

Federal Court of Appeal



Cour d'appel fédérale

Date: 20190611

Docket: A-35-17

Citation: 2019 FCA 176

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

BETWEEN:

MEDIATUBE CORP.

Appellant

and

BELL CANADA

Respondent

Heard at Ottawa, Ontario, on June 11, 2019.
Judgment delivered from the Bench at Ottawa, Ontario, on June 11, 2019.

REASONS FOR JUDGMENT OF THE COURT BY:

STRATAS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on June 11, 2019).

STRATAS J.A.

[1] The appellant, MediaTube Corp., appeals from the judgment dated January 4, 2017 of the Federal Court (*per* Locke J.): 2017 FC 6.

[2] In the Federal Court, MediaTube brought an action for damages and punitive costs alleging that Bell Canada infringed its patent. Bell Canada defended on the basis that it did not infringe MediaTube's patent and, alternatively, that MediaTube's patent was invalid.

[3] The Federal Court described “unusual developments” that “had the effect of changing the main thrust of this matter from one of patent infringement to one of allocation of costs” (at para. 7). By the end of its submissions before the Federal Court, the appellant conceded most of its infringement allegations. According to the Federal Court, all that remained was an issue of potential infringement if Bell Canada chose to operate its system in a particular way (paras. 10-11). The Federal Court called this an issue of vestigial infringement (para. 11).

[4] The Federal Court dismissed the action. It concluded that while the patent was valid, Bell did not infringe it. It ordered the appellant to pay elevated costs for most issues and to pay solicitor-and-client costs relating to its punitive damages claim.

[5] On appeal, MediaTube brought an interlocutory motion for leave to withdraw the concessions it made at trial and to introduce a new ground of appeal. This Court dismissed the motion: *MediaTube Corp. v. Bell Canada*, 2018 FCA 127.

[6] MediaTube now moves for leave to file fresh evidence on appeal. Bell Canada opposes on the primary basis that the fresh evidence is on an issue that was already apparent in the record before the Federal Court and MediaTube could have investigated that issue during discoveries and at trial. In Bell Canada’s view, at best the evidence merely supplements evidence that was in the record. The fresh evidence does not cast any different light on the matter, nor could it reasonably have affected the result of the case. Thus, it does not meet the criteria for admission set out in cases such as *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212 and *Brace v. Canada*, 2014 FCA 92, 68 C.P.C. (7th) 81.

[7] We agree with these submissions. Thus, we dismissed the motion at the conclusion of MediaTube's oral argument of the motion at the hearing. Bell is entitled to costs of the motion.

[8] Turning to the merits of the appeal, during oral argument Media Tube did not persuade us that there was any reversible error in the Federal Court's observation at the outset of its reasons that only the issues of vestigial infringement and liability for costs remained to be decided.

[9] On appeal, the appellant challenges the Federal Court's determination of the issue of vestigial infringement. The appellant does not take issue with the costs award made against it.

[10] We see no reversible error in the Federal Court's conclusion on the vestigial infringement issue or its construction of the patent relevant to that issue. In particular, it correctly constructed the patent using the required purposive approach: at paras. 38-93, applying *Free World Trust v. Electro Santé Inc.*, 2000 SCC 66, [2000] 2 S.C.R. 1024. Further, it did not commit palpable and overriding error in concluding at that there was no infringement of the patent, so construed. Indeed, we see no error in the Federal Court's analysis on these issues (at paras. 184-224) and substantially adopt its reasons as our own.

[11] MediaTube submits that the Federal Court improperly added limiting words to the claims, improperly limiting the patent to the preferred embodiments. In our view, this submission relies on a literal reading of the claims, not a purposive approach as the law requires. A purposive approach to claims construction sometimes arrives at a construction different from that reached through a purely literal approach.

[12] Therefore, despite the articulate submissions of Ms. Desrosiers, the appeal will be dismissed with costs. Security for the costs was paid into this Court by Orders dated July 7, 2017 and June 28, 2018. This security plus accumulated interest shall be released to Bell Canada thirty days after the date of judgment.

“David Stratas”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-35-17

**APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE LOCKE DATED
JANUARY 4, 2017, DOCKET NO. T-705-13**

STYLE OF CAUSE: MEDIATUBE CORP. v. BELL
CANADA

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: JUNE 11, 2019

REASONS FOR JUDGMENT OF THE COURT BY: DAWSON J.A.
STRATAS J.A.
LASKIN J.A.

DELIVERED FROM THE BENCH BY: STRATAS J.A.

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