the Report, at least in part (I note that Prothonotary Morneau did not specify “in part” at paragraph 18 of his reasons), provide an opinion on the relevant international law as it applies to Mr. Boily; thus, it was rightfully deemed inadmissible by Prothonotary Morneau.

[27] Gagné J. then rejected Mr. Boily’s argument that the legal conclusion found at pages 10 to 12 of the Report is not dispositive of the issue to be determined at trial because it does not usurp the role of the trial judge, who must still decide what remedies, if any, are owed to Mr. Boily as a consequence of the Crown’s alleged breach of its domestic obligations (1457 *CCQ*) (See paras. 35-39).

[28] Gagné J. was very well aware of the status of this file and aware of the fact that avoiding further delay was an important consideration. She held at paragraph 48:

> [48] As stated above, the Report is inadmissible for providing a legal conclusion and Prothonotary Morneau struck the Report in its entirety to prevent further delay for an action that has already been drawn out over several years. As Prothonotary Morneau has been the case management judge for this file since 2012, he is well positioned to decide the best way to put this case forward on the merits and his decision on this issue is owed deference.

[29] Prothonotary Tabib, the Federal Court and the parties all focused on the following two paragraphs in Gagné Judgment's conclusion. I will therefore reproduce them in their entirety:

> [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.

[30] It is thus clear that the Gagné Judgment expressly deals with the alternative remedy sought by Mr. Boily in his motion, and dismisses it.

[31] The last part of the puzzle that needs to be included in this Background section is a brief review of the components of the First Rosenblum Report. As mentioned, it was an essential element in the reasoning of Prothonotary Tabib and of the Federal Court that the Second Rosenblum Report was fundamentally the same report that was struck out in the Gagné

Judgment. It is also relevant to appreciate Mr. Boily's conduct and his argument that he understood the Gagné Judgment as an invitation to file a new report that included only the elements that could be admissible at this stage in the Second Rosenblum Report.

C. *The First Rosenblum Report*

[32] In the first nine pages of the First Rosenblum Report, the author deals with the problem arising from the acceptance of diplomatic assurances and how these assurances are perceived by certain specific human right international players. It offers the opinion that the limited recognition of the use of such assurances by certain specific European and International bodies and doctrinal authors has led to the proposal of minimum standards to assess their potential effectiveness to avoid breaches of two international conventions, the European Convention on Human Rights (ECHR) and the Convention against Torture (CT).

[33] Dr. Rosenblum then specifies how the proposed standards have been used by the ECoHR in the context of some alleged violations of the ECHR. He also refers to the fact that although used in a different way, these proposed standards have been found relevant by the CAT to evaluate a breach under the CT.

[34] Then, on pages 8 and 9, Dr. Rosenblum expresses, based on this jurisprudence and proposals made in international publications, what conditions could be effective if included in diplomatic assurances. He then goes on to opine on what continuing obligations a sending state could adopt to avoid a breach of the ECHR or the CT. Here again he relies on a 2011 article written by a Canadian jurist (J.G. Johnston see notes 4, 7, 10, 14, 16, 24, 27 in the First

Rosenblum Report), that effectively describes the same background in relation to diplomatic assurances and the continuing debate about minimum standards.

[35] In the next section of the First Rosenblum Report (subsection III(e), starting at page 10), Dr. Rosenblum offers the view that the frame of reference which he previously established, must be adapted to the specific circumstances, and then looks at the actual assurances received from the Mexican Government in this case. This is the only section where Mr. Rosenblum refers to the human rights situation in Mexico, for he is then applying his views to the actual situation that will be before the trier of facts.

[36] Dr. Rosenblum goes on to evaluate each actual assurance and matches them with extracts from three human rights reports; particularly, he assesses the value of assurances based on the Mexican Constitution, its laws and institutional commitment, and the availability of the Mexican National Human Rights Commission, and its adherence to the Istanbul Protocol. He then offers his views as to the impact this documentation should have on Canada, even offering his opinion as to whether Canada (a member of the international community) ought to know about the sources he quotes from. In the Conclusion, which covers essentially almost all of page 12, Dr. Rosenblum states that a sending state like Canada should be held to the standards elaborated in his report. Dr. Rosenblum also offers a conclusion based on the jurisprudence and doctrine he selected as to what was foreseeable for a sending state such as Canada, an issue expressly raised at paragraph 52 of the Statement of Defence of the Crown.

II. The Issues, the Standards of Review and the Best Approach to Deal with this Appeal

[37] Mr. Boily acknowledges in his memorandum that the Federal Court applied the appropriate standards of review; that is, those set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Those are also the standards applicable in this appeal.

