Federal Court of Appeal  Cour d'appel fédérale

Date: 20210820

Docket: A-92-21

Citation: 2021 FCA 169

Present: **LOCKE J.A.**

BETWEEN:

MUNCHKIN, INC. AND MUNCHKIN BABY CANADA, LTD.

Appellants

and

ANGELCARE CANADA INC., EDGEWELL PERSONAL CARE CANADA ULC AND PLAYTEX PRODUCTS, LLC

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on August 20, 2021.

REASONS FOR ORDER BY: LOCKE J.A.

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REASONS FOR ORDER

LOCKE J.A.

I. Background

[1] The respondents move to quash the present appeal as premature and outside this Court's jurisdiction.

[2] The appeal concerns an Order made by Justice Yvan Roy on March 18, 2021 (2021 FC 238) during the lengthy trial of a patent infringement action in the Federal Court (File No. T-151-16). The Order dismissed a motion by the appellants to exclude certain testimony. The notice of appeal was filed on March 29, 2021. The trial concluded on April 30, 2021. A final judgment on the trial has not yet issued.

[3] Since the notice of appeal was filed, the respondents filed a notice of appearance on April 12, 2021 and, after a period from April 21 to June 28, 2021 during which the appeal was suspended due to the COVID-19 pandemic, the appellants filed an agreement as to the contents of the appeal book on June 30, 2021. Throughout this period, the respondents repeatedly communicated to the appellants their view that this Court cannot entertain the appeal independent of the trial judgment. Recognizing that the appellants may be seeking to preserve their right of appeal, the respondents repeatedly proposed that the parties agree to request a stay of the appeal pending the trial judgment. The respondents also indicated that, failing that, it would move to quash the appeal. The appellants responded that they disagreed that this Court should not entertain this appeal. They also opposed a stay pending the trial judgment.

[4] On July 13, 2021, the respondents, true to their word, filed the present motion to quash the appeal.

II. Preliminary Issue: Filing of reply evidence

[5] With their reply submissions, the respondents submitted evidence in the form of the affidavit of Jason Vallée Buchanan dated July 27, 2021, and more specifically, Exhibit JVB-1

thereto, which reproduces an email chain between counsel for the appellants and counsel for the respondents between April 25, 2021 and June 28, 2021. This email chain is cited in support of the respondents' submission that they never renounced their right to bring the present motion by agreeing to the contents of the appeal book. The respondents argue that this evidence should be admitted because it is necessary to respond to the appellants' suggestion to the contrary. This relates to the appellants' argument that the motion should be dismissed because it was filed late.

[6] The appellants oppose the filing of the reply evidence, arguing that it is not necessary to correctly decide the motion, that some of it is duplicative of the respondents' evidence in chief, and that the respondents have improperly split their case on the motion.

[7] Though the *Federal Courts Rules*, S.O.R./98-106 (the Rules) are silent on the admissibility of evidence in reply, Justice David Stratas addressed the issue in *Amgen Canada Inc. v. Apotex Inc.*, 2016 FCA 121. At paragraph 8 of that decision, he stated that the Federal Courts do have jurisdiction to allow the filing of reply evidence. He also provided the following guidance:

> [11] The filing of reply evidence on a motion is permitted only in "unusual circumstances"…
>
> [12] …a plaintiff cannot split its case by adducing evidence on reply that is merely confirmatory of the case in chief…
>
> [13] …Additional affidavits are permitted only where it is "in the interests of justice": … the Court must have regard to whether:
>
> - the evidence will assist the court (in particular, its relevance and sufficient probative value);
>
> - admitting the evidence will cause substantial or serious prejudice to the other side;

> • the evidence was available when the party filed its affidavits or it could have been discovered with the exercise of due diligence.

[8] I recognize that part of the email chain in the reply evidence was produced as part of the respondents' evidence in chief. However, this is the nature of an email chain, and I see no reason for concern. It is not "merely confirmatory" evidence of the type that should be avoided. It does not confirm evidence produced in chief. Rather, it simply reproduces some of the same emails as part of the chain.

[9] The novel aspect of the evidence is the later emails from the respondents' counsel stating that their agreement on the contents of the appeal book did not override their previous position that the appeal is improper, and that it should be stayed pending the trial judgment, failing which the respondents would move to quash the appeal. This qualification was acknowledged by the appellants' counsel on June 14 and 28, 2021.

