Court of Appeal for Saskatchewan

Citation: ***101115379 Saskatchewan Ltd. v Saskatchewan (Financial and Consumer Affairs Authority),*** **2019 SKCA 50**

Date: 2019-06-06

Docket: CACV2576

Between:

101115379 Saskatchewan Ltd., 101114386 Saskatchewan Ltd., Cryptguard Ltd., Alena Pastuch, Teamworx Productions Ltd., Idendego Inc.

Appellants

And

Financial and Consumer Affairs Authority

Respondent

Docket: CACV2655

Between:

101115379 Saskatchewan Ltd., 101114386 Saskatchewan Ltd., Cryptguard Ltd., Alena Pastuch, Teamworx Productions Ltd., Idendego Inc.

Appellants

And

Financial and Consumer Affairs Authority

Respondent

Before:	Jackson, Whitmore and Ryan-Froslie JJ.A.
Disposition:	Application denied
Written reasons by:	The Honourable Madam Justice Ryan-Froslie
In concurrence:	The Honourable Madam Justice Jackson The Honourable Mr. Justice Whitmore
On Application From:	2019 SKCA 31, Regina
Application on written submissions:	March 14, 2019
Counsel:	Alena Pastuch on her own behalf and on behalf of the corporate Appellants Sonne Udemgba and Nathaniel Day for the Respondent

Ryan-Froslie J.A.

I. INTRODUCTION

[1] The appellants apply for a rehearing of the appeal found at 2019 SKCA 31, which upheld the decision of a panel appointed pursuant to s. 17 of *The Securities Act, 1998*, SS 1998, c S-42.2 [*Securities Act*]. The panel found the appellants had contravened that *Act*. Alena Pastuch is the sole director and officer of all of the corporate appellants.

[2] The appellants request a rehearing on the basis this Court: (i) overlooked, misapplied or failed to consider a statute, decision or controlling principle; (ii) overlooked or misconceived some material fact and omitted facts; and (iii) overlooked or misconceived a material question.

[3] In particular, the appellants contend the Court failed to consider the Financial Consumer Affairs Authority's [FCAA] legal duty to preserve electronic records in accordance with the Sedona Principles and the "Saskatchewan Civil Practice Directive #1 E-Discovery Guidelines Reference", as well as this Court's decision in *Schatz v Doust* (2002), 227 Sask R 1 [*Schatz*]. The appellants further contend that the FCAA's failure to preserve the original and electronic records resulted in the spoliation of evidence, which, in turn, constituted an abuse of process and led to a miscarriage of justice.

[4] The appellants also contend this Court overlooked evidence, including what documents were returned by the FCAA to the appellants' accountant, Frank Garrett and that the FCAA was in possession of records ordered to be disclosed and did not produce them. The appellants submit that the records in the FCAA's possession included emails between Mr. Garrett and Ms. Pastuch and in written submissions to the Court, the appellants had cited reasons why Ms. Pastuch was no longer in possession of the "Garrett e-records", which facts were overlooked by the Court. The appellants also assert the Court overlooked evidence that confirmed Mr. Garrett had conducted a business valuation and that a trust fund existed, as well as material evidence supporting a conclusion that Sandy Novak's notes were required to be disclosed. The appellants submit the Court misapprehended how the FCAA's evidence-logging process worked. They further argue "[t]he repeated, false, inaccurate, and misleading statements, provided by [FCAA counsel]" to this Court perpetrated "a fraud upon the court". It is the appellants' position that the

conduct of the FCAA investigators and staff throughout the Securities Commission hearing and before the Court of Appeal was overlooked, prejudicing the appellants and tarnishing the integrity of the justice system.

[5] Finally, it is the appellants' position that Ms. Pastuch suffered from a mental disability, which affected her capacity to present the appellants' case before the panel. The appellants contend that mental disability was overlooked by the panel during the hearing and was not even mentioned by this Court in rendering its decision. The appellants submit this resulted in a breach of Ms. Pastuch's s. 15 *Charter* right to "equal benefit" of the law.

[6] In their written submissions, the appellants indicate that if a rehearing is ordered, they will bring an application to adduce fresh evidence. That evidence consists of an affidavit from a lawyer who had acted for the appellants and was in possession of a binder – the contents of which, the appellants claim, were not fully disclosed by the FCAA. The appellants also indicate there is new medical evidence that shows Ms. Pastuch's mental disability impacted the appellants' entire defence, including their decision not to cross-examine the FCAA witnesses.

[7] The FCAA opposes the appellants' application. It contends the appellants have not satisfied the test for a rehearing as set out by this Court in *Storey v Zazelenchuk* (1985), 40 Sask R 241 (CA) [*Storey*].

II. ANALYSIS

[8] The sole issue before this Court is whether the appellants should be granted a rehearing.

[9] The Court may, in its discretion, rehear an appeal, provided formal judgment has not issued. This power, however, is exercised only in *special or unusual circumstances*.

