Federal Court Cour fédérale

Date: 20171109

Docket: T-541-10

Citation: 2017 FC 1021

Ottawa, Ontario, November 9, 2017

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

RÉGENT BOILY

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an appeal of the Order made by Prothonotary Richard Morneau, dated April 25, 2017, whereby the expert report of Professor Rosenblum [Report], tendered by Mr. Boily in support of his action against the Crown for damages, was struck in its entirety. Prothonotary Morneau was of the view that the Report contains a legal opinion on international law as it applies to the facts of the case.

[2] For the reasons set out below, Mr. Boily's motion will be dismissed.

II. Facts

[3] Mr. Boily is a Canadian citizen. In November 1998, he was sentenced to 14 years in prison in Mexico for transporting almost 600 kilograms of marijuana. In March 1999, he escaped from prison and a guard was killed during the incident.

[4] Mr. Boily fled to Canada and was arrested by Canadian authorities in 2005. Mexico then requested that he be extradited to Mexico in order to face criminal prosecution on charges of escape and manslaughter, in addition to serving the remainder of his sentence for drug trafficking. The Government of Canada agreed to his extradition, upon assurances that all reasonable precautions would be taken to ensure his safety while in Mexico.

[5] Mr. Boily contested the extradition decision, but he was ultimately unsuccessful.

[6] In August 2007, he was extradited to Mexico and returned to the same prison from which he escaped. He claims that he was tortured by prison guards upon his arrival in Mexico.

[7] Mr. Boily now seeks damages from the Crown for its alleged failure to ensure that the Mexican government would follow through on the diplomatic assurances that it proffered. He submits, pursuant to article 1457 CCQ, that the Crown was responsible for the alleged acts of torture since, according to him, the Crown did not put any mechanisms or procedures in place,

around the time of his extradition, to ensure that Mexico would respect the diplomatic assurances it provided to the effect that he would not be tortured upon his return.

[8] The Crown submits, in its defence, that it was under no legal obligation to ensure that the Mexican government would follow through after Mr. Boily's extradition.

[9] The existence and, where appropriate, the scope of the Crown's legal obligations to Mr. Boily following his extradition to Mexico are live issues between the parties in the action for damages.

[10] In support of his claim in the action for damages before this Court, and to establish the current state of international law, Mr. Boily filed into evidence the Report of Peter Rosenblum, a professor of International Law and Human Rights at Bard College.

[11] The Report was the subject of a motion to strike by the Crown, a motion granted by Prothonotary Morneau in the Order at the heart of this proceeding.

III. Impugned Decision

[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.

[13] More specifically, the Report provides a legal opinion concerning the standards that should be respected by states choosing to rely on diplomatic assurances in extradition. It concludes that the sending state has a legal obligation to fulfill substantive requirements regarding monitoring after extradition. As such, Prothonotary Morneau found the Report to be inadmissible and struck it in its entirety, prior to the action proceeding to trial.

[14] In the Order, Prothonotary Morneau states that international law, contrary to foreign law, is akin to domestic law; it cannot be the object of expert evidence because it is within the expertise and experience of this Court.

[15] Although Mr. Boily did present cases where expert evidence on international law was accepted by the courts, Prothonotary Morneau highlights that the rule in Canada is that a court must take judicial notice of international law through counsel's pleadings and not through the admission of expert evidence (Gib van Ert, *Using International Law in Canadian Courts*, 2nd ed (Toronto: Irwin Law, 2008) at 42-72).

[16] Prothonotary Morneau also concludes that the Report goes beyond mere presentation of international law, as it opines directly on Mr. Boily's case – a clear red line that further justifies his decision to deem the Report inadmissible. Prothonotary Morneau highlights this Court's prior remarks: where testimony contains "masked legal conclusions" or "when [it is] nothing more than the reworking of the argument of counsel", it is rendered inadmissible (*Association of Chartered Certified Accountants v The Canadian Institute of Chartered Accountants*, 2016 FC 1076 at para 31).

[17] In a recent case, this Court was faced with a similar situation where one party submitted an affidavit that was essentially a legal opinion on an issue before the Court. Although the initial decision *not* to strike the affidavit (a decision also made by Prothonotary Morneau), which was eventually overturned by the Federal Court of Appeal in *Canada (Board of Internal Economy) v Canada (Attorney General)*, 2017 FCA 43, concerned the striking of an expert's affidavit in the context of a judicial review, Prothonotary Morneau considered the general principles articulated by the Federal Court of Appeal in that decision to be applicable to the case at bar.

