Federal Court of Appeal | Cour d'appel fédérale

Date: 20140522

Docket: A-106-13

Citation: 2014 FCA 134

Present: STRATAS J.A.

BETWEEN:

UHA RESEARCH SOCIETY, JAMES EDWARD AUSTIN, HIDEAWAY II VENTURES LTD. and ANDREW MILNE on their own behalf and on behalf of all eligible category G licence holders

Appellants

and

THE ATTORNEY GENERAL OF CANADA, MINISTER OF FISHERIES AND OCEANS and DON CARTO

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 22, 2014.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] The appellants move for an adjournment of the appeal, currently scheduled for June 9, 2014 because one of their counsel is unavailable.

[2] In these reasons, I determine the appellants' motion. I also offer more general comments. These general comments are not really in response to the appellants' motion. Instead, they are in response to what appears to be an increasing number of motions to adjourn appeal hearings. Something needs to be said. Perhaps consideration might be given to a revised Practice Direction on the point.

[3] First, some background about how this Court schedules appeal hearings.

[4] The primary document in the scheduling of appeals is the requisition for hearing under Rule 347. The Court's Judicial Administrator reviews that information. Based on the information contained in the requisition for hearing, the Judicial Administrator causes the Court to issue an order setting the date and location for the appeal hearing.

[5] Appellants file the requisition for hearing after the parties have completed all of the preparatory steps for an appeal. The requisition for hearing, among other things, discloses the parties' availability for a hearing in the next 90 days.

[6] This Court manages its caseload well and so it is often able to schedule the appeal hearing within the 90 day period. But sometimes the only available dates fall after the 90 day period. The Judicial Administrator deals with that by communicating with the parties to find an acceptable date for the appeal hearing.

[7] On occasion, as the appellant helpfully did here, available dates are supplied beyond the 90 day period. Whether the dates are within the 90 day period or beyond, absent further notification from the parties the Court is entitled to rely on the information it has been given when issuing an order setting the date and location for the appeal hearing.

[8] I reiterate and underscore the fact that the end result is an order of the Court scheduling the appeal hearing. A scheduling order is no different from any other order of the Court – it is an instrument of law, on its terms mandatory and effective.

[9] Among other things, this means that an order, once made, will stay in place unless there are significant new developments, marked changes in circumstances, or compelling reasons of fairness: *Del Zotto v. Canada (M.N.R.)*, [1996] 2 C.T.C 22, 195 N.R. 74 at paragraph 12 (F.C.A.); *Gould v. Canada*, 2009 TCC 107, [2009] 6 C.T.C. 2165 at paragraph 18. When considering whether to bring a motion to vary a scheduling order – *e.g.*, to adjourn an appeal hearing – counsel must keep front of mind this legal test and the significant threshold in it.

[10] Scheduling orders of this Court are not trivial matters that can be set aside whenever something comes up for counsel.

[11] This Court is aware of the practicalities of scheduling and the difficulties some counsel face. On occasion there can be a gap, sometimes a few months, between the submission of a requisition for hearing and the setting of the date for the hearing. And the schedules of some counsel, particularly senior counsel, can frequently and rapidly change. But if a particular counsel's presence

at the hearing is really important, then it should be equally important to advise the Court (specifically the Judicial Administrator) of any changes to that person's schedule *before* the scheduling order is issued. Experienced counsel mark in their schedules the dates they have offered up in a requisition for hearing as "held for FCA hearing in X" along with a notation that if the date is offered up for other purposes, the Judicial Administrator immediately be advised that the date is no longer available.

[12] In this case, the appellants supplied the Court with information about the parties' availability in their requisition for hearing. Some months passed, with no update of that information. Based on the information supplied in the requisition for hearing, the Court ordered June 9, 2014 to be the hearing date.

[13] In the appellants' notice of motion to change that hearing date, the appellants simply say that "not all counsel can be available on the date set for hearing," the motion is on consent, and "no prejudice would be suffered if the hearing date is adjourned." The affidavit contains no information whatsoever.

[14] These unparticularized, boilerplate, unsworn assertions fall way short of the mark. The vague statement of unavailability is far from sufficient to vary a scheduling order of this Court. The motion may be on consent, but that is also insufficient: the Court has a strong interest in the timing of its hearings. And there is prejudice: at this late date, the time allocated for hearing on June 9, 2014 will likely go unused, resulting in waste of the Court's resources. Also this Court travels:

adjournments often alter transportation, accommodation and physical hearing arrangements made long in advance, sometimes with cost to the public purse.

[15] In this case, it turns out that one or more of the appellants' counsel are unavailable because of a hearing in the Federal Court. Left unexplained is the lack of any update to this Court.

[16] Yes, mistakes can happen and counsels' schedules can be complex, dynamic and fluid. But all steps must be taken to minimize the risk of mistakes. And if a mistake happens, full adequate explanations must be given.

[17] This Court, an appellate court, is by no means bound to give way to other courts. However, in this case I exercise my discretion, in the interests of comity, to accommodate the scheduling of the hearing in the Federal Court. Therefore, the appeal hearing on June 9, 2014 shall be adjourned.

[18] Having written these reasons – reasons written in response to a spate of recent incidents of lack of regard for scheduling orders of this Court – I may well be less accommodating in a future case.

[19] On the issue of rescheduling the appeal hearing, I note that the appellants have advised the Court of the parties' unavailability from September-December, 2014. The Judicial Administrator has received no further update. This means that on every other date during that period, all counsel are available. Absent any further advice from the parties, the Court should now proceed to reschedule the appeal on the basis of the information provided.

[20] A motion has been brought to quash the appeal for mootness. I direct that this motion be heard at the same time as the appeal.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-106-13
STYLE OF CAUSE:	UHA RESEARCH SOCIETY, JAMES EDWARD AUSTIN, HIDEAWAY II VENTURES LTD. and ANDREW MILNE on their own behalf and on behalf of all eligible category G licence holders v. THE ATTORNEY GENERAL OF CANADA, MINISTER OF FISHERIES AND OCEANS and DON CARTO

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	MAY 22, 2014

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