

Federal Court of Appeal



Cour d'appel fédérale

Date: 20121109

Docket: A-360-12

Citation: 2012 FCA 286

Present: STRATAS J.A.

BETWEEN:

PETER DONALDSON

Appellant

and

WESTERN GRAIN STORAGE BY-PRODUCTS

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 9, 2012.

REASONS FOR ORDER BY:

STRATAS J.A.

Federal Court of Appeal



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REASONS FOR ORDER

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[1] The respondent (“Western Grain”) brings a motion to quash this appeal, and, in the alternative, a motion for security for costs.

The nature of the appeal

[2] Mr. Donaldson appeals from a judgment of the Federal Court dated June 21, 2012: 2012 FC 804. He raises issues concerning the merits of the Federal Court’s decision. He also raises an issue of procedural fairness.

Preliminary issue

[3] In response to Western Grain's motion, Mr. Donaldson has presented to the Registry a document intended to be a record responding to the motion. Forming the view that the document does not comply with Rule 365, the Registry has sought direction under Rule 72 regarding whether it can be filed.

[4] I direct the Registry not to accept the document for filing. It falls far short of the requirements in Rule 365.

[5] Normally, I would grant Mr. Donaldson an opportunity to file a proper record responding to the motion. However, given my disposition of the motion, it is unnecessary for him to do so.

Western Grain's request for an order quashing the appeal

[6] The following are Western Grain's submissions in support of an order quashing the appeal and the Court's response to them:

- a. *There is a long history of delay and abusive behaviour on the part of the respondent in the Federal Court.* This Court can act only on the basis of evidence and the respondent has not filed any evidence. In particular, Western Grain has not filed an affidavit before the Court. The unsworn assertions in the notice of motion and written representations, most of which concern Mr. Donaldson's conduct in the

Federal Court, are not evidence. But even assuming these assertions are true, Western Grain has presented no authority for the proposition that a long history of delay and abusive behaviour in the Federal Court means that an appeal to this Court should be quashed.

- b. *Mr. Donaldson is ignoring the deadline for filing his appeal book in this Court.*

That may be so but that, in itself, is not a recognized ground for quashing an appeal at this time. However, the Court will soon issue a notice of status review (see Rule 382.2) and, among other things, Mr. Donaldson will have to account for his delay, failing which his appeal will be dismissed.

- c. *Mr. Donaldson's appeal has no merit.* Here, Western Grain seems to be advancing some of the submissions the Federal Court accepted and, on that basis, asserts that the appeal is "bereft of any chance of success." However, none of Western Grain's submissions are in the nature of a "show stopper" or a "knockout punch" – a submission of the exceptional sort that strikes at the root of this Court's power to entertain the appeal or the appellant's ability to prosecute the appeal any further: see, *e.g., David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 (C.A.). Instead, Western Grain's submissions concern the substantive merits of the appeal and are akin to the sort routinely advanced by respondents at the hearing of the appeal: *Chrysler Canada Inc. v. Canada*, 2008 FC 1049.

Western Grain's request for an order for security for costs

[7] Western Grain considers itself to be facing a pointless, expensive appeal and an opposing party of insufficient means to satisfy a future costs award. Therefore, it seeks an order for security for costs.

[8] However, Western Grain's motion is inadequately formulated and insufficiently supported.

[9] As mentioned above, Western Grain has not filed an affidavit in support of its motion. This means that there is no admissible evidence before the Court establishing the prerequisites for an order for security for costs. Western Grain asserts much in the grounds set out in the notice of motion and its written submissions, but assertions are not admissible evidence. This Court cannot grant an order merely on a party's say so.

[10] Further, assuming Western Grain is entitled to an order for security for costs, the Court has no evidence before it upon which it can determine the amount of security that should be posted. What costs has Western Grain incurred to date? What are its expected future costs? Taking these together, what award of costs might the Court make at the end of the proceeding?

[11] At a more basic level, Western Grain simply asks for "security for costs." It does not ask for a particular amount. Should it be \$10,000? Should it be \$50,000? The Court can only guess.

Conclusion

[12] The motion is dismissed. This is without prejudice to Western Grain's ability to bring a new motion for security for costs, properly formulated and properly supported.

[13] The Court determined this motion without any responding material properly filed before it. Therefore, in these circumstances, there shall be no costs.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-360-12

STYLE OF CAUSE: Peter Donaldson v. Western Grain
Storage By-Products

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: Stratas J.A.

DATED: November 9, 2012

WRITTEN REPRESENTATIONS BY:

Chantelle Bryson

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Buset & Partners LLP
Thunder Bay, Ontario

FOR THE RESPONDENT