Federal Court of Appeal | Cour d'appel fédérale

Date: 20160902

Docket: A-422-14

Citation: 2016 FCA 218

CORAM: **STRATAS J.A.**
RYER J.A.*
GLEASON J.A.

BETWEEN:

PFIZER CANADA INC.

Appellant

And

TEVA CANADA LIMITED

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 2, 2016.

REASONS FOR ORDER BY: STRATAS J.A.

CONCURRED IN BY: GLEASON J.A.
NOT TAKING PART IN THE ORDER: RYER J.A.*

* Ryer J.A. was unable to participate in the Court's deliberations due to his retirement.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20160902

Docket: A-422-14

Citation: 2016 FCA 218

CORAM: **STRATAS J.A.**
RYER J.A.*
GLEASON J.A.

BETWEEN:

PFIZER CANADA INC.

Appellant

and

TEVA CANADA LIMITED

Respondent

REASONS FOR ORDER

STRATAS J.A.

[1] Pfizer Canada Inc. moves in writing for an order reconsidering and varying the judgment of this Court in this appeal (reasons reported at 2016 FCA 161).

A. The basic facts underlying the motion

[2] In the judgment that Pfizer seeks to vary, this Court allowed the appeal from the Federal Court, set aside the Federal Court's damage award against Pfizer, and remitted the matter to the Federal Court for reconsideration.

[3] In this motion, Pfizer brings to the Court's attention that after the Federal Court awarded damages against it, it paid the damages award to Teva Canada Limited, satisfying its obligations. Then Pfizer issued its notice of appeal in this Court. After this Court issued its judgment setting aside the damages award, Pfizer asked Teva to satisfy its obligations and return Pfizer's payment, with interest. Teva refused.

[4] In light of the judgment of this Court and on the record before us, Teva has absolutely no right to keep Pfizer's payment. In submissions on this motion, Teva suggested nothing to the contrary. The solution, of course would be for Teva to recognize its obligations, respect the implications of the judgment of this Court, and return the payment to Teva with some amount respecting interest. But it decided not to do so.

[5] Pfizer asks this Court to vary its judgment to add a requirement that Teva return the payment with interest. Pfizer relies upon Rule 397(1)(*b*) and Rule 399(2)(*a*) of the *Federal Courts Rules*, SOR/98-106, as amended. Under the former, the Court may reconsider the terms of its judgment if "a matter that should have been dealt with has been overlooked or accidentally

omitted." Under the latter, it may vary a judgment "by reason of a matter that arose or was discovered subsequent to [its] making."

[6] However, this Court cannot entertain Pfizer's motion unless it has subject-matter jurisdiction over it.

[7] In their motion materials, the parties did not raise issues of subject-matter jurisdiction. But the fact that the parties have not raised such issues does not relieve this Court of its responsibility to ensure that it has subject-matter jurisdiction. A court must always be certain that it is legally authorized to act. A court that acts without legal authorization is acting contrary to law and fundamental constitutional arrangements.

[8] After reading and considering the parties' motion materials, this Court was concerned about its subject-matter jurisdiction. The concern stems from the retirement of Ryer J.A., one of the three Justices on the appeal panel that issued the judgment of this Court. Following his retirement, consistent with subsection 45(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, Ryer J.A. continued to act on cases that he had heard. But, in accordance with that subsection, eight weeks after his retirement he became *functus*. That eight week period has expired.

[9] Can the two remaining members of the appeal panel entertain a motion to vary a judgment issued by the three-judge panel? This Court invited the parties to make submissions on this question.

[10] The Court has now received and considered the parties' submissions. It concludes that it has jurisdiction.

B. The jurisdictional issue

[11] As a general rule, judgments on an appeal can be made only by a panel of three judges: *Federal Courts Act*, R.S.C. 1985, c. F-7, subsection 16(1). It follows that as a general rule variations of judgments under Rules 397 and 399 can be made only by a panel of three judges. The requirements set out in statutory provisions carry through to the interpretation of provisions of subordinate instruments, such as regulations. The *Federal Courts Rules* are regulations under the *Federal Courts Act*.

