Federal Court of Appeal | Cour d'appel fédérale

Date: 20200107

Docket: A-481-19

Citation: 2020 FCA 3

Present: **NADON J.A.**

BETWEEN:

WESTERN OILFIELD EQUIPMENT RENTALS LTD.

and

MARANGONI INC.

Appellants

and

M-I L.L.C.

Respondent

Hearing held by Tele-conference between Ottawa, Calgary and Toronto on December 30, 2019.

Reasons for Order delivered at Ottawa, Ontario, on January 7, 2020.

PUBLIC REASONS FOR ORDER BY: NADON J.A.

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PUBLIC REASONS FOR ORDER

NADON J.A.

[1] On December 30, 2019, I heard, on an urgent basis, a motion brought by the appellants, pursuant to section 50 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the Act), for an interim stay of a decision (the Decision) rendered by O'Reilly J. of the Federal Court (the Judge) on December 23, 2019 (2019 FC 1606) wherein he concluded that the appellants had infringed and had induced infringement of Canadian Letters Patent 2,664,173 (the '173 Patent). At the end of a

3 hours hearing by way of tele-conference, I indicated to the parties that I would be rendering judgement on the following day. On December 31, 2019, I signed an Order dismissing the appellants' motion with an indication that reasons would follow. These are my reasons for dismissing the appellants' motion.

[2] Because of his conclusion that the appellants had infringed and had induced infringement of the '173 Patent, the Judge granted the respondent an injunction and ordered the delivery up of certain materials. Further, the Judge awarded damages and costs against the appellants which may well amount to a sum in excess of $5 millions.

[3] The appellants have appealed the Decision and their Notice of Appeal raises a number of questions of law which, they say, are serious questions which can in no way be considered as vexatious or frivolous.

[4] The appellants further say that without the granting of an interim stay, they will suffer irreparable harm, not compensable in damages. More particularly, the appellants say, *inter alia*, that their assets, covered by security interests, are insufficient to cover the monetary award of the decision. They submit that unless a stay is granted, their creditors will enforce their security interests and they will become insolvent. Thus, according to the appellants, without the granting of a stay of the Decision, they will be unable to continue their business which will inevitably lead to bankruptcy. Hence, the appellants will be unable to pursue their appeal.

[5] It is for these reasons that the appellants seek an interim order staying the Decision, pending the hearing and disposition of an interlocutory motion for a stay of the Decision until their appeal is disposed of by this Court.

[6] The applicable test herein is the one enunciated by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117 [*RJR-MacDonald*]. It is a tripartite test which requires, in this case, the appellants to satisfy the Court that:

1) Their appeal raises a serious issue;

2) They will suffer irreparable harm if the stay is not granted; and

3) The balance of convenience lies in their favour.

[7] It is trite law that the appellants must succeed on all of the branches of the test (*Janssen Inc. v. Abbvie Corporation et al.*, 2014 FCA 112, 120 C.P.R. (4th) 385, [*Janssen*] at paragraphs 13-17);

[8] I now turn to the first part of the test which requires the appellants to show that their appeal raises a serious issue. In *RJR-MacDonald Inc.*, at paragraph 54 of its reasons, the Supreme Court made it clear that "[t]he threshold is a low one". In other words, once the Court is satisfied that, in this case, the appeal is neither vexatious nor frivolous, the Court should move on to consider the second and third branches of the test. The fact that the Court might be of the view that the party seeking the stay will not succeed on its appeal is an irrelevant consideration. In the

words of the Supreme Court at paragraph 55 of RJR-MacDonald, "[a] prolonged examination of the merits [of the case] is generally neither necessary nor desirable."

[9] Notwithstanding Ms. Crain's forceful arguments for the respondent, I am satisfied that the appellants have met the first branch of the test, at least in regard to the issue pertaining to the construction of the '173 Patent. Whether the appeal will succeed or not, I obviously cannot say at this stage. However, I am satisfied, on the basis of what is before me, that the appeal is neither frivolous nor vexatious.

[10] I not turn to the second branch of the test, *i.e.* whether the appellants will suffer irreparable harm if I do not grant the interim stay which they seek. For the following reasons, I am not satisfied that the evidence adduced by the appellants, in support of their motion, demonstrates that they will suffer irreparable harm failing the granting of a stay. More particularly, as I will explain shortly, I find the appellants' evidence to be highly unsatisfactory.