[38] Mr. Boily argues that the Federal Court:

i. Erred in law in its interpretation of the Tabib Order;

ii. Erred in law in its interpretation of the Gagné Judgment, and its application of *res judicata*; and

iii. Erred in law and in fact in upholding the finding of Prothonotary Tabib that there was an abuse of process by Mr. Boily in this case.

[39] Ultimately, this Court must determine whether the final conclusion reached by the Federal Court, i.e. that the Second Rosenblum Report could be struck out, was open to it on the basis of the record before it.

[40] Considering the particular circumstances of this case, I believe that this appeal can be determined without addressing each and every argument raised by Mr. Boily. Indeed, in my view, the doctrine of abuse of process offers the most appropriate framework to determine whether the Second Rosenblum Report could be struck.

[41] As noted in *CUPE*, the doctrines of *res judicata*, issue estoppel, collateral attack and abuse of process are complementary and interrelated, and more than one doctrine may support a

particular outcome (in this case, striking out). I therefore do not need to address them individually as one is sufficient to determine this appeal.

[42] In the present matter, Mr. Boily made a strategic decision not to appeal the Gagné Judgment and to unilaterally file the Second Rosenblum Report without seeking any intervention of the case manager or another member of the Federal Court.

[43] Such situation does not fit the usual fact pattern for the application of res judicata, as it is Mr. Boily's conduct, not a statement of claim or motion brought by him, which is in question. Res judicata typically involves looking at two distinct proceedings. Both the Federal Court and Prothonotary Tabib found that Mr. Boily was trying to do indirectly what Gagné J. had refused to do in his appeal before her. On such facts, I believe that it is appropriate to determine this appeal based on the complementary doctrine of abuse of process relied upon by Prothonotary Tabib.

III. Analysis

[44] It is clear from *CUPE* that the doctrine of abuse of process is wider than the doctrines of *res judicata* and collateral attack, for it is not restricted to the same technical requirements. In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the Court's process and the adjudicative functions of the courts, thus the focus is less on the interest of the parties, and the motive of a party like Mr. Boily cannot be determinative (*CUPE* at paras. 42, 43 and 45).

[45] I understand from Mr. Boily's submissions that he interpreted the Gagné Judgment as confirming his views that international law could be the subject of an expert report. This was a positive finding for Mr. Boily since, as argued before Prothonotary Tabib, this precluded the Crown (who could not appeal from the reasons of a judgment in its favour) from objecting to the filing of an expert report on that sole basis at any time prior to a determination by the trier of facts of its admissibility (Gagné Judgment at para. 30).

[46] Mr. Boily clearly understood that the Gagné Judgment denied him the benefit of keeping pages 1 to 9 of the First Rosenblum Report. However, in his view, this conclusion was wrong, because it was based on a misunderstanding that the Prothonotary had exercised his discretion in respect of this alternative remedy, which he had not. (Appellant's Memorandum at para. 47). In any event, he viewed the Gagné Judgment simply as a refusal by Gagné to do the parsing herself.

[47] I ought to note that this is a misunderstanding of how things are done by judges. A judge does not deny a remedy simply because he or she does not want to have additional work. Second, had Gagné J. granted the alternative remedy, it would likely have been done by giving general directions as to what needed to be changed, such as deleting pages 10 to 12, as well as consequential amendments to the description of the mandate, the overview, and potentially the addition of a new shorter conclusion limited to the neutral parts of his report. This would then actually be done by Mr. Boily, in concert with the Crown to avoid further objections on the new revised version that would have to be filed. Any unsettled objection would have been brought to the attention of Gagné J..

A. *Mr. Boily's Strategic Decision*

[48] Mr. Boily says that he understood the Gagné Judgment, particularly paragraph 49 (see paragraph 29 above), as an implicit invitation to do this parsing himself and to file another expert report that, unlike the First Rosenblum Report, could not be characterized as giving an opinion on international law as it applied in the present case (i.e. that would not include pages 10 to 12).

[49] Mr. Boily says that, in light of the above, he chose not to appeal the Gagné Judgment on the basis of proportionality; that is, in order to avoid spending time and money on an appeal.

[50] Obviously, Mr. Boily did have to spend money for the Second Rosenblum Report, a report that goes much further, in my view, than answering this so-called invitation.

[51] Every tactical decision made in the context of a proceeding has consequences, even if all those consequences are not foreseen by counsel: see for example the recent decision of this Court in *Her Majesty the Queen v. James S.A. MacDonald*, 2021 FCA 6, which deals with what is described as a "cautionary tale", and how counsel needs to manage the risk involved in making some decisions. This is not the first warning of this kind.

