

Federal Court of Appeal



Cour d'appel fédérale

Date: 20190718

Docket: A-425-18

Citation: 2019 FCA 209

**CORAM: DAWSON J.A.
STRATAS J.A.
LASKIN J.A.**

BETWEEN:

EVOLUTION TECHNOLOGIES INC.

Appellant

and

HUMAN CARE CANADA INC.

Respondent

Heard at Ottawa, Ontario, on June 12 and 13, 2019.

Judgment delivered at Ottawa, Ontario, on July 18, 2019.

REASONS FOR JUDGMENT BY:

LASKIN J.A.

CONCURRED IN BY:

**DAWSON J.A.
STRATAS J.A.**

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REASONS FOR JUDGMENT

LASKIN J.A.

[1] The appellant, Evolution Technologies Inc., and the respondent, Human Care Canada Inc., both supply mobility aiding devices. These include “rollators” – more colloquially, walkers with wheels. Human Care’s “Nexus” series of centre-folding, solid-seat rollators is a commercial embodiment of its Canadian Patent No. 2,492,392. Human Care brought an action in the Federal Court alleging that Evolution’s “Xpresso” rollators – also centre-folding with a solid seat –

infringe claims 16 and 18 of its patent. Evolution denied infringement and counterclaimed for a declaration of invalidity.

[2] The Federal Court found in favour of Human Care: *Human Care Canada Inc. v. Evolution Technologies Inc.*, 2018 FC 1302; supplementary judgment and reasons, 2018 FC 1304 (Elliott J.). It concluded that every essential element of claims 16 and 18 of the patent as it had construed them is present in the Xpresso rollator. It therefore found infringement. It went on to conclude that the patent is valid, and awarded remedies including a permanent injunction, reasonable compensation for the period between the launch of the Xpresso and the issuance of the patent, and an accounting and disgorgement of profits. It also dismissed Evolution's counterclaim.

[3] Evolution appeals to this Court, raising multiple grounds of appeal. It submits that the Federal Court both failed to apply its claims construction in its infringement analysis, and incorrectly construed the claims terms, resulting in erroneous findings of infringement. Evolution argues that when the patent is correctly construed, four claim elements of the seven that the Federal Court determined are essential are missing from the Xpresso – “tension rod means for distributing the weight,” “tension rod structurally interconnects said first and second supports,” “[...] cross brace extending between the [...] support and the [...] frame member,” and “a handle extending through said first support.” In aid of its submission on the second of these elements, Evolution relies on representations it says the applicant for the patent made to the Patent Office, and invokes the recently enacted subsection 53.1(1) of the *Patent Act*, R.S.C. 1985, c. P-4, under which a written communication between the applicant for a patent and the Patent Office in the

prosecution of a patent application may be admitted into evidence in a proceeding respecting the patent to rebut a representation made by the patentee in the proceeding as to the construction of a claim. Evolution also says that the Federal Court committed reversible error in failing to find the patent to be invalid on the basis of overbreadth and obviousness.

[4] In my view, it is necessary to consider only the grounds of appeal relating to the claim element “tension rod means for distributing the weight.” Evolution submits that the Federal Court accepted, based on its appreciation of the expert evidence as to how the skilled person would understand the claims, that “tension rod means” in claims 16 and 18 captures only “means” that are “primarily” in tension. I agree with Evolution that the Federal Court implicitly came to this construction, and that it then committed an error of law by failing to apply this construction in its consideration of infringement. Since the “tension rod means” element is an essential element of the claims that Human Care asserted, this was fatal to the finding that the patent is infringed. For these reasons, which I develop below, I would allow the appeal.

[5] In its construction analysis, the Federal Court considered the evidence of both Human Care’s expert witness, Dr. David Brienza, and Evolution’s expert witness, Jonathon Schuch. The Court made it clear (at paras. 185-193 of its public reasons), under the heading “The Approach to Claims Construction by Dr. Brienza and Mr. Schuch,” that it preferred Dr. Brienza’s approach, which it described as, among other things, “purposive” and arising from a consideration of “the patent as a whole.” In contrast, the Federal Court found that Mr. Schuch took a “narrow” approach, and failed to consider the “actual language” of the claims or consider that language in context.