[18] Prothonotary Morneau determined that paragraph 23 of *Board of Internal Economy* applies *mutatis mutandis* to the Report:

> [23] It cannot credibly be contended that the St-Hilaire affidavit is in the nature of a factual brief providing neutral information with respect to the historical development of the parliamentary privilege, and on comparative and foreign law. It reads like a legal opinion: it draws from Canadian and foreign sources to offer a conclusion which happens to support the respondent MPs' argument. Indeed, the gist of its content could very well have been integrated in the Memorandum of Fact and Law submitted by the respondent MPs. Alternatively, the affidavit could have been reformatted into an article for publication in a legal journal, and referred to by the respondent MPs as an authority supporting their position. But it clearly does not provide evidence that is necessary to enable a judge, as a trier of fact, to appreciate the matters in issue due to their technical nature, as required by *Mohan*.

[19] As such, Prothonotary Morneau found it appropriate to intervene at a preliminary stage and to strike the Report.

IV. Issue and Standard of Review

[20] This motion for appeal raises a single issue:

Did the Prothonotary make a reviewable error in striking the Report?

[21] The applicable standard of review for discretionary decisions of prothonotaries was recently revisited by the Federal Court of Appeal in *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215. The Court indicated that such decisions will be reviewed on the standard set out by the Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33 (*Hospira*, above at paras 28, 57, 65, 70). As such, a prothonotary's legal determinations are to be reviewed on a standard of correctness, while a prothonotary's findings of fact or mixed fact and law can only be interfered with in the presence of a palpable and overriding error.

V. Analysis

[22] In my view, Prothonotary Morneau made no reviewable error in striking the Report in its entirety at a preliminary stage before trial. I therefore see no reason to interfere with his Order.

[23] Considering this Court's standard of intervention, this appeal raises two sub-issues: (1) the Prothonotary deeming the Report to be inadmissible, due to its characterization as a legal opinion on international law as it applies to the facts of the case; and (2) the Prothonotary's decision to strike the Report at a preliminary stage before trial and in its entirety.

A. *Inadmissibility of the Report*

[24] Prothonotary Morneau justifies his conclusion that the Report is inadmissible on two legal grounds – the first regarding a prohibition on the submission of expertise on international law (Order at paras 11-17) and the second, a prohibition on expertise providing legal conclusions

(Order at paras 18-20). The second justification is submitted as an alternative to the first (Order at para 18).

[25] However, in my view, the second justification saves Prothonotary Morneau's decision on the Report's inadmissibility from intervention by this Court. As discussed below, the state of the law on the admissibility of expertise on international law is uncertain and has received little explicit attention from Canadian courts. What remains far more certain is the inadmissibility of expertise providing legal conclusions on the issue(s) to be decided by the court, whether that law be 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) provide an opinion on the relevant international law as it applies to Mr. Boily's case. This type of legal analysis cannot be the subject of expert evidence and was rightfully deemed inadmissible by Prothonotary Morneau.

B. *Prohibition on the Submission of Expertise on International Law*

[26] Prothonotary Morneau's first legal determination as to the Report's inadmissibility can be summarized as follows: Courts must take judicial notice of international law, as they do for domestic law, because international law is incorporated within domestic law. Given that courts take judicial notice of international law, legal expert evidence on international law is not necessary. Since necessity is one of the four criteria for the admissibility of expert evidence set forth by the Supreme Court in *R v Mohan*, [1994] 2 SCR 9 at page 20, unnecessary expert evidence is thus inadmissible. In short, expert evidence on domestic law is inadmissible and so expert evidence on international law must be inadmissible as well.

[27] However, there is no authoritative legal position in Canada on whether or not judges are to take judicial notice of international law and consequently, on the admissibility of expertise on international law. Prothonotary Morneau summarizes his position on this issue at paragraph 12 of the Order and he basically relies on comments made by the author Gib van Ert in *Using International Law in Canadian Courts* (above at 42-72), where he expresses the opinion that courts take judicial notice of international law, as argued by the parties.

