

Federal Court



Cour fédérale

**Date: 20161011**

**Docket: T-775-16**

**Citation: 2016 FC 1129**

**Ottawa, Ontario, October 11, 2016**

**PRESENT: The Honourable Mr. Justice Martineau**

**BETWEEN:**

**ELBIT SYSTEMS ELECTRO-OPTICS ELOP  
LTD.**

**Plaintiff**

**and**

**SELEX ES LTD.**

**Defendant**

**ORDER AND REASONS**

[1] This is an appeal by the defendant, Selex Es Ltd. [Selex], from Prothonotary Mireille Tabib's [Prothonotary] order dated September 2, 2016 (2016 FC 1000), which dismissed in part their motion to strike portions of the statement of claim.

[2] The plaintiff, Elbit System Electro-Optics Elop Ltd's [ELOP], opposes the present motion.

*Background*

[3] The plaintiff's owns Canadian Patent No. 2,527,754 entitled "Fiber Laser Based Jamming System" ['754 Patent], which relates to a fiber laser based directional infrared counter measures [DIRCM] system used as a countermeasure against missiles that tracks base a target based on the target's infrared heat signature. One of the plaintiff's products is a multi-spectral DIRCM solution that it markets under the trade-mark MUSIC. The defendant is a direct competitor of the plaintiff and has commercialized a multi-spectral DIRCM solution which is offered under the trade-mark MIYSIS.

[4] The present action was commenced on May 13, 2016. It concerns the procurement of upgrades to Canada's fleet of the Lockheed CP140 Aurora aircrafts, and in particular, to the installation of DIRCM systems in those aircrafts. General Dynamics Mission Systems – Canada [GDC] is the prime contractor which was awarded the upgrade contract from the Government of Canada. The defendant is a subcontractor of GDC, responsible for installing the DIRCM system. The plaintiff alleges that the DIRCM systems to be supplied, delivered, and installed by the defendant would infringe the '754 Patent.

[5] The action claims that the defendant has, or will imminently infringe the '754 Patent by offering, agreeing or contracting with GDC to supply its systems, but also that the defendant is inducing or procuring the infringement of the patent by GDC and the Canadian Government. Further, the plaintiff alleges that GDC has or will consequently induce infringement by the Government of Canada.

[6] It is useful to note that neither GDC nor the Canadian Government are named as defendants, even though allegations are made that they both have or will directly infringe the '754 patent.

*Motion to strike*

[7] On August 17, 2016, the Prothonotary heard a motion made by the defendant under Rule 221 of the *Federal Courts Rules*, SOR/98-106 [Rules], to strike parts of the statement of claim without leave to amend:

- i. the entirety of paragraphs 19, 21, 37, 46, 47 and 48;
- ii. the text “and the Government of Canada” from paragraph 1(c)(iii);
- iii. the text “two separate procurement processes. One process that the Canadian government considered was a purchase directly from a foreign military, and in particular, the United States Air Force. A second process considered was a” in paragraph 12;
- iv. the text “the second” in the first sentence and the entire second and third sentences in paragraph 13;
- v. the text “Request for Proposal to potential subcontractors for various components of the AIMP Block IV upgrade. Once such” in paragraph 14;
- vi. the entire first sentence in paragraph 17;
- vii. the entire last sentence in paragraph 18;
- viii. the entire last sentence in paragraph 21;
- ix. the text “and the Canadian government” from paragraph 41;

[8] The defendant withdrew its motion in respect of paragraphs 41 and 1(c) of the statement of claim and classified the remaining impugned paragraphs of the statement of claim as follows:

- (a) Allegations of inducement to induce (portions of paragraph 18 and paragraphs 19 and 37).
- (b) Bald assertions or speculation (portions of paragraph 21, paragraph 24 and paragraphs 46 to 48).
- (c) Irrelevant pleadings (portions of paragraphs 12, 13, 14 and 17).

[9] Having successively examined the arguments of the parties on all three issues, the Prothonotary allowed the motion to strike in part and ordered that the following passages from the statement of claim be struck:

- (a) The text “two separate procurement processes. One process that the Canadian government considered was a purchase directly from a foreign military, and in particular, the United States Air Force. A second process considered was a” in paragraph 12;
- (b) The text “the second” in the first sentence and the entire second and third sentences in paragraph 13; and
- (c) The entire first sentence of paragraph 17.

