Federal Court of Appeal | Cour d'appel fédérale

Date: 20190516

Docket: A-245-18

Citation: 2019 FCA 150

CORAM: **DAWSON J.A.**
GAUTHIER J.A.
RIVOALEN J.A.

BETWEEN:

WAEL MAGED BADAWY

Appellant

and

1038482 ALBERTA LTD. also known as INTELLIVIEW TECHNOLOGIES INC., FIDELITER INC., BILL HEWS, MISSING LINK BUSINESS OPERATIONS ADVISORS LTD., GORDON EDWARDS, CHRISTOPHER BEADLE, SHANE ROGERS, FLIR SYSTEMS INC., FLIR SYSTEMS, LTD., SPARTAN CONTROLS LTD., CANADA150IN150, SCHNEIDER ELECTRIC SE, SCHNEIDER ELECTRIC CANADA INC., WEST AT PELCO BY SCHNEIDER ELECTRIC and ENBRIDGE PIPELINE INC.

Respondents

Heard at Calgary, Alberta, on May 6, 2019.

Judgment delivered at Ottawa, Ontario, on May 16, 2019.

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

CONCURRED IN BY: DAWSON J.A.
GAUTHIER J.A.

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Respondents

REASONS FOR JUDGMENT

RIVOALEN J.A.

[1] Wael Maged Badawy appeals from a judgment of the Federal Court (2018 FC 807) rendered by Justice McVeigh (the Judge) striking his amended statement of claim "without leave

to amend or to refile" (Judgment, para. 2). The Judge also dismissed Mr. Badawy's motions, including his motion to disqualify certain respondents' counsel, as Mr. Badawy had not convinced her that any conflict of interest existed and furthermore the issue was now moot.

[2] For the reasons set out below, I would dismiss the appeal, with costs.

I. Brief History of the Proceedings

[3] In his statement of claim, Mr. Badawy asserted claims of infringement of copyright, trademark and patent rights he allegedly owns domestically and internationally, in addition to other purported causes of action. The respondents moved to strike the statement of claim under Rule 221(1)(*a*), (*c*) and (*f*) of the *Federal Courts Rules*, S.O.R./98-106 for failure to disclose any reasonable cause of action and for being vexatious and an abuse of process.

[4] The respondents' motions to strike the statement of claim were returnable on February 8, 2018. On January 29, 2018, Mr. Badawy filed a motion seeking to disqualify and restrain counsel at the law firm of Borden Ladner Gervais LLP (BLG) from acting.

[5] On February 8, 2018, Justice Heneghan adjourned the hearing of the motions to strike to March 8, 2018 and provided Mr. Badawy time to amend his statement of claim. She pronounced the following order:

> 1. The adjudication of the motions to strike filed by the Intelliview Defendants, Enbridge, the FLIR Defendants and the Schneider Defendants

is adjourned to the General Sittings in Calgary scheduled for Thursday, March 8, 2018, subject to any other [o]rder of the Court.

2. The within proceeding is referred to the Office of the Chief Justice for the appointment of a Case Management Judge.

3. The Case Management Judge shall determine the hearing date of the Plaintiff's motion.

4. The issue of costs in respect of the hearing on Thursday, February 8, 2018 is referred to the Case Management Judge.

5. The Plaintiff is at liberty to serve and file an Amended Statement of Claim on or before February 24, 2018.

6. The Intelliview Defendants, Enbridge, the FLIR Defendants and the Schneider Defendants shall advise the Plaintiff and the Registry of this Court by Thursday, March 1, 2018 if it is necessary to proceed with their motions to strike, on March 8, 2018.

[6] No appeal was taken from this order.

[7] Mr. Badawy filed his amended statement of claim on February 20, 2018. The Judge heard the motions on March 8, 2018. On July 31, 2018, she rendered the judgment that is the subject of this appeal.

II. The Position of the Parties

[8] Mr. Badawy argues that the Judge erred by:

A. not hearing his motion to disqualify BLG and by hearing the motions to strike the amended statement of claim before a case management judge was appointed;

B. not requiring respondents' counsel to file "fresh" notices of motion to strike the amended statement of claim;

C. subjecting him to cruel and unusual treatment and violating his rights under the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (the Charter); and

D. conducting herself in a manner that was not impartial and which evidenced bias against him, thereby denying him a fair hearing.