[28] Yet the chapter that Prothonotary Morneau cites from is less definitive that this rule has fully been adopted in Canadian courts. Mr. van Ert's conclusion is that "[j]udicial notice is also taken of international law, though the general rule and its application in particular cases are not without some uncertainty" (at 42). Throughout the chapter, Mr. van Ert argues for the "orthodox view that international legal questions are questions of law for argument by counsel and decision by the court" (at 51) and presents numerous examples where Canadian courts have abided by this orthodoxy. Nevertheless, he also presents several examples of exceptions to this rule where Canadian judges have accepted expert evidence on international law.

[29] In their submissions, Mr. Boily and the Crown also provide ample examples of where Canadian courts have either accepted expertise on matters of international law or taken judicial notice of international law without requiring the submission of any particular expertise. There is clearly no settled position on this point.

[30] Therefore, Prothonotary Morneau's legal determination that expert evidence on international law is inadmissible because judges must take judicial notice of international law

could be said to be a legal error. That conclusion is not the law in Canada. Courts' taking judicial notice of international law and their acceptance of expert evidence on international law will continue to be made on a case-by-case basis going forward, until such point as a Canadian court takes a more definitive stance on this practice. Such a determination need not be made by this Court at this time.

[31] Had this been Prothonotary Morneau's only legal ground for deeming the Report inadmissible, his decision would warrant intervention. However, Prothonotary Morneau provided a second legal ground justifying the Report's inadmissibility which, in my view, rightfully supports his conclusion.

C. *Prohibition on Expertise Providing Legal Conclusions*

[32] Prothonotary Morneau's second legal determination as to the Report's inadmissibility can be summarized as follows: Expert evidence that provides legal conclusions is inadmissible because it is unnecessary, failing one of *Mohan*'s four criteria for the admissibility of expert evidence. Such expert evidence is unnecessary because it usurps the role of lawyers and judges by opining specifically on the legal issues to be decided by the court.

[33] Here, the Prothonotary made no legal error. It is established Canadian law that legal expert evidence that applies the relevant law to the facts of the case, thus providing legal conclusions, is inadmissible. Applying the law to the facts is the purview of the lawyers to plead and the judge to decide. The British Columbia Court of Appeal echoed this principle in *R v Appulonappa*, 2014 BCCA 163 (QL):

> 62 Finally, with respect to expert evidence, the respondents called Professor Dauvergne, who testified to issues of refugee law and policy. Mr. Dandurand, who was called by the Crown, gave evidence as an expert in human smuggling as a transnational crime. I agree with the respondents that, to the extent that both experts strayed into providing opinions on the interpretation and application of international law and s. 117 of the *IRPA*, their testimony was not properly admissible as these were questions of law for the court. I accordingly limit my consideration of their evidence to factual matters.

[34] In support of his legal determination, Prothonotary Morneau cites two recent decisions of the Federal Court and the Federal Court of Appeal – *Association of Chartered Certified Accountants* and *Board of Internal Economy*. He also cites the following excerpt from *Québec (Attorney General) v Canada*, 2008 FC 713 at para 161, aff'd 2009 FCA 361, 2011 SCC 11, referred to in *Association of Chartered Certified Accountants* (above at para 31) (at para 19 of the Order):

> […] The role of experts is not to substitute themselves for the court but only to assist the court in assessing complex and technical facts. It must never be forgotten that, ultimately, it is the court that must decide questions of law. As the British Columbia Supreme Court wrote in *Surrey Credit Union v. Willson* (1990), 45 B.C.L.R. (2d) 310 (B.C.S.C.), cited by my colleague Mr. Justice Teitelbaum in *Samson Indian Nation & Band v. Canada* (2001), 199 F.T.R. 125 (Fed. T.D.), at paragraph 21:
>
> > Expert opinions will be rendered inadmissible when they are nothing more than the reworking of the argument of counsel participating in the case. Where an argument clothed in the guise of an expert's opinion is tendered it will be rejected for what it is. [emphasis added]
>
> [Emphasis in original.]

[35] Mr. Boily argues that this legal ground for deeming the Report inadmissible is not applicable because the legal conclusion contained in the Report is not a dispositive one. His support for this argument is that he ultimately seeks a remedy from the Crown for breach of its domestic obligations (as found in art 1457 CCQ, 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, and the *Québec Charter of Human Rights and Freedoms*, CQLR c C-12), not its international obligations. Since the Report merely provides an opinion on Canada's international obligations to Mr. Boily, it does not ultimately 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.

