Federal Court of Appeal | Cour d'appel fédérale

Date: 20211103

Docket: A-215-21

Citation: 2021 FCA 214

Present: **LEBLANC J.A.**

BETWEEN:

STEPHANIE DIFEDERICO and JAMESON EDMOND CASEY

Appellants

and

AMAZON.COM, INC., AMAZON.COM.CA, INC., AMAZON.COM SERVICES LLC, AMAZON SERVICES INTERNATIONAL, INC., and AMAZON SERVICES CONTRACTS, INC.

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 3, 2021.

REASONS FOR ORDER BY: LEBLANC J.A.

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REASONS FOR ORDER

LEBLANC J.A.

[1] The appellants move for an order staying two Federal Court interlocutory orders issued in file T-445-20, one dated April 13, 2021, the other, refusing to vary the April 13, 2021 Order, dated August 13, 2021. The appellants have appealed to this Court the August 13, 2021 Order (the Motion to Vary Order) but not the April 13, 2021 Order.

[2] The appellants are plaintiffs in a proposed class proceeding in which they assert that contrary to sections 45 and 46 of the *Competition Act*, R.S.C. 1985 c. C-34, the respondents (defendants in the Federal Court) conspired, agreed or arranged among themselves and third-party sellers to fix the retail e-commerce prices in Canada by entering into anti-competitive agreements, thereby causing loss or damage to individuals in Canada who purchased products on the Amazon platforms (Amazon.ca and Amazon.com) and other e-commerce websites. This proposed class proceeding is brought on behalf of three classes of consumers: (i) Amazon e-commerce class members who are direct purchasers of Amazon products; (ii) Other e-commerce class members who purchase Amazon products on websites other than Amazon's websites; and (iii) Umbrella class members who are purchasers of non-Amazon products on websites other than the Amazon's websites. The Plaintiffs want to see Canadian e-commerce consumers, including themselves, reimbursed for any losses suffered as a result of the respondents' alleged anti-competitive conduct, which they assess at 12 billion dollars.

[3] On April 5, 2021, the respondents move to stay the appellants' action as against one of the proposed classes of consumers, prior to certification. The stay was sought on the basis that those plaintiffs were subject to a binding arbitration clause contained in Amazon's Conditions for Use for those who purchase products on Amazon's websites. The appellants opposed the motion, claiming that the respondent's motion ought to be argued no earlier than the certification motion. On April 13, 2021, the Federal Court allowed the stay motion to proceed in advance of the certification motion and set out a timetable leading to the hearing of the stay motion, at a date in September 2021, to be set through case management (the Sequencing Order).

[4] On July 16, 2021, the appellants sought to set aside or vary the Sequencing Order pursuant to Rule 399(2)(*a*) of the *Federal Courts Rules,* SOR/98-106 (the Rules) on the ground that the respondents, subsequent to said order, had modified the Conditions of Use agreements for customers who purchase products from the Amazon.com platform so as to allow disputes arising from the use of that platform to be resolved in litigation, instead of arbitration, and amended their stay motion accordingly to narrow it to disputes arising from the use of the Amazon.ca platform, which remained subject to binding arbitration. According to the appellants, this change, which arose subsequent to the making of the Sequencing Order, would have prevented the relief sought by the respondents in their original motion for stay. This was so, for two reasons. First, there was no longer a potential to stay the claims of the entire Amazon e-commerce class and to narrow the class proceeding in the manner originally proposed by the respondents. Second, this change in circumstances would now require the Federal Court to delve into the composition of the class members of the Amazon e-commerce class, thereby further complicating the issues on the stay motion, with the inevitable increase in costs or delay.

[5] On August 13, 2021, the Federal Court dismissed the applicants' motion to vary the Sequencing Order. Although it was satisfied that the change in the Conditions of Use agreements for customers who purchase products from the Amazon.com platform was, as required by Rule 399(2)(*a*) of the Rules, a "matter" not discoverable with reasonable diligence prior to the making of the Sequencing Order, the Federal Court found that this new information would not have had a determining influence on the Sequencing Order. In particular, it ruled that said Order could still have the effect of significantly narrowing issues before certification, which is not

scheduled to be debated until October 24, 2022, by eliminating all purchases made on the Amazon.ca platform, thereby streamlining the certification motion and saving time and costs.

[6] The appellants are appealing the Motion to Vary Order and seek that it be stayed, together with the Sequencing Order, pending the outcome of the appeal.

