

Date: 20081203

**Dockets: A-94-08
A-95-08**

Citation: 2008 FCA 383

**CORAM: DESJARDINS J.A.
NADON J.A.
BLAIS J.A.**

Docket: A-94-08

BETWEEN:

**ROLAND HARRISON and
CAROLINA MAT CO. INC.**

Appellants

and

SWAMP MATS INC.

Respondent

Docket: A-95-08

BETWEEN:

**ROLAND HARRISON and
CAROLINA MAT CO. INC.**

Appellants

and

STERLING LUMBER COMPANY

Respondent

Heard at Toronto, Ontario, on December 3, 2008.
Judgment delivered from the Bench at Toronto, Ontario, on December 3, 2008.

REASONS FOR JUDGMENT OF THE COURT BY:

NADON J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on December 03, 2008)

NADON J.A.

[1] These are appeals from two decisions of Madam Justice Simpson of the Federal Court, dated February 20, 2008 and April 11, 2008.

[2] By her decision dated February 20, 2008, the Judge set aside a decision of Prothonotary Aalto dated June 26, 2004, and refused to allow the appellants to make a number of amendments to their Statement of Claim, namely, proposed amended paragraph 11.

[3] By her decision dated April 11, 2008, the Judge reconsidered her decision of February 20, 2008, and concluded that she had “overlooked the question of whether to strike paragraphs 8 and 12 of the amended claims when I struck paragraph 11 therefrom”.

[4] We are satisfied that Simpson J. made no error in holding that she could review the Prothonotary’s decision on a *de novo* basis. In our view, because of the nature of the amendments sought to be made by the appellants, i.e. asserting the infringement of additional claims of the ‘302 patent, it cannot be said that the amendments were not vital to the final issue of the case (see: *Merck & Co. v. Apotex Inc.*, 2003 FCA 488, at paragraphs 21 to 28).

[5] We are also satisfied that in striking sub-paragraph 8(1), 8(2), 8(4), 8(5) and paragraph 11 of the proposed amended Statement of Claim and in determining that paragraph 12 thereof was to be amended so as to eliminate all references to claims other than claim 14 of the patent, Simpson J. did

not make her decision on a wrong basis. It is also our view that she was not plainly wrong in making her decision.

[6] Finally, we have not been persuaded that the Judge made any error in reconsidering her Order of February 20, 2008, so as to dispose of the issue concerning proposed amended paragraphs 8 and 12 of the Statement of Claim.

[7] The appeals will therefore be dismissed with costs.

“M. Nadon”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-94-08

(APPEAL FROM A JUDGMENT OR ORDER OF THE HONOURABLE MADAM JUSTICE SIMPSON DATED FEBRUARY 20, 2008, NO. T-2099-05)

STYLE OF CAUSE: ROLAND HARRISON and CAROLINA MAT CO. v. SWAMP MATS INC.

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 3, 2008

REASONS FOR JUDGMENT OF THE COURT BY: DESJARDINS, NADON, BLAIS JJ.A.

DELIVERED FROM THE BENCH BY: NADON J.A.

DATED: DECEMBER 3, 2008

APPEARANCES:

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Jeilah Chan FOR THE RESPONDENT

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FEDERAL COURT OF APPEAL

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