Federal Court  Cour fédérale

Date: 20100106

Docket: T-219-07

Citation: 2010 FC 12

BETWEEN:

VALENCE TECHNOLOGY INC.

Plaintiff/
Defendant by Counterclaim

and

PHOSTECH LITHIUM INC.

Defendant/
Plaintiff by Counterclaim

REASONS FOR ORDER

LEMIEUX J.

Introduction

[1] The following reasons support the order I issued on December 11, 2009, whereby I dismissed with costs the appeal of the defendant, Phostech Lithium Inc., of a decision made by Prothonotary Tabib (the Prothonotary) on September 29, 2009, which had required the Phostech representative at the examination for discovery, Michel Gauthier Ph.D., to answer the following questions that had been refused:

No.	**Question**
...	
8.	Produce specification sheets for all sources of lithium carbonate that Phostech has used in its P-1 process.
9.	Produce specification sheets for all sources of ferric phosphate dihydrate that Phostech has used in its P-1 process.
...	
12.	Provide specification sheets for all polymers Phostech is using in its P-1 process and provide the source of the polymer that Phostech is using in its P-1 process.
…	
20.	What is the piece of equipment used for drying?
…	
22.	Verify what temperature Phostech uses to evaporate the isopropanol.
23.	Verify how long the isopropanol is heated.
24.	Verify if the rate of rotation and the angle of rotation of the rotary kiln at Phostech is different from what is given at P-20, example 7.
25.	Does Phostech's kiln have the same dimensions and length as the one described on line 6 of P-20?
26.	Provide what the actual fill volume of the rotary kiln is.

Background

[2] On January 31, 2007, plaintiff Valence Technology Inc. (Valence), an American company, brought an action against Phostech, which infringed on three of its patents. Phostech is a Canadian company that operates a plant in Saint-Bruno-de-Montarville, in which it produces LiFePO4 powder for its next generation batteries (hereinafter the lithium iron phosphate cathodes or

Phostech's product). These two companies are direct competitors on the global marketplace. Valence produces its powders at a plant in China.

[3] The process used by Phostech to manufacture its product can be summed up in two steps, the first of which is preparing a mixture of starting materials, including the following: (1) lithium carbonate; (2) ferric phosphate dihydrate; and (3) copolymer polyethylene (polymer solution). The second step is to put the mixture in an oven where the reaction takes place under certain specific conditions.

[4] Valence's action is based on three patents concerning the manufacture of LiFePO4 cathodes, namely the following patents: 2,395,115, entitled "Preparation of Lithium-Containing Materials"; 2,483,918, entitled "Synthesis of Metal Compounds Useful as Cathode Active Materials"; and 2,466,366, also entitled "Synthesis of Metal Compounds Useful as Cathode Active Materials" (hereinafter referred to respectively as "'115", "'918", and "'366", or the patents in issue).

[5] On March 2, 2007, the dispute was placed under special management. The Prothonotary acquired a central role in this management since Hugessen J. retired. On March 8, 2008, the Court issued a confidentiality order.

[6] During the argument, counsel for Valence focused on the following claims in the patents in issue:

a. Patent ‘115:

b. A method of making a lithium mixed metal compound by reaction of starting materials which comprises:

mixing starting materials in particle form, said starting materials comprising at least one or more metal containing compound, a lithium compound, and carbon, where said carbon is present in an amount sufficient to reduce the oxidation state of at least one metal ion of said starting materials without full reduction to an elemental state; and,

heating said starting materials at a temperature sufficient to form a reaction product comprising lithium and said reduced metal ion; wherein said lithium compound is selected from the group consisting of lithium carbonate, lithium phosphate, lithium oxide, lithium vanadate, and mixtures thereof; and,

…

68. A reactive composition comprising:

a mixture of starting materials in particle form, said starting materials comprising at least one metal containing compound, a lithium compound and carbon, said carbon being present in at least an amount sufficient to reduce the oxidation state of at least one metal ion of said starting materials without full reduction to an elemental state upon heating of the mixture.