[10] In my view, the reply evidence should be admitted. It is necessary to show that the respondents never strayed from their intention to move to quash the appeal, even as they agreed on the contents of the appeal book. The email chain was known to the appellants, and so admitting it should not cause any substantial or serious prejudice to them. Finally, although the later portion of the email chain was available when the respondents filed their evidence in chief, it appears that the respondents had no reason to expect that they would have to establish that they had maintained their intention to bring the present motion despite agreeing to the contents of the appeal book. I conclude therefore that the interests of justice favour the admission of the reply evidence.

III. Analysis

A. *Saint John Shipbuilding lays out the general rule on this Court's jurisdiction to hear appeals from mid-trial evidentiary rulings*

[11] The respondents' arguments concerning prematurity and jurisdiction are based on this Court's decision in *Saint John Shipbuilding & Dry Dock Co. Ltd. v. Kingsland Maritime Corp.*, [1978] 1 F.C. 523, 24 N.R. 523 (C.A.) (*Saint John Shipbuilding*), and authorities that cite it. In that decision, this Court enunciated the principle that evidentiary rulings made by the trial judge during the course of the trial "cannot form the subject matter for appeals until he has pronounced his judgment on the matters put in issue by the pleadings" (at para. 7). That case, like the present, involved an appeal of a decision on the admissibility of evidence made by the Federal Court during a trial. Unlike the present appeal, the trial judge in that case had delivered the impugned decision orally from the bench and had not reduced it to writing.

B. *The distinction drawn by the appellants between oral and written orders is inconsequential*

[12] I agree with the position articulated in the respondents' written representations in reply that the fact that the Order was made in the form prescribed by the Rules is inconsequential. It is its nature as a ruling on the admissibility of evidence during trial that is relevant.

[13] The Court in *Saint John Shipbuilding* considered whether it had jurisdiction to hear the appeal separate from an appeal from the trial judgment. It began its analysis by noting section 27 of what was then called the *Federal Court Act*. That statute is now known as the *Federal Courts*

Act, R.S.C. 1985, c. F-7, but the key subsection 27(1), reproduced here, is substantially unchanged:

27 (1) An appeal lies to the Federal Court of Appeal from any of the following decisions of the Federal Court:	27 (1) Il peut être interjeté appel, devant la Cour d'appel fédérale, des décisions suivantes de la Cour fédéral:
(a) a final judgment;	a) jugement définitif;
(b) a judgment on a question of law determined before trial;	b) jugement sur une question de droit rendu avant l'instruction;
(c) an interlocutory judgment; or	c) jugement interlocutoire;
(d) a determination on a reference made by a federal board, commission or other tribunal or the Attorney General of Canada.	d) jugement sur un renvoi d'un office fédéral ou du procureur général du Canada.

[14] At paragraph 6 of *Saint John Shipbuilding*, the Court stated as follows:

> Clearly, no "final judgment" within the defined meaning of that term in section 27 has ever been pronounced. Nor has there been any interlocutory judgment pronounced. It goes without saying that, since the so-called order in issue was made during the course of trial, there has not been a judgment on a question of law determined before trial. What the learned Trial Judge did here, as Trial Judges are called upon to do in practically every trial, was to rule whether or not certain evidence proposed by a party to be adduced, was admissible or not. The transcript discloses that after argument by counsel, he ruled, orally, that the letter in issue was not admissible and the trial proceeded to its conclusion, at least in so far as the adducing of evidence was concerned. He neither pronounced nor delivered any judgment nor any order which, at this stage, would give this Court jurisdiction to hear an appeal. After final judgment has been pronounced, his ruling may become a ground of appeal, but it cannot, of itself, before judgment, do so.

[15] This aspect of the decision in *Saint John Shipbuilding* relies on the absence of a formal order to quash the appeal on the basis that the evidentiary ruling during trial was neither a final judgment nor an interlocutory judgment. In their opposition to the present motion, the appellants

rely on the distinction between written and oral orders. However, this Court in *Saint John Shipbuilding* followed up as follows in paragraph 7:

> While the absence of a written judgment delivered and pronounced in accordance with the *Federal Court Act* and the Rules of Court is fatal, even if a Trial Judge were to reduce his rulings on matters arising during the course of trial to writing, they would not, in our view, provide the basis for an appeal. The trial Judge is the master of the proceedings in his Court after the commencement of a trial. His rulings during the course thereof, whether reduced to writing and signed by him or a not, cannot form the subject-matter for appeals until he has pronounced his judgment on the matters put in issue by the pleadings.
>
> [Emphasis added]

[16] Accordingly, it would seem that the distinction the appellants assert between oral and written orders was considered unimportant by this Court. The foregoing analysis has since been applied by this Court several times, including in *Buffalo v. The Queen*, 2001 FCA 282 (*Buffalo*), in which this Court concluded that it was without jurisdiction in an appeal of an evidentiary ruling made during trial by the presiding judge. In that case, the trial judge had issued a written order.

