

**Date: 20070725**

**Docket: A-235-07**

**Citation: 2007 FCA 259**

**Present: SHARLOW J.A.**

**BETWEEN:**

**POLARIS INDUSTRIES INC., LEISURE MART AND RV CANADA CORPORATION  
doing business as POWERSPORTS & RV CANADA,  
861073 ONTARIO LTD. doing business as WAYNE'S WORLD,  
RICK'S PERFORMANCE INC., ELITE PERFORMANCE PRODUCTS (LONDON) INC.,  
FOREST FARM EQUIPMENT LTD., 1070678 ONTARIO INC. doing business as  
SPOILED SPORTS, ELK ISLAND SALES INC., CYCLE WORKS CALGARY LTD.,  
YELLOWHEAD POLARIS INC. doing business as PARKLAND SLED & ATV,  
LETHBRIDGE HONDA CENTRE LIMITED, COUNTRYSIDE MOTOR SPORTS INC.,  
THUNDER CITY POWER & LEISURE LTD., ROND'S MARINE LTD., RANDY  
GUDMUNDSON doing business as RANDY'S TIRE & REPAIR, SEA TO SKY  
MOTORSPORTS INC., KOOTENAY SLEDS & WHEELS INC., CYCLE NORTH  
ENTERPRISES LIMITED, SCHULTZ MOTORSPORTS INC., 363337 B.C. LTD. doing  
business as M & M PERFORMANCE, JAMES VINCENT MARK, TREVOR JAMES  
MARR, K.V. AUTO & TRUCK CENTRE INC., and SUNSET AUTO SALES LIMITED**

**Appellants  
(Defendants)**

**and**

**VICTORY CYCLE LTD.**

**Respondent  
(Plaintiff)**

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on July 25, 2007.

**REASONS FOR ORDER BY:**

**SHARLOW J.A**

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**Appellants  
(Defendants)**

**and**

**VICTORY CYCLE LTD.**

**Respondent  
(Plaintiff)**

**REASONS FOR ORDER**

[1] The appellants Polaris Industries Inc., Leisure Mart and RV Canada Corporation and others (to be referred to collectively as "Polaris") have appealed the interlocutory order of Justice

Kelen dated May 1, 2007 (2007 FC 466). Before me is a motion by Polaris to stay the order of Justice Kelen pending the disposition of the appeal. The respondent Victory Cycle Ltd. (“Victory”) opposes the motion for a stay.

[2] Victory is suing Polaris in the Federal Court for trademark infringement in relation to the registered trademark “VICTORY CYCLE”. The statement of claim was issued on December 15, 2005 and served on all defendants by February 7, 2006. In March of 2006, Polaris demanded particulars. Victory responded to that demand in July of 2006. Polaris took the position that the response was not adequate and filed a motion for particulars and to strike the statement of claim. Before that motion was heard, the Federal Court issued a notice of status review.

[3] The motion and the submissions on the notice of status review were heard by Prothonotary Milczynski on February 5, 2007. She concluded that Polaris has all the material facts necessary to plead, and on that basis she dismissed the motion for particulars. Her order dismissing the motion is dated April 13, 2007. Polaris appealed that order. The appeal was dismissed by Justice Snider on May 29, 2007. Polaris has appealed the order of Justice Snider (A-276-07). That appeal is pending.

[4] With respect to the status review, Prothonotary Milczynski ordered that the action proceed as a specially managed proceeding and ordered the parties to provide a consent timetable. The parties could not reach agreement because Polaris wished to conduct examinations for discovery before filing their statement of defence. Polaris took the position (and still takes the position) that it is entitled as of right to discoveries before pleading (Rule 236(2) of the *Federal Courts Rules*).

[5] The Rule 236(2) issue was one of the items discussed in a case management conference with Prothonotary Milczynski on March 5, 2007. She directed that Polaris either serve and file its statement of defence or serve its motion record to strike the statement of claim by March 23, 2007. She also directed a timetable for the remaining steps to be taken, up to and including the request for a pre-trial conference.

[6] Polaris brought a motion in the Federal Court for an order varying the timetable set by Prothonotary Milczynski. That motion was heard by Justice Kelen on April 23, 2007. He dismissed the motion on May 1, 2007. That is the order under appeal in the matter before me.

[7] Meanwhile, the Federal Court proceedings continue. Polaris filed a motion in the Federal Court for an order extending the time to file their statement of defence until 10 days after the disposition of their appeal. That motion resulted in an order dated June 11, 2007 requiring Polaris to file its statement of defence by July 13, 2007 (last Friday). I understand that there is another motion pending in the Federal Court for a further extension of time.

[8] Before dealing with the stay motion, I must address the request of Polaris to disregard the response of Victory to the stay motion because it is supported by an affidavit of a lawyer who practices in association with Victory's solicitor of record, and is based in part on information and belief where the source of the information is Victory's solicitor of record. Polaris argues, on the basis of *Cross-Canada Auto Body Supply (Windsor) Limited et al. v. Hyundai Auto Canada*, 2006 FCA 133, that the affidavit is improper and should be disregarded, and also suggests that new counsel should be appointed for Victory. The affidavit to which Polaris objects states only

uncontested facts about the proceedings in the Federal Court and is appropriate in all respects. It bears no resemblance to the affidavits in the *Cross-Canada* case, which were affidavits of counsel or employees of counsel dealing with contentious facts in the substantive dispute between the parties. I will not disregard the affidavit or entertain the suggestion that new counsel should be appointed for Victory.

[9] In determining whether to grant a stay of an order pending appeal, the three questions to be asked are (1) whether the appeal of Polaris raises a serious issue, (2) if so, whether Polaris will suffer irreparable harm if the stay is not granted and its appeal succeeds, and (3) if so, whether the balance of convenience favours granting the stay.

[10] As to the first question, Victory properly concedes that there is a serious issue and that the appeal is not frivolous or vexatious. The first test is met.

[11] Polaris argues that it will suffer irreparable harm if the stay is not granted and its appeal succeeds. This argument is based on the premise that a defendant has an unqualified right under Rule 236(2) to conduct its examinations for discovery before filing its statement of defence. Because the order under appeal requires Polaris to file its statement of defence without having conducted its examinations for discovery, Polaris argues that it will have lost its Rule 236(2) right unless the order is stayed.

[12] I am not persuaded that in the circumstances of this case the filing of a statement of defence can amount to irreparable harm. The right given to defendants by Rule 236(2), whether

absolute or not, is a procedural right, and there are few procedural errors that cannot be remedied adequately.

[13] In this case the action is already subject to case management. If the appeal of Polaris were to result in a decision that the right of a defendant under Rule 236(2) is absolute and unqualified, as Polaris argues, the order requiring the statement of defence to be filed would be set aside. The case management judge, if persuaded that an incorrect application of Rule 236(2) Polaris has caused prejudice to Polaris, has the discretionary authority to permit the statement of defence to be withdrawn and to make the necessary changes in the timetable for the pre-trial proceedings.

[14] In the absence of irreparable harm, there is no basis for granting a stay. The motion of Polaris is dismissed. Victory is entitled to its costs of this motion regardless of the outcome of the appeal.

“K. Sharlow”

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-235-07

**STYLE OF CAUSE:** POLARIS INDUSTRIES INC., et al  
v.  
VICTORY CYCLE LTD.

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

**REASONS FOR ORDER BY:** SHARLOW J.A.

**DATED:** July 25, 2007

**WRITTEN REPRESENTATIONS BY:**

Kenneth D. McKay

FOR THE APPELLANTS/  
DEFENDANTS)

Rohit Parekh

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PLAINTIFF

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