

Federal Court of Appeal



Cour d'appel fédérale

Date: November 23, 2018

**Dockets: A-225-18
A-224-18**

Citation: 2018 FCA 215

**CORAM: PELLETIER J.A.
DE MONTIGNY J.A.
GLEASON J.A.**

Docket: A-225-18

BETWEEN:

PROGRESS ENERGY CANADA LTD.

Appellant

and

**SPECIALIZED DESANDERS INC. AND
ENERCORP SAND SOLUTIONS INC.**

Respondents

Docket: A-224-18

AND BETWEEN:

ENERCORP SAND SOLUTIONS INC.

Appellant

and

**SPECIALIZED DESANDERS INC. AND
PROGRESS ENERGY CANADA LTD.**

Respondents

Heard at Vancouver, British Columbia, on November 5, 2018.

Judgment delivered at Ottawa, Ontario, on November 23, 2018.

REASONS FOR JUDGMENT BY:

PELLETIER J.A.

CONCURRED IN BY:

DE MONTIGNY J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

I. Introduction

[1] This is an appeal from the decision of Southcott J. of the Federal Court (FC Reasons, reported as 2018 FC 689) dismissing an appeal from the decision of Prothonotary Aylen (unreported) dismissing the appellants' motions for leave to amend their statements of defence and counterclaims.

[2] The appellants are the defendants Enercorp Sand Solutions Inc. (Enercorp) and Progress Energy Canada Ltd (Progress). The plaintiff Specialized Desanders Inc. (SDI) alleges that Enercorp infringed its three Canadian patents, specifically patent no. 2,407,544 (the '544 patent), patent no. 2,433,741 and patent no. 2,535,215 (collectively "the SDI patents"), by making and selling a device which, like the patented device, removes particulates (sand) from a fluid stream coming out of a gas well. Progress is alleged to have infringed the SDI patents by using Enercorp's infringing device. Enercorp and Progress both filed a statement of defence and counterclaim denying infringement. Progress alleged invalidity of the '544 patent while Enercorp alleged invalidity of the SDI patents, both by way of defence and by counterclaim seeking a declaration of invalidity.

[3] Since the hearing of this appeal, Progress and SDI have settled their differences but there remains a live controversy between SDI and Enercorp. For the sake of completeness of the

record, a copy of these reasons and of the judgment to be rendered will be placed in both files in this Court.

II. The Federal Court Decisions

[4] The litigation has been hard fought but is well advanced. The trial of the action is scheduled to begin in the early part of the new year. At this late date, Enercorp has brought a motion seeking to amend its statement of defence and counterclaim alleging that the '544 patent is invalid as a result of having been disclosed to the public more than one year before its filing date. In raising this ground, Enercorp relies on paragraph 28.2(1)(a) of the *Patent Act*, R.S.C. 1985, c. P-4. The proposed amendment arises as a result of information obtained during the examination for discovery of Mr. Christopher Hemstock, SDI's representative.

[5] Enercorp's proposed amendment provided as follows:

The invention was disclosed and made available to the public by an inventor more than one year before the filing date rendering the 554 Patent invalid pursuant to section 28.2(1)(a) of the Patent Act. More particularly, the invention was disclosed at least in a Manufacturers Data Report [MDR] dated on or about October 5th, 2001, and earlier, the particulars of which are known to the Plaintiff.

[6] The Prothonotary found that Enercorp's proposed amendment did not plead sufficient supporting material facts because it did not disclose "what information was made public, what elements of the claims at issue in each of the three patents were disclosed in the MDR or elsewhere, how it was disclosed, or how the alleged disclosure would have enabled a person skilled in the art to practice the invention claimed in the patents": FC Reasons at para. 27.

[7] As a result of these deficiencies, the Prothonotary found that the proposed amendment was nothing more than a bald allegation, designed to permit Enercorp to engage in a fishing expedition on examination for discovery: Prothonotary's Reasons at para. 12. Given the absence of material facts, the Prothonotary found that the proposed amendment was subject to be struck out under Rule 221(1) of the *Federal Courts Rules*, SOR/96-108 (the Rules) and therefore had no reasonable prospect of success: FC Reasons at para. 27. The Prothonotary went on to find that, because SDI could not know how to plead to the proposed amendment and the Court could not regulate the proceedings, the proposed amendment was also frivolous and vexatious and liable to be struck out on that basis as well.