[52] Proportionality is desirable, but it involves more than a quick face value assessment. Particularly so in a matter where failure to appeal the Gagné Judgment will most evidently preclude Mr. Boily from arguing against its conclusion and essential findings, as this would be an impermissible attack on a final judgment. There is no doubt that a decision, once final, is

presumed to be right, especially for the purpose of applying the doctrines such as res judicata, collateral attack, and abuse of process (*Werbin c. Werbin*, 2010 QCCA 594 at para. 8; *Roberge v. Bolduc*, [1991] 1 S.C.R. 374 at 403).

[53] To avoid such radical consequences, one could reasonably expect Mr. Boily to at least evaluate the pros and cons of not appealing the Gagné Judgment by discussing his understanding of the said decision and its effects with the opposing counsel. Before us, Mr. Boily argued that he simply has a genuine disagreement with the Crown and Prothonotary Tabib regarding the effect of the Gagné Judgment. If one relies on proportionality as a reasonable explanation for his choices, one would be expected to consider the costs saved by a quick appeal (which can be done within months when an expedited hearing is requested) with those that would likely be spent on further disputes with respect to a further expert report such as the Second Rosenblum Report. Of course, an appeal would have given an opportunity for the Crown to contest that particular finding in respect of the admissibility of an expert neutral evidence on international law.

[54] Another alternative would have been for Mr. Boily to seek a direction from the case manager extending the time to file another expert report that would include pages 1 to 9, if that is what he understood the Gagné Judgment to say, and this before the time to appeal the Gagné Judgment expired. The Federal Courts are extremely efficient at dealing with urgent requests, and he would have received a direction in that respect well before the expiration of the delay to appeal.

[55] Even if I were to accept Mr. Boily's argument that Gagné J. invited him to file an amended report (which I do not), he could not have understood her decision as inviting him to file a new report containing pages 10 to 12 of the First Rosenblum Report. This is what he did here.

B. *The Second Rosenblum Report*

[56] Indeed, not only was Mr. Boily not satisfied with simply relying on pages 1 to 9 with an amended overview and a new conclusion, the Second Rosenblum Report includes much of what was in pages 10 to 12 of the First Rosenblum Report. Dr. Rosenblum also added references to new documents, effectively adding new parts to the First Rosenblum Report (added references to four new human rights reports, and none of those are dated after the date of his first report). Obviously, even if Gagné J. had granted Mr. Boily's request to remove only parts of pages 10 to 12 of the First Rosenblum Report, he would not have been allowed to amend the said Report to add these references at this stage of the proceedings without an express leave of the Court.

[57] Mr. Boily and his expert clearly did more than parse the inadmissible parts of the report.

[58] The Second Rosenblum Report is now 14 pages. It includes a few minor changes to what were pages 1 to 9 in the First Rosenblum Report. More importantly, the Conclusion of the First Rosenblum Report remains basically unchanged. One would expect more significant changes in the Conclusion than the removal of express reference to Canada and the inclusion of the words "international law", if the body of the report had indeed been substantially modified. As

mentioned, this Conclusion took the whole of page 12 of the First Rosenblum Report, except for a few lines at the top of the page.

[59] I will now turn to the content of what was previously on pages 10 to 11 in the First Rosenblum Report, which is now in subsection III(e) of the Second Rosenblum Report.

[60] Mr. Boily now describes this part as a neutral and thus admissible opinion on the human rights situation in Mexico. However, a proper review of pages 11 to 13 — the new subsection now entitled "Evaluating the Assurances in light of credible human rights reporting and research" (my emphasis) — leads me to conclude that this section is nothing less than a masked attempt at addressing again the specifics of the diplomatic assurances issued in this case. This section does not simply list reports from credible organizations; rather, it combs through those reports to support the very points he was opining on pages 10-11 of his first report.

[61] A reasonably informed person would recognize that Dr. Rosenblum is dealing with the actual assurances in this case, without expressly saying so. He expressly comments on assurances from Mexico that would refer to the Mexican Constitution, its human rights legislation, to its Human Rights Commission, and to implementation of the Istanbul Protocol. The cosmetic changes do not change the nature of this section; it is still what Gagné J. considered inadmissible. Here again, it is nothing more than the reworking of the arguments of counsel participating in the case. I have indeed seen many such memoranda from counsel in immigration cases, who take the Court through all the particularly relevant passages of human rights reports that are routinely filed before the Federal Court.