[12] However, subsection 16(1) does not stand alone. The *Federal Courts Act* sets out an exception in circumstances such as these. Under subsection 45(3), after a judge who has been acting under subsection 45(2)—such as Ryer J.A. in this case—has become *functus*, "the remaining judges may give judgment and, for that purpose, are deemed to constitute the Federal Court of Appeal": *Air Canada Pilots Assn. v. Kelly*, 2012 FCA 209, [2012] 1 F.C.R. 308; *Canada (A.G.) v. Larkman*, 2012 FCA 204, 433 N.R. 184. It follows from this and the reasoning in the preceding paragraph that orders varying judgments under Rules 397 and 399 can be made by the two remaining judges.

[13] Teva disagrees. It begins by submitting that under Rule 399, the Court can designate a new panel of three judges to consider whether an earlier judgment of the Court should be varied.

It adds that the general rule is that variations be performed by three judges. These propositions are indisputably true: *Pfizer Canada Inc. v. Canada (Minister of Health)*, 2011 FCA 215, 420 N.R. 337 at para. 3; *Ayangma v. Canada*, 2003 FCA 382, 313 N.R. 312.

[14] Teva takes this proposition one step further and says that the Court must always only act under Rule 399 by way of a three-judge panel. This is a step too far. It ignores subsection 45(3). Under subsection 45(3), the original two-judge panel may act in circumstances such as these.

[15] Teva adds that jurisprudence of this Court supports its submissions. It cites *Consorzio del Prosciutto di Parma v. Maple Leaf Meats Inc.*, 2002 FCA 417, 297 N.R.135 at para. 3. *Consorzio* does not assist. It stands only for the proposition that the judge who signed the judgment in this Court cannot act alone and vary the Court's judgment under Rule 397. In *Consorzio*, Décary J.A. did suggest that there must be a panel of three judges to vary the Court's judgment. As a general matter, he is correct. But he said nothing about subsection 45(3) of the *Federal Courts Act* and this Court's ability to act as a two-judge panel following one judge's retirement, nor did the facts of his case call for any comment on that issue.

[16] Teva also cites the jurisprudence of other provincial appellate courts: *Beriault (Trustee of) v. Pacific National Leasing Corp.* (1996), 93 O.A.C. 233, 66 A.C.W.S. (3d) 193 (C.A.); *Mullins v. Levy*, 2010 BCCA 294, 320 D.L.R (4th) 752. These authorities are to the same effect as *Consorzio* and do not concern subsection 45(3) of the *Federal Courts Act* and this Court's ability under that subsection to act as a two-judge panel. Further, it is trite that all appeals and appeal courts are statutory. The particular statutes that establish appeal courts and vest them with

particular powers determine their jurisdiction. Decisions of other provincial appellate courts acting under statutes irrelevant to the Federal Courts system offer no useful guidance on the question before us.

[17] This Court has a penumbral jurisdiction concerning basic matters related to its procedures and powers—a plenary jurisdiction—and it exists alongside the explicit and implicit powers given to this Court by statute: see, *e.g.*, *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385 at paras. 35 to 38; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50, 443 N.R. 378 at paras. 35-36; *Mazhero v. Fox*, 2014 FCA 226 at para. 9. The foregoing analysis should not be taken as foreclosing whether this Court has jurisdiction to entertain this motion under its plenary jurisdiction. In particular, I do not comment on the exceptional circumstance where a judgment requires variation under Rule 397, the original panel cannot act, the need for this Court to act is urgent, and private or public order must be preserved.

C. The merits of the motion

[18] Rule 399(2)(*a*) does not apply in circumstances such as these. That Rule allows for variation, among other things, where something unforeseen that could not have been dealt with as part of the appeal hearing but related to it has later happened.