2. Patent ‘918:

1. A solid state method for synthesizing an inorganic metal compound, comprising the steps of:

combining starting materials comprising at least one particulate metal compound and at least one organic material to form a mixture;

heating the mixture at a temperature to form a reaction product, wherein upon heating, at least one organic material decomposes to form a decomposition product containing carbon in a form capable of acting as a reductant; and,

wherein at least one metal of the starting materials is reduced in oxidation state during heating to form the inorganic metal compound.

3. Patent ‘366:

1. A method for synthesis of a Li metal compound of the formula […] by bringing into equilibrium a mixture containing at least one precursor of […]:

   said method comprising effecting a reduction step to reduce the valency of the transition metal or metals whereby the oxidation state of at least one metal ion of the precursor or precursors is reduced to form the compound of said formula.

2. The method according to claim 1, the method being carried out in a gaseous reducing atmosphere. [Emphasis added.]

[7] According to counsel for Phostech, a very important part of the context of Phostech's appeal is the fact that Phostech formally admitted, in a document entitled "Particularized List of Admissions by Phostech Lithium dated April 3, 2004," a considerable number of essential elements of the claims in the patents in issue.

[8] Michel Gauthier's admissions are related to the process used by Phostech to manufacture its product. They are the following:

a. Phostech's process is described at example 7 of the '446 patent (see exhibit P-20[1]) but without the use of reductive gases which are a mix of CO, CO_2 diluted in N_2. The pyrolysis of the organic product generates what is necessary to carry out the reduction.

b. The polymer referred to in example 7 of the '446 patent application is described at example 4 of the same application.

c. Exhibit P-18 (Florida presentation 2003) essentially describes Phostech's process save and except for production details.

d. The thermal treatment of the mixed precursors is conducted in a closed rotary oven and one cannot extract samples during the different stages within the oven.

5. The polymer used in Phostech's process is used as a source of conductive carbon.

6. For more precision, Phostech states that isopropanol is used in replacement of water in the process described in example 7.

[9] Valence accepted most of the admissions made by the defendant. The steps of Phostech's production process are those described in example 7 of Canadian patent application 2,422,446 (application '446). This patent application, filed on September 21, 2001, by Hydro Québec, is still under review. It is entitled "Method for synthesis of carbon-coated redox materials with controlled size." Example 7 is entitled: "Continuous Production in Electrical Rotary Kiln," and its 4th example: "Examples 4 and 4′: "Demonstration of Coating Power of the Polyethylene-Type Carbon Additive and of the Control of the Size of Particles by Coating."

[10] The gist of example 7 in application '446, which Phostech uses under licence, is the following:

> [TRANSLATION]
>
> 1. We mix a certain quantity of ferric phosphate dihydrate (Buddenheim grade E53-82) in water with a certain percentage of Limtech lithium carbonate using of a ball mill. Buddenheim and Limtech are the suppliers of the starter materials of Phostech's product.
>
> 2. Copolymer (ethylene glycol), as described in example 4 of the same application, is is added as a carbon additive, which improves the conductivity of the final product by pyrolysis, during the thermal treatment of the mixture of precursors. The mass of copolymer is equivalent to a certain percentage of the quantity of ferric phosphate and lithium carbonate. The example indicates the quantities of reagents used.
>
> 3. The mixture is dried using a particular brand of atomizer then placed in a particular brand of rotary oven.

4. The mixture is fed into the rotary oven depending on the prescribed quantity, and the rate of the precursors is adjusted to reach a certain internal volume, ensuring the uniformity of the mixing and the exchange with the gaseous phase during the thermal processing.

5. A gaseous mixture in equilibrium with the iron is introduced into the oven against the mixture of precursors. The reduction of the iron is carried by the CO/CO2 diluted in nitrogen in specific proportions.