[10] Rule 51(1) provides that an order of a prothonotary may be appealed by a motion to a judge of the Federal Court. The plaintiff did not appeal, while the defendant served and filed the

present motion in appeal which was heard in general sittings on October 5, 2016 in Ottawa by the Motions Judge.

*Motion in appeal*

[11] As a preliminary observation, there is no dispute between the parties concerning the applicable rules and principles that govern pleadings. The purpose of Rule 221 is to enable the Court to expeditiously dispose of unmeritorious claims which have no chance of succeeding at trial. This includes claims that disclose no reasonable cause of action (Rule 221(a)). The test is very stringent. The Court will not strike out an allegation of a pleading unless it is plain and obvious that it discloses no reasonable cause of action or it is so clearly futile that it does not have the slightest chance of success (*Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at 980; *Pfizer Inc v Apotex Inc* (1999), 1 CPR (4<sup>th</sup>) 358 (FCTD) at para 30).

[12] Although in *Apotex Inc v Wellcome Foundation Ltd*, [1996] FCJ No 634, Madam Justice Danielle Tremblay-Lamer was addressing a motion to strike the defendants' pleadings (Apotex) made by the plaintiffs (Wellcome) under former Rule 419, her general comments at paragraph 60 are still relevant today:

[60] In conclusion, I would like to reiterate that striking out pleadings is a draconian measure. The defendants may not have a strong case on some of the issues raised by the plaintiffs in their motion. However, the test in my view is stringent: if there is a scintilla of success in a claim, a Court should not strike it down. As pointed out by counsel for the defendant Apotex, this is not a mini-trial or a summary judgment proceeding where I could have resolved some of the issues. The case law is clear that it has to be beyond doubt. Despite able argument by counsels for the plaintiff Wellcome, I have not been convinced that there is sufficient lack

of substance to use this draconian measure, thereby depriving the defendants of their day in Court.

[13] On the other hand, the Court has a duty to carefully assess the reasonableness or viability of a claim in light of applicable legal principles. In particular, I endorse the reasoning of Prothonotary Roger Lafrenière in *Merck & Co Inc v Apotex Inc*, 2014 FC 883, [2014] FCJ No 1067 at paragraph 38:

[38] In determining whether a novel claim has a “reasonable prospect” of success, many factors must be examined. The clarity of the factual pleadings is important, as well as the existence of case law discussing the same or similar causes of action is relevant. The courts must be careful not to inhibit the development of the common law by applying too strict a test to novel claims. However, as was stated by the Alberta Court of Appeal in *O’Connor Associates Environmental Inc v MEC OP LLC*, 2014 ABCA 140: “the courts must resist the temptation to send every case to trial, even if some legal analysis is needed to determine if a claim has any reasonable prospect of success...”. The courts accordingly have a duty to carefully assess the reasonableness or viability of a plea and separate the wheat from the chaff.

[14] While the defendant does not allege that the Prothonotary misunderstood the applicable legal test to strike a pleading, in the present motion in appeal, the defendant nevertheless submits that the Prothonotary erred in law in refusing to strike the last sentence of paragraph 18 and paragraphs 19 and 37 of the statement of claim, as well as paragraphs 46 to 48 of same. Accordingly, the defendant submits that the Motions Judge is entitled to interfere in the exercise of the Prothonotary’s discretion and review the whole matter in order to come to its own conclusion on whether: (1) the last sentence of paragraph 18 and paragraphs 19 and 37 introduce an impermissible cause of action (inducement to induce infringement); and (2) paragraphs 46 to 48 are defective (speculative allegations relating to sales outside of Canada of systems that do not infringe the ‘754 Patent).

[15] The decision to strike a pleading is a discretionary one. I have considered the respective representations of the parties in light of the applicable standard of review to be applied in the present case. However, I disagree with the defendant's submission that in the case at bar, the appropriate standard of review is correctness. Rather, the appropriate standard of review is a palpable and overriding error as defined in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 [*Housen*].

[16] Recently, a panel of 5 judges from the Federal Court of Appeal reviewed the applicable standard of review governing discretionary decisions made by prothonotaries (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215, [2016] FCJ No 943 [*Hospira*]). As stated by the Federal Court of Appeal, the supervisory role of judges over prothonotaries enunciated in Rule 51 no longer requires that discretionary orders of prothonotaries be subject to *de novo* hearings. In accordance with *Housen*, absent error on a question of law or an extricable legal principle, intervention is warranted only in case of palpable and overriding error.