[62] The addition of the words “international law” throughout the report does not make it any more admissible. As stated in the Gagné Judgment, this rule applies whether one is dealing with a domestic, foreign or international law. Gagné J. expressly rejected Mr. Boily’s argument that by opining on the international obligation of the Crown to Mr. Boily, it does not ultimately usurp the role of the trial judge (Gagné Judgment at para. 35).

[63] My view that this section is nothing more than a masked attempt to do what Gagné J. held that he could not do is further confirmed by some language used on page 13 of the Second Rosenblum report. For example, where it goes on to say “even more worryingly”, one would not expect to find this language in a neutral exposé nor “as evidenced by”, words so often used by counsel in their representations.

C. *Unilateral Filing by Mr.Boily*

[64] In addition to finding that Mr. Boily had effectively tried to circumvent the Gagné Judgment, Prothonotary Tabib clearly considered the fact that the period for the service and filing of an expert report in chief had expired well before the motion to strike the First Rosenblum Report was filed (Tabib Order page 3). She reiterated at page 6 of the Tabib Order that Mr. Boily’s right to serve and file an expert report had been exhausted and could not be reinstated unilaterally by serving the Second Rosenblum Report.

[65] This, Mr. Boily argues, shows that Prothonotary Tabib misconstrued the Gagné Judgment, giving it a broader scope than it has. This is also one of the errors of law that the Federal Court allegedly made in construing the Tabib Order. I disagree.

[66] I agree with Mr. Boily that at page 6, Prothonotary Tabib speaks of an expert report, but this statement must be read in its context. Here, she is addressing an issue with which prothonotaries of the Federal Court are particularly familiar and concerned with, as they case manage most of the cases under case management before the Federal Court.

[67] Mr. Boily had argued that he had an inalienable right to rely on an expert at trial provided it was admissible. The statement of Prothonotary Tabib on page 6 is in answer to this argument. She notes that Mr. Boily's right is subject to the procedural conditions set out in the Rules, which the case manager has the discretion to adapt and modify. This is perfectly in line with the views expressed by the Supreme Court of Canada in *Porto Seguro Companhia De Seguros Gerais v. Belcan S.A.*, [1997] 3 S.C.R. 1278 at paragraphs 30 and 40.

[68] The Protonotary notes at page 3 of the Tabib Order that, in this case, the time to file this expert report had already expired. She specifies at page 6 that Mr. Boily had exhausted his right to unilaterally file a report in March 2018; that is, more than a year after the filing of the First Rosenblum Report and the expiration of the amended schedule agreed to by the parties and confirmed as binding by the case manager, and five months after the Gagné Judgment.

[69] When asked to address this important aspect at the hearing before us, it was agreed that the parties could make additional submissions on whether leave to extend the time to serve and file the Second Rosenblum Report was required.

[70] Having now considered these submissions, I cannot conclude that Prothonotary Tabib made a palpable and overriding error in finding that the time to file any expert report to replace the First Rosenblum Report without seeking leave had well passed. In that respect, whether or not the Crown raised this issue is irrelevant, for only the case manager or another member of the Court has the discretion to grant an extension of the length required here. Obviously, it is easier to obtain leave when one has the agreement of the other side. But the case manager or another member of the court must have the opportunity to ascertain that the parties are not simply complacent and create an undue delay for the setting of a date for trial. This is especially so when the Crown would likely wish to file a rebuttal report as it said when the First Rosenblum Report was contested. The relevance of further delay underpinned Prothonotary Morneau's decision that was reviewed and confirmed in the Gagné Judgment.

[71] I note that at the pre-trial conference in December 2016, Prothonotary Morneau did insist on an undertaking of the parties to meet the schedule for the filing of expert reports referred to in Mr. Boily's letter dated December 9, 2016. When Mr. Boily encountered a delay with respect to the filing of his report on diplomatic assurances and torture, his counsel wrote to Prothonotary Morneau on February 6, 2017 to obtain a month extension. He then had a sound reason for the delay. Given that the Crown had agreed to this extension, Prothonotary Morneau directed that nothing further was required to amend the schedule set in the December 9, 2016 letter.

[72] It is evident that Mr. Boily could not foresee that a motion to strike would be filed. But this is a regular occurrence, and objections to the admissibility of expert reports are made promptly, especially when the process of pre-trial management conference has started (Rule

258 (4)). Had such a request been made right after the Gagné Judgment was issued or Mr. Boily made his decision not to appeal, it might well have been granted, but a definite time would have been set for the filing of such report.