6. The rotary oven turns at a specific rpm and at an indicated angle during a prescribed period of time, and the temperature is precisely maintained at a certain number of degrees between a cold and hot zone.

7. The recuperated product contains a certain level of carbon produced by the pyrolysis of the polyethylene-based polymer. The elementary particles have certain dimensions and are carbon-coated, which favours high electronic conductivity, an essential criterion for manufacturing electrodes.

[11] Example 4 of the application for ‘446 reuses the same elements described in example 7. It specifies that the product is synthetized by the reaction of precursors with specific features in the presence of the carbon additive.

[12] According to counsel for Phostech, the result of the admissions made by Phostech is that there are very few facts not admitted by Phostech concerning the infringement issue, thus it delimits the relevance of questions on this matter. The unadmitted elements are the following:

i. The starting materials (matériel précurseur ou réactifs de départ) for the preparation of Phostech's product are not all mixed in particle form (forme particulaire);

ii. There is no elemental carbon in particle form (carbone particulaire) used as a starting material in the production of Phostech's product;

iii. There is no elemental carbon in particle form used as a starting material in the production of Phostech's product that acts as the reducer (réducteur) in order "to reduce the oxidation state of at least one metal ion of said starting material without full reduction to an elemental state"; and,

iv. There is no carbon in a form acting as a reductant in the production of Phostech's product.

[13] Phostech is arguing before this Court that Valence had the burden of both relating every issue on appeal to one of the four allegations of unadmitted facts and showing how an answer to each of these undertakings could prove or contradict an unadmitted allegation of fact.

[14] Phostech affirms that the Prothonotary's order to have it answer questions 8 and 9 was clearly wrong because it had already admitted using these two starting materials in its process.

[15] As for question 12, according to Phostech, the Prothonotary committed the same mistake; Phostech had already admitted the description of the process and the identity of the polymer used. In addition, Phostech remarks that there is no evidence on record that using various types of copolymers would have any kind of impact on any of the four unadmitted factual elements.

[16] For questions 20, 22 and 23, the defendant submits that they concern the drying apparatus and the use of isopropanol. The defendant affirms that none of the elements of the claims of the patents in suit involve preparing any of the starting materials. Furthermore, during his examination, Phostech's representative, Michel Gauthier, specifically affirmed that preparing the starting materials has no impact on the chemical reactions that take place. Finally, it adds that there is no evidence on record that supports the relevance of those questions.

[17] Finally, concerning questions 24, 25 and 26, Phostech claims that they concern the features of the oven, namely the rate and angle of rotation, the length of the oven, and fill percentage.

[18] Phostech acknowledges that the oven's features are included in example 7 in Hydro-Quebec's application for patent '446. It claims that, on their very face, there is no connection between those questions and the four unadmitted factual elements at issue and that in fact none of the elements of the claims of the patents in suit (claims) involve the features of the oven; moreover, during the examination for discovery, Michel Gauthier affirmed that a variation of the features of the oven had no impact on the chemical reactions that take place. Finally, there is no evidence on record that supports the relevance of these questions.

The Prothonotary's decision dated September 29, 2009

[19] I have reproduced the essence of the decision on appeal:

