Court of Appeal for Saskatchewan

Docket: CACV4427

Citation: *Mosiuk v BASF Canada Inc.*, 2025 SKCA 90

Date: 2025-09-12

Between:

Larry Mosiuk, also known as Eddy Larry Mosiuk, also known as Edward Larry Mosiuk, also known as Larry Edward Mosiuk, and Joy Skrapek

Appellants
(Defendants)

And

BASF Canada Inc.

Respondent
(Plaintiff)

Before:	Drennan, Bardai and Kilback JJ.A.
Disposition:	Appeal dismissed
Written reasons by:	The Honourable Justice Keith D. Kilback
In concurrence:	The Honourable Justice Jillyne M. Drennan The Honourable Justice Naheed Bardai
On appeal from:	KBG-RG-01741-2024, Regina
Appeal heard:	June 19, 2025
Counsel:	Jason M. Clayards for the Appellants Tristan N. Culham and Michael Marschal for the Respondent

Kilback J.A.

I. INTRODUCTION

[1] Larry Mosiuk and his spouse, Joy Skrapek, farm near Kamsack, Saskatchewan. BASF Canada Inc. suspected Mr. Mosiuk had planted a canola crop in violation of its patent rights and applied pursuant to Rules 6-41 and 6-44 of *The King's Bench Rules* for an interlocutory injunction and preservation order.

[2] A judge of the Court of King's Bench sitting in Chambers granted the order sought by BASF (*BASF Canada Inc. v Mosiuk* (8 August 2024) Regina, KBG-RG-01741-2024 (Sask KB) [*Decision*]). In general terms, the *Decision* authorized BASF to enter onto Mr. Mosiuk's land, take leaf samples from his canola crop, and conduct destructive testing on those leaves to determine whether the crop had been grown in violation of BASF's rights. These steps have all been completed.

[3] Mr. Mosiuk and Ms. Skrapek appeal from the *Decision*. They contend the judge made numerous jurisdictional, legal, and evidentiary errors and that the injunction and preservation order should not have been granted. They ask this Court to set aside the *Decision* and grant orders directing BASF to destroy all samples and test results or alternatively, prohibiting BASF from using the samples and test results in evidence at trial.

[4] For the reasons that follow, I would dismiss the appeal.

II. BACKGROUND

[5] BASF holds patent rights in canola seed sold under the brand name InVigor Hybrid Canola, that was originally developed by Bayer CropScience Inc. The sale and use of InVigor is governed by a form of licencing contract called a Liberty & Trait Agreement [LTA].

[6] On July 19, 2013, Mr. Mosiuk signed an LTA with Bayer that gave him a limited licence to use InVigor seed to plant a single crop. The LTA prohibits Mr. Mosiuk from using seeds harvested from that crop (commonly called bin-run seed) to grow a second generation crop (called a filial 2 or F2 crop). Bayer's rights under the LTA were assigned to BASF in August 2018.

[7] In June 2024, Mr. Mosiuk purchased 12 bags of InVigor seed. This was only enough seed to cover approximately 120 acres, which is not a very large area. Around that same time, BASF learned that Mr. Mosiuk may have planted an F2 canola crop using bin-run seed in violation of the LTA and suspected that he may have planted the 12 bags of InVigor seed around the perimeter of the field to disguise this fact.

[8] BASF tried to exercise its audit rights under the LTA to confirm whether bin-run seed had been planted, but Mr. Mosiuk did not cooperate with the audit request. On July 24, 2024, BASF commenced an action against Mr. Mosiuk and Ms. Skrapek for breach of contract and patent infringement.

[9] BASF then applied pursuant to Rules 6-41 and 6-44 of *The King's Bench Rules* for an interlocutory injunction and preservation order. The order sought by BASF: (i) required Mr. Mosiuk and Ms. Skrapek to disclose the location of lands on which they were growing canola; (ii) authorized BASF to enter onto those lands and take leaf samples; (iii) authorized BASF to conduct destructive testing on those leaves; and (iv) restrained Mr. Mosiuk and Ms. Skrapek from obstructing those actions.

