Federal Court of Appeal | Cour d'appel fédérale

Date: 20141209

Dockets: A-48-14
A-49-14

Citation: 2014 FCA 290

Present: STRATAS J.A.

BETWEEN:

MCKESSON CANADA CORPORATION

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on December 9, 2014.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] The appellant moves to file an amended notice of appeal and related relief.

[2] The background giving rise to this motion can be briefly summarized. The judgment under appeal is from the Tax Court of Canada (*per* Justice Boyle): 2013 TCC 404. The judgment dealt with one of a number of issues. The Tax Court judge remained seized of the remaining issues.

[3] The appellant then filed in this Court its notice of appeal, the appeal book, and its memorandum of fact and law. The respondent filed its memorandum of fact and law.

[4] After all of those filings, the Tax Court judge recused himself from further involvement in the matter. He wrote reasons explaining why: 2014 TCC 266. He had reviewed the appellant's memorandum of fact and law. In his recusal reasons, he responded to certain things in it. Based on these reasons, the appellant now wishes to raise a new ground of appeal.

[5] Broadly speaking, in its new ground of appeal, the appellant alleges that the Tax Court judge responded in considerable detail to the appellant's memorandum. By doing so, they say, he has improperly injected himself into the appeal process and has compromised its integrity.

[6] The respondent opposes the motion. It says that the recusal reasons are irrelevant to the merits of the Tax Court's decision. It adds that the recusal reasons affect neither the appearance nor the reality of a fair appeal in this Court.

[7] While there are many decisions of this Court dealing with Rule 75 in the context of trial pleadings, this Court has never set out in considered form the principles that should apply on a motion under Rule 75 to amend a notice of appeal. In my view, however, the principles that apply to the amendment of trial pleadings set out in *Canderel Ltd. v. Canada*, [1994] 1 F.C. 3 (C.A.) apply, with minor modification, to the amendment of a notice of appeal. Guiding me in the translation of the *Canderel* principles to the amendment of a notice of appeal is the

interpretive rule, Rule 3. Rule 3 injects into the analysis the concepts of fairness, avoidance of delay, cost-effectiveness, and a preference for adjudication of the real merits of cases.

[8] As in the case of amendments to trial pleadings, the Court, faced with a motion to amend a notice of appeal, must ask whether the amendment is directed to the real merits at stake in the case. In considering this, the Court must understand the nature of the parties' case, assess whether the amendment is relevant to the determination of that case, and, where a new ground of appeal is being asserted, ask whether that ground can possibly succeed.

[9] In asking whether a new ground of appeal can possibly succeed, a motions judge should keep front of mind the demarcation of tasks between a motions judge and an appeal panel. The line drawn between the motions judge's task and the appeal panel's task depends on the certainty of the matter. Where it is clear cut or obvious that the new ground will fail, the motions judge should not allow it to enter the appeal. If, on the other hand, reasonable minds could differ on the merits of the new ground, the motions judge should allow the new ground to enter the appeal, leaving its ultimate resolution to the panel hearing the appeal. By way of analogy on evidentiary points, see *Collins v. Canada*, 2014 FCA 240 at paragraph 6.

[10] However, that is not the end of the matter. Under Rule 75, the Court can refuse an amendment if the moving party has been dilatory, or considerations of fairness or prejudice lean against the amendment and those considerations cannot be satisfactorily addressed by way of terms. In many cases, the Court allows amendments on terms. The imposition of terms is a handy

tool to promote fairness and mitigate prejudice, while allowing the court to get at the real issues in the case.

[11] I now apply these principles to the appellant's motion. In my view, the recusal reasons, by responding to the appellant's memorandum of fact and law, depart from the norm. They are a new, material development in this appeal and have become part of the real issues at stake. Respecting the demarcation of tasks between motion judges and appeal panels, I will only go so far as to say that it is neither clear cut nor obvious that the new ground raised by the appellants will fail.

[12] In my view, there are no reasons to refuse the entry of the new ground into the appeal. It might have been better if the appellant had brought this motion sooner, but the appellant has not been dilatory. There is nothing unfair about introducing the new ground into the appeal at this time. Indeed, fairness supports it: the appellants are aggrieved by what they say is an inappropriate and unprecedented intervention by the Tax Court judge. The introduction of the additional ground into the appeal and the resulting need for memoranda on it will not appreciably delay the appeal. The respondent has not alleged any other sort of prejudice.

[13] Therefore, I shall permit the appellant to amend its notice of appeal to introduce the new ground of appeal.

[14] There are two remaining issues.

– I –

[15] In the course of its written representations, the respondent noted that the recusal reasons have not been included in the appeal book. They could not have been, as the appeal book was filed before the Tax Court judge issued his recusal reasons.

[16] The respondent says that the recusal reasons cannot be placed before the Court because the appellant has not brought a motion to adduce fresh evidence under Rule 351. I reject this. The recusal reasons are not evidence. Reasons released by courts form part of the general body of law that the Court has within its cognizance.

[17] In my view, I should provide for the filing of a supplementary appeal book containing the recusal reasons and the Order of this Court on this motion.

[18] Appeal books normally contain two types of documents. First, there are materials that the Court has within its cognizance, such as the order and reasons for judgment of the Court below, orders made by this Court in the appeal, and the notice of appeal. These materials, although already within the cognizance of the Court, are included in the appeal book for the convenience of the Court and the parties who appear before it. Second, there is the record of evidence in the case, which normally consists of the record that was before the Court below.

[19] The recusal reasons and the Order of this Court on this motion fall into the first category of documents. Although the Court can take cognizance of them, for the convenience of the Court and the parties the appellant should file a supplementary appeal book containing these materials.

– II –

[20] The appellant asks for leave to file a supplementary memorandum of fact and law on the new ground of appeal. I shall grant this, and shall also grant the respondent an opportunity to file a responding memorandum.

[21] Helpfully, the appellant submits a draft memorandum for this Court's consideration. It is 29 pages long. It seems to me that the panel would be best assisted by a memorandum of no more than 20 pages.

[22] In the circumstances, 20 pages is generous. Parties normally make all of their written submissions for all grounds of appeal in less than the 30 page limit in Rule 70. And many of those appeals are more complex than this one. However, in this case, the new ground is somewhat novel and the circumstances are somewhat unusual, so I am prepared to grant the appellant some leeway.

[23] The difference between what the appellants propose in page length and what I am willing to grant is nine pages. Some might wonder, "What's the big deal about nine pages?"

[24] Unnecessarily lengthy, diffuse submissions are like an unpacked, fluffy snowball. Throw it, and the target hardly feels it. On the other hand, short, highly focused submissions are like a snowball packed tightly into an iceball. Throw it, and the target really feels it. Shorter written submissions are better advocacy and, thus, are much more helpful to the Court.

[25] Structures that lead to repetition, over-elaboration of arguments, block quotations, and rhetorical flourishes make submissions diffuse. Simple but strategic structures, arguments presented only once and compactly, tight writing that arranges clinical details in a persuasive way, and short snippets from authorities only where necessary make submissions highly focused. The former dissipates the force of the argument; the latter concentrates it.

[26] If the parties can make their submissions on the new ground in fewer than 20 pages, so much the better.

[27] An order shall go in accordance with these reasons.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-48-14 AND A-49-14
STYLE OF CAUSE:	MCKESSON CANADA CORPORATION v. HER MAJESTY THE QUEEN

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	DECEMBER 9, 2014

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