> With respect to questions 8 to 10, 11 (second part) and 12, I had previously ruled that Phostech did not have to supply further documents as to the starting materials for its reaction because it had made sufficient binding admissions as to their identity and composition. These admissions relied, for the characterization of the materials, on reference to the suppliers of the materials. As it became apparent in the course of discovery that Phostech has changed its suppliers, the questions are now relevant.
>
> With respect to questions 20, 22 and 23, again, the admissions of Phostech indicated the use of certain steps by reference to examples. When it becomes apparent on discovery that Phostech uses a different kind of apparatus and method for drying (question 20) and a different solvent that requires evaporation through heating, it is not enough for Phostech to refuse to impart any information whatsoever as to these changes by baldly affirming that it is irrelevant to the result. That is a self-serving opinion which the Plaintiff is not obliged to accept without having an opportunity to get some factual background.
>
> Similarly, for questions 24 to 26, Valence had previously sought production of documents setting out detailed specifications for the kiln, despite having been given its principal parameters by way of general reference to an example. Even though Phostech admitted that there might be minor variations, which the witness for Phostech had at the time opined did not affect the overall process. Valence's request for exact details and specification had been refused for lack of evidence as to how these complete details would advance its case or hurt the Defendant's. This did not however mean that any question on discovery that would explore the magnitude of the differences in how the Defendant's kiln is built or used should be barred. Without leaping to request the full detailed specifications, the Plaintiff was nevertheless entitled to enquire at least generally as to the magnitude of these differences, but was improperly blocked by the Defendant at every turn. In the circumstances, those questions, as framed in questions 24 to 26, were proper, relevant, and are to be answered. [Emphasis added.]

The decision dated February 2009

[20] As we will see later on in these reasons, when the Prothonotary writes in her grounds of appeal that she had already decided that Phostech was not obliged to produce additional documentation—for example, concerning the starting materials it uses in its manufacturing process—she is referring to her decision dated February 6, 2009, in which she rejected a motion filed by Valence on November 3, 2008, under section 227 of the Rules, to obtain an order obliging Phostech to serve more complete documents. More specifically, through that motion dated November 3, 2008, Valence was seeking the following:

> An order requiring the Defendant to serve a further and better affidavit of documents that is accurate and complete and includes all documents relating to the manufacturing processes that are used, and have been used, by the Defendant for making its lithium phosphate cathode materials, including, but not limited to:
>
> > (a) Documents relating to the raw materials and their physical properties, including raw material specifications, certificates of analysis and internal quality control documents;
> >
> > (b) Documents relating to the quantity and type of material used and produced during each process step and of the specific process conditions, including batch cards and process flow diagrams;
> >
> > (c) Documents relating to the process steps, and any allowable variations to the process steps, including standard operating procedures; and
> >
> > (d) Documents relating to the end products and their physical and chemical properties, including final products specifications and certificates of analysis. [Emphasis added.]

[21] At the very beginning of her order dated February 6, 2009, the Prothonotary specified the extent of the admissions made by Phostech as follows:

> … The novel aspect of this motion is due to the fact that the Defendant has effectively, at least as at the time of the hearing, made extremely specific and detailed account of its method and products, all now amounting to admissions and supported by evidence, and related same with great precision to the principal and independent claims of the patents at issue. Given these details, evidence and admissions, and absent considerably more details and particulars from the Plaintiff as to what, in the processes and elements described by the Defendant, the Plaintiff denies or contests, it is virtually impossible for the Court to determine how the documents requested could possibly advance the Plaintiff's case or adversely affect the Defendant's. [Emphasis added.]

[22] She continues her analysis as follows:

> The uncontradicted evidence provided by the Defendant, and which amounts to admissions binding upon it, provides more than sufficient details of the composition of the materials used in the Defendant's process, the manner in which they are prepared and introduced into a closed oven, the physical and operating parameters of this closed oven, and the composition and characteristics of the resulting product. Sworn, expert testimony was adduced to explain the reactions which the Defendant believes occur in the process, and the evidence satisfies me that documents do not exist that would provide further evidence of what, in fact, occurs in the closed oven which could reasonably be likely to advance the Plaintiff's case or contradict the Defendant's. From those facts, as established by the evidence before me, the Defendant on the merits of the action argues that it does not infringe the patents at issue because of the manner in which it believes the patents should be interpreted. These facts amount to admissions against the interest of the Defendant, since there is clearly a dispute between the Plaintiff and Defendant as to the proper interpretation of the patents, and that if the Defendant is wrong in its interpretation, it recognizes that its admissions would result in a finding of infringement. [Emphasis added.]