[8] In response to Enercorp's argument that she should not dismiss its motion to amend without granting it leave to amend its proposed amendments, the Prothonotary held that:

...I will not exercise my discretion to permit [Enercorp] to do so [amend its motion]. [Enercorp] was unable to articulate at the hearing any further material facts that it could plead if it was granted leave to further amend its proposed amended pleading that would address the deficiencies noted above.

FC Reasons at para. 48

[9] Enercorp appealed the Prothonotary's decision to the Federal Court which dismissed its appeal. The Federal Court found that the Prothonotary correctly stated the law as to the elements a defendant needs to establish that an invention was anticipated by prior disclosure. The Federal Court found that the Prothonotary's reliance upon the jurisprudence, specifically *Packers Plus Energy Services Inc. v. Essential Energy*, 2017 FC 1111, [2017] F.C.J. No. 1200 and *Apotex Inc. v. Sanofi-Synthelabo Canada Inc.*, 2008 SCC 61, [2008] 3 S.C.R. 265 was appropriate.

[10] The Federal Court further found that the Prothonotary made no palpable and overriding error in applying the law to the facts of the case. In particular, the Federal Court rejected Enercorp's argument that its reference to the MDR incorporated by reference the elements to be included in the latter by virtue of the *Pressure Equipment Safety Regulation*, Alta. Reg 49/2006 which was sufficient to establish anticipation by disclosure. It found that the inclusion of these elements would not satisfy the concerns expressed by the Prothonotary.

[11] As far as Enercorp's argument that the Prothonotary erred in failing to grant it leave to amend its proposed amendment, the Federal Court found that, had the Prothonotary failed to consider whether Enercorp's proposed amendment was capable of being amended to cure its deficiencies, she would have erred in law. But the Federal Court found that the Prothonotary did not err because she considered whether a legally sufficient amendment was possible. Furthermore, the Prothonotary's conclusion that no legally sufficient amendment could be pleaded, based on Enercorp's inability to articulate further material facts at the hearing, did not constitute palpable and overriding error which would justify the Court's intervention.

[12] At the hearing before the Federal Court, Enercorp provided the Court with its further proposal to amend its statement of defence and counterclaim which, it alleged, satisfied the requirements set out by the Prothonotary. The Federal Court noted that this proposal had not been put before the Prothonotary but did not address its mind to the question of whether the further proposed amendment was legally sufficient.

[13] On appeal to this Court, Enercorp, while not conceding that the Prothonotary's decision with respect to its original proposed amendment was correct, focused solely on the question of whether "leave to amend" should have been granted.

III. Analysis

[14] The standard of review applicable to the Federal Court's review of the Prothonotary's decision as well as to our review of the Federal Court's decision is the standard set out in the Supreme Court's decision in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, namely correctness for questions of law and palpable and overriding error for questions of fact or questions of mixed fact and law except for extricable errors of law which are subject to review on the correctness standard: see *Hospira Health Care Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at para. 69, [2017] 1 F.C.R. 331.

[15] As this Court stated in *Sikes v. Encana Corporation*, 2017 FCA 37 at para. 12, [2017] F.C.J. No. 196:

[...] In a case such as the present one [an appeal from the Federal Court dismissing an appeal from a decision of a prothonotary] where each level of decision-maker is in agreement as to the outcome, this Court must look to the Prothonotary's decision to determine whether the Federal Court judge erred in law or made a palpable and overriding error in refusing to intervene (*Hospira*, paras. 83-84).

[16] In argument before us, counsel for Enercorp attempted to persuade us that the pre-*Hospira* standards, error of law, misapprehension of the facts, and failure to give sufficient consideration to all relevant factors, had survived *Hospira* and continued to apply to discretionary decisions of a judge. This argument is based upon dicta found at paragraph 68 of

Hospira. In my view, this argument is based upon a misunderstanding of the point being made in that paragraph. The Court was simply observing that the various articulations of the appropriate standard did not necessarily refer to different standards. In the end, this Court, at paragraph 72 of *Hospira*, unambiguously adopted the *Housen* standard:

I am in complete agreement with the remarks made by Mr. Justice Stratas in *Imperial Manufacturing* as to why we should apply the *Housen* standard to discretionary orders of motions judges. Further, his remarks clearly support the view that the *Housen* standard should also be applied to discretionary orders made by prothonotaries. Whether a motion is determined by a prothonotary or a motions judge is, in my view, irrelevant. The same standard should apply to the review of all discretionary orders.

