Federal Court of Appeal  Cour d'appel fédérale

Date: 20190118

Docket: A-425-18

Citation: 2019 FCA 11

Present: WEBB J.A.

BETWEEN:

EVOLUTION TECHNOLOGIES INC.

Appellant

and

HUMAN CARE CANADA INC.

Respondent

Heard at Toronto, Ontario, on January 16, 2019.

Order delivered at Ottawa, Ontario, on January 18, 2019.

PUBLIC REASONS FOR ORDER BY: WEBB J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20190118

Docket: A-425-18

Citation: 2019 FCA 11

Present: **WEBB J.A.**

BETWEEN:

EVOLUTION TECHNOLOGIES INC.

Appellant

and

HUMAN CARE CANADA INC.

Respondent

PUBLIC REASONS FOR ORDER

WEBB J.A.

[1] Evolution Technologies Inc. (Evolution) has brought a motion for, *inter alia*, an order staying certain paragraphs of the Supplementary Judgment of the Federal Court dated December 28, 2018 (2018 FC 1304). The motion also included a request for orders on various other matters. However, since the only matter that was addressed during oral argument of this motion was the motion for a stay, this is the only matter that will be addressed in these reasons and in the

order related to these reasons. A separate order, without reasons, will be issued for the other parts of the motion since these parts were not contested.

[2] Evolution and Human Care Canada Inc. (Human Care) are competitors in the business of marketing mobility-aiding devices such as four-wheeled walkers (rollators). The Federal Court found that Evolution's Xpresso rollators infringed the patent held by Human Care.

[3] The Supplementary Judgment issued by the Federal Court following the trial in this matter provides that:

> THIS COURT ADJUDGES AND DECLARES as follows:
>
> 1. Canadian Patent No. 2,492,392 (392 Patent) and each of its claims are valid;
>
> 2. The Defendant has infringed Claims 16 and 18 of the 392 Patent by its manufacture, use, offer for sale, sale, import and export in Canada of Xpresso Rollators (wherein 'Xpresso Rollators' is defined as set out in the Agreed Statement of Facts dated August 15, 2017 and as referred to in paragraph 14 of the Reasons);
>
> 3. A permanent injunction shall issue restraining the Defendant and its respective directors, officers, servants, agents, employees and all those acting by, through or with the direction and control of the Defendant, from infringing the 392 Patent by manufacturing, using, selling, offering for sale, distributing, importing, exporting or otherwise dealing in Xpresso Rollators in Canada;
>
> 4. For greater certainty, the injunction contemplated by paragraph 3 does not preclude the Defendant from making repairs limited only to handles, wheels, brakes, brake pads, seat pads, back rests, baskets/soft bags and accessories (specifically, cane holders, cup holders, curb climbers, flower vases, oxygen tank holders, and phone holders) on Xpresso Rollators that were sold on or before December 10, 2018 and are under warranty in the normal course of business through the Defendant's customary and existing distribution channels and dealers;
>
> 5. By January 18, 2019, all Xpresso Rollators that are in the power, possession, or control of the Defendant in Canada shall be treated in the manner provided by one of (a) or (b), at the Plaintiff's election:

a. The Xpresso Rollators shall be destroyed and the Plaintiff may arrange for an independent third party to observe the destruction and to provide an appropriate affidavit to that effect at the Plaintiff's sole discretion; or

b. The Xpresso Rollators shall be delivered up to the Plaintiff at a place and manner as the Plaintiff may direct provided that, if such delivery is to take place outside of British Columbia or Ontario, it shall be at the Plaintiff's expense;

6. By January 18, 2019, the Defendant shall pay to the Plaintiff reasonable compensation for the period from July 1, 2008 to November 30, 2010 in the amount of $241,022;

7. By January 18, 2019, the Defendant shall pay to the Plaintiff an accounting and disgorgement of profits for the period from December 1, 2010 to June 30, 2016 in the amount of $12,156,745;

8. The award of profits payable by the Defendant to the Plaintiff is to be updated to account for the period from July 1, 2016 to the date of this Public Judgment. The process for updating is as follows:

a. By January 15, 2019, the Defendant shall provide the Plaintiff with updated versions of EVO 48, 49, 52, 55, 56, 64, 65, 66, 67, 76, 78 and 79 for the period from July 1, 2016 to the date of this Public Judgment and this information shall be updated monthly as required.

b. By February 15, 2019, the Plaintiff shall provide the Defendant with a calculation of the Defendant's profits earned in relation to its manufacturing, using, offering for sale, selling, importing and exporting of its Xpresso Rollators from July 1, 2016 to the date of this Public Judgment. The Plaintiff's calculation shall follow Ms. Roger's methodology in her scenario 4(a) as described at paragraph 486 of the Reasons, and the inventory cost is to be set as described at paragraph 68 of the Reasons. Pre-and post-judgment interest shall be provided on this amount in accordance with paragraphs 9 and 10 below.

c. In the event that the parties cannot agree on a quantum by March 1, 2019, the Plaintiff shall be entitled to apply to the Court for determination of any matters that may arise in the course of calculating the profits and interest that are owed by the Defendant to the Plaintiff.