[10] From BASF's perspective, the application was urgent because there was only a short time within which they could obtain leaf samples before the leaves would desiccate and no longer be testable. Accordingly, before serving the application, BASF obtained an *ex parte* order abridging time for service from the usual 14 days to 5 days. That order was granted by Currie J. on July 24, 2024, and has not been appealed.

[11] At the first appearance in Chambers on July 30, 2024, Mr. Mosiuk sought a one-month adjournment to file materials in response. Justice Klatt denied that request but granted a one-week adjournment. That order has also not been appealed. The application was next in Chambers on August 6, 2024, when it was fully argued.

[12] Ms. Skrapek did not appear in Chambers, but Mr. Mosiuk was present and opposed BASF's application. He said the LTA was not enforceable because (i) he signed it without reading it; (ii) the seed dealer presented it to him as a mere formality; and (iii) he had received no

consideration for it. BASF argued the consideration was the licence to plant and harvest InVigor seed and that the LTA bore Mr. Mosiuk's signature and was enforceable according to its terms.

[13] The judge found that BASF had established a serious issue to be tried in the underlying action for breach of the LTA and patent infringement. He observed that Mr. Mosiuk's purchase of a small amount of InVigor seed appeared to be unusual and stated that the purchase "could have occurred because [Mr. Mosiuk] intended to plant InVigor seed around the perimeter of farmed land, and to plant bin-run seed to produce an F2 crop inside the perimeter. It is significant that Mosiuk has not denied planting bin-run seed" (*Decision* at para 20). The judge determined that BASF would suffer irreparable harm if it could not preserve the evidence it needed to prove that Mr. Mosiuk grew an F2 crop contrary to the licence terms in the LTA. He concluded the balance of convenience favoured BASF's position and granted the order (see paras 19–22).

III. ISSUES

[14] The issues raised in this appeal may be addressed by answering the following questions:

(a) Is the appeal moot?

(b) Should the appellants be permitted to raise new issues on appeal?

(c) Did the judge err by finding BASF had established a serious issue to be tried in the absence of detailed evidence of the specific patents it was seeking to enforce?

(d) Did the judge err by finding BASF had established a serious issue to be tried when the LTA was unenforceable because of (i) the absence of consideration; or (ii) a misrepresentation by BASF's agent?

(e) Did the judge consider inadmissible evidence?

[15] The appellants initially advanced two additional grounds of appeal. They alleged that the judge erred in granting the order because (i) BASF failed to disclose all material facts in its application before Currie J. to abridge the time for service; and (ii) they were denied sufficient time to respond to the application because of the orders of Currie and Klatt JJ. These grounds of appeal were abandoned during the hearing.

[16] As mentioned, if the appeal is allowed, the appellants seek an order directing BASF to destroy the leaf samples and test results. Alternatively, they seek an order prohibiting BASF from using the test results in evidence at trial in the Court of King's Bench. They contend that if the orders were granted in error, the evidence should not have been preserved and BASF should not be permitted to use it at trial.

IV. ANALYSIS

A. Mootness

[17] As a preliminary issue, BASF argues the appeal is moot and should not be heard because all actions authorized by the *Decision* have already been carried out. BASF has obtained the leaf samples and performed testing on them. As such, it submits the *Decision* has been exhausted and there is no longer a live controversy between the parties as to whether the relief that was sought in its application should be granted.

[18] Considering whether a question before the Court should be dismissed as moot normally involves two steps. The first is to determine if the question is indeed moot. The second is to decide whether, notwithstanding that the question is moot, it should nevertheless be heard (see *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 (WL) at para 16, [1989] SCJ No 14; *Dubois v Saskatchewan*, 2022 SKCA 15 at para 53, 467 DLR (4th) 651). Determining whether to hear a moot appeal involves examining three broad rationales that underlie the mootness doctrine: (i) the presence of an ongoing adversarial context; (ii) the need for judicial economy; and (iii) the requirement that courts be sensitive to their proper law making function as an adjudicator of disputes (see *Borowski* at paras 29–42; *Cimmer v Niessner*, 2022 SKCA 60 at para 48). These rationales supply "the principled framework within which 'the interests of justice' can be evaluated" (*R v Smith*, 2004 SCC 14 at para 41, [2004] 1 SCR 385). They are not to be examined in a rigid manner, as "the principles […] may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of a third, and vice versa" (*Wilson Olive and Friends of the Aquifer v Keys (Rural Municipality)*, 2020 SKCA 124 at para 17, citing *Borowski* at 363; see also *Patel v Saskatchewan Health Authority*, 2021 SKCA 115 at para 81).