[6] As noted above, one of the Federal Court’s conclusions was that the “tension rod means” element set out in claims 16 and 18 of the patent is present in the Xpresso. The Court found it to be present through a feature of the Xpresso referred to as a “beam.” The claims set out the “tension rod means” element as follows:

tension rod means for distributing the weight between the first and second supports, said tension rod means being adjustable between an extended position in which said tension rod structurally interconnects said first and second supports, when the device is in the use position, and a released position enabling the device to be adjusted to the storage position [...].

[7] The Federal Court had evidence from both experts to assist it in construing this claim element. Dr. Brienza stated in his expert report that the skilled person would understand the words “for distributing the weight between the first and second supports” as “describing a function of the ‘tension rod means,’” and that “[w]hen weight is applied to one of the ‘supports’, a pulling force (or ‘tension’) is created in the ‘tension rod means.’” He further stated that the skilled person would understand the term “extended position” as referring to a position where the “tension rod means” is “fully extended and capable of resisting tension when loaded”: Appeal Book at 2736.

[8] Mr. Schuch stated in his primary and rebuttal reports that the “tension rod means” taught in the patent experiences purely “tensile” loading, and that the Xpresso’s beam, being subject to “transverse” loading, did not fit this description: Appeal Book at 20237, 20833. The terms “tensile” and “transverse” describe different forces. A “tensile” force is a pulling or stretching force along the length of a beam, while a “transverse” force is the opposite – a force applied perpendicular to the length of a beam.

[9] Dr. Brienza stated in his responding report that the skilled person would understand that a “tension rod means” need not experience purely tensile loading, but also that “the primary function of the ‘tension rod means’ is to resist a pulling force (prevent the spreading)”: Appeal Book at 24358. In cross-examination, Dr. Brienza was asked whether an engineer would understand the term “tension rod” as meaning “a component that is designed to support transverse loading.” He responded that an engineer would understand that a tension rod “could be subjected to transverse and tensile loading,” but also that “the purpose of the tension bar means is for resisting the tensile loading”: Appeal Book at 1216.

[10] The Federal Court summarized the expert evidence on this point, stating (at paras. 240-241) that Mr. Schuch saw the “tension rod means” as experiencing “purely” tensile loading, while Dr. Brienza saw the “tension rod means” as being “primarily” in tension when in use (emphasis in original). The Federal Court further distilled the difference between the two experts as follows (at para. 242):

Ultimately, the difference between the two experts on this aspect of the tension rod means is a disagreement over the degree of tension carried by the tension rod means and whether it is subject to resisting any compressive forces.

[11] The Federal Court did not proceed at this point in its reasons to explicitly resolve the “disagreement over the degree of tension,” or explicitly come to a view as to whether the “tension rod means” must be “purely” or “primarily” in tension. Rather, it concluded its discussion of this element of the claims by stating (at para. 243) that it was

satisfied that given the environment in which a rollator operates, it will be subject to a variety of forces including both tensile and transverse forces. A mobility aiding device whether navigating outside or indoors faces the distinct possibility that the rollator would knock into walls, doors, rocks or other obstacles while travelling through narrow spaces, around objects or over uneven ground. Such impacts would cause forces to be applied at a variety of angles other than purely vertically or horizontally.

[12] However, later in its reasons (at para. 420), the Federal Court specifically stated that it had “agreed with the construction of claims put forward by Dr. Brienza [...]” This can only be understood as referring to the construction of all of the claims and their elements.

[13] On appeal, Evolution first submitted that the Federal Court erred in law by providing no “specific” or “clear” construction of “tension rod means”: Evolution’s memorandum at paras. 30, 54. In response, Human Care submitted that the Federal Court did provide a clear construction of “tension rod means,” and that Evolution’s argument was “nothing more than a complaint that the [Federal Court] preferred the evidence of Dr. Brienza over that of Mr. Schuch”: Human Care’s memorandum at para. 37.