9. By January 18, 2019, the Defendant shall pay to the Plaintiff pre-judgment interest on the amounts contemplated by paragraphs 6 and 7, calculated on a simple basis using the annual average bank rate published by the Bank of Canada plus 1%;

10. The Plaintiff is awarded post-judgment interest at the rate of 5.0% per annum on the amounts contemplated by paragraphs 6, 7, 8 and 9, calculated on a simple basis, from the date of this Public Judgment until payment;

11. The Defendant's Counterclaim is hereby dismissed; and

12. The Plaintiff is awarded costs assessed pursuant to Column IV of Tariff B and the parties shall advise the Court on a jointly agreed amount within 14 days from the date of this Public Judgment; if parties cannot agree on a costs disposition, they are referred to an Assessment Officer.

[4] Prior to issuing this Supplementary Judgment, a judgment was issued on December 21, 2018 (2018 FC 1302). This judgment provided that:

THIS COURT'S JUDGMENT is that:

[1] The Plaintiff is entitled to:

(a) a declaration that the 392 Patent and each of its claims are valid;

(b) a declaration that the Defendant infringed Claims 16 and 18 of the 392 Patent;

(c) an order for reasonable compensation in the amount of $241,022;

(d) an order for an accounting and disgorgement of profits currently set at $12,156,745;

(e) a permanent injunction restraining Evolution and its respective directors, officers, servants, agents, employees and all those acting by, through or with the direction and control of Evolution, from infringing the 392 Patent;

(f) an order directing the delivery up to the Plaintiff or the destruction upon oath of all infringing products in the possession, custody or control of the Defendant;

(g) pre and post judgment interest to be calculated; and

> (h) costs of the proceedings follow the event and the parties are to advise the Court on a jointly agreed amount within 14 days pursuant to Column IV of the Court's Tariff B; if parties cannot agree on a costs disposition, they are referred to an Assessment Officer.

[5] The Supplementary Judgment provided that it entirely replaced the earlier judgment. Counsel for Evolution indicated that the authority for the issuance of the Supplementary Judgment was Rule 394 of the *Federal Courts Rules*, SOR/98-106. However, this rule provides that:

394(1) Where the Court gives reasons, it may direct one of the parties to prepare for endorsement a draft order to implement the Court's conclusion, approved as to form and content by the other parties or, where the parties cannot agree on the form and content of the order, to bring a motion for judgment in accordance with rule 369.	394(1) Lorsque la Cour donne des motifs, elle peut donner des directives à une partie pour qu'elle rédige un projet d'ordonnance donnant effet à la décision de la Cour, dont la forme et le fond ont été approuvés par les autres parties ou, si les parties ne peuvent s'entendre sur la forme et le fond, pour qu'elle présente une requête pour jugement selon la règle 369.
(2) On the return of a motion under subsection (1), the Court shall settle the terms of and pronounce the judgment, which shall be endorsed in writing and signed by the presiding judge or prothonotary.	(2) Sur réception de la requête pour jugement visée au paragraphe (1), la Cour fixe les termes du jugement et le prononce. Le jugement est consigné et signé par le juge ou le protonotaire présidant.

[6] It would appear that this Rule applies where judgment has not yet been rendered. However, in this case the original judgment was rendered on December 21, 2018. There is no indication that any motion was brought under either Rule 397 or 399 of the *Federal Courts Rules* to reconsider or vary the original judgment. Of particular note in relation to this motion to stay the Supplementary Judgment, is the addition of the date (January 18, 2019) by which the significant award of "an accounting and disgorgement of profits currently set at $12,156,745"

must be paid. The original judgment was silent with respect to the date by which this amount is to be paid. Also paragraph 484 of the reasons attached to the original judgment provides that:

> 484 Given that Evolution is permitted to make some discretionary deductions but have not provided fulsome evidence on their expenditures I accept Ms. Rogers' "rough justice" approach in her scenario 4(a). Therefore, I order Evolution to pay Human Care a total of $12,156,745.