[19] It is unnecessary to embark on an analysis of whether this appeal is moot because, even if it is moot, it should still be heard. I agree with the appellants that judicial economy and the interests of justice are served by hearing the appeal because, due to the tight timeframe, it would have been difficult for them to challenge the *Decision* before BASF took the samples and did the testing. In general terms, the mootness doctrine is not applied strictly where questions that might otherwise evade review are raised (see *Borowski* at para 36; *Cimmer* at para 53).

B. New issues on appeal

[20] As a second preliminary issue, BASF argues that the appellants should not be permitted to raise new issues on appeal that were not raised in the court below. I agree.

[21] The appellants concede they are raising several new arguments on appeal. In addition to the grounds of appeal listed above, they allege the judge also erred by:

(a) failing to dismiss the application because he lacked jurisdiction to grant the order either due to a forum selection clause in the LTA or s. 54 of the *Patent Act*, RSC 1985, c P-4 (which provides that actions for patent infringement may be brought in the Federal Court or certain provincial courts);

(b) failing to dismiss the application because the LTA had terminated according to its terms in either 2018 or 2021;

(c) failing to dismiss the application because the LTA is governed by Alberta law; and

(d) considering affidavits filed by BASF that were not properly sworn by electronic means because they were not accompanied by a form recommended by a practice directive issued by the Law Society of Saskatchewan.

[22] As a general rule, an argument that was not raised or considered in Chambers cannot be raised for the first time on an appeal to this Court (see *Kupsar v Regina Provincial Correctional Centre*, 2020 SKCA 142 at para 29, 97 Admin LR (6th) 181, and the cases cited therein). However, this rule is not absolute. The decision whether to entertain a new argument on appeal is discretionary and is guided by a balancing of the interests of justice as they affect the parties (*Kupsar* at para 29, citing *R v Ahmed*, 2019 SKCA 47 at para 15, [2019] 10 WWR 99 and *Kaiman*

v Graham, 2009 ONCA 77 at para 18, 245 OAC 130). An appellate court may consider a new issue "where it is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice" (*Performance Industries Ltd. v Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 at para 33, [2002] 1 SCR 678; see also *Guindon v Canada*, 2015 SCC 41 at para 22, [2015] 3 SCR 3).

[23] I am not persuaded it is in the interests of justice to permit the appellants to raise the new issues on this appeal. Since none of them were raised or argued before the judge, BASF had no opportunity to adduce evidence to respond to them and they are not fully addressed in the existing evidentiary record in a way that would permit fair adjudication. Indeed, the jurisdictional argument based on s. 54 of the *Patent Act* was not even raised in the appellants' notice of appeal in this Court. In these circumstances, it would not be appropriate to consider the new issues raised by the appellants because they cannot be addressed without visiting procedural prejudice on BASF (see *Guindon* at para 22; *Kupsar* at para 29).

[24] I also observe the appellants have filed an application in the Court of King's Bench for an order pursuant to Rule 3-14 of *The King's Bench Rules* dismissing the action based on what they describe as a forum selection clause in the LTA and the proposition that the LTA is governed by Alberta law. That application was adjourned *sine die* and has not yet been heard. It would not be in the interests of justice for this Court to decide the jurisdictional question raised in that new ground of appeal for the additional reason that it is currently a live issue in the Court of King's Bench.

C. Evidence of the specific patents in issue

[25] The first substantive issue is whether the judge erred in granting the injunction by finding that BASF had established a serious issue to be tried in the absence of detailed evidence of the specific patents it was seeking to enforce. I am not persuaded the judge erred in this way.