[17] The Federal Court of Appeal concluded that the *Housen* standard should be applied in reviewing discretionary decisions of judges and prothonotaries. This standard establishes that with respect to factual conclusions reached by trial judges, the applicable standard is that of palpable and overriding error, and with respect to questions of law and questions of mixed fact and law, where there was an extricable legal principle at issue, the applicable standard is that of correctness: *Hospira* at para 66, citing to paras 19 to 37 of *Housen*; para 69; para 71, citing to paras 25 to 29 of *Imperial Manufacturing Group Inc v Decor Grates Incorporated*, 2015 FCA

100, [2016] 1 FCR 246 79; para 74, citing to para 12 of *Turmel v Canada*, 2016 FCA 9, 481 NR 139; and para 79.

[18] In the present case, since the Prothonotary did not make any error while describing the applicable test and legal principles governing the striking out of a pleading under Rule 221, and since the defendant is challenging the Prothonotary's application of Rule 221 on the specific facts of the case, the applicable standard of review for such question of mixed fact and law should be that of palpable and overriding error. No final decision has been made by the Prothonotary on the merit of the allegations of infringement and induced infringement made by the plaintiff in its statement of claim. I doubt very much that the issues raised today by the defendant in this appeal truly deal with a pure question of law or an extricable legal principle at issue.

[19] While the impugned order was made by the Prothonotary a few weeks before her designation as the Case Management Judge in this matter, considering her vast experience in these types of file, as observed by the Federal Court of Appeal in *Hospira* at paragraph 103: "[...] it is always relevant for motions judges, on Rule 51 appeal, to bear in mind that the case managing prothonotary is very familiar with the particular circumstances and issues of a case and that, as a result, intervention should not come lightly. This does not mean, however, that errors, factual or legal, should go undetected. In the end, "elbow room" is simply a term signalling that deference, absent a reviewable error, is owed, or appropriate, to a case managing prothonotary – no more, no less." Be that as it may, considering that "discretionary orders of prothonotaries should only be interfered with when such decisions are incorrect in law or are based on a



palpable and overriding error in regard to the facts” (*Hospira* at para 64), I have no ground to interfere with the order made by the Prothonotary, having found no error of law or an error of the type that falls within the palpable and overriding error component of the *Housen* standard.

*Allegations of inducement to induce (portions of paragraph 18 and paragraphs 19 and 37)*

[20] Firstly, the defendant submits that the last sentence of paragraph 18 and paragraphs 19 and 37 of the statement of claim should be struck out because inducement to induce an infringement is not a reasonable cause of action in Canada.

[21] It is not challenged that in a motion to strike, “[a]ll allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proved” (*Edell v Canada (Revenue Agency)*, 2010 FCA 26, [2010] FCJ No 110 at para 5, citing to *Giacomelli v Canada (Attorney General)* (2005), 78 OR (3d) 388, [2005] OJ No 4298 at para 7).

[22] The plaintiff alleges in the first portion of paragraph 18 of the statement of claim, which is not the object of the defendant’s motion to strike, the following:

18. As part of the AIMP Block IV contract, GDC has now, therefore, agreed to sell, supply, deliver and install Selex’s MIYSIS DIRCM system on the CP140 Aurora aircraft, and to provide ongoing after installation training, maintenance, service and life-cycle support to the Canadian government, and in particular, the DND and its employees, in relation to the MIYSIS DIRCM system. The provision of such after installation training, maintenance, service and life-cycle support would have been a requirement for GDC to be selected as the Canadian government’s prime contractor in the AIMP Block IV upgrade program. [...]

[23] The impugned paragraphs read as follows:

18. [...] Also as part of the contract, GDC will have assumed all liability, and agreed to indemnify the Canadian government, for any patent infringement relating to AIMP Block IV upgrade program, including with respect to the MIYSIS DIRCM system.

19. Without GDC's influence by way of, among other things, agreeing to supply, deliver, install and provide after installation training, maintenance, service and life-cycle support, and to indemnify the Canadian government in the event of any patent infringement, as described in paragraph 1817, above, the Canadian government would not have selected GDC as its prime contractor for the AIMP Block IV upgrade program.

[...]

37. In addition, GDC has also induced and procured, or will imminently induce or procure, the Canadian government to infringe the '754 Patent, and the Asserted Claims.