[7] There is no date by which the amount of $12,156,745 must be paid in paragraph 484 of the reasons and therefore the original judgment corresponds with the reasons. In any event, since neither party raised any issue with respect to the validity of the Supplementary Judgment, the validity of the Supplementary Judgment will not be determined as part of this motion.

[8] It should also be noted that Evolution acknowledged during the hearing of this motion that it had agreed to the insertion of the date of January 18, 2019 in the Supplementary Judgment as the date for the payment of this amount (as well as the other changes reflected in the Supplementary Judgment). Given that Evolution is now claiming that it will not be able to pay this amount by January 18, 2019, it seems unusual that there was an agreement by Evolution on the payment of this amount by this date.

[9] Human Care has raised a preliminary matter in relation to the application for a stay. Human Care argues that Evolution does not come to this Court with “clean hands” and therefore, the balance sheets and income statements that Evolution has tendered as part of its motion record are inadmissible and Evolution should be denied the stay. If Human Care is successful in having the financial statements excluded as evidence in this motion, then the foundation for Evolution’s argument that it will be unable to pay the monetary award will not be before this Court.

[10] In its written representations Human Care raised four arguments in relation to its argument that Evolution does not have clean hands. In paragraphs 66 and 67 of its written representations Human Care noted that:

> 66. First, Evolution has breached court orders related to the disclosure of its financial documents. The very documents that Evolution now seeks to rely on in its claim of irreparable harm. Evolution has disrespected this Court in this action, and should not be granted any form of discretionary relief.
>
> 67. Second, Human Care was told in the underlying action that these documents did not exist, and they were in fact never produced. Both Evolution's and Human Care's financial experts requested these financial statements in the underlying action. Human Care only received copies of Evolution's alleged financial statements for the first time on December 28, 2018, as part of Evolution's evidence on this motion.

[11] The only order that Human Care identified as the order that Evolution allegedly breached was the Order dated January 16, 2015 of Prothonotary Milczynski. This order provides that Evolution was to produce various information and documents. The list of information and documents comprise approximately three pages of various enumerated documents. However, neither a balance sheet nor an income statement for Evolution would be included in this list of documents.

[12] The relevant documents for this stay application would be the most recent income statements and balance sheets for Evolution that are available, which, based on the record, would be the income statements and balance sheets for its June 30, 2016 and June 30, 2017 fiscal years. Mr. Liu (the sole shareholder of Evolution) had prepared an income statement for 2018 but there does not appear to be any balance sheet for the year ended June 30, 2018. It is clear that none of

the income statements or balance sheets for 2016 or 2017 would have been covered by the order dated January 16, 2015.

[13] As well, Human Care referred to the following question posed to Jose-Luis Pita (Evolution's Director of Sales and Marketing) during his discovery examination:

> Q. Identify the financial reports generated in the usual course of business.

[14] The initial response was a refusal to answer on the basis that it was "irrelevant and overbroad". This was updated on September 22, 2015 to "[n]o reports are generated in the usual course of business". However, this response would not relate to the financial statements for 2016 and 2017 as these documents did not exist when the answer was given on September 22, 2015.

[15] Counsel for Human Care referred to the decision of the Nova Scotia Court of Appeal in *White v. E. B. F. Manufacturing Limited*, 2005 NSCA 103 in which a stay pending an appeal was denied. The basis for denying the stay in that case appears to be the failure of the party seeking the stay to comply with a court order to make certain royalty payments. Therefore, there was a breach of a court order in that case. Since Human Care has been unable to establish any breach of a court order by Evolution, this case is distinguishable.

[16] Human Care has also raised the issue of whether Evolution has disclosed all of its assets. Counsel for Evolution acknowledged that no balance sheets were provided for the subsidiaries of Evolution, which Human Care identified as Evolution Technologies USA Inc., Evolution Technologies Japan Inc., and Evolution Technologies Ltd., located in China. The evidence that

was in the record disclosed that the sales made in the United States were included in the sales revenue, the sales made in Japan were minimal and there were no sales in China. The real estate that is owned by the company in the United States was included as an available asset by Evolution's expert when he was determining whether Evolution would be able to satisfy the monetary award.

[17] The evidence of Mr. Liu was also that the company in the United States did not have any other significant assets (only one or two forklifts and a few shelves). While it would have been preferable to have financial statements for all of the subsidiaries in this case, the issue is whether, on a balance of probabilities, Evolution has met its onus to establish irreparable harm, which is examined below.

[18] Human Care also submitted that certain information relating to costs and revenue as disclosed in the documents in this motion is inconsistent with information presented at trial. However, the issue in relation to the stay motion is the financial solvency of Evolution, not the accuracy of information on costs.

