Cour d'appel fédérale

Date: 20190131

Dockets: A-460-16
A-469-16

Citation: 2019 FCA 22

Coram : **NOËL C.J.**
STRATAS J.A.
WOODS J.A.

BETWEEN:

ADVANTAGE PRODUCTS INC., MSI MACHINEERING SOLUTIONS INC., LYNN P. TESSIER, JAMES L. WEBER AND JOHN P. DOYLE

Appellants

and

EXCALIBRE OIL TOOLS LTD, EXCALIBRE DOWNHOLE TOOLS LTD, KUDU INDUSTRIES INC., CARDER INVESTMENTS LP, CARDER MANAGEMENT LTD AND LOGAN COMPLETION SYSTEMS INC.

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on January 31, 2019.

REASONS FOR ORDER BY: STRATAS J.A.

CONCURRED IN BY: NOËL C.J.
WOODS J.A.

Federal Court of Appeal

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REASONS FOR ORDER

STRATAS J.A.

[1] Excalibre Oil Tools Ltd. *et al.* (collectively "Excalibre") move for an order dismissing for delay the appeals of Advantage Products Inc. *et al.* (collectively "Advantage") in files A-460-16 and A-469-16.

[2] I would grant Excalibre's motion. Advantage's appeals should be dismissed for delay. Advantage has not responded to this motion to dismiss. Long ago, Advantage's counsel was removed from the record and Advantage has not appointed new counsel of record. Further, Advantage has done nothing to advance the appeals for over a year.

[3] Excalibre also moves for a judgment allowing its cross-appeal in file A-460-16. Alternatively, it moves for an order permitting it to requisition a hearing in the cross-appeal and proceed with it without regard to the availability of Advantage.

[4] What should be done regarding Excalibre's cross-appeal in file A-460-16? Should it be allowed by default? To answer these questions we can draw upon an analogous body of jurisprudence concerning the consent granting of judgments in applications and appeals.

[5] The leading case is *Garshowitz v. Canada (Attorney General)*, 2017 FCA 251. The relevant principles appear at paras. 17-19:

> [17] First, in all cases, courts can act only on the basis of facts proven by admissible evidence and other permissible sources of fact, such as oral testimony, documentary evidence, affidavit evidence, material admitted by statute or statutory deeming provisions, agreed statements, admissions in pleadings, or judicial notice: *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161, 400 D.L.R. (4th) 723 at paras. 79-80, citing, among other authorities, *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548 at paras. 26-27. And of course courts can only act in accordance with the law. The [motion before the Court] did not offer any admissible evidence or other permissible sources of fact in support of the relief sought.
>
> [18] Second, a consent dismissal and the discontinuance of an application differ from the allowing of an application on consent. The former is not normally controversial. In the case of a consent dismissal or a discontinuance of an

> application, the legal status quo is not changing: a binding administrative order that was the subject of the application will remain in place. But allowing an application on consent is controversial. The legal status quo is changing: the binding administrative order is now being affected in some way. A reviewing court must be persuaded on the facts and the law before it that it can grant the application and change the legal status quo.
>
> [19] There are a number of ways the granting of an application on consent can be done. A respondent to the application can rely upon the existing evidentiary record before the reviewing court, agree that the administrator applied an unreasonable view of law, offer a supporting explanation, and ask that the administrator's decision be set aside. Or the respondent can offer fresh evidence the parties have agreed to admit—an agreed statement of facts could suffice—and explain that on the facts and the law the administrator's order must be set aside and the matter be remitted to the administrator or a mandamus order be made. There may be other ways this can be done. In each case, the Court, acting judicially and not as a rubber stamp, must be satisfied on the facts and the law that it should make the requested judgment.

[6] Unknown to the Court in *Garshowitz*, the Supreme Court of the United Kingdom dealt with a similar issue just six days earlier: *R. v. Secretary of State for the Home Department ex p. Hysaj*, [2017] UKSC 82. *Hysaj* underscores the points made in *Garshowitz*.

[7] In *Hysaj*, the Supreme Court of the United Kingdom confirmed that it was not going to act as a rubber stamp at the behest of the parties acting on consent. Rather, it had to be sure that there was a legal and evidentiary basis for the granting of the appeal (at para. 1):

> The Secretary of State, as respondent to these appeals, has applied pursuant to rule 34(2) of the *Supreme Court Rules 2009* for these appeals to be allowed by consent. The appellants of course agree. However, this court took the view that we could not make an order allowing the appeals and setting aside the orders in the courts below without understanding the reasons for doing so and their impact upon the point of law of general public importance raised by the appeals. The Secretary of State has supplied those reasons, with which this court agrees. This judgment is accordingly based upon them.

[8] Applying the principles in *Garshowitz* and *Hysaj*, Excalibre's cross-appeal cannot be allowed by default at this time. The cross-appeal can only be allowed if this Court is satisfied it should do so on the facts and the law. In this case, an evidentiary record is before the Court in the form of an appeal book. But this Court has not received any submissions on the law.

[9] In these circumstances, the alternative relief sought by Excalibre is appropriate. Therefore, I would order that within twenty days Excalibre may file a requisition for the hearing of its cross-appeal. Given the unresponsiveness of Advantage and the delay in this matter to date, I would direct that in preparing their requisition for hearing Excalibre need not investigate the availability of Advantage for the hearing. A date for the hearing may be set even if Advantage does not respond.

"David Stratas"
J.A.

"I agree
Marc NoëL C.J."

"I agree
Judith Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-460-16 AND A-469-16
STYLE OF CAUSE:	ADVANTAGE PRODUCTS INC., MSI MACHINEERING, SOLUTIONS INC., LYNN P. TESSIER, JAMES L. WEBER, AND JOHN P. DOYLE v. EXCALIBRE OIL TOOLS LTD., EXCALIBRE DOWNHOLE TOOLS LTD., KUDU INDUSTRIES INC., CARDER INVESTMENTS LP, CARDER MANAGEMENT LTD. AND, LOGAN COMPLETION SYSTEMS INC.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
CONCURRED IN BY:	NOËL C.J. WOODS J.A.
DATED:	JANUARY 31, 2019

WRITTEN REPRESENTATIONS BY:

Shaun B. Cody	FOR THE RESPONDENTS

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