[17] The appellants distinguish *Saint John Shipbuilding* and the authorities that cite it on the basis that they relate to trial decisions made under a previous version of the Rules. That previous version included Rule 337(2)(a), which required that a judgment be pronounced "by separate document signed by the presiding judge." The former rule also referred to a specific prescribed form. By contrast, current Rule 392 provides simply that the Federal Court "may dispose of any matter that is the subject-matter of a hearing by signing an order." The appellants argue that the current Rules define the requirements for orders that may be subject to appeal, and the decision

under appeal, which was reduced to writing, signed and given a neutral citation, meets those requirements.

[18] My reservation with this argument is that it appears to be based on the jurisdiction of this Court to hear an appeal having been altered with the introduction of the current version of the Rules. However, this Court's jurisdiction comes from the *Federal Courts Act*, not the Rules. This Court in *Saint John Shipbuilding* and in *Buffalo* found that an evidentiary ruling during trial was neither a final judgment nor an interlocutory judgment (per subsection 27(1) of the *Federal Courts Act*), and therefore could not be appealed separately from an appeal from the trial judgment, even if it was reduced to writing. It is difficult to see how a change in the Rules could impair this reasoning.

C. *In "very unusual circumstances" the rule from Saint John Shipbuilding may be inoperable*

[19] The appellants note a later decision of this Court, *Sawridge Band v. Canada*, 2006 FCA 228 (*Sawridge*), in which the reasoning in *Saint John Shipbuilding* was characterized as a "general rule" (see para. 26), and was not followed in the "very unusual circumstances" of that case (see para. 28).

[20] The threshold is high for quashing an appeal. The parties agree that "[t]his Court will only summarily dismiss an appeal if it is obvious that the basis of the appeal is such that the appeal has no reasonable chance of success and is clearly bound to fail": *Lessard-Gauvin v. Canada (Attorney General)*, 2013 FCA 147 at para. 8. In view of *Sawridge*, I am not prepared to

conclude that exceptional circumstances could not exist in this case sufficient to set aside the reasoning in *Saint John Shipbuilding*. Accordingly, I am not prepared to conclude that the present appeal has no reasonable chance of success and is clearly bound to fail. I will therefore dismiss the respondents' motion to quash the present appeal.

[21] That said, I am also not prepared to conclude that the reasoning in *Saint John Shipbuilding* should be set aside in this case. That issue may be argued if and when the present appeal is heard.

IV. Conclusion

[22] This Court's jurisdiction to hear the present appeal may be a determinative issue when it is heard. Because the present appeal may be dismissed for lack of jurisdiction, or could become unnecessary following the trial judgment, a stay of this appeal pending the trial judgment may be a practical means of avoiding the risk of wasted resources. As mentioned above, prior to bringing the present motion, the respondents proposed to the appellants that the present appeal be stayed pending the trial judgment, and the appellants refused. The present motion does not seek such a stay, even in the alternative, and neither side has addressed the possibility in its motion materials. Accordingly, I have not heard any argument on this issue. In view of this, this Order will not address the issue of a stay. However, I do wish to hear the parties' representations as to why a stay of the present appeal pending the trial judgment should or should not be issued. Therefore, I will request the parties' respective submissions on this issue, and make a separate ruling thereon.

[23] Though it has not been necessary, for the purposes of this Order, to comment on the appellants' argument that the present motion was filed late, I conclude that it was not filed late. As indicated above, the respondents maintained their intention to bring the motion. Moreover, it was filed just 15 days after the end of the suspension period related to the pandemic. In my view, this delay was not unreasonable.

V. Costs

[24] I will not award costs of this motion at this time. Though the respondents' motion is dismissed, it was brought in a reasonable effort to avoid devoting resources to an appeal that may be outside this Court's jurisdiction or become unnecessary. I may award costs of this motion when ruling on whether the present appeal should be stayed.

"George R. Locke"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-92-21
STYLE OF CAUSE:	MUNCHKIN, INC. AND MUNCHKIN BABY CANADA, LTD. v. ANGELCARE CANADA INC., EDGEWELL PERSONAL CARE CANADA ULC AND PLAYTEX PRODUCTS, LLC

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	LOCKE J.A.
DATED:	AUGUST 20, 2021

WRITTEN REPRESENTATIONS BY:

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