

T-309-95

OTTAWA, ONTARIO, THE 13TH DAY OF JUNE, 1997

PRESENT: THE HONOURABLE MR. JUSTICE J.E. DUBÉ

BETWEEN:

AVANT-GARDE ENGINEERING (1994) INC.

Plaintiff
Defendant by counterclaim

AND:

**GESTION DE BREVETS FRACO LIMITÉE
and
LES PRODUITS FRACO LIMITÉE**

Defendants
Plaintiffs by counterclaim

AND:

ANDRÉ ST-GERMAIN

Plaintiff

AND:

JEAN G. ROBILLARD

Defendant by counterclaim

AND:

THE COMMISSIONER OF PATENTS

Mis en cause

ORDER

The application is dismissed. Costs to follow.

J.E. Dubé

J.

Certified true translation

Christiane Delon

T-309-95

BETWEEN:

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Plaintiff
Defendant by counterclaim

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THE COMMISSIONER OF PATENTS

Mis en cause

REASONS FOR ORDER

The plaintiff (“Avant-Garde”) has moved for an interlocutory injunction until final judgment on the merits, to be rendered following the scheduled hearing on November 24, 1997 on an alleged infringement of Canadian patent number 1,304,109.

It has long been held that in matters of interlocutory injunctions an application must meet three criteria, namely, the existence of a serious question to be tried, irreparable harm and the balance of convenience. The defendant (“Fraco”) concedes from the start that the question submitted by Avant-Garde is not futile or vexatious. Indeed, the allegation of infringement of this properly registered and therefore presumably valid patent is a serious one.

In the first place, it is incumbent on Avant-Garde to demonstrate that it will suffer irreparable harm if Fraco continues in business between now and the hearing on the permanent injunction. The cases have consistently held that irreparable harm is harm that cannot be compensated monetarily. To my way of thinking, Avant-Garde has not provided this evidence.

Avant-Garde did not attempt to show that the damage it would suffer as a result of Fraco’s business activities could not be expressed in monetary terms. Instead, it focused on demonstrating Fraco’s financial inability to pay the damages incurred. According to it, the damages, as assessed by its president, Mr. Jean G. Robillard, would amount to \$1.8 million or so should it obtain a judgment in its favour. It argues that on the basis of admissions by Fraco’s president himself, that company should be seeking out financing. Avant-Garde submits that it is questionable whether a financial institution would loan such a sum to Fraco, *a fortiori* in the event of judgment against it.

However, Fraco has demonstrated that its present activities are profitable and, furthermore, that it is in the process of obtaining financing through an offering memorandum to allow it to expand in the United States and elsewhere internationally. According to the affidavit of Carolyne Lassonde, a lawyer with Allaire et Associés, the offering memorandum filed with the Commission des valeurs mobilières du Québec projects financing of up to \$1,500,000 and at least \$900,000. In her opinion, the issuance of an interlocutory injunction would jeopardize any chance of obtaining

the financing that is sought through this offering memorandum.

It would appear that it is the U.S. distributors of both parties in this case who would suffer immediate damages in the event that this motion is allowed or denied, but these distributors are not before the court, and Avant-Garde is under no obligation to plead on behalf of another in this proceeding. Its allegation of irreparable harm is based more on speculation than on any demonstrable proposition.

The balance of convenience, on the other hand, clearly leans in favour of Fraco. It is common ground that this company is much more fragile than Avant-Garde. An interlocutory injunction against it would affect its reputation on the American market and jeopardize its possibilities of obtaining the financing that is necessary for its expansion. Of course, if it is convicted of infringement in November, and is hit by a permanent injunction, it will have to suffer the consequences.

The motion is accordingly dismissed. Costs to follow.

O T T A W A

June 13, 1997

J.E. Dubé

J.

Certified true translation

Christiane Delon

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

FILE NO. T-309-95

STYLE:AVANT-GARDE ENGINEERING (1994) INC. v. GESTION DE BREVETS FRACO
LTÉE ET AL.

PLACE OF HEARING:MONTRÉAL

DATE OF HEARING:JUNE 10, 1997

REASONS FOR JUDGMENT OF J.E. DUBÉ J.

DATED:JUNE 13, 1997

APPEARANCES:

Armand J. ElbazFOR THE PLAINTIFF

Réginald GagnonFOR THE DEFENDANTS

SOLICITORS OF RECORD:

DUBÉ, ELBAZ
MONTRÉAL, QUEBECFOR THE PLAINTIFF

BRASSARD, ROY, GAGNON
LONGUEUIL, QUEBECFOR THE DEFENDANTS