[9] Mr. Badawy asks that we vacate the "orders" of the Judge, that there be a *de novo* review, that we in effect grant an injunction and summary judgment, and that we order costs in his favour.

[10] Counsel for the respondents took the position that the Judge made no errors and that the appeal should be dismissed, with costs.

III. The Standard of Review

[11] Mr. Badawy's submissions focus on the process followed by the Judge. He asserts that the Judge should have heard his motion to disqualify BLG and awaited the appointment of a case management judge to hear the motions to strike.

[12] The standard of appellate review that applies to the issues raised in this appeal is the standard set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[13] For the reasons below, Mr. Badawy has not demonstrated any error that warrants intervention.

IV. Analysis

[14] I now turn to each of the arguments made by Mr. Badawy.

A. *Case Management*

[15] During oral submissions, Mr. Badawy focussed on the argument that the Judge should not have heard the motions to strike. This argument must fail. Justice Heneghan's order provided that the motions to strike were to be dealt with at the General Sittings in Calgary set for March 8, 2018, irrespective of whether a case management judge was appointed.

[16] In addition, Rule 385 of the *Federal Courts Rules*, which sets out the powers of a case management judge, does not prevent another judge from hearing a motion in the proceedings (*Trevor Nicholas Construction Co. Ltd. v. Canada*, 2004 FC 238, aff'd 2004 FCA 356). There, the Federal Court noted, at paragraph 13, that "[c]ase management is intended to facilitate the work of the Court rather than to place it in a straight-jacket." and that "it is important that all judges and prothonotaries of the Court have the jurisdiction and the flexibility to ensure that the work of the Court is carried forward in the most efficient and effective manner that is practicable." Mr. Badawy's contention that the Judge should have awaited the appointment of a case management judge has no merit.

[17] Finally, Mr. Badawy's submission that the Judge should have heard his motion to disqualify BLG must also fail. The Judge was alive to his motion, as at the outset of the hearing before her it was agreed that counsel representing the respondents Schneider Electric SE, Schneider Electric Canada Inc. and West at Pelco by Schneider Electric would argue on behalf of all of the respondents. It was within the Judge's discretion to determine in what order the motions should be heard. She committed no error in doing so.

B. *No Fresh Motions Filed*

[18] Mr. Badawy submits that the motions to strike should not have proceeded as new motions to strike were required to deal with the amended statement of claim. I cannot agree.

[19] At paragraph 1 of her order, Justice Heneghan ordered that the motions to strike be heard at the General Sittings in Calgary scheduled for March 8, 2018. She further ordered that the

respondents were to advise Mr. Badawy and the registry by Thursday, March 1, 2018, if it was necessary to proceed with their motions to strike on March 8, 2018. During the March 8, 2018 hearing, the respondents confirmed that such notice had been provided (Transcript of hearing, Appeal Book, Vol. 1, page 18, lines 9-14, 20-28; and page 19, lines 1-11). I am satisfied that the respondents properly advised Mr. Badawy and the registry of their intention to proceed. Therefore, the Judge did not err by proceeding with the motions to strike on their merits on March 8, 2018.

C. *Charter Breaches*

[20] Mr. Badawy's claim that his Charter rights were violated must also fail. The Charter has no application in the present case. Any reviewable error by the Judge is remedied by an appeal to this Court, not by recourse to the Charter.

D. *Reasonable Apprehension of Bias*

[21] The test for a reasonable apprehension of bias is "would an informed person, viewing the matter realistically and practically – and having thought the matter through – … think that it is more likely than not that the [decision-maker], whether consciously or unconsciously, would not decide fairly." (*Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282, at paras. 20-21, 26). Mr. Badawy has not met this test.

[22] There is no basis for the claim advanced by Mr. Badawy of bias, real or apprehended. The Judge, in hearing the respondents' motions to strike and declining to hear the appellant's motion to disqualify counsel, was not manifesting partiality or bias. Rather, she exercised her discretion to decide which motion she would hear first. In light of her conclusion with regard to the respondents' motions to strike, the Judge found it was unnecessary to address Mr. Badawy's motion to disqualify. This cannot qualify as a demonstration of bias.