[24] In addition to the impugned paragraphs of the statement of claim and the first portion of paragraph 18 already cited above, consideration should also be given to the allegations mentioned in paragraphs 20 to 22 of the statement of claim:

20. GDC has accepted Selex's offer as set out above in its response to GDC's Request for Proposal. GDC and Selex have either entered into a subcontract relating to the supply of the MIYSIS DIRCM system for the AIMP Block IV upgrade program, or will imminently enter into such a subcontract, to formalize their agreement. Under the terms of the agreement and subcontract between Selex and GDC, Selex is, or imminently will be, obligated to sell its MIYSIS DIRCM system to GDC, and deliver, supply and install it on the fleet of CP140 Aurora aircraft on behalf of GDC, and provide ongoing after installation training, maintenance, service, and life-cycle support, to the Canadian government, and in particular the DND and its employees, on behalf of GDC.

21. Selex's agreement to supply, deliver, install, and to provide after installation training, maintenance, service and life-cycle support will have been a requirement for Selex to be selected as GDC's subcontractor in the AIMP Block IV upgrade program. It is also customary and ordinary practice in the defence industry that

contracts relating to the sales and service of goods, machinery and equipment contain clauses under which the supplier assumes all liability, and indemnifies the purchaser, for any patent infringement.

22. Without Selex's influence by way of, among other things, offering and agreeing to deliver, supply and install, and provide after installation training, maintenance, service and life-cycle support, and to indemnify GDC in the event of any patent infringement, as described in paragraphs 20 and 20 [sic], GDC would not have selected Selex to provide the MIYSIS DIRCM and the AIMP Block IV upgrade program.

[25] The defendant recognizes that the impugned paragraphs must be read in light of the other paragraphs of the statement of claim. It is important to note that the plaintiff has alleged that the defendant has directly infringed the '754 Patent. Additionally, the plaintiff has also alleged that the defendant, by itself, has induced the Government of Canada to infringe the '754 Patent. However, the defendant submits that the impugned paragraphs of the statement of claim pertain to a third separate and distinct alleged cause of action, namely that the defendant has induced GDC to in turn induce the Government of Canada to infringe the '754 Patent. As such, it is an allegation of contributory infringement which is not a valid cause of action in Canada (*Apotex Inc v Nycomed Canada Inc*, 2011 FC 1441, [2011] FCJ No 1764 at paras 18 to 28, aff'd 2012 FCA 195, [2012] FCJ No 846).

[26] In the defendant's respectful submission, the Prothonotary misapplied the three-prong test on inducement mentioned by the Federal Court of Appeal in *Weatherford Canada Ltd c Corlac Inc*, 2011 FCA 228, [2011] ACF No 1090 at paragraph 162 [*Weatherford*]:

[162] It is settled law that one who induces or procures another to infringe a patent is guilty of infringement of the patent. A determination of inducement requires the application of a three-prong test. First, the act of infringement must have been completed by the direct infringer. Second, the completion of the acts of

infringement must be influenced by the acts of the alleged inducer to the point that, without the influence, direct infringement would not take place. Third, the influence must knowingly be exercised by the inducer, that is, the inducer knows that this influence will result in the completion of the act of infringement: *Dableh v. Ontario Hydro*, [1996] 3 F.C. 751, paras. 42, 43 (C.A.), leave to appeal refused, [1996] S.C.C.A. No. 441; *AB Hassle v. Canada (Minister of National Health and Welfare)*, 2002 FCA 421, 22 C.P.R. (4th) 1, para. 17 (C.A.), leave to appeal refused, [2002] S.C.C.A. No. 531; *MacLennan v. Les Produits Gilbert Inc.*, 2008 FCA 35, 67 C.P.R. (4th) 161, para. 13. The test is a difficult one to meet.

[27] In this respect, the Prothonotary writes at paragraphs 8 and 9 of the impugned decision:

[8] I am not satisfied that the passage of *Corlac* identified by the Defendant was intended by the Federal Court of Appeal to negate indirect infringement as a cause of action, or that the analysis it presents necessarily leads to the conclusion that no cause of action for indirect infringement can exist. There were no allegations of indirect infringement in *Corlac*. Further, the Defendant's argument ignores the first sentence of paragraph 162 of *Corlac*: "It is settled law that one who induces or procures another to infringe a patent is guilty of infringement of the patent". Since inducement is itself an act of infringement, the "act of infringement" referred to in the Federal Court of Appeal's analysis could be read as including a previously established infringement by inducement. For the purpose of determining whether a second or indirect inducer is itself guilty of infringement by inducement, the first inducer could then be construed as the "direct infringer". I need not embark on a complete review of the law of inducement to determine whether the law would otherwise support the Defendant's interpretation of the Federal Court of Appeal's reason in *Corlac*. It was the Defendant's burden to satisfy the Court that a cause of action in indirect inducement did not have the slightest chance of success; its argument, based as it is solely on the interpretation of one paragraph of a 172-paragraph decision, falls far short of the required standard.