[7] It is trite that in order to succeed, the appellants must satisfy the tripartite test outlined in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 at 334 (*RJR-MacDonald*). The appellants must therefore establish to this Court's satisfaction that there is a serious issue to be tried, that they will suffer irreparable harm if the stay is not granted, and that the balance of convenience favours granting the stay. All three requirements must be satisfied (*Janssen Inc. v. AbbVie Corporation*, 2014 FCA 112, 120 C.P.R. (4th) 385 at para. 14 (*Janssen*)).

[8] Assuming, without deciding it, that the underlying appeal meets the low threshold for seriousness (*RJR-MacDonald* at 337), I am not satisfied that the appellants will suffer irreparable harm if the stay is not granted.

[9] The appellants claim that absent a stay pending the hearing of the underlying appeal, "every one of the millions of putative class members will suffer irreparable harm" as they will be faced with having their substantive rights litigated and adjudicated in a proceeding to which they are not parties and of which they have no knowledge. In other words, they contend that the

hearing of the respondents' amended stay motion – currently scheduled to take place on February 3, 2022, would in and of itself cause these putative class members irreparable harm.

[10] I cannot accept this proposition. Irreparable harm is harm that cannot be quantified in monetary terms or cured (*RJR-MacDonald* at 341). The moving party "must demonstrate in a detailed and concrete way that it will suffer real, definite, unavoidable harm – not hypothetical and speculative harm – that cannot be repaired later" (*Janssen* at para. 24).

[11] The evidence submitted by the appellants falls far short of establishing irreparable harm. First, the only "evidence" on irreparable harm is contained in the affidavit of Mr. Justin Smith, one of the appellants' lawyers, who expresses his belief that the putative class members would suffer such harm if the requested stay is not granted. There is no evidence from the appellants themselves on that issue. The sole affidavit from the appellants, that of Stephanie Difederico, is silent on any harm she would experience if the stay was to be denied. The appellants' evidence hardly qualifies as detailed and concrete evidence of real and definite irreparable harm.

[12] But more importantly, I fail to see how the alleged harm, which stems from an alleged error in the exercise by the Federal Court of its authority to manage the proceeding before it, qualifies as unavoidable or incurable harm. If the present appeal is granted, then the alleged harm would be cured as it would have been an error on the part of the Federal Court to allow the respondents' amended stay motion to proceed ahead of certification. If, on the other hand, the appeal is dismissed on its merits, then there could be no harm in having the respondents' stay motion proceed ahead of certification, as this course of action would have been permitted by a

court order of a procedural nature upheld on appeal as having resulted from a valid exercise of discretion. The appellants have provided no authority – and I could not find any – for the proposition that harm, let alone irreparable harm, can ensue from such circumstances. There is always the possibility that the respondents' amended motion could proceed before the underlying appeal is heard. To avoid or mitigate the potential issues associated with that possibility, the appellants could always seek that their appeal be expedited, something they could have - but have not - done in their stay motion's materials.

[13] The appellants refer to *Heller v. Uber Technologies Inc.*, 2021 ONSC 5518, [2021] O.J. No. 4316 (QL/Lexis) for the proposition that the determining rights in the absence of a *lis* between the parties constitutes irreparable harm. However, I note from that judgment that Uber brought a motion to have the proposed class proceeding stayed in favour of arbitration. That motion was brought, as was done in the present matter, as an interlocutory motion in the proposed class proceeding and appears to have been fully debated on its merits up to the Supreme Court of Canada (*Heller* at paras. 41-45). *Heller* is of no assistance to the appellants for the purposes of the present motion.

[14] This suffices to dismiss the appellants' motion for a stay. According to Rule 334.39 of the Rules, class proceedings in the Federal Court are subject to a presumptive no-costs regime. This presumably explains why the respondents did not to seek their costs. No costs, therefore, will be awarded on this motion.

"René LeBlanc"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-215-21
STYLE OF CAUSE:	STEPHANIE DIFEDERICO and JAMESON EDMOND CASEY v. AMAZON.COM, INC., AMAZON.COM.CA, INC., AMAZON.COM SERVICES LLC, AMAZON SERVICES INTERNATIONAL, INC., and AMAZON SERVICES CONTRACTS, INC.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	LEBLANC J.A.
DATED:	NOVEMBER 3, 2021

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