[23] As an illustration, the Prothonotary chooses an example. Among the claims in Valence's patents in issue, one "… claims a process using "a source of carbon"; the Defendant (Phostech) argues that "a source of carbon" must be understood as "a source of carbon in particle form". The Defendant does admit that its process uses a source of carbon, and provides the exact description

and composition of the carbon-containing ingredient. The Defendant has led uncontradicted evidence that the carbon in that composition is not in particle form, so that in its reading of the patent, it does not infringe. The Defendant concedes that if it is wrong in its interpretation of this claim (and if the claim is held to be valid) then its process would indeed be found infringing. [Emphasis added.]

[24] She notes that Valence is seeking "Documents relating to the raw materials and their physical properties, including raw material specifications, certificates of analysis and internal quality control documents." She adds and concludes with the following point:

> … The Defendant's evidence is that the sole source of carbon used by the Defendant corresponds to the description and formula given by the Defendant. The evidence led by the Defendant is further to the effect that material of this description and formula does not correspond to carbon in particle form or contain carbon in particle form. … [Emphasis added.]

[25] In her order issued on February 6, 2009, Prothonotary Tabib indicates that for each category of documents sought, she subjected Valence's application to an analysis similar to the one established for the source of the carbon.

Analysis

a) Standard of review

[26] Two standards of review are possible for an appeal of a Prothonotary's decision at this Court:

1) A *de novo* consideration of the decision on appeal if the underlying issue was vital to the final issue of the case.

2) In all other circumstances of the appeal, if the Prothonotary's order is clearly wrong in that by exercising his or her discretion, the Prothonotary relied on a wrong principle or a misapprehension of the facts. See Décary J.'s decision in *Merck & Co., Inc. v. Apotex Inc.*, 2003 FCA 488; [2004] 2 F.C.R. 459 (F.C.A.) (Merck), at paragraph 19, which I cite.

> **19** To avoid the confusion which we have seen from time to time arising from the wording used by MacGuigan J.A., I think it is appropriate to slightly reformulate the test for the standard of review. I will use the occasion to reverse the sequence of the propositions as originally set out, for the practical reason that a judge should logically determine first whether the questions are vital to the final issue: it is only when they are not that the judge effectively needs to engage in the process of determining whether the orders are clearly wrong. The test would now read: Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless: a) the questions raised in the motion are vital to the final issue of the case, or b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.
> [Emphasis added.]

[27] In this case, I believe Phostech had to prove that the Prothonotary's order was clearly wrong, that is to say, that she exercised her discretion based on a wrong principle or a misapprehension of the facts. The issue that Prothonotary Tabib had to decide did not have a decisive influence on the outcome of the action against the defendant (see *Eli Lilly Canada Inc. v. Novopharm Ltd.*, 2008 FCA 287 (Novopharm), at paragraph 52).

b) The relevance criterion

[28] In *Novopharm*, above, the Federal Court of Appeal reiterated the fundamental principle on which the relevance criterion must be assessed: the notion of carrying out a "train of inquiry" test. In *Novopharm*, I found that Prothonotary Tabib had correctly identified the relevance criterion. The Federal Court of Appeal, per Nadon J., sustained us. I cite paragraphs 61 and 65 of *Novopharm*:

> **61** At paragraphs 18 and 19 of her Order, Prothonotary Tabib sets out as follows her understanding of the "train of inquiry test" enunciated in Peruvian Guano, supra, which this Court has constantly approved
>
> > 18. … Unless the party producing the affidavit intends to rely on a document at trial, it is not obliged to disclose it unless "it is reasonable to suppose" that the document would undermine its own case, advance its opponent's, or would "fairly lead him to a train of inquiry, which may have either of these two consequences".
> >
> > 19. In other words, it is not sufficient for a document to merely relate to the facts at issue. If, for example, a document can only reasonably be construed as supporting the disclosing party's case, and cannot be shown to lead to information that would reasonably be supposed to be helpful to its opponent, then it need not be disclosed in an affidavit of documents. A document which is neutral and can only reasonably be supposed to lead to other similarly neutral documents is not relevant for the purpose of an affidavit of documents. And on a motion for a further and better affidavit of documents, the reasonable possibility that a document can have or lead to one of the desired effects must be established by the moving party. To say that a document might conceivably lead to other documents, which, although not in themselves relevant, might then conceivably lead to useable information, is not enough. It is precisely the type of fishing expedition which the jurisprudence of this Court consistently refused to sanction. That is not to say that the moving party must establish that the document sought will necessarily lead to useable information: a reasonable likelihood will suffice; an outside chance will not.
>
> …
>
> **65** I therefore conclude that there can be no doubt that the Prothonotary understood the "train of inquiry" test. She found that