[17] As the only issue in the appeal is the Prothonotary’s failure to allow Enercorp “leave to amend”, the standard of review for the test to be applied is correctness as that is a question of law while the standard of review for the application of the test to the facts is palpable and overriding error as that is a question of mixed fact and law.

[18] However, before addressing the substance of the appeal, it is necessary to deal with an issue of terminology. Enercorp moved to amend its pleadings pursuant to Rule 75 of the Rules which provides as follows:

75 (1) Subject to subsection (2) and rule 76, the Court may, on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties.

75 (1) Sous réserve du paragraphe (2) et de la règle 76, la Cour peut à tout moment, sur requête, autoriser une partie à modifier un document, aux conditions qui permettent de protéger les droits de toutes les parties.

[19] The jurisprudence establishes the criteria governing whether leave to amend a pleading will be granted. In *Canderel Ltd. v. Canada*, [1994] 1 F.C. 3 (C.A.) at page 10, [1993] F.C.J. No. 777, this Court held that, while it was impossible to set out all the factors that a judge must take into consideration in dealing with an application to amend pleadings, the general rule is that “an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice.”

[20] In *Continental Bank Leasing Corp. v. R.*, [1993] T.C.J. No. 18, (1993) 93 D.T.C. 298 at page 302 (*Continental Banking*), Bowman J., as he then was, set out the broader context in which motions to amend pleadings should be assessed:

... I prefer to put the matter on a broader basis: whether it is more consonant with the interests of justice that the withdrawal or amendment be permitted or that it be denied. The tests mentioned in cases in other courts are of course helpful but other factors should also be emphasized, including the timeliness of the motion to amend or withdraw, the extent to which the proposed amendments would delay the expeditious trial of the matter, the extent to which a position taken originally by one party has led another party to follow a course of action in the litigation which it would be difficult or impossible to alter and whether the amendments sought will facilitate the court’s consideration of the true substance of the dispute on its merits. No single factor predominates nor is its presence or absence necessarily determinative. All must be assigned their proper weight in the context of the particular case. Ultimately, it boils down to a consideration of simple fairness, common sense and the interest that the courts have that justice be done.

[21] This statement of principle was adopted by this Court in *Merck & Co., Inc. v. Apotex Inc.*, 2003 FCA 488 at para. 30, [2004] 2 F.C. 459. See also *Janssen Inc. v. Abbvie Corporation*, 2014 FCA 242 at para. 3, 131 C.P.R. (4th) 128.

[22] In *Nidek Co. v. VISX Incorporated*, 209 N.R. 342 (F.C.A.), 72 C.P.R. (3d) 19 at page 24, this Court pointed out that in determining whether an amendment to a defence should be allowed, “it is often helpful for the Court to ask itself whether the amendment, if it was already part of the proposed pleadings, would be a plea capable of being struck out under Rule 419 [now Rule 221].” See also *Bauer Hockey Corp. v. Sport Maska Inc. (Reebok-CCM Hockey)*, 2014 FCA 158 at para. 16, 122 C.P.R. (4th) 97, *Teva Canada Limited v. Gilead Sciences Inc.*, 2016 FCA 176 at paras. 28-31, [2016] F.C.J. No. 605.

[23] The references to being struck out pursuant to Rule 221(1) have led to a certain confusion in this case. Rule 221 provides as follows:

221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it

(a) discloses no reasonable cause of action or defence, as the case may be,

221 (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d’un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :

a) qu’il ne révèle aucune cause d’action ou de défense valable;

[24] The confusion arises from the fact that Rule 221 specifies that a pleading may be struck out, “with or without leave to amend” whereas Rule 75 has no such requirement. In its pleadings, Enercorp argues that the Prothonotary and the Federal Court were bound to consider whether it should be given “leave to amend” its motion seeking leave to amend its statement of defence and counterclaim.