[23] In addition, a thorough review of the transcript of the hearing produces no examples of conduct by the Judge to establish such a claim. The Judge was polite and treated Mr. Badawy fairly and with respect. She patiently explained the process to him at numerous occasions (Transcript of hearing, Appeal Book, Vol. 1, page 6, lines 15-28; page 7, lines 1-16, 23-27; page 8, lines 1-4; page 15, lines 19-23, 26-28; page 16, lines 1-4; and page 21, lines 10-12). She also explained in some detail his right to appeal her decision (Transcript of hearing, Appeal Book, Vol. 1, page 24, lines 23-28; page 25, lines 1-28).

E. *Merits of the Motions to Strike*

[24] Finally, while in his written materials and oral submissions before this Court Mr. Badawy does not allege any errors made by the Judge on the merits of the motions to strike, I find that the amended statement of claim is without question a vexatious pleading and it was properly struck for that reason. This Court, in *Murray v. Canada (Public Service Commission)* (1978), 21 N.R. 230 (Fed. A.D.), confirmed, at paragraph 13, that a pleading which fails to "sufficiently [reveal] the facts on which [a claim is based] to make it possible for a defendant to answer it or for the

court to regulate the proceedings [is] fundamentally ‘vexatious’ within the legal sense of that word.”

[25] It is not necessary for me to consider the Judge’s alternative findings of no reasonable cause of action and abuse of process.

V. Conclusion

[26] In conclusion, the findings of the Judge are amply justified by the record and she made no error that requires our intervention. For these reasons, I would dismiss the appeal with costs.

"Marianne Rivoalen"
J.A.

“I agree.
Eleanor R. Dawson J.A.”

“I agree.
Johanne Gauthier J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-245-18
STYLE OF CAUSE:	WAEL MAGED BADAWY v. 1038482 ALBERTA LTD. ET AL.
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	MAY 6, 2019
REASONS FOR JUDGMENT BY:	RIVOALEN J.A.
CONCURRED IN BY:	DAWSON J.A. GAUTHIER J.A.
DATED:	MAY 16, 2019

APPEARANCES:

Wael Maged Badawy	SELF-REPRESENTED
Frank Tosto Evan Nuttall	FOR THE RESPONDENTS, INTELLIVIEW TECHNOLOGIES INC., FIDELITER INC., BILL HEWS, MISSING LINK BUSINESS OPERATIONS ADVISORS LTD., GORDON EDWARDS, CHRISTOPHER BEADLE AND SHANE ROGERS
Elizabeth Fashler	FOR THE RESPONDENTS, FLIR SYSTEMS INC. AND FLIR SYSTEMS LTD.
Cassidy Thomson	FOR THE RESPONDENT, ENBRIDGE PIPELINES INC.
Laura Easton Daniel Davies	FOR THE RESPONDENTS, SCHNEIDER ELECTRIC SE,

SCHNEIDER ELECTRIC
CANADA INC. AND PELCO, INC.

SOLICITORS OF RECORD:

Borden Ladner Gervais LLP Calgary, Alberta	FOR THE RESPONDENTS, INTELLIVIEW TECHNOLOGIES INC., FIDELITER INC., BILL HEWS, MISSING LINK BUSINESS OPERATIONS ADVISORS LTD., GORDON EDWARDS, CHRISTOPHER BEADLE AND SHANE ROGERS
Norton Rose Fulbright Canada LLP Calgary, Alberta	FOR THE RESPONDENTS, FLIR SYSTEMS INC. AND FLIR SYSTEMS LTD.
Brownlee LLP Calgary, Alberta	FOR THE RESPONDENT, CANADA 150IN150
McCarthy Tétrault LLP Calgary, Alberta	FOR THE RESPONDENT, ENBRIDGE PIPELINES INC.
Dentons Canada Edmonton, Alberta	FOR THE RESPONDENT, SPARTAN CONTROLS LTD.
Smart and Biggar/Fetherstonhaugh Ottawa, Ontario	FOR THE RESPONDENTS, SCHNEIDER ELECTRIC SE, SCHNEIDER ELECTRIC CANADA INC. AND WEST AT PELCO BY SCHNEIDER ELECTRIC