[26] A decision to grant an interlocutory injunction is discretionary in nature and is entitled to deference (see *Google Inc. v Equustek Solutions Inc.*, 2017 SCC 34 at para 22, [2017] 1 SCR 824; and *Turtle v Valvoline Canadian Franchising Corp.*, 2021 SKCA 76 at para 29). This Court will interfere with a decision of the Court of King's Bench involving the grant or refusal of an

interlocutory injunction only if the decision "involves an error of principle, the disregard or misapprehension of a material fact, a failure to act judicially or a result that is so plainly wrong as to amount to an injustice" (*Farms and Families of North America Inc. (Farmers of North America) v AgraCity Crop & Nutrition Ltd.*, 2024 SKCA 22 at para 50, quoting *101280222 Saskatchewan Ltd. v Silver Star Salvage (1998) Ltd.*, 2019 SKCA 59 at para 14, [2019] 11 WWR 516).

[27] The appellants acknowledge the judge correctly identified the law governing the granting of an interlocutory injunction. The judge was required to consider: (i) whether there is a serious issue to be tried (or a strong *prima facie* case with respect to the mandatory aspects of the injunction); (ii) whether BASF had demonstrated a material risk of irreparable harm if the injunction was not granted; and (iii) whether the balance of convenience favoured granting it (see *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311; *Mosaic Potash Esterhazy Limited Partnership v Potash Corporation of Saskatchewan Inc.*, 2011 SKCA 120, 341 DLR (4th) 407; *R v Canadian Broadcasting Corp*., 2018 SCC 5 at para 15, [2018] 1 SCR 196).

[28] The appellants also acknowledge the judge correctly identified the law governing the granting of a preservation order under Rule 6-44, which involves similar considerations to those set out in *Mosaic* (see *HMW-Bennett & Wright Contractors Ltd. v BWV Investments Ltd.*, (1991) 95 Sask R 211 (QB) at para 35). However, they contend the judge erred in applying the criteria governing the grant of an injunction and preservation order to the facts before him.

[29] The appellants submit that the judge erred in finding there was a serious issue to be tried on the evidence. They assert that, in a patent infringement case, "it is not possible to find a serious issue to be tried unless there is evidence of what the patent protects and evidence of how the patent is being infringed". They say that the judge could not have concluded there was a serious issue to be tried because BASF had not proven: (i) that it had the legal right to enforce the patents covered by the LTA; (ii) what specific seed traits the patents protected; and (iii) that BASF's rights in those protected traits were, in fact, infringed.

[30] As I understand the first argument, the appellants say there was no evidence to support the judge's finding that BASF held patents for InVigor canola that were initially developed by Bayer (*Decision* at para 2).

[31] In support of the application, BASF filed an affidavit sworn by Kent Hall, the Manager of Business Development and Licencing with BASF who had previously been employed by Bayer in various roles for approximately 15 years. Mr. Hall stated that "[i]n 2018, BASF was assigned Bayer's rights under the existing patents related to InVigor and Liberty Herbicide. BASF was also assigned Bayer's rights under the LTA" (at para 23). The appellants say this assertion is insufficient to support the judge's finding that BASF held the patents for InVigor because (i) the assignment agreements were not filed in evidence, and (ii) Mr. Hall was not qualified as an expert to interpret the assignment agreements between Bayer and BASF or opine on their legal effect.

[32] I do not accept this submission. For the purposes of the application, the uncontested evidentiary assertion that Bayer's rights under the InVigor patents were assigned to BASF was sufficient to establish that fact. There was no call for expert evidence on the point and no requirement for the assignment agreements to be filed for the judge to find there was a serious issue to be tried.

[33] I am also unable to accept the appellants' argument that the judge could only find there was a serious issue to be tried if BASF had filed detailed evidence on the specific traits protected by its patents together with evidence that its rights in those traits had been infringed.