[11] I begin with the remarks of my colleague Stratas J.A. found at paragraph 24 of his reasons in *Janssen*, where he sets out his understanding of the second branch of the test:

> On the irreparable harm branch of the test, 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: *Stoney First Nation v. Shotclose*, 2011 FCA 232 at paragraphs 47-49; *Laperrière v. D. & A. MacLeod Company Ltd.* , 2010 FCA 84 at paragraphs 14—22; *Gateway City Church v. Canada (National Revenue)*, 2013 FCA 126 at paragraphs 14- 16; *Glooscap Heritage Society*, *supra* at paragraph 31; *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25 at paragraph 12. Here again, it would be strange if a litigant complaining of harm it caused itself; harm it could have avoided or repaired, or harm it still can avoid or repair could get such serious

> relief. Similarly, it would be strange if vague assumptions and bald assertions, rather than detailed and specific evidence, could support the granting of such serious relief.

[12] I agree entirely with Stratas J.A.'s understanding of the second part of the *RJR-MacDonald* test.

[13] The appellants offered two affidavits for consideration by the Court. The first one was signed by Mr. Nic Stanton, manager of operations of the appellant Western Oilfield Equipment Rentals Ltd. (Western). The second affidavit was signed by Ms. Cathy Konski, Western's controller.

[14] For present purposes, I need only focus on Ms. Konski's affidavit which deals with the appellants' and more particularly with Western's financial situation. In effect, Ms. Konski is saying that Western has no money and that it is unable, irrespective of the judgment, to meet its financial obligations. Her evidence is clear that Western cannot satisfy the Decision.

[15] It appears from Ms. Konski's evidence that Western has survived because its bank has been prepared to offer credit facilities and that two venture capital companies have provided cash infusions at various points in time. It is clear that without the "help" of the bank and the venture capital companies, Western would not have survived until now.

[16] Ms. Konski says in her affidavit that, effective January 2, 2020, Western's credit facilities with the bank will be reduced to $[redacted], down from $[redacted]. I also note that prior to January

20, 2017, the line of credit with the bank was $[redacted] having been reduced to $[redacted] in January 2017. At present, Western owes its bank a sum of $[redacted].

[17] Ms. Konski also says that should Western inform its bank of the Decision against the appellants, the likelihood is that the bank will execute its security interests over Western's assets. It appears that the bank, at the time of the hearing, had not been informed of the existence of the Decision which leads me to surmise that had the bank been informed of the Decision, it might, irrespective of the possibility of obtaining a stay, have called in Western's advance of $[redacted] and exercised its security interests. I can only speculate on this point because the appellants have not provided me with any information in that regard.

[18] To this, I would add that, considering that the appellants became aware of the Decision on December 5, 2019, when they received a draft of the Federal Court's Order and Reasons for the purpose of insuring confidentiality in the judgment to be rendered, there was ample time for the appellants to produce an affidavit from their bank outlining its position following the rendering of the judgment and its position in the event that a stay was not granted.

[19] In the circumstances, such evidence, in my respectful view, was necessary if not crucial to enable me to come to a proper view as to whether irreparable harm would result from a refusal to grant the interim stay or whether it had already occurred. I therefore find that the appellants' failure to produce this information considerably weakens their case with respect to irreparable harm. To put it bluntly, the information which only the bank could provide was, in my view, crucial to my determination.

[20] I now turn to the information which could have been provided to the Court by the venture companies and in respect of which I come to a conclusion similar to the one that I have reached in regard to the information which should have been provided by the appellants' bank.

[21] Ms. Konski's evidence is that these companies, having so far advanced $[redacted] ($[redacted] and $[redacted]) to Western will not fund Western any longer if Western is prevented from earning revenue because, in effect, of the Court's refusal to grant a stay. Ms. Konski says that she was so informed by the managing director of the venture capital companies.

[22] I find this evidence wholly unsatisfactory. The evidence given by Ms. Konski is hearsay evidence. In the circumstances, given that there was ample time for the appellants to adduce evidence from the venture capital companies, I am not prepared to give any weight to Ms. Konski's evidence.

[23] As I indicated with respect to the information which the bank ought to been asked to provide by way of an affidavit, it is my view that the managing director of the venture capital companies should have been called upon by the appellants to provide an affidavit setting out their companies' position in regard to the funding of Western. More particularly, an affidavit setting out the position of the venture capital companies, firstly with respect to the impact of the Decision on their funding decisions and whether or not a stay of the Decision would lead to a different position on their part.

[24] The appellants' failure to provide information with respect to the position of the capital venture companies also considerably weakens the strength of their case in regard to irreparable harm which leads me, in the end, to conclude that the appellants have not met their burden of demonstrating that irreparable harm would be caused to them by reason of my refusal to grant them an interim stay.

[25] For these reasons, I concluded that the appellants' motion for an interim stay should be dismissed.

"M. Nadon"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-481-19
STYLE OF CAUSE:	WESTERN OILFIELD EQUIPMENT RENTALS LTD. and MARANGONI INC. v. M-I L.L.C.

MOTION DEALT BY TELE-CONFERENCE WITH APPEARANCE OF PARTIES.

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