[25] In the present case, the motion was made under Rule 75 not Rule 221 so that the “leave to amend” issue does not arise in the form pleaded by Enercorp. In proceedings under Rule 221, the

right to amend, should it be granted, is for the benefit of the party whose statement of claim or defence has been struck. In this case, Enercorp is not in the position of having had its statement of defence and counterclaim struck. It has simply been unable to persuade a judge that it should be allowed to amend the latter. The original pleading stands. Enercorp's argument amounts to an argument that it ought to be allowed to amend its notice of motion. It is not entitled to that relief though it may be entitled to something similar, namely a dismissal without prejudice to its right to bring a new motion for the same relief or, what amounts to the same thing, an order giving it leave to reapply.

[26] In this case, the Prothonotary and the Federal Court dealt with the issue of "leave to amend" because the issue was put to them in those terms. No reviewable error arises from their use of that terminology because the question of whether a litigant ought to be given leave to amend or the right to reapply turns on substantially the same considerations.

[27] It has long been the policy of the law that meritorious claims should not be defeated on the basis of inadequate pleadings. In that spirit, when a pleading is struck, leave to amend should be granted unless it is plain and obvious that the defect cannot be cured by an amendment: see *Simon v. Canada*, 2011 FCA 6 at para. 15, 410 N.R. 374. A defect may be incurable if, for example, the Court lacks jurisdiction or if there are no facts which would disclose a cause of action: see *Spatling v. Canada (Solicitor General)*, 2003 FCT 445 at paras 7-8, [2003] F.C.J. No. 621, *Canada (Minister of Citizenship and Immigration) v. Seifert*, 2002 FCT 859 at para.12, [2003] 2 F.C. 83.

[28] Similarly, a litigant should be allowed to reapply if the material in support of a motion is insufficient and the relief sought appears to have merit: see *Canada v. Besselt*, 56 D.T.C. 6755, [2000] 4 C.T.C. 286, *Johnson & Johnson Inc. v. Boston Scientific Ltd.*, 2001 FCT 880, 14 C.P.R. (4th) 512, *Gilead Sciences, Inc. v. Teva Canada Limited*, 2016 FC 31 at para. 28, [2016] F.C.J. No. 378. This is in keeping with the overriding principle that decisions on amendments should be driven by “simple fairness, common sense and the interest that the courts have that justice be done”: see *Continental Banking* as quoted above.

[29] In this case, the Prothonotary found that Enercorp’s proposed amendment failed to set out material facts which could establish disqualifying disclosure. To the extent that the proposed amendment rested entirely on the content of the MDR, I agree with the Prothonotary. The proposed amendment was insufficient.

[30] On the issue of leave to reapply, it appears to me that the Prothonotary did not address her mind to the criteria relevant to the question of whether or not to grant leave to reapply. It is not, with respect, enough to say that counsel could not state additional material facts at the hearing.

[31] The material before the Prothonotary included an extract of the examination for discovery of Christopher Hemstock, one of the three inventors, on behalf of SDI. In the course of his examination, he explained how the inventors performed calculations to determine the length of the vessel [a length of pipe] which forms part of the invention. In answer to the question “So what happened after that?”, Mr. Hemstock answered that they thought they had solved the

problem. Questioned further as to why they thought so, Mr. Hemstock replied “We took a sketch and took it to a fabricator, and we built a test unit.”

[32] Later, Mr. Hemstock was asked what happened after the test unit was certified by the Alberta Boiler Safety Association. He indicated that the test unit was put on a wellsite for a test.

The following exchange followed:

Q Do you recall which site that was?

A It was down in Connorsville.

...

A Which is a shallow gas West 4 field.

Q Do you recall which wellsite it was?

A No

Q So it was connected, I guess, to the wellsite?

A That's correct.

Q Would it be a tie-in, or you have some of these –

A Yeah

Q – what I understand –

A It's the first version of it. Direct tie-in to the well.

Q Direct tie-in to the well. Okay. Thank you. Anything happen after that?

A It was successful.

Q Okay. And when you mean -- “successful”—what does --what does “success” mean?

A It removes sand.

Q Removes sand. Did you have some data at that time?

A Just anecdotal data, looking at what happened when we opened it –

Q Okay.

A – then raked sand out into the – into the tub.

...

Q Okay. And who was in attendance during that hour of use?

A Probably one of my two partners.

Q Okay. So there'd be you and one or the other two partners?

A I don't even think I was in attendance.