[73] If Mr. Boily had made his request for such leave in March 2018, he would have had to explain in detail why it took five months from the date of the Gagné Judgment for him to seek such leave or to prepare a new report. This is a substantial extension considering that Mr. Boily only sought a brief extension to file the First Rosenblum Report. The case manager would obviously have had to look at the nature of the expertise and the impact of the Gagné Judgment.

[74] These decisions are discretionary and they involve a balancing of well-established factors to ultimately find if it is in the overall interest of justice to grant leave.

[75] Mr. Boily's counsel appears to be well-aware of the applicable test and certainly it was clear in the decision of *Apotex Inc. v. Abbott Laboratories*, 2006 FCA 294, referred to at paragraph 45 of the Federal Court decision, that in light of the timing, Apotex, whose expert report had been struck out because of the unsuitability of its author, had to seek leave to file another expert report in its stead. This was also an example where leave was denied based on the particular facts of the matter, and our Court confirmed the decision.

[76] In a case like this one, if I had concluded that the decision of the Federal Court had to be quashed, I would not propose to simply leave the Second Rosenblum Report on the record, for it is not clear to me that Mr. Boily was entitled to a five-month extension after the issuance of the

Gagné Judgment, and a definite delay to file a report in rebuttal would also have to be set, given that the proceedings are now otherwise ready for trial.

D. *Abuse of Process*

[77] I now come back to the Federal Court decision on abuse of process, and Mr. Boily's argument that the Federal Court erred in not finding that Prothonotary Tabib made an error by inferring an intent to disregard the Gagné Judgment (Tabib Order page 4). In the particular circumstances of this case, I am not satisfied that this constitutes a palpable and overriding error on the part of the Federal Court or Prothonotary Tabib.

[78] Finally, with respect to the prejudice arising from a finding of abuse, Mr. Boily has not convinced me that this made the exercise of the discretion in this case abusive or unreasonable or non-judicial. The Crown has repeatedly stated that Mr. Boily could file all the foreign jurisprudence, publications, and the human rights reports referred to in the Rosenblum Reports. This means that the defendant could not object on the basis that an expert affidavit was required. The very same passages relied upon by Dr. Rosenblum can be highlighted and discussed as part of Mr. Boily's argument. This is exactly what our Court said in *Board of Internal Economy* at para. 23 (Gagné Judgment at para. 18) when it deleted an expert affidavit in its entirety.

[79] I have also read the 2011 Johnston article cited several times by Dr. Rosenblum. The Canadian jurist not only sets out the relevant background, but also the problems raised by various international players with the acceptance of diplomatic assurances and the attempts made to

propose minimum standards. Not only does it present these topics in a more neutral fashion but it also puts them in the context of Canadian jurisprudence.

[80] I am therefore not satisfied that in the circumstances, a finding of abuse would result in such unfairness that the exercise of discretion warranted the Federal Court's intervention. As mentioned at paragraph 49 of the Gagné Judgment, Mr. Boily courted the risk by deciding to file an expert report that commented on the particular facts of the case, and the Federal Court also noted that he did court a risk when he decided not to appeal the Gagné Judgment and chose to file the Second Rosenblum Report.

E. *Conclusion*

[81] Albeit on a somewhat different reasoning, I conclude that in this case, Mr. Boily was attempting to do indirectly what he had been prohibited from doing in the Gagné Judgment. This coupled with the fact that it was done unilaterally without seeking leave, or at the very least the agreement of the defendant, was a sufficient basis to support the exercise of discretion by Prothonotary Tabib whatever the intent of Mr Boily. The Federal Court did not err in concluding that the appeal from her decision should be dismissed.

[82] I therefore propose to dismiss the appeal with costs. The parties agreed on the amount of their respective costs; I therefore propose that the costs be set at an all-inclusive amount of $1,800.00.

IV. Post-Script

[83] As explained during the hearing, this Panel was surprised, considering section 18 of the *Official Languages Act*, R.S.C., 1985, c. 31 (4th Supp.), that the written and oral arguments were presented in two languages, with the Crown having decided to do all its arguments in French. This means that, pursuant to section 20 of the said legislation, this Court's decision must be issued in the two official languages at the same time. This was explained to the parties who advised us that the further delay this involved, especially with the changes resulting from the pandemic, would not be detrimental.

"Johanne Gauthier"
J.A.

"I agree
Yves de Montigny J.A."

"I agree
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE GASCON DATED MARCH 18, 2019

DOCKET:	A-132-19
STYLE OF CAUSE:	RÉGENT BOILY v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 25, 2020
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	DE MONTIGNY J.A. LOCKE J.A.
DATED:	FEBRUARY 8, 2021

APPEARANCES:

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