[14] At the hearing of the appeal, Evolution made it clear that it accepts the position advanced in Human Care’s memorandum. In other words, it now agrees that the Federal Court construed “tension rod means” in accordance with Dr. Brienza’s evidence. Evolution stresses, however, that the Federal Court understood the experts as differing on the degree of tensile force necessarily experienced by the “tension rod means” – “purely” tensile force, in Mr. Schuch’s opinion, or “primarily” tensile force, in Dr. Brienza’s. Evolution submits that by accepting Dr. Brienza’s evidence, the Federal Court construed “tension rod means” as requiring that the

“means” be “primarily” in tension. On this construction, Evolution argues that the Federal Court erred in finding infringement, since the record does not demonstrate that the Xpresso’s beam primarily experiences tensile loading.

[15] But as its counsel submitted in oral argument, Human Care now disagrees that the Federal Court accepted Dr. Brienza’s evidence “writ large.” Human Care submits that the Federal Court followed a pattern in its construction analysis of first setting out the point of controversy and each party’s position, as expressed through expert evidence, and then coming to a view on the correct construction of each disputed claim term. Human Care argues that where the Federal Court expressly adopted Dr. Brienza’s view, it indicated as much in its reasons. As a result, it submits that the Federal Court did not accept Dr. Brienza’s construction of “tension rod means,” but arrived at a different construction. However, the portions of the reasons where Human Care submits this construction can be found (paras. 237, 243) are not cast in terms of construction of this claim element, and do not suggest disagreement with Dr. Brienza.

[16] Human Care was asked at the hearing how paragraph 243 of the Federal Court’s reasons can be understood to resolve the point of controversy identified in the paragraphs that precede it. Its counsel responded by referring again to the expert evidence, submitting that in Dr. Brienza’s opinion “the tension rod as it’s used to help keep the seats together is primarily using that tensile force.” Counsel further submitted that at paragraph 243, the Federal Court was concluding that “tension rod means” refers to a “means” not subject purely to tensile forces, but to both tensile and transverse forces. Counsel argued that Evolution had not identified any error in the Federal Court’s construction analysis, and added that even if this Court were to conclude that the Federal

Court construed “tension rod means” as requiring a “means” subject to primarily tensile forces, there was still a factual basis on which the Federal Court could have found infringement.

[17] As set out above, the Federal Court was clear that it preferred Dr. Brienza’s evidence on matters of construction, and specifically stated that it agreed with his construction of the claims. Human Care has itself asserted that the Federal Court preferred its evidence “*on every single issue asserted at trial*”: Human Care’s memorandum at para. 3 (emphasis in original). As Human Care acknowledges, a trial judge’s appreciation of the expert evidence that affects construction is entitled to deference on appeal: *ABB Technology AG v. Hyundai Heavy Industries Co., Ltd.*, 2015 FCA 181 at paras. 22-23, 475 N.R. 341.

[18] Human Care does not argue that the Federal Court mischaracterized Dr. Brienza’s position in summarizing the point of controversy as whether the “tension rod means” must be “purely” or “primarily” in tension when in use. I therefore agree with Evolution that the Federal Court implicitly construed “tension rod means” in accordance with Dr. Brienza’s evidence as the Federal Court understood it. In these circumstances, this Court may uphold that implicit construction if it agrees with it: see *Bourgault Industries Ltd. v. Flexi-Coil Ltd.* (1999), 237 N.R. 74 at para. 13, 86 C.P.R. (3d) 221 (F.C.A.), leave to appeal refused, [2000] 1 S.C.R. xi; and contrast *Polansky Electronics Ltd. v. AGT Ltd.*, 2001 ABCA 36 at paras. 15-22, 11 C.P.R. (4th) 7. In *Polansky*, the Alberta Court of Appeal could not find even an implicit construction in the reasons of the trial judge, and there were competing expert opinions and unresolved credibility issues affecting the expert evidence as to the scope of the claims, requiring that the matter be remitted.

[19] Here, I agree with the Federal Court's implicit construction of the "tension rod means" element. I have set out above some of the expert evidence as to how the skilled person would understand the term. I see no error on the part of the Federal Court in summarizing and accepting Dr. Brienza's evidence in this regard.

[20] I also consider the Federal Court's construction to be consistent with the principle of purposive construction. Purposive construction relates "not only to the overall purpose of the invention, but also to the purpose of the various components": Donald H. MacOdrum, *Fox on the Canadian Law of Patents*, 5th ed., looseleaf (Toronto: Thomson Reuters, 2013), at § 8:6(h). It is clear that the purpose of the "tension rod means" is primarily to resist tensile loading, even if it may be subject to some other forces as well.