[19] Here, what has happened was foreseeable and could have been dealt with as part of the appeal. Pfizer issued its notice of appeal after it paid Teva the damages award. In its notice of

appeal, it could have specifically requested that if judgment were given in its favour, Teva should return the payment with interest. It did not.

[20] Similarly, this is a bar to relief under Rule 397(1)(*b*). That Rule deals only with "a matter that should have been dealt with" that "has been overlooked or accidentally omitted" in the Court's judgment. Pfizer's payment of the damages award to Teva was not raised in the notice of appeal, nor was any relief requested in the notice of appeal concerning that. Accordingly, nothing in the notice of appeal has been "overlooked or accidentally omitted" in the judgment of this Court.

[21] There was a single line or two in passing amongst the argument at the end of Pfizer's memorandum of fact and law filed on the appeal alluding to the need for some undefined quantum of monies to be refunded. But there was no evidence before the Court concerning this and, thus, no evidence upon which this Court could act. In any event, brief, unparticularized mention in passing in a memorandum is no substitute for a formal, explicit request for specific relief in a notice of appeal. There was no such request in Pfizer's notice of appeal.

[22] The notice of appeal defines the scope of the appeal, sets the parameters of the debate, and triggers the Court's jurisdiction to act. Without a formal, explicit request for specific relief in the notice of appeal, the request is not before the Court. It was open to Pfizer to seek leave to amend the notice of appeal to include that sort of request right up until the time of judgment and offer fresh evidence as to the payments made in accordance with the Federal Court's judgment.

Pfizer did not do so. Now that judgment has been rendered, it is not possible to retroactively expand the scope of the appeal and then vary the judgment.

D. Where does this leave Pfizer?

[23] Pfizer can sue Teva for restitutionary recovery of monies wrongly withheld from it and any other relief warranted by Teva's act. If speed is of the essence, Pfizer can bring a summary judgment motion on an expedited basis. But in these circumstances there is another option. This Court has remitted the matter to the Federal Court. The Federal Court will be determining whether Pfizer owes any damages to Teva and, if so, what the quantum of damages should be. In a case such as this, the damages are to be awarded to compensate Teva for damages suffered. As we said at 2016 FCA 161 at paragraph 47, Teva is "to be compensated, no more, no less." In pursuit of this principle, the Federal Court will be bound to take into account any payments that Teva might have received to which it is not entitled. As part of this, it will want to hear submissions as to what interest Teva should pay during the period that it wrongly held Pfizer's payment.

[24] When the Federal Court decides the matter, its judgment becomes a legal statement of the state of affairs that should have existed all along. Depending on how it decides, it may turn out that Teva was entitled to its damages award all along. If so, in pursuit of the compensation principle, the Federal Court may find that Teva's retention of Pfizer's damages payment is of no remedial consequence whatsoever.

E. Proposed disposition

[25] In these unusual circumstances, I would dismiss the motion, but order no costs of this motion. Although, as explained above, Teva could have conducted itself differently, both parties long ago could have discussed and resolved how to handle judgments made as appeals and redeterminations are decided. This motion was avoidable.

"David Stratas"

J.A.

"I agree.
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-422-14
STYLE OF CAUSE:	PFIZER CANADA INC. v. TEVA CANADA LIMITED

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
CONCURRED IN BY:	GLEASON J.A.
NOT TAKING PART IN THE ORDER:	RYER J.A.
DATED:	SEPTEMBER 2, 2016

WRITTEN REPRESENTATIONS BY:

Peter Wilcox Jason Markwell Benjamin Reingold Stefanie Di Giandomenico	FOR THE MOVING PARTY, PFIZER CANADA INC.
David W. Aitken Marcus Klee	FOR THE RESPONDENT, TEVA CANADA LIMITED

SOLICITORS OF RECORD:

Belmore Neidrauer LLP Toronto, Ontario	FOR THE MOVING PARTY, PFIZER CANADA INC.
Aitken Klee LLP Ottawa, Ontario	FOR THE RESPONDENT, TEVA CANADA LIMITED