Federal Court of Appeal

Cour d'appel fédérale

Date: 20210415

Docket: A-57-21

Citation: 2021 FCA 76

Present: **LASKIN J.A.**

BETWEEN:

MAOZ BETSER-ZILEVITCH

Appellant

and

PETROCHINA CANADA LTD.

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on April 15, 2021.

REASONS FOR ORDER BY: LASKIN J.A.

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REASONS FOR ORDER

LASKIN J.A.

[1] The respondent in this appeal moves in writing for security for costs both of the appeal and of the action below in which it successfully defended the appellant's claim for patent infringement. The motion is brought in reliance on rule 416(1)(f) of the *Federal Courts Rules*, SOR/98-106. Read together with rule 415, it authorizes the Court to order an appellant to give security for the respondent's costs where "the [respondent] has an order against the [appellant] for costs in the same or another proceeding that remain unpaid in whole or in part."

[2] In his judgment in the action (2021 FC 85, Manson J.), the trial judge awarded the respondent its costs, and gave the parties an opportunity to make written costs submissions. After considering these submissions, he expressed his conclusions on costs in supplementary reasons, and granted a supplementary judgment, as follows (2021 FC 151):

> [25] In conclusion, I find that the [respondent] should be awarded costs that meet the following requirements:
>
> > a) The [respondent] is entitled to costs at the middle range within Column III of Tariff B of the *Federal Courts Rules*;
> >
> > b) Mr. Brindle's expert fees [the fees of the respondent's expert] shall be capped at $104,440.00, which is two-thirds the billed amount;
> >
> > c) The [respondent's] disbursements, other than Mr. Brindle's expert fees, are allowed in full, in an amount of $211,761.52 ($368,421.52 (total disbursements) - $156,660.00 (Mr. Brindle's billed amount of expert fees));
> >
> > d) No costs associated with these post-judgment costs submissions are awarded; and
> >
> > e) Post-judgment interest on both fees and disbursements will be granted from the date of the Court's Judgment and Reasons (January 26, 2021) to the date of payment by the [appellant], at a rate of 2.5% per annum.
>
> [26] An assessment officer of this Court shall assess such costs in the manner directed above.
>
> **<u>JUDGMENT IN T-1158-18</u>**
>
> **THIS COURT'S JUDGMENT is that:**
>
> > 1. The [respondent] is entitled to costs at the middle range within Column III of Tariff B of the *Federal Courts Rules*;
> >
> > 2. Mr. Brindle's expert fees shall be capped at $104,440.00, which is two-thirds the billed amount;
> >
> > 3. The [respondent's] disbursements, other than Mr. Brindle's expert fees, are allowed in full, in an amount of $211,761.52;
> >
> > 4. No costs associated with these post-judgment costs submissions are awarded;

5. Post-judgment interest on both fees and disbursements will be granted from the date of the Court's Judgment and Reasons (January 26, 2021) to the date of payment by the [appellant], at a rate of 2.5% per annum; and

6. An assessment officer of this Court shall assess such costs in the manner directed above.

[3] The appellant has appealed from both the judgment on the merits and the supplementary judgment on costs. The respondent has cross-appealed.

[4] On the same day as it filed its notice of cross-appeal, the respondent filed with the Federal Court a request for assessment of its bill of costs. The bill of costs filed by the respondent includes the amounts for expert fees and disbursements specified by the trial judge. The assessment officer has directed that the assessment proceed in writing, and has fixed a schedule for the parties to serve and file supporting material. The last deadline, for reply material from the respondent, is June 25, 2021. The assessment, therefore, has not yet been carried out.

[5] In its motion, the respondent seeks security for costs of the trial in the total amount of $316, 201.52, comprising the total of the approved amounts for expert fees and disbursements, plus security for costs of the appeal of $5,906.25. It does not seek security for the amount of its fees for the trial, which remains to be assessed at the middle range of Column III of Tariff B as directed by the trial judge. It estimates the recoverable amount of these fees in its draft bill of costs at approximately $62,000.00.

[6] As noted above, the ground for ordering security for costs on which the respondent relies is that set out in rule 416(1)(f): that "the [respondent] has an order against the [appellant] for

costs in the same or another proceeding that remain unpaid in whole or in part." This is one of the eight grounds set out in rule 416(1) on which security for costs may be ordered. The unpaid order against the appellant for costs on which the respondent relies in its notice of motion is the supplementary judgment of the trial judge directing the amounts payable for expert fees and disbursements. The respondent submits that no part of these amounts has been paid, and that the appellant has given no indication that he will pay any part of them.

[7] The respondent also alleges that, shortly before commencing the action below and another patent infringement action, the appellant sought to make himself judgment-proof by transferring his interest in his matrimonial home to his wife. The respondent further anticipates an argument by the appellant that he is impecunious, so as to be entitled to the protection of rule 417. Rule 417 provides, read with rule 415, that "[t]he Court may refuse to order that security for costs be given under any of paragraphs 416(1)(a) to (g) if [an appellant] demonstrates impecuniosity and the Court is of the opinion that the case has merit." The respondent emphasizes the heavy burden on a party resisting a security for cost order to demonstrate impecuniosity.

[8] The appellant opposes the granting of security for costs. He does so primarily on the basis that the prerequisite for rule 416(1)(f) to apply has not yet been met: that there is at this stage no "order against the [appellant] for costs […] that remain unpaid in whole or in part." He submits that the supplementary judgment does not meet this prerequisite, but instead provides for the assessment officer to assess costs, following the trial judge's directions. Until the costs have been assessed, there is no "order for costs" and the costs cannot be described as unpaid.