[21] I turn now to infringement. As Human Care submitted in oral argument, the infringement analysis requires the court to compare the impugned device – in this case, the Xpresso – with the language of the claims as construed. Evolution argues that, given the Federal Court's implicit construction of "tension rod means," it erred in finding infringement, because the Xpresso's beam is not primarily in tension when in use. Evolution submits that there was no evidence to the contrary.

[22] As set out above, Human Care submitted in oral argument that even if this Court upheld the Federal Court’s implicit construction of “tension rod means” as requiring a “means” that is “primarily” in tension when in use, it was still open to the Federal Court to find infringement. However, Human Care’s counsel appeared to abandon this position when addressing infringement, ultimately agreeing that the degree of tension was a “red herring” and a “false argument.” Human Care instead stressed Dr. Brienza’s evidence that the Xpresso’s beam experiences some tensile loading while in use. Human Care’s counsel submitted that it was not necessary for the Federal Court to determine the degree of tensile loading so long as it concluded that the Xpresso’s beam helps to distribute weight, and prevent the downward collapse of the seat, at least in part through tension.

[23] In my view, Human Care’s arguments on infringement speak more properly to a position it could have pursued with respect to construction. Infringement is a question of mixed fact and law; the court must first construe the claims and then determine whether, on the facts, the impugned device falls within them: *ABB Technology* at para. 30. Claims construction is therefore antecedent to consideration of infringement: *Mediatube Corp. v. Bell Canada*, 2017 FC 6 at para. 28, [2017] F.C.J. No. 6 (QL), affirmed 2019 FCA 176. Once the infringement stage is reached, the focus is factual. As the Supreme Court stated in *Monsanto Canada Inc. v. Schmeiser*, 2004 SCC 34 at para. 30, [2004] 1 S.C.R. 902, “once the claim has been construed it is [usually] clear on the facts whether infringement has taken place: one need only compare the thing made or sold [...] with the claims as construed.”

[24] In this case, as discussed above, the Federal Court construed the term “tension rod means” to require that the “means” be primarily in tension. However, the Federal Court’s finding of infringement (at para. 346) was based not on that construction but on the conclusion that the Xpresso’s beam “is subject to tensile forces in addition to transverse forces,” and that the “tension rods means” element is therefore “present in the Xpresso rollator.” The Federal Court’s infringement analysis therefore discloses an extricable error of law – a failure to apply at the infringement stage the construction of “tension rod means” it had earlier adopted.

[25] It is a “fundamental rule” that the claims of a patent receive “one and the same interpretation for all purposes”: *Whirlpool Corp. v. Camco Inc.*, 2000 SCC 67 at para. 49(b), [2000] 2 S.C.R. 1067; *Tearlab Corporation v. I-MED Pharma Inc.*, 2019 FCA 179 at para. 34. As this Court has put it, the claims “are to be construed once, and for all purposes”: *Zero Spill Systems (Int’l) Inc. v. Heide*, 2015 FCA 115 at para. 96, 130 C.P.R. (4th) 291, leave to appeal refused *sub nom. 1284897 Alberta Ltd. v. Zero Spill Systems (Int’l) Inc.*, [2016] 1 S.C.R. v.

[26] I also agree with Evolution that had the Federal Court applied its construction of “tension rod means,” it would have had no factual basis to conclude that the Xpresso’s beam is primarily in tension when in use. Human Care did not refer us to any evidence that would provide a basis for concluding otherwise. Since the Xpresso therefore does not include an essential element of the claims as construed, the finding of infringement cannot stand: *Free World Trust v. Électro Santé Inc.*, 2000 SCC 66 at paras. 68, 75, [2000] 2 S.C.R. 1024.

[27] I would accordingly allow the appeal, and set aside the judgment of the Federal Court dated December 28, 2018, except for paragraph 11 of the judgment, which dismissed the counterclaim. Counsel for Evolution confirmed at the hearing that the counterclaim was not in issue and need not be further determined. Giving the judgment the Federal Court should have given, I would dismiss Human Care's action. I would also award Evolution its costs in the Federal Court and this Court.

"J.B. Laskin"

J.A.

"I agree.

Eleanor R. Dawson J.A."

"I agree.

David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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