Federal Court of Appeal  Cour d'appel fédérale

Date: 20130109

Docket: A-448-11

Citation: 2013 FCA 5

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

BETWEEN:

McCALLUM INDUSTRIES LIMITED

Appellant

and

HJ HEINZ COMPANY AUSTRALIA LTD.

Respondent

Heard at Ottawa, Ontario, on January 9, 2013.

Judgment delivered from the Bench at Ottawa, Ontario, on January 9, 2013.

REASONS FOR JUDGMENT OF THE COURT BY: PELLETIER J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on January 9, 2013)

PELLETIER J.A.

[1] This is an appeal from a decision of the Federal Court (per Justice Pinard): 2011 FC 1216.

[2] McCallum Industries Limited applied under section 57 of the *Trade-marks Act*, R.S.C. 1985 c. T-13, to expunge the trade-mark "OX & PALM", owned by HJ Heinz Company Australia Ltd. The Federal Court dismissed the application.

[3] McCallum alleges that the Federal Court erred in three respects:

> -Finding that McCallum lacked the standing to bring an application under section 57 of the *Trade-marks Act* because it was not a "person interested" under section 2 of the *Act*.
>
> -Failing to find that Heinz's trade-mark "OX & PALM" was confusing with McCallum's trade-mark "PALM & Device".
>
> -Finding that Heinz's trade-mark "OX & PALM" was distinctive.

[4] In argument before us, both parties agreed that the appellant was a "person interested" within the meaning of subsection 57(1) of the *Act*. In light of that admission, it is not necessary for us to address this question. However, we should not be taken to endorse the Federal Court's analysis of this issue.

[5] As to the second and third alleged errors, many of McCallum's submissions relate to findings of fact and matters of factual appreciation, such as the weight to be given to relevant factors. Here, the burden is on McCallum to demonstrate palpable and overriding error – an error that is obvious and that will affect the outcome of the matter. In our view, McCallum has not satisfied this burden.

[6] We agree that in the course of its analysis, the Federal Court made a number of errors. By way of example only, the Federal Court was not entitled to rely upon the coexistence of the marks in the United States market in its consideration of the surrounding circumstances. It would also have been preferable if the Federal Court had more specifically addressed the issues of the relevant dates in its reasons.

[7] That said, we are satisfied that there was sufficient evidence to support the Federal Court's conclusions of fact, law, and mixed fact and law. We have not been persuaded that the Federal Court committed any palpable and overriding error which would justify our intervention.

[8] Accordingly, the appeal will be dismissed with costs.

"J. D.Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-448-11
APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE PINARD DATED OCTOBER 26, 2011, DOCKET NO. T-1702-10	
STYLE OF CAUSE:	McCallum Industries Limited v. HJ Heinz Company Australia Ltd.
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 9, 2013
REASONS FOR JUDGMENT OF THE COURT BY:	Pelletier, Dawson, Stratas JJ.A.
DELIVERED FROM THE BENCH BY:	Pelletier J.A.

APPEARANCES:

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