

Federal Court of Appeal



Cour d'appel fédérale

Date: 20171115

Docket: A-473-16

Citation: 2017 FCA 224

[ENGLISH TRANSLATION]

**CORAM: NOËL C.J.
GAUTHIER J.A.
DE MONTIGNY J.A.**

BETWEEN:

LEDDARTECH INC.

Appellant

and

PHANTOM INTELLIGENCE INC.

Respondent

Heard at Montréal, Quebec, on November 15, 2017.
Judgment delivered from the Bench at Montréal, Quebec, on November 15, 2017.

REASONS FOR JUDGMENT OF THE COURT BY:

NOËL C.J.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Montréal, Quebec, on November 15, 2017).

NOËL C.J.

[1] In 2015, LeddarTech Inc. (LeddarTech) began an action for patent infringement against Phantom intelligence Inc. (Phantom). In August 2016, Prothonotary Morneau (the Prothonotary) struck a part of LeddarTech's statement of claim on the ground that it was speculative and an abuse of the court's process pursuant to rule 221(1)(f) of the *Federal Court Rules*, SOR/98-106

[Rules]. His decision was subsequently upheld by Roussel J. (The Federal Court judge). This is the decision now under appeal.

[2] The following paragraphs of the statement of claim provide context for the pleading at issue:

[9] The Plaintiff LeddarTech was recently informed that the Defendant Phantom has been, and continuing to the present, actively involved in the development and commercialization in Canada of LiDAR systems implementing a method for acquiring a detected light optical signal and generating an accumulated digital trace, the method comprising: (1) providing: a) a light source for illumination of a field of view; b) an optical detector; c) an analog-to-digital converter (ADC); (2) emitting multiple pulses by said light source; (3) detecting reflection signals associated with the pulses; (4) introducing a phase shift between light pulses and the acquisition of one or more samples by the ADC in the corresponding reflections and accumulating the samples from multiple reflections to generate the accumulated digital trace.

[10] The LiDAR systems developed and commercialized by or on behalf of Phantom having the characteristics described in paragraph 9 above include at least the “new Wideview LiDAR system” referred to in recent trade publications and depicted below. Additionally, Phantom may manufacture, or have manufactured on its behalf, use, sell or license other LiDAR systems or methods comprising said characteristics that LeddarTech is not currently aware of, but that are within the knowledge of Phantom.

[3] The last sentence of paragraph 10 reflects the part of the pleading that was struck. The Prothonotary struck this sentence at the tail end of his order at his own initiative on the basis that it was [TRANSLATION] “clearly speculative” without citing any case law or explaining why this plea amounted to an abuse of the process of the court.

[4] The Federal Court judge in the ensuing appeal issued a speaking order which shows that she considered the relevant case law. Specifically, she accepted Phantom’s argument that *Emerson Electric Co. v. Canadian tire Corporation Ltd.*, 2016 FC 308 [*Emerson Electric*] “[...]”

is distinguishable from the current situation as there is no nexus between the Wideview LiDAR and other products of Phantom claimed but unknown;”(Order, page 4).

[5] We agree with the parties that *Emerson Electric* was well decided and provides a useful summary of the law with respect to open-ended pleadings in patent infringement cases.

However, according to this decision, the nexus which the Federal Court judge had to look for is not between “the Wideview LiDAR and other products of Phantom claimed but unknown;” but between the characteristics of the Wideview LiDAR system and other LiDAR systems sharing those characteristics (*Emerson Electric*, paras. 26 and 27).

[6] Had the Federal Court judge asked the proper question, she would have been bound to conclude that the nexus identified in *Emerson Electric* is present here as the “other LiDAR systems or methods” referred to in paragraph 10 are those that share the detailed characteristics set out in paragraph 9.

[7] As such, we are not looking at an open ended pleading because LeddarTech has laid out sufficient material facts to allow Phantom to know precisely which “other LiDAR systems or methods” are alleged to be infringing and is in a position to fully answer the case against it by either denying the existence of these other systems or methods or, if they exist, by demonstrating that they are not infringing.

[8] The Federal Court judge therefore committed a legal error in failing to ask the appropriate question. As otherwise the Prothonotary failed to explain how the speculation which he identified is abusive in any way, his decision also cannot stand.

[9] We would therefore allow the appeal with costs, set aside the decision of the Federal Court judge and, giving the decision which she ought to have given, we would allow the appeal from the decision of the Prothonotary, with costs. These are fixed at 1 250.00\$ in each instance.

« Marc Noël »
Chief Justice

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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PHANTOM INTELLIGENCE INC.

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GAUTHIER J.A.
DE MONTIGNY J.A.

DELIVERED FROM THE BENCH BY: NOËL C.J.

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