[10] In *Storey*, the full Court (seven judges) considered when an application for a rehearing should be granted. Chief Justice Bayda, writing for the majority (Hall, Vancise, Wakeling and Gerwing JJ.A. concurring; Tallis and Cameron JJ.A. dissenting), stated (at para 5):

> ... The guiding principle in rehearing applications in civil matters where the judgment has not been perfected seems to be that **a Court of Appeal will reconsider its judgment only in special or unusual circumstances** (see: *Metz v. Marshall supra*, *Shaw v. City of Regina supra*, *Woodpulp Inc. (Canada) v. Jannock Industries Ltd.* (1979), 33 N.B.R. (2d)

652; 80 A.P.R. 652; *Fruehauf Trailer Company v. McCrea et al.* (1955), 38 M.P.R. 151). In *Metz*, Martin, J.A. (later C.J.S.), on behalf of this court, said at p. 203:

> But while many authorities may be cited to the effect that a court has jurisdiction to rehear before the formal order is entered, I have been unable to find any case where after judgment was given on the evidence, as in the present case, a court reheard, reviewed or practically retried a case on the grounds that the court had been mistaken in its interpretation of the evidence; and I am of the opinion that such application should only be entertained under very exceptional circumstances, otherwise there could be no finality to litigation.
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> ...
>
> (Emphasis added)

[11] Given the test set out in *Storey*, an applicant has a significant hurdle to overcome to obtain a rehearing.

[12] Rehearings are not encouraged because of the desirability of having finality to litigation and the costs involved. Chief Justice Richards made this point in *Borowski v Stefanson*, 2015 SKCA 140 at para 9, 472 Sask R 107 [*Borowski*], where he stated: "rehearings are not granted for the asking. Considerations of cost and finality dictate that a rehearing should be granted in only special or unusual circumstances". See also, the comments of Cameron J.A. at page 627 of *Armco Canada Ltd. v PCL Construction Ltd.* (1986), 33 DLR (4th) 621 [*Armco*].

[13] While what constitutes a *special or unusual circumstance* must be determined on a case-by-case basis, it is instructive to consider what type of circumstances have or have not resulted in a rehearing.

[14] A rehearing has been granted: (i) where a relevant point of law involving the construction of a statute was not argued (*Shaw v Regina (City)*, [1945] 1 WWR 433 (Sask CA)); (ii) where a subsequent decision of a higher court might affect the outcome (*Harrison v Harrison*, [1955] 1 Ch 260); and (iii) when a relevant statutory provision that governs the case was not brought to the Court's attention (*Glebe Sugar Refining Company, Limited v Trustees of Part and Harbours of Greenock*, [1921] 2 AC 66).

[15] A rehearing was not granted: (i) on the basis the decision was wrong (*Storey* at para 8; *Borowski* at para 9; *Whatcott v Canadian Broadcasting Corporation*, 2016 SKCA 51, 395 DLR (4th) 294 [*Whatcott*]; *HDL Investments Inc. v Regina (City)*, 2008 SKCA 59 at para 3); (ii) where

counsel sought further interpretation of a contract on a question already covered in the judgment (*Canadian Utilities Ltd. v Mannix Ltd.* (1960), 21 DLR (2d) 269 (Alta CA)); (iii) on the ground the decision was not warranted on the evidence (*Metx v Marshall* (1922), [1923] 1 DLR 367 (Sask SC)); (iv) where there was a dissent or split decision of the Court (*Armco* at 625); (v) because of the public importance of the decision (*Storey* at para 10; *Armco* at 626); (vi) on the basis the judgment created uncertainty in the law (*Storey* at para 9); (vii) where the decision established new facts giving rise to other claims (*Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2017 SKCA 5, [2017] 5 WWR 84); or (viii) where there was an alleged error in the judgment (*Chutskoff Estate v Ruskin Estate*, 2011 SKCA 47).

[16] The authorities cited do not stand for the proposition that, in the circumstances identified in each of those cases, a rehearing will always either be granted or denied. Rather, the cases underscore the discretionary nature of the relief requested and illustrate the difficulty of obtaining a rehearing.

[17] In their written submissions, the appellants rely on two cases emanating from the British Columbia Court of Appeal: *Menzies v Harlos* (1989), 37 BCLR (2d) 249 (CA) at paras 7–11 [*Menzies*], and *Bains v Bhandar*, 2000 BCCA 466, 141 BCAC 62. In those cases, the British Columbia Court of Appeal adopted a more flexible approach to the granting of a rehearing. That approach follows the dissent in *Storey*. However, the governing law in this province is not reflected by that dissent but, rather, is set out in the reasons of the majority.

[18] In my view, the appellants have not established any *special or unusual circumstances* to justify a rehearing. Their grounds include that the case was wrongly decided by this Court and that the Court overlooked or misapprehended evidence. Those grounds, however, do not amount to *special or unusual circumstances* so as to meet the test set out in *Storey*. Further, the Sedona Principles, the E-discovery Guidelines and the *Schatz* case were not raised before the panel or in the appeal to this Court. These arguments are new and, in my view, would not have affected the outcome of the appeal. Finally, Ms. Pastuch's mental disability was not raised before the panel, despite frequent requests by it for medical information. Nor was that matter raised before this Court. In the circumstances, rehearing the appeal would not be appropriate.

[19] In its decision, the Court dealt with many of the arguments raised by the appellants on the application for rehearing. That the appellants feel the Court made errors in arriving at its decision does not constitute a *special or unusual circumstance* that would justify a rehearing.

III. CONCLUSION

[20] The appellants' application for a rehearing is dismissed. There shall be no order as to costs for the same reasons as set out in the appeal decision.

"Ryan-Froslie J.A."

Ryan-Froslie J.A.

I concur. "Jackson J.A."

Jackson J.A.

I concur. "Whitmore J.A."

Whitmore J.A.