[34] Mr. Hall's evidence was that BASF holds a number of different patents for various aspects of its seed technology processes and that all InVigor seed contains at least some of the genetically determined characteristics that are an expression of one or more of BASF's patented biotechnology processes. More detailed evidence was not required because, at root, the relevant question before the judge was whether there was a serious issue that the appellants had violated the restriction in the LTA against growing an F2 canola crop from bin-run seed. For the purposes of the injunction and preservation order, the nature and scope of the protected traits covered by BASF's patents were not in issue. In addition, the judge's finding that there was a serious issue to be tried in connection with BASF's claim for breach of contract turned on the terms of the LTA and did not depend on the specifics of the patents in issue.

[35] To raise a serious issue to be tried, an applicant is not required to prove their claim will succeed; only that it is not frivolous or vexatious (see *Mosaic* at para 113). I see no error in the judge's determination that BASF had raised a serious issue to be tried in the absence of more

detailed evidence of the specific patents it was seeking to enforce and would not give effect to this ground of appeal.

D. Enforceability of the LTA

[36] The second issue is whether the judge erred by finding BASF had established a serious issue to be tried because the LTA was unenforceable. The appellants say BASF's claim depends on the LTA being valid, but the evidence before the judge demonstrated that it was unenforceable for two reasons: (i) the absence of consideration; and (ii) because of a misrepresentation by BASF's agent. They contend the judge could not have found a serious issue to be tried based on this evidence. Again, I am not persuaded the judge erred in the manner alleged.

[37] The appellants submit there was no evidence that Mr. Mosiuk received any consideration for signing the LTA and that it was unenforceable for that reason. In the *Decision*, the judge reviewed this argument and BASF's position that the consideration for the LTA was the right to acquire and use InVigor seed in accordance with the terms of the licence in the LTA:

> [18] Mosiuk takes the position that the enforceability of the LTA is questionable. His evidence is that he signed it without reading it, and that it was presented to him as a mere formality. His position is that he received no consideration for signing the LTA – he signed it after he had already planted the In Vigor seed he bought in 2013 – and he has never agreed to the auditing provisions contained therein. In response, BASF submits that the LTA provided Mosiuk the ongoing ability to acquire and use In Vigor under the terms of the LTA (including to harvest and sell it, but not to use bin-run seed from any harvest). Mosiuk bought and planted In Vigor seed in 2013 and afterward, including in 2022, 2023, and 2024, but he has not complied with the LTA's auditing provisions.

[38] The judge then concluded he was "satisfied that BASF has established serious issues to be tried in the underlying action with respect to breach of the LTA and patent infringement" and that BASF's claims could not be characterized as frivolous or vexatious (*Decision* at para 19). I see no error in this conclusion. As I read the *Decision*, the judge accepted BASF's submission that the consideration Mr. Mosiuk received for signing the LTA was the right to use InVigor seed. The evidence supporting that conclusion was clearly set out in the affidavit of Mr. Hall and in the LTA itself.

[39] The appellants submit that the LTA was also unenforceable because the seed dealer who presented it to Mr. Mosiuk to sign told him that it was just for "housekeeping" purposes. The evidence on this point came from Mr. Mosiuk, who deposed that "I simply signed [the LTA] as I

was told by staff of [the seed dealer] that it was 'housekeeping'". The appellants say this evidence demonstrates that the LTA was represented to Mr. Mosiuk as being a mere formality, which was a material misrepresentation rendering the LTA unenforceable.

[40] The judge understood, considered, and rejected this argument. When reviewing Mr. Mosiuk's evidence, the judge stated that "[t]he employee explained to [Mr. Mosiuk] that [the LTA] was a housekeeping matter" (*Decision* at para 11). After noting Mr. Mosiuk's position "that it was presented to him as a mere formality" (at para 18, quoted above), the judge concluded BASF had established a serious issue to be tried. It follows from this that the judge was not persuaded the seed dealer's statement to Mr. Mosiuk that the LTA was for "housekeeping" purposes was a misrepresentation that called the enforceability of the LTA into question in a way that prevented him from finding there was a triable issue. This conclusion does not reveal an error in principle or a misapprehension of the evidence.

E. Reliance on inadmissible evidence

[41] The third issue is whether the judge erred by considering inadmissible evidence. I see no such error.