> Novopharm had to establish that it was reasonable to suppose that the documents at issue contained information which could either directly or indirectly enable it to advance its own case or to damage that of the respondents. Not only did she understand the test, she consistently applied it in her assessment of the documents at issue. Therefore, it cannot be said that the Prothonotary's Order was based upon a wrong principle, and Lemieux J. did not err by refusing to interfere with her Order on that ground. [Emphasis added]

[29] Before Prothonotary Tabib and before this Court, the issue also involves section 240 of the Rules. This section concerns the scope of the examination for discovery and reads as follows:

Scope of examination	Étendue de l'interrogatoire
240. A person being examined for discovery shall answer, to the best of the person's knowledge, information and belief, any question that	240. La personne soumise à un interrogatoire préalable répond, au mieux de sa connaissance et de sa croyance, à toute question qui :
(a) is relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party; or	a) soit se rapporte à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire préalable ou par la partie qui interroge;
(b) concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action. [Emphasis mine.]	b) soit concerne le nom ou l'adresse d'une personne, autre qu'un témoin expert, dont il est raisonnable de croire qu'elle a une connaissance d'une question en litige dans l'action. [Je souligne.]

c) Phostech's claims

[30] In his written submissions, counsel for Phostech, relying on Rule 240, argues that the unadmitted facts in a pleading define the relevance and scope of an examination. More generally, he cites this Court's decision in *Reading & Bates Construction Co. v. Baker Energy Resources Corp.*, (1988), 24 C.P.R. (3d) 66 (F.C.) in which McNair J. wrote the following:

> 6. The ambit of questions on discovery must be restricted to unadmitted allegations of fact in the pleadings, and fishing expeditions by way of a vague, far-reaching or an irrelevant line of questioning are to be discouraged: *Carnation Foods Co. Ltd. v. Amfac Foods Inc.* (1982), 63 C.P.R. (2d) 203 (F.C.A.); and *Beloit Ltee/Ltd. v. Valmet Oy* (1981), 60 C.P.R. (2d) 145 (F.C.T.D.).

[31] He refers the Court to ample case law that allowing an irrelevant question, that is to say, that is not encompassed by the factual framework defined by the unadmitted questions of facts, is tantamount to allowing a patent holder to commence an action without any particular factual grounds in the hope of discovering the items that prove the existence of infringement during the examination, which clearly prohibits the state of law.

[32] Counsel for Phostech argues that a person who seeks to justify the relevance of a question must first connect it to an unadmitted allegation of fact, then prove that the answer to this question tends to prove or disprove this fact.

[33] In this case, he claims that the Prothonotary made a palpable error concerning the relevance of the applications that are the subject of this appeal. According to him, there is no unadmitted allegation of fact justifying the relevance of these applications and, in the absence of any evidence, Valence cannot prove that the answers to inquiries tend to validate or invalidate this fact.

[34] To prove that the Prothonotary had made mistakes by ordering that answers be provided and that documents related to them justifying the intervention of this Court on appeal be produced, counsel for Phostech, during his oral presentation, focused on the following items as proof of a lack of relevance:

1. Questions 8, 9, 12, 20, 22 and 23 are not relevant because none of the patents in issue cover the preparation of the mixture of starting materials. These patents only cover the treatment of the mixture once in the oven, that is to say, the chemical reaction and the results it produces in the oven following the heating within it.