[9] The second prong of the Defendant's argument on this issue is that, even assuming that indirect infringement is a recognizable cause of action, the "act of infringement" allegedly completed by the first inducer, GDC, includes an agreement by GDC to indemnify Canada. Since the SOC fails to allege, in turn, that the Defendant's actions in any way influenced GDC in giving that indemnification agreement, the three prong test in *Corlac* cannot

be met, and the action is bound to fail. The Defendant's argument requires a very strict reading of the allegations of the SOC, to the point that the giving of an indemnity by GDC to Canada would become a necessary component of the alleged inducement. I am not satisfied that, either on a fair reading of the SOC or at law, the giving of an indemnity is a *sine qua non* condition of inducement. Further, the SOC specifically alleges, at paragraph 22, that: "Without [the Defendant's] influence by way of among other things, (...) agreeing (...) to indemnify GDC (...), GDC would not have selected [the Defendant] (...)." Assuming as I must, that this and other allegations of the SOC are proven, I am not satisfied that there are no grounds on which a court might find that the Defendant's acts influenced GDC's acts to the point that without them, GDC would not have given the alleged indemnity to Canada.

[Emphasis in original]

[28] For there be a reasonable cause of action for infringement by inducement, there must be facts upon which the Court can find that "but for" the acts of inducement the direct infringement would not take place. At this stage, the Prothonotary had to assume as proven all relevant allegations of the statement of claim related to infringement and inducement to infringe. After reviewing the totality of the plaintiff's allegations in the statement of claim, it is not plain and obvious to me that the relationship between the defendant and GDC and the Government of Canada, is a separate and distinct cause of action. Consequently, the defendant has not convinced me that the Prothonotary has made any reviewable error in refusing to strike out the last sentence of paragraph 18 and paragraphs 19 and 37 of the statement of claim.

[29] The Prothonotary was not called to decide the merit of the allegations of infringement and induced infringement found in the statement of claim, but only to decide if same should be struck out because it is plain and obvious that they do not disclose a reasonable cause of action. According to Rule 221, the statement of claim must be read as generously as possible and the Court should generally refuse to strike out "surplus statements" that are not prejudicial (*Sivak v*

*Canada*, 2012 FC 272, [2012] FCJ No 291 at paras 16 and 27 [*Sivak*]). Doubt is to be resolved in favour of permitting the pleading so that relevant evidence in support of the pleading may be brought before the trial judge (*Sivak* at para 27 citing *Apotex Inc v Glaxo Group Ltd*, 2001 FCT 1351, [2001] FCJ No 1863).

[30] While the parties have not cited any cases that have considered acts of inducement consisting of a subcontractor providing and indemnity to a prime contractor who, in turn, provides an indemnity to the ultimate customer, as mentioned by the Prothonotary, “[i]t was the Defendant’s burden to satisfy the Court that a cause of action in indirect inducement did not have the slightest chance of success”. The Prothonotary, in my respectful opinion, did not err in law or make any palpable and overriding error in concluding that she was “not satisfied that there are no grounds on which a court might find that the Defendant’s acts influenced GDC’s acts to the point that without them, GDC would not have given the alleged indemnity to Canada.”

*Allegations related to sales outside of Canada (paragraphs 46 to 48)*

[31] Secondly, the defendant submits that paragraphs 46 to 48 of the statement of claim should be struck out because speculative allegations relating to sales outside of Canada of systems that do not infringe the ‘754 Patent do not disclose a reasonable cause of action.

[32] The impugned paragraphs read as follows:

46. ELOP’s damage, and Selex’s profit, as a result of the infringement, also extend beyond the specifically pleaded infringing activity. Selex has, for a number of years, unsuccessfully attempted to sell its MIYSIS DIRCM system into the market place in Canada and around the world. It has been

unsuccessful in obtaining any foothold in the market, or making any sale at all, at least in part because it has not been able to demonstrate the operational capabilities of the system.