[19] In *Centre d'information & d'animation communautaire c. R.*, [1984] 2 F.C. 866, 61 N.R. 117, Pratte, J.A., writing for the majority in relation to the question of whether an interlocutory injunction should be granted, noted that:

> 6 Further, I do not consider that this is a proper case for applying the rule of equity by which "He who comes into equity must come with clean hands". The appellants' conduct is certainly open to criticism. However, I do not feel that it was so reprehensible and, if reprehensible, so closely related to the remedy they are seeking that it should be denied to them solely on this ground.

[20] In this case Evolution was not forthcoming with financial information during the course of the trial before the Federal Court. However, the granting of a stay is discretionary (Section 50 of the *Federal Courts Act*, (R.S.C. 1985, c. F-7) and Rule 398) and may be granted when 'it is in the interest of justice that the proceedings be stayed' (paragraph 50(1)(b) of the Act). In my view, the conduct of Evolution is a factor that should not be considered in isolation in determining whether it is in the interest of justice that the Supplementary Judgment be stayed. The three-stage test as set out in *RJR-MacDonald v. Canada*, [1994] 1 S.C.R. 311; [1994] S.C.J. No. 17 should still be applied to the facts of this case.

[21] In *RJR-MacDonald v. Canada* this test was summarized as follows:

> 43 Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits….

I. Serious Question

[22] In *RJR-MacDonald v. Canada*, the Supreme Court noted that:

> 49 What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case….
>
> 50 Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

[23] Evolution has raised a number of issues that it proposes to pursue in its appeal. At this stage it would not be appropriate to review all of them. It is sufficient at this stage if Evolution has raised at least one question that is a serious question that should be considered in the appeal. Counsel for Human Care eventually conceded that because this is a low threshold there was at least one serious issue that was raised by Evolution in its notice of appeal. This is sufficient for this part of the test to be satisfied. As noted by the Supreme Court it would not be appropriate to comment on the merits of any particular issue raised by Evolution in its notice of appeal.

[24] As a result I am satisfied that Evolution has raised a serious question.

II. Irreparable Harm

[25] With respect to irreparable harm, the issue is whether Evolution has established that it will suffer irreparable harm if the stay is not granted and Evolution is ultimately successful on appeal. Irreparable harm will be examined in relation to the monetary aspect of the judgment and in relation to the injunction that would prevent Evolution from selling certain products.

[26] With respect to the monetary aspect, the most significant payments are for the accounting for profits (paragraphs 7 and 8 of the Supplementary Judgment). These amounts are significant. Evolution's accounting expert confirmed that based on his examination of what information was available to him, Evolution would not be able to pay the full amount of the award. Evolution would be several million dollars short and therefore, insolvent. It would not be able to continue to operate and would be out of business. The inability of Evolution to pay the full amount of the award of damages and the resulting insolvency of Evolution would be irreparable harm. If

Evolution is successful on appeal, then this insolvency would be avoided. In this regard it is important to note that while it is referred to as a heavy burden on the party seeking a stay, the burden of proof is on a balance of probabilities. Therefore Evolution only needs to satisfy the court that, on a balance of probabilities, it will be insolvent if the stay is not granted.

[27] Although the financial statements for its subsidiaries were not included in the record, given the evidence that the sales in the United States were included in the information provided to Evolution's expert, the minimal sales in Japan, the lack of sales in China, and the limited assets that were not taken into account by Evolution's expert, it is more likely than not that the fair market value any such undisclosed assets would not be sufficient to cover the very large shortfall as identified by Evolution's expert.

[28] There is a significant discrepancy between the cash as of June 30, 2016 and June 30, 2017 based on the balance sheet and the cash as shown on the bank statements for Evolution as of these dates. The balance sheets show significantly [approximately $3 million] more cash than was shown in the bank statements. No explanation for this discrepancy was provided. However, for the purpose of determining whether Evolution would be insolvent, it was assumed that this cash existed. If the cash did not exist, then the risk of insolvency is even greater. While it would have been preferable to have an explanation for this discrepancy, since Evolution has stated on its balance sheet that it has this cash and since this cash was factored into the determination of whether Evolution would be insolvent, in my view, Evolution has satisfied its onus to establish, on a balance of probabilities, that it would be insolvent if it was required to pay the significant monetary amounts as set out in the Supplementary Judgment.

[29] As noted by the Supreme Court in paragraph 59 of *RJR-MacDonald*, an example of irreparable harm is “where one party will be put out of business by the court's decision”. In my view, Evolution has established, on a balance of probabilities, that it will be put out of business if the stay is not granted and it is successful in its appeal. Therefore, it will suffer irreparable harm if the payment of the amounts for profits is not stayed and it is ultimately successful on appeal.