[9] It does not appear that this Court or the Federal Court has ever considered the question whether an order can be made under rule 416(1)(f) before the costs said to be unpaid have been assessed. However, case law in other jurisdictions, including jurisdictions whose security for costs rules include an equivalent to rule 416(1)(f), supports the appellant’s position.

[10] In *Tricontinental Investments Co. v. Guarantee Co. of North America* (1989), 70 O.R. (2d) 461, 17 A.C.W.S. (3d) 496 at 6-7, the Court of Appeal for Ontario addressed the meaning of rule 56.01(1)(c) of the *Rules of Civil Procedure*, R.R.O., Reg. 194, which, in terms very similar to those of rule 416(1)(f), authorizes an order for security for costs where “the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part.” It held that rule 56.01(1)(c) does not apply where costs have not yet been assessed. Until assessment, it stated, an order for costs that forms part of a judgment at trial cannot be said to “remain unpaid.” The Court also queried how a plaintiff could be expected to pay costs when their quantum has not been ascertained. *Orkin on the Law of Costs* cites this case as authoritative: Mark M. Orkin & Robert G. Schipper, *Orkin on the Law of Costs*, 2nd ed (Toronto: Thomson Reuters Canada Ltd, 2020) (loose-leaf, release 2021-1), ch 5 at 5-30.

[11] Similarly, in *Johnston v. Montreal Trust Company of Canada*, 1993 CanLII 2913 (PE SCTD), 40 A.C.W.S. (3d) 680 at 6-7, the Prince Edward Island Supreme Court Trial Division dealt with rule 56.01(c) of the P.E.I. *Rules of Civil Procedure*, which was then cast in the same terms as those of Ontario rule 56.01(1)(c). The Court held that it would be premature, when the costs for which security was sought had not yet been taxed, to say that the circumstances

required by the rule – that costs ordered in the same or another proceeding remain unpaid – were in existence.

[12] In British Columbia, the authority of the Court of Appeal to order security for costs awarded at trial is found in section 10(2)(b) of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, which authorizes interim orders "to prevent prejudice to any person." In *E.B. v. British Columbia (Child, Family and Community Services),* 2020 BCCA 263 at paras. 27-28, the Court of Appeal for British Columbia referred to "the usual practice of the Court" as being to require that trial costs be assessed and certified before an order for security for costs will be made. The Court added that "[w]hile there will be cases where the evidence of prejudice is so great that it will be in the interests of justice to award security for trial costs before the amount of those costs is known, […] the preferable practice in most cases is to wait until costs are assessed before ordering security for them."

[13] In both *Lu v. Mao*, 2006 BCCA 560 at para. 19, and *Hammond v. Hammond*, 2018 BCCA 399 at para. 12, the Court of Appeal for British Columbia found it premature to order security for the costs of the proceeding in the court below when those costs had not yet been assessed.

[14] I agree with the appellant's position on this issue. That position is also, in my view, more consistent with the distinction drawn in the Rules between orders for costs and directions to the assessment officer. Rule 403 contemplates motions for directions to the assessment officer respecting any matter referred to in rule 400, the rule that confers on the Court its broad

discretionary powers with respect to costs. Rule 400 itself also provides for the Court to give directions on its own initiative. These directions, if given under either rule, may be set out in an order or judgment. But they remain directions, to be implemented by the assessment officer, and they do not require payment until that implementation occurs.

[15] The language employed by the trial judge in his supplementary reasons and judgment here reflects this distinction. At paragraph 26 of those reasons, after setting out in the preceding paragraphs certain parameters of his award, he stated that "[a]n assessment officer of this Court shall assess such costs in the manner directed above." The same language appears in paragraph 6 of the supplementary judgment. Until the assessment officer completes the assessment in accordance with the trial judge's directions, the costs are not payable.

[16] As this Court has stated, the security for costs regime must operate fairly for all parties involved: *Sauve v. Canada*, 2012 FCA 287 at para. 7. In my view, there is an element of fairness involved in ensuring that a party against whom an order for security for costs may be made have an opportunity to know, and to consider how to address, its total liability for costs as finally determined by the assessment officer before any order is made on the basis of failure to pay.

[17] I appreciate that in this case, the directions given by the trial judge will account for a large proportion of the total amount ultimately payable once the assessment has been completed. But that will not always be so. And this issue will not of course arise when the trial judge actually fixes costs, rather than giving directions to the assessment officer. Once costs are fixed or assessed, it is incumbent on the party obliged to pay them to address them promptly, or risk a

motion for security for costs: *Safe Gaming System Inc. v. Atlantic Lottery Corporation*, 2018 FCA 180 at paras. 8-9.

[18] Before concluding, I should note that in its reply representations, the respondent raised for the first time what it submitted was evidence of another order against the appellant that remains unpaid. It referred to and quoted from the decision of the Alberta Court of Queen's Bench in *Betser-Zilevitch v. Prowse Chowne LLP*, 2020 ABQB 732 (which has since been affirmed, 2021 ABCA 129). The respondent did not seek leave to adduce reply evidence relating to the Alberta decision, but nonetheless treated the facts it drew from the decision as if they had evidentiary value. This was not appropriate. In any event, the Alberta decision cannot constitute "an order against the [appellant] for costs in […] another proceeding" so as to found an order under rule 416(1)(f): the rule could apply only if it was the respondent that had obtained the order. It also appears that the review officer's decision at issue in the Alberta case was an order for the payment of fees as between lawyer and client, not an order for costs.

[19] For these reasons, the motion for security for costs will be dismissed, with costs fixed at $1,500.00, all-inclusive.

"J.B. Laskin"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-57-21
STYLE OF CAUSE:	MAOZ BETSER-ZILEVITCH v. PETROCHINA CANADA LTD.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	LASKIN J.A.
DATED:	APRIL 15, 2021

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