47. The implementation of Selex's infringing MIYSIS DIRCM system in the CP140 Aurora aircraft will provide Selex with an infringing platform to demonstrate the system's operational capabilities, and leverage Selex's ability to expand sales of the MIYSIS DIRCM system to other jurisdictions, including those where ELOP does not have patent protection. Selex's use of this infringing platform to demonstrate its system's capabilities will materially facilitate and aid Selex to penetrate and make sales in these other markets.

48. Selex's infringing activity will thus lead to permanent and irreparable loss of market share.

[33] The defendant submits that products made, used and sold in other jurisdictions cannot constitute an infringement of the '754 Patent and that the damages claimed by the plaintiff in respect of such future sales activities are speculative at best and should be struck by the Court. Moreover, allowing the impugned paragraphs remain in the statement of claim would be prejudicial to the defendant, since the plaintiff will inevitably attempt to pursue discovery of facts and documents relating to all of the defendant's sales activities in respect of MIYSIS in other jurisdictions.

[34] In this respect, the Prothonotary writes at paragraph 12 of the impugned decision:

Finally, the Defendant submits that paragraphs 46 to 48 of the SOC improperly speculate as to what it might do in the future. The Defendant cites *Faulding (Canada) Inc. v Pharmacia S.p.A.*, 1998 82 CPR 3<sup>rd</sup> 435 in support of its argument that they should be struck. I agree with the submissions of the Plaintiff to the effect that the facts alleged in those paragraphs do not purport to set up a speculative cause of action, but to support a claim for a certain species of damages flowing from the alleged acts of infringement. The pleadings therefore do not impermissibly plead a speculative cause of action. If there is an element of foretelling as to the damages that might in the future flow from the infringement, it is

not, in the circumstances, purely speculative or improper, as the future losses are reasonably arguable as foreseeable consequences of a specifically pleaded set of past and current factors.

[35] The defendant has not convinced me that the Prothonotary has made any reviewable error in refusing to strike out paragraphs 46 to 48 of the statement of claim.

[36] Under subsection 55(1) of the *Patent Act*, RSC 1985, c P-4, a person who infringes a patent is liable to the patentee and for any damages sustained by the patentee by reason of the infringement. Moreover, damages for patent infringement may include damages incurred outside of Canada, if the damages are caused by an infringement in Canada (*Allied Signal Inc v DuPont Canada Inc* (1998), 78 CPR (3d) 129 (FCTD) at paras 18-19, 25-29, 31 and 34, aff'd 86 CPR (3d) 324 (FCA) [*Allied Signal*]). According to the case law, a future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation (*Apotex Inc v Merck Canada Inc*, 2012 FC 1235, [2012] FCJ No 1323 at para 37). Therefore, the Prothonotary, in my respectful opinion, did not err in law or make any palpable and overriding error in concluding that “the facts alleged in [paragraphs 46 to 48] do not purport to set up a speculative cause of action, but [are alleged] to support a claim for a certain species of damages flowing from the alleged acts of infringement.”

### *Conclusion*

[37] The role of the Motions Judge in deciding the merit of an appeal of a discretionary order of a prothonotary is limited to verify whether a reviewable error has been made by the prothonotary (*Hospira* at paras 64, 69, 78 and 79). In the case at bar, it was not plain and obvious



for the Prothonotary that the impugned paragraphs of the statement of claim should be struck out under Rule 221 because they disclosed no reasonable cause of action or were otherwise deficient. In the absence of an error on a question of law or an extricable legal principle, intervention is warranted only in cases of palpable and overriding error by the Prothonotary. This is not the case here and I have no reason to intervene today in the exercise of the Prothonotary's discretion to refuse to strike a proceeding.

[38] The present motion in appeal is dismissed with costs.

**ORDER**

**THIS COURT ORDERS** that motion in appeal from the Prothonotary's order dated September 2, 2016 is dismissed with costs.

"Luc Martineau"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-775-16

**STYLE OF CAUSE:** ELBIT SYSTEMS ELECTRO-OPTICS ELOP LTD. v  
SELEX ES LTD.

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** OCTOBER 5, 2016

**REASONS FOR ORDER AND  
ORDER:** MARTINEAU J.

**DATED:** OCTOBER 11, 2016

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