[30] While Evolution has established irreparable harm if the significant monetary awards are not stayed, it has not demonstrated that it will suffer irreparable harm if the smaller monetary awards (paragraphs 6, 9 and 12 of the Supplementary Judgment) are not stayed. As a result, the stay will only apply to the amounts awarded for profits in paragraphs 7 and 8 of the Supplementary Judgment.

[31] With respect to the injunction in paragraph 3 of the Supplementary Judgment and the obligations under paragraph 5, Human Care stated they would not be providing any undertaking to pay any amount to Evolution for any lost profits if Evolution is successful in its appeal and the stay is not granted. Therefore, if the stay is not granted Evolution will be prevented from selling certain products. If Evolution is successful in its appeal, it will have lost the profit that it could have realized from selling those products and it will not be able to recover this lost profit. In my view, this would be irreparable harm. Since these lost profits would be irreparable harm if Evolution is successful in its appeal, there is no need to address the other arguments of Evolution for irreparable harm if the stay is not granted in relation to the injunction.

III. Balance of convenience

[32] The balance of convenience weighs in favour of granting the stay. As noted, if the stay is not granted, Evolution has established that there will be serious financial consequences to Evolution as it would be unable to satisfy the monetary awards and would be insolvent. It would be out of business. On the other hand if the stay is granted and Human Care is successful on the appeal any inconvenience to it can be minimized by imposing conditions in relation to the granting of the stay.

[33] Human Care, in its written submissions in reply, requested that a receiver be appointed in the event that a stay is granted. Human Care referred to section 44 of the Act which grants this Court the right to appoint a receiver but does not address the procedure to be followed by the person who is requesting the receiver. Rule 375(1) provides that "[o]n motion, a judge may appoint a receiver in any proceeding". Human Care did not bring a motion to appoint a receiver but instead made this request in its written representations in response to Evolution's motion. This is not appropriate and it is not a proper request for the appointment of a receiver. Human Care's request for a receiver is denied.

[34] To minimize any inconvenience to Human Care, Evolution has suggested several conditions that would be imposed upon it as part of a stay. Human Care has not indicated that it has any objection to these, except, as noted above, its request for a receiver and specific restrictions of the sale or transfer of the real property located in British Columbia. Whether Human Care will be able to register or record any charge against this property as a result of a

stay being granted, is a matter that will have to be determined based on the laws of British Columbia.

[35] While the conduct of Evolution in not producing the required financial information at the trial of this matter cannot be condoned, this does not outweigh the very serious consequences that would arise if the stay is not granted and Evolution is ultimately successful in its appeal. Therefore, given the serious consequences that could arise to Evolution if the stay is not granted, the balance of convenience weighs in favour of Evolution and it is in the interest of justice that a stay be granted.

[36] Evolution had proposed a number of conditions for the stay and at the hearing also proposed that the total monthly remuneration that would be paid to Stephen Liu and his family be limited to $12,500. The order will reflect these conditions, with some modifications.

[37] Human Care has also requested that Evolution post security for costs in the amount of $250,000. Evolution proposed a reduced sum of $50,000 which Human Care agreed to accept if the smaller monetary awards were not stayed. Since the monetary awards in paragraphs 6, 9 and 12 are not stayed, Evolution will be required to post security for costs in this appeal in the amount of $50,000.

[38] There is no need to stay paragraph 10 as it only contemplates the payment of interest from the date of the Public Judgment to the date of payment. Even though payment of the amounts is stayed, interest will continue to accrue on these amounts.

[39] As a result the motion for a stay is granted and the order shall include, with some changes, the conditions as proposed by Evolution in its written representations and during the hearing of this motion. Costs of this motion shall be in the cause.

"Wyman W. Webb"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

ORAL MOTION FOR AN ORDER STAYING A SUPPLEMENTARY JUDGMENT

DOCKET:	A-425-18
STYLE OF CAUSE:	EVOLUTION TECHNOLOGIES INC. v. HUMAN CARE CANADA INC.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 16, 2019
PUBLIC REASONS FOR ORDER BY:	WEBB J.A.
DATED:	JANUARY 18, 2019

APPEARANCES:

Andrew R. Brodkin Jordan D. Scopa Jaclyn Tilak	FOR THE APPELLANT
Kristin Wall Amy Grenon Chelsea Nimmo	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Goodmans LLP Toronto, Ontario	FOR THE APPELLANT
Norton Rose Fulbright Canada LLP Toronto, Ontario	FOR THE RESPONDENT