[42] Rulings with respect to the admissibility of evidence are generally reviewable for correctness, particularly where, as here, the admissibility decision involves the interpretation and application of the rules of evidence rather than an assessment of the probative value of the evidence (see *Grandel v Government of Saskatchewan*, 2024 SKCA 53 at para 49, [2024] 10 WWR 179, citing *Dolynchuk v McGowan*, 2022 SKCA 42 at para 22, 26 CLR (5th) 1; *Kawula v Institute of Chartered Accountants of Saskatchewan*, 2017 SKCA 70 at para 55, 24 Admin LR (6th) 112; and *R v Alves*, 2014 SKCA 82 at para 54, 314 CCC (3d) 313).

[43] The appellants identify parts of two affidavits that they say contain inadmissible evidence. They argue that parts of five paragraphs in the affidavit of Mr. Hall were inadmissible because they are irrelevant or contain opinion, hearsay, or argument. They also say parts of six paragraphs in the affidavit of Mr. Horkoff were inadmissible because they contain facts not within his present knowledge or because they contain opinion, speculation, or hearsay.

[44] The appellants concede they did not object to any of these paragraphs or otherwise raise any concern about the admissibility of this evidence during the hearing before the judge. However, they submit that the judge had an obligation to disregard inadmissible evidence. Relying in part on *Wongstedt v Wongstedt*, 2017 SKCA 100, [2018] 4 WWR 82, they say the judge should have, of his own volition, formally identified what evidence he disregarded. They contend that the judge's failure to do so in the *Decision* was an error justifying intervention on appeal. I would not give effect to this argument.

[45] In most cases, "if no objection is made to the admissibility of evidence in a civil trial, an objection on appeal will usually be unsuccessful" (*Hoang v Vicentini*, 2016 ONCA 723 at para 45, 352 OAC 358; *Marshall v Watson Wyatt & Co.* (2002), 209 DLR (4th) 411 (Ont CA) at para 15; see also *Saskatchewan v Racette*, 2020 SKCA 2 at para 34, [2020] 8 WWR 84, leave to appeal to SCC refused, 2020 CanLII 32301; *Piche v Saskatchewan Government Insurance*, 2020 SKCA 53 at para 90). While a failure to object presents a significant hurdle for an appellant, it is not always fatal. Appellate intervention may nevertheless be appropriate "if the admission of the evidence has caused a substantial wrong or a miscarriage of justice" (*Racette* at para 37).

[46] In my respectful view, none of the concerns raised by the appellants over the admissibility of the impugned paragraphs of the Hall and Horkoff affidavits are particularly well founded. I am also not persuaded that the admission of any of the impugned parts of the Hall and Horkoff affidavits caused a substantial wrong or miscarriage of justice. The appellants do not suggest this; nor do they explain how any of the identified evidence influenced the *Decision* or how the result may have been different if it had not been admitted. They simply state that the evidence should not have been considered and, relying on *Wongstedt*, say that the judge erred by not expressly identifying what evidence was disregarded in the *Decision*.

[47] On the latter point, *Wongstedt* is distinguishable and does not assist the appellants. In *Wongstedt*, this Court found that a chambers judge erred by failing to properly address an application for a ruling on objections made to affidavit evidence (at paras 38–39). Here, there was no objection to the Hall or Horkoff affidavits and no request for a ruling on their admissibility. *Wongstedt* does not stand for the proposition that a judge must, in the absence of any objection by

the parties, formally indicate on the record when aspects of affidavit evidence filed in Chambers are disregarded.

[48] The judge did not err by considering inadmissible evidence as suggested by the appellants and I see no basis to intervene on this ground of appeal.

V. CONCLUSION

[49] For the reasons set out above, I would dismiss the appeal with costs to BASF in accordance with Rule 54(1) of *The Court of Appeal Rules*. For clarity, this judgment does not address the admissibility or use of the test results in evidence in the Court of King's Bench.

"Kilback J.A."

Kilback J.A.

I concur.

"Drennan J.A."

Drennan J.A.

I concur.

"Bardai J.A."

Bardai J.A.