[36] Mr. Boily proffers no jurisprudence to support this assertion. As a rebuttal, the Crown makes the point that a central argument of its defence is that it has no international obligation to provide consular services to Canadian citizens abroad, since those services are provided by the royal prerogative. Accordingly, the Crown submits that Mr. Boily may not maintain that a fault was committed by agents of the Minister of Foreign Affairs in failing to follow up with Mr. Boily after he was extradited to Mexico, exactly because they had no international obligation to do so.

[37] Thus, a judge's eventual findings as to the existence of the Crown's international obligations to Mr. Boily are a critical first step in this litigation. This issue must be decided by the eventual trial judge before he or she can determine whether and how these international obligations impact the Crown's domestic obligations to Mr. Boily. Consequently, 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 is not convincing.

[38] Mr. Boily also argues that it is possible for expert evidence to get very close to the ultimate issue for the court to determine and still be admissible. Nevertheless, the examples that Mr. Boily cites are not legal expert evidence. In *R v Bingley*, 2017 SCC 12, the expert was a drug recognition expert and in *R v J-LJ*, 2000 SCC 51, the expert was a psychiatrist. The Supreme Court in *Mohan* does state that, "[t]he closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle" (above at 25). However, the expert in *Mohan* was also a psychiatrist, not a jurist. Moreover, the Supreme Court does state the following on the necessity criteria for the admissibility of expert evidence (*Mohan*, above at 24-25):

> There is also a concern inherent in the application of this criterion that experts not be permitted to usurp the functions of the trier of fact. Too liberal an approach could result in a trial's becoming nothing more than a contest of experts with the trier of fact acting as referee in deciding which expert to accept.
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> These concerns were the basis of the rule which excluded expert evidence in respect of the ultimate issue. Although the rule is no longer of general application, the concerns underlying it remain. In light of these concerns, the criteria of relevance and necessity are applied strictly, on occasion, to exclude expert evidence as to an ultimate issue. Expert evidence as to credibility or oath-helping has been excluded on this basis. See *R. v. Marquand*, [1993] 4 S.C.R. 223, per McLachlin J.

[39] Therefore, legal expert evidence on an ultimate issue is an area where the criteria of necessity would be applied strictly and properly excluded, as Prothonorary Morneau decided in this case.

[40] Finally, Mr. Boily raises the case of *Bouzari v Iran*, [2002] OJ No 1624 (Ont Sup Ct J) (QL), aff'd (2004), 243 DLR (4th) 406 (Ont CA) as one very similar to the facts of this case. Mr. Bouzari and his family brought an action against the Islamic Republic of Iran, claiming damages for torture. Iran did not file a defence, deeming it to have admitted the truth of all allegations of fact in the Statement of Claim. The action before the Ontario Superior Court of Justice was to determine whether a Canadian court could have jurisdiction over the proceeding. Given Iran's default and non-appearance, the Ontario Superior Court of Justice permitted the submission of two expert opinions for providing the court assistance on international law – one expert opinion in support of Mr. Bouzari and the other in support of the intervenor, the Attorney General of Canada.

[41] Mr. Boily submits that in *Bouzari,* the court accepted the opinion of one expert that the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, creates no obligations on Canada to provide access to the courts so that a litigant can pursue an action against a foreign state for torture. Mr. Boily provides this case as an example of where a court accepted an expert report providing a legal opinion on the relevant international law as it applies to the facts of the case. At paragraphs 53 to 56, Justice Swinton writes:

> **53** My task is to determine whether Canada's *State Immunity Act* should be interpreted to provide a further exception for damages for torture committed by foreign states outside Canada so as to be in compliance with international law, or whether s. 3 of the Act is unconstitutional. In making my decision, especially on the interpretation issue, I need to know the current state of international law. Therefore, I have found Mr. Greenwood's evidence much more helpful on the issues that I need to decide, and I have relied on it extensively.

