Federal Court of Appeal | Cour d'appel fédérale

Date: 20110128

Docket: A-248-10

Citation: 2011 FCA 31

CORAM: **LÉTOURNEAU J.A.**
NOËL J.A.
TRUDEL J.A.

BETWEEN:

OSMOSE PENTOX INC.

Appellant

and

SOCIÉTÉ LAURENTIDE INC.

Respondent

Heard at Montréal, Quebec, on January 25, 2011.

Judgment delivered at Montréal, Quebec, on January 28, 2011.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: NOËL J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] The appellant seeks reversal of a decision of Martineau J. of the Federal Court (judge) who dismissed the appellant's motion to appeal from a decision of Prothonotary Morneau, dated November 26, 2009.

[2] The appellant's motion made to the Prothonotary, which led to his November 26, 2009 decision, was to vary, pursuant to subsection 399(2) of the *Federal Courts Rules*, SOR/98-106, two previous orders rendered on December 14, 2005 and June 5, 2008.

[3] Among other things, the December 14, 2005 order of the Prothonotary, who was case-managing the proceedings, put an end to the examinations for discovery as he was satisfied that they were essentially completed. This is the part of the order relevant to our appeal.

[4] The June 5, 2008 order adjourned the appellant's motion for contempt filed on February 22, 2007 until the determination of the issues of liability, namely the validity of the trade-mark and its infringement. The order also relieved the parties of their disclosure obligations regarding the issue of remedy until a final determination on the issues of liability.

[5] In support of its motion submitted to the judge, the appellant alleged fraud on the court by the respondent. The respondent would have obtained the court orders by way of deceitful means.

[6] The appellant raises a number of grounds of appeal, but the core of the matter giving rise to the appellant's motion alleging fraud on the court is the respondent's failure to produce a letter that it sent to its customer, Rona, in the summer of 2001 in response to a letter sent by the appellant to Rona, informing Rona that it held a trade-mark and that the respondent's product was infringing the mark. At the examination for discovery of a representative of the respondent, counsel for the

respondent undertook to produce a copy of the response letter, but never did, notwithstanding numerous attempts by counsel for the appellant to have counsel's undertaking enforced.

[7] The appellant's lawsuit was launched in 2002 and a flood of interlocutory proceedings followed thereafter, all revolving around the failure to comply with the above undertaking. From the partial record that we have on this appeal, I counted six motions by the appellant, including a motion for contempt that is adjourned and the motion alleging fraud, as well as six appeals by the appellant, including the present appeal.

[8] In *Osmose-Pentox Inc. v. Société Laurentide Inc.*, 2007 F.C. 242, at paragraph 2, Hugessen J. found that the parties had been engaged in an "unceasing guerilla warfare relating to interlocutory matters" with the result that the file has never been able to progress beyond pre-trial procedures.

[9] On March 1, 2007, Hugessen J. issued an order severing the issue of remedy from the issues of infringement and validity of the mark. The determination of liability and infringement were to be determined first.

[10] With respect, I think the appellant fails to understand that the respondent's missing letter to Rona, even if its content was assumed to be most favorable from the perspective of the appellant, is not relevant at the first stage of the proceedings. The determination of the validity of the registration of the appellant's trade-mark entails a legal determination over which the beliefs of the respondent,

whatever the self-serving or even incriminating terms in which they have been expressed in the response letter, carry no influence. The same holds true for the determination of the respondent's liability should the trade-mark be found to be valid and to have been infringed.

[11] The judge analyzed the appellant's contention that the impugned orders were obtained by a fraud which allegedly took place during the examinations for discovery held on January 10, 2005 and May 25, 2005: see paragraph 28 of his reasons for judgment. He also reviewed the appellant's request to have the suspension of its motion for contempt against the respondent lifted: *ibidem*, at paragraph 29.

[12] At paragraph 31 of his reasons for judgment, the judge ruled that he was satisfied that it had not been demonstrated that both the issues of fraud and contempt were relevant to a determination of an infringement by the respondent and its liability for said infringement. I see no error in this ruling that requires or justifies our intervention.

[13] Finally, the appellant asks that the judge's order as to costs in the amount of $3,000 payable forthwith to the respondent be set aside. A cost order is discretionary. In the case at bar, the judge refused the respondent's request for solicitor-client costs. However, he reviewed the *Federal Courts Rules* on costs, the circumstances leading to the appeal from the Prothonotary's decision and provided adequate justification for his award of costs. I cannot say that he exercised his discretionary power contrary to the law or in an abusive or arbitrary manner.

[14] Before concluding, I think it is fair to say that the debate between the parties, which so far has been going on for at least eight years, has been acrimonious. I agree with counsel for the appellant that counsel for the respondent at one time behaved in a manner not expected from a colleague at the bar and, from the perspective of the judiciary, not expected from an officer of Justice. However, he is no longer counsel of record. The parties should understand that the time has now come to move this case to trial without further interruption.

[15] For these reasons, I would dismiss the appeal with costs.

"Gilles Létourneau"
J.A.

"I agree
Marc Noël J.A."

"I agree
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-248-10
STYLE OF CAUSE:	OSMOSE PENTOX INC. v. SOCIÉTÉ LAURENTIDE INC.
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CONCURRED IN BY:	NOËL J.A. TRUDEL J.A.
DATED:	January 28, 2011

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