

Federal Court of Appeal



Cour d'appel fédérale

Date: 20121121

Docket: A-196-12

Citation: 2012 FCA 307

**CORAM: BLAIS C.J.
NADON J.A.
TRUDEL J.A.**

BETWEEN:

AUTOMATED TANK MANUFACTURING INC.

Appellant

and

LARRY BERTELSEN

Respondent

Heard at Vancouver, British Columbia, on November 21, 2012.

Judgment delivered from the Bench at Vancouver, British Columbia, on November 21, 2012.

REASONS FOR JUDGMENT OF THE COURT BY:

TRUDEL J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Vancouver, British Columbia, on November 21, 2012)

TRUDEL J.A.

[1] This is an appeal from an Order of Near J. (the Federal Court Judge) of the Federal Court (Docket T-2084-11) dismissing Automated Tank Manufacturing's (ATM) motion to strike the statement of claim filed by the respondent, Larry Bertelsen, who alleges infringement of Canadian Patent no. 2,479,412 (Patent '412). This statement of claim is also referred to as the New Action, so as not to confuse it with an earlier statement of claim which supported a previous action (Old Action) commenced by the respondent against ATM. That action also alleged infringement of the same patent.

[2] After several amendments and a judicial debate on the respondent's thrice amended statement of claim in the Old Action, O'Keefe J. of the Federal Court struck key paragraphs of the amended statement of claim without leave to amend and dismissed the respondent's action as there was nothing left to support an infringement action [2011 FC 1219].

[3] The respondent discontinued his appeal of that Order, preferring instead to commence the New Action, which is the focus of the within appeal.

[4] ATM is of the view that the Federal Court Judge ignored or misapprehended the previous order of O'Keefe J. As a result of that order denying the respondent leave to amend, it was simply not open to the respondent to commence the New Action. In any event, ATM also argues that the New Action constitutes an abuse of process, not only because of the history of the Old Action, but also because the New Action arose "in suspicious circumstances that demonstrate its speculative nature". These arguments were all in front of the Federal Court Judge in the case at bar, who dismissed them for the following reasons.

[5] First, the Federal Court Judge concluded that the statement of claim in the New Action was "not the same or similar to that in the Old Action considered by [O'Keefe J.] in his order". On that point, we also fail to see how the order made by O'Keefe J. could have survived the dismissal of the Old Action and precluded the institution of the New Action, when the question at issue in front of O'Keefe J. was simply whether the respondent had pleaded the requisite material facts to support his claim of infringement.

[6] Second, having reviewed the parties' submissions as well as the pleadings at issue, the Federal Court Judge held that the pleadings in the statement of claim in the New Action were "proper and not speculative" adding that if true, the material facts and allegations put forward in the statement of claim would constitute infringement of the patent in question. Finally, the Federal Court Judge accepted the respondent's explanations for having started the New Action rather than continued his appeal from the decision of O'Keefe J. and refused to see in the respondent's procedural choice an abuse of process.

[7] Having carefully considered the submissions of counsel for the appellant, we are all agreed that this appeal cannot succeed. The appellant has failed to demonstrate that the Federal Court Judge, while exercising his discretion, committed an error of principle or any other error warranting our intervention. Consequently, this appeal will be dismissed with costs.

"Johanne Trudel"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-196-12

STYLE OF CAUSE: Automated Tank Manufacturing Inc. v.
Larry Bertelsen

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: November 21, 2012

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DELIVERED FROM THE BENCH BY: TRUDEL J.A.

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