> **54** I accept his opinion that the Convention creates no obligation on Canada to provide access to the courts so that a litigant can pursue an action for damages against a foreign state for torture committed outside Canada. Rather, Article 14 requires states like Canada, who are signatories, to provide a remedy for torture committed within their jurisdiction.
>
> **55** In addition, I accept Mr. Greenwood's opinion that there is no obligation under the *International Covenant on Civil and Political Rights* that requires access to the courts for actions alleging torture by foreign states committed outside Canadian jurisdiction. Article 14 provides that in determination of a criminal charge or rights and obligations in a suit at law, an individual shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. To date, this has not been interpreted to require a state to provide access to its courts with respect to sovereign acts committed outside its jurisdiction. As discussed more fully below, the European Court of Human Rights, in interpreting a similar, but differently worded article in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, did not find the United Kingdom in violation of that Convention because it granted sovereign immunity for acts of torture committed outside the state.
>
> **56** Therefore, Canada has no treaty obligation which requires it to provide a civil remedy for acts of torture committed by foreign states.

[42] I am of the opinion that this case should not be relied upon in the present circumstances for the following reasons. First, the question in *Bouzari* was to determine whether Canadian courts have jurisdiction to hear Mr. Bouzari's claim and the legal expert opinions went to that preliminary issue – not yet to an ultimate determination of the parties' rights and obligations, as here. Second, the role of the legal experts in this case seems to go beyond what Justice Swinton presents their role to be at the beginning of her judgment, undercutting Mr. Boily's argument that this case should be relied upon to overturn the Pronothonary's Order and to admit the Report in full:

> **37** In *R. v. Finta* (1994), 112 D.L.R. (4th) 513, the Supreme Court of Canada commented on the role of experts in international law (at 554). Essentially, such experts can assist the court in determining the applicable international law by setting out the relevant sources and describing the general principles of law accepted in the international community.

[43] Finally, further evidence that militates against relying upon the *Bouzari* decision is the fact that Mr. van Ert references *Bouzari* as "a particularly striking instance of the evidentiary difficulties Canadian courts have had with international law" (above at 53) and notes how unclear the judgment is as to whether the court is using the international legal evidence before it as findings of fact or determinations of law (above at 53-54).

D. *Striking the Report at a Preliminary Stage before Trial and in its Entirety*

[44] Prothonotary Morneau's finding that the Report is inadmissible as a legal opinion on international law as it applies to the facts of the case is one of mixed fact and law that can only be interfered with by this Court where there is a palpable and overriding error. The Prothonotary made no such error. The Prothonotary, Mr. Boily and the Crown are all in agreement that, at least in part, the Report contains a legal opinion on international law as it applies to the facts of the case and as discussed above, the Prothonotary made no legal error setting out the principle that legal expert evidence that includes legal conclusions on the issues to be determined at trial is inadmissible.

[45] Mr. Boily argues that even if certain parts of pages 10 to 12 of the Report contain Professor Rosenblum's opinion on Canada's international obligations to Mr. Boily, it is nonetheless a palpable error to characterize the entire twelve-page Report as fundamentally a

legal opinion on international law as it applies to the facts of the case and to strike the whole Report.

[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.

[47] I agree with the Crown that on the appeal of the exercise of a discretionary power, courts may only intervene where it is established that the power has been exercised in an abusive, unreasonable or non-judicial manner (*Québec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26 at para 52), none of which can be said of the Prothonorary's decision before me. Prothonotary Morneau relies upon *Board of Internal Economy* to support his decision to strike the Report in its entirety and at a preliminary stage before trial (Order at para 21).

[48] While the bar for striking evidence prior to a hearing is high (*Board of Internal Economy*, above at para 29), it is permissible to do so in order to allow the hearing to proceed in a more timely and orderly fashion or where the evidence is clearly irrelevant or otherwise inadmissible (*Collins v Canada*, 2014 FCA 240 at para 6; *Canadian Tire Corp Ltd v PS Partsource Inc*, 2001 FCA 8). 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 (*J2 Global Communications Inc v Protus IP Solutions Inc*, 2009 FCA 41 at para 16).

VI. Conclusion

[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.

JUDGMENT in T-541-10

THIS COURT'S JUDGMENT is that:

1. The Plaintiff's motion for an appeal of Prothonotary Richard Morneau's Order, dated April 25, 2017, is dismissed;
2. Costs are awarded to the Defendant.

"Jocelyne Gagné"
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
DATE OF HEARING:	JULY 18, 2017
JUDGMENT AND REASONS:	GAGNÉ J.
DATED:	NOVEMBER 9, 2017

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