2. Questions 24, 25 are 26 are not relevant because the patents in issue do not contain any claims on the oven itself.

3. Valence did not file any affidavit on the effects of the changes of suppliers or equipment Phostech made to its manufacturing process focused on the application for patent ‘446. He cites Merck, above, to support his claim that Patrick Taylor’s affidavit dated September 17, 2009, does not have any probative value. Mr. Taylor is a judicial clerk who works for Valence’s Canadian attorneys. According to counsel for Phostech, this absence of evidence of the impact of the change acknowledged by Mr. Gauthier means that the Prothonotary did not have any evidence before her to justify her order. This absence of evidence is fatal in this case because Valence had the burden of proving the relevance of the questions refused or the required documents and to relate them to an allegation.

d) Conclusions

[35] I cannot agree with Phostech’s claims regarding the lack of evidence of the relevance of these answers and the production of additional documents ordered by the Prothonotary.

[36] With respect, I believe that Phostech's argument missed the mark because it ignores the context that incited Valence to request the sought for order from the Prothonotary, which Phostech is appealing before this Court. Valence's motion dated September 18, 2009, must be weighed according to all of Valence's efforts to have Phostech produce the pending documents and answers concerning the process used by Phostech to manufacture its product, a process that Phostech affirmed was based on its Hydro Québec licence, which was issued under its application for patent '446. Phostech's defence in this case is that it follows the claims of the process described in '446 and therefore does not breach any of Valence's patents.

[37] On November 3, 2008, Valence had filed a motion to obtain an additional affidavit of documents from Phostech. This motion by Valence was supported by two affidavits, one of which was made by Yaziq Saidi, one of the inventors of patents '115, '366 et '918.

[38] Michel Gauthier's affidavit, on which he was cross-examined on January 5, 2009, was Phostech's response to this motion. In her decision issued on February 6, 2009, the Prothonotary dismissed Valence's motion for an additional affidavit on the grounds that Mr. Gauthier's affidavit and cross-examination supported the admissions made by Phostech concerning Phostech's use of the process described in examples 4 and 7 of patent '446 under review.

[39] During his cross-examination on January 5, 2009, Mr. Gauthier acknowledged the following elements of the process used by Phostech to manufacture its product:

1. He reiterates that the process Phostech uses to manufacture its product is the one described

in example 7 of Hydro Québec's patent application.

2. He acknowledges the basic materials used in Phostech's manufacturing process, the important conditions required to achieve these reactions, the products derived from the manufacturing process and their properties, as well as their by-products. He believes that all these details are inter-related in that the materials used at the beginning determine the final product (cross-examination transcript (the transcript), pages 33, 34, 35, 36, 37, 40, 41, 94, 97 and 103).

3. He also acknowledges that the conditions of the process (for example, the temperature in the oven) could have an impact on the shape and size of the final product (transcript, pages 37, 42 and 43).

4) He confirms that no changes were made to either the starting materials or the operating conditions from what had already been specified in example 4 and example 7, but adjustments were made to the parameters based on the know-how that Phostech had acquired (transcription, pages 59, 61, 63 [emphasis added], 67, 70, 91, 92, 93 and 94).

[40] Considering the evidence on record that was before her, I am satisfied that the findings drawn from this evidence were open to her and that no intervention by this Court would be justified. In short, Mr. Gauthier's testimony establishes that Phostech made some changes to the process described in '446, on which his admissions were based, and that the steps followed to manufacture

his product had an impact on the final product. I can only find that the Prothonotary's order was well-founded.

[41] The appeal is dismissed with costs.

"François Lemieux"

_____

Judge

Ottawa, Ontario
January 6, 2010

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	VALENCE TECHNOLOGY INC. v. PHOSTECH LITHIUM INC.
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