Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20100226

Docket: A-460-09

Citation: 2010 FCA 67

Present: **SHARLOW J.A.**

BETWEEN:

MAPLE LEAF FOODS INC.

Appellant

- and -

CONSORZIO DEL PROSCIUTTO DI PARMA

Respondent

- and -

THE REGISTRAR OF TRADE-MARKS

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on February 26, 2010.

REASONS FOR ORDER BY: SHARLOW J.A.

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REASONS FOR ORDER

SHARLOW J.A.

[1] The Attorney General of Canada seeks an order removing the Registrar of Trade-Marks as a respondent in this appeal on the basis that the Registrar is not a necessary or proper party. The respondent Consorzio del Prosciutto di Parma has consented to the motion but the appellant Maple Leaf Foods Inc. has not.

[2] In this appeal, Maple Leaf is challenging a judgment of the Federal Court dated October 15, 2009 (2009 FC 1035) dismissing its application for judicial review of a decision of the Registrar. In the Federal Court application, Maple Leaf was seeking, among other things, a declaration that

Consorzio is not a “public authority” within the meaning of subparagraph 9(1)(*n*)(iii) of the *Trade-Marks Act*, R.S.C. 1985, c. T-13. Maple Leaf was also seeking an order compelling the Registrar to withdraw an objection to a pending trade-mark application by Maple Leaf that, according to Maple Leaf, is based on an incorrect interpretation of subparagraph 9(1)(*n*)(iii).

[3] In its notice of appeal, Maple Leaf named two respondents, Consorzio and the Registrar. Consorzio has served and filed a notice of appearance.

[4] The Registrar served a notice of appearance on Maple Leaf, but withdrew the notice on the basis that it was served in error. The notice of appearance was never filed.

[5] The Registrar had also been named as a respondent in the application for judicial review in the Federal Court, and had filed a notice of appearance indicating an intention to oppose the application. The Registrar took no active part in the Federal Court proceedings, and did not seek to be removed as a respondent.

[6] It appears to me that the Registrar should not have been named as a party in the application for judicial review in the Federal Court. The governing provision is Rule 303(1) of the *Federal Courts Rules*, SR/98-106, which reads as follows:

303. (1) Subject to subsection (2), an applicant shall name as a respondent every person	303. (1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur :
(*a*) directly affected by the order sought	*a*) toute personne directement touchée par l’ordonnance recherchée, autre que

in the application, other than a tribunal in respect of which the application is brought; or	l'office fédéral visé par la demande;
(*b*) required to be named as a party under an Act of Parliament pursuant to which the application is brought.	*b*) toute autre personne qui doit être désignée à titre de partie aux termes de la loi fédérale ou de ses textes d'application qui prévoient ou autorisent la présentation de la demande.

[7] Rule 303(1)(*a*) did not apply to require the Registrar to be named as a respondent because the Registrar is the statutory decision maker whose decision is under review. Rule 303(1)(*b*) did not apply because there is no statutory requirement to name the Registrar as a party.

[8] The provision governing the naming of respondents in an appeal is Rule 338(1) of the *Federal Courts Rules*, which reads as follows:

338. (1) Unless the Court orders otherwise, an appellant shall include as a respondent in an appeal	338. (1) Sauf ordonnance contraire de la Cour, l'appelant désigne les personnes suivantes à titre d'intimés dans l'appel :
(a) every party in the first instance who is adverse in interest to the appellant in the appeal;	a) toute personne qui était une partie dans la première instance et qui a dans l'appel des intérêts opposés aux siens;
(b) any other person required to be named as a party by an Act of Parliament pursuant to which the appeal is brought; and	b) toute autre personne qui doit être désignée à titre de partie aux termes de la loi fédérale qui autorise l'appel;
(c) where there are no persons that are included under paragraph (a) or (b), the Attorney General of Canada.	c) si les alinéas a) et b) ne s'appliquent pas, le procureur général du Canada.

[9] Maple Leaf relies particularly on Rule 338(1)(*a*), but in my view that reliance is misplaced. Despite an early indication that the Registrar intended to oppose the Federal Court application, the

Registrar as the statutory decision maker is not adverse in interest to Maple Leaf in respect of this appeal. It may well be that the Registrar is of the opinion that Maple Leaf's position in this appeal has no merit, but that does not give the Registrar an "interest" in this matter as that term is used in Rule 338(1), much less an interest that is adverse to the interest of Maple Leaf.

[10] Maple Leaf cites my decision in *Nowoselsky* v. *Canada (Canadian Human Rights Commission)*, 2005 FCA 276. In that case I refused the motion of a tribunal to be removed as the only respondent in an appeal from the Federal Court. The tribunal had also been named as the only respondent in a judicial review application in the Federal Court, but for a number of reasons it proved impossible for the applicant to correct the error although he tried to do so. The tribunal's motion to be removed as a respondent in the appeal was dismissed because the particular circumstances of the case brought the tribunal within Rule 338(1)(*a*) (see also the decision of this Court disposing of the appeal, 2006 FCA 382). There are no such circumstances in this case.

[11] In my view, Rule 338 justifies an order removing the Registrar as a party to this appeal. An order will be made accordingly.

Costs

[12] The Attorney General of Canada seeks costs against Maple Leaf. In a reply submission, the Attorney General of Canada repeated the request for costs against Maple Leaf and stipulated an amount which exceeds the amount suggested in the motion record. The reply submission includes

an affidavit to which is appended some correspondence and a draft bill of costs. Rule 369 does not permit an affidavit to be submitted in a reply, and for that reason I have disregarded the affidavit.

[13] I note also that among the documents appended to the affidavit are "without prejudice" communications between counsel. Those documents remained in the reply submissions despite the objections of counsel for Maple Leaf. The improper inclusion of those documents is a further reason to disregard the affidavit.

[14] The matter of costs will be reserved pending the agreement of the parties or, failing agreement, a motion to be made as stipulated in the order disposing of this motion.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-460-09
STYLE OF CAUSE:	Maple Leaf Foods Inc. v. Consorzio del Prosciutto di Parma and The Registrar of Trade-marks

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	SHARLOW J.A.
DATED:	February 26, 2010

WRITTEN REPRESENTATIONS BY:

James Buchan Laurent Massam	FOR THE APPELLANT
Jacqueline Dais-Visca	FOR THE RESPONDENT THE REGISTRAR OF TRADEMARKS
Daniel Glover	FOR THE RESPONDENT CONSORZIO DEL PROSCIUTTO DI PARMA

SOLICITORS OF RECORD:

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