Q You don't think you were. Okay. So somebody out of the three was –

A Yeah

Q – there? Was there an operator of the wellsite that was –

A Yeah.

Q – in attendance? Do you recall his name?

A No

Q Would you have records to show who it was?

A Probably not.

Q Could you check to see if there are records of who, sort of, viewed this demonstration?

A. Yeah.

Q And provide the information and contact information?

Mr. Regan: I'm not sure that's relevant. So, for the moment – meantime it's refused.

...

Mr. Gierczak: Okay. That was in 2001?

A H-hm

Q Do you recall when? Was it in the winter of 2001:

Mr. Regan: Refused.

...

A Could be. It was – it was successful.

Mr. Gierczak: Very successful. Okay. And that was sometime in 2001?

A Yes. Late.

Q Late 2001. Oh, okay. Now you remember. Okay. So what happened after that?

A We took steps to patent the device.

[33] These excerpts from Mr. Hemstock’s examination for discovery show that the inventors designed a prototype of the invention which was manufactured by a third party, that the prototype was tested and was found to work as intended, and that the test was performed in the presence of a third party sometime in late 2001. It seems to me that this evidence provides a credible basis for an allegation of disclosure to the fabricator and to the wellsite operator.

[34] At this point, it is important to put the question of specificity of pleadings in context. Rule 174 requires that a party’s pleadings contain a concise statement of the material facts on which the party relies but not the evidence by which those facts are to be proved. The meaning of “material facts” was discussed in *Mancuso v. Canada (National Health and Welfare)*, 2015 FCA 227 (*Mancuso*) at paras. 18-20, 476 N.R. 219, where it was pointed out there is no bright line “between material facts and bald allegations, nor between pleadings of material facts and the prohibition on pleading of evidence.” Rather, the judge charged with assessing the adequacy of the pleadings must consider the pleadings as a whole and “ensure that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair.”

[35] In my view, the “manageable and fair” requirement is the primary consideration in assessing the sufficiency of pleadings, particularly in light of the absence of any bright line test for distinguishing between material facts and bald allegations.

[36] In deciding whether pleadings are “manageable and fair”, the Court should consider the whole of the circumstances, including the relative knowledge and means of knowledge of the parties. Rules as to sufficiency of pleadings must not be allowed to become instruments of oppression in the hands of those who have knowledge of material facts at the expense of those who seek to rely on those facts without, however, having the means of knowing those facts so as to be able to plead them with specificity.

[37] The statement at paragraph 19 of *Mancuso* that “The pleading must tell the defendant who, when, where, how and what gave rise to its liability” must be understood in light of the “manageable and fair” requirement. Where, as here, a party seeks to rely upon a transaction to which it is a stranger, it must be able to describe the transaction with sufficient particularity to allow the other party to identify the transaction in issue. If that criterion is met, the question of whether the pleadings are sufficient is to be assessed in light of all the circumstances including the respective means of knowledge of the parties.

[38] This brings us back to the issue of whether the Prothonotary should have granted Enercorp leave to reapply to amend its pleadings. As noted previously, the Prothonotary declined to exercise her discretion on the basis that the amendment could not be remedied because counsel for Enercorp could not identify additional facts when asked to do so. The Federal Court

construed this as a conclusion that “a legally sufficient amendment was not possible”: FC Reasons at para. 49. While counsel’s inability to think on his feet is regrettable, it is not grounds for refusing to grant leave to reapply. The question as to whether to grant leave to reapply must be made on a consideration of the whole record: see *Heli Tech Services (Canada) Ltd. v. Weyerhaeuser Company Limited*, 2011 FCA 193 at para. 25, 423 N.R. 273.

[39] Enercorp’s reliance on paragraph 28.2(1) of the *Patent Act* raises the issue of disclosure by “prior knowledge, prior use, prior publication and prior sale”, a question canvassed in *Baker Petrolite Corp. v. Canwell Enviro-Industries Ltd.*, 2002 FCA 158, [2003] 1 F.C. 49 (*Baker Petrolite*). While accepting that the principles of anticipation by prior publication are also relevant to anticipation by prior use or sale, Rothstein J.A. (as he then was) went on to point out that those principles may have to be adapted to reflect the particular characteristics of anticipation by prior public use or sale: see *Baker Petrolite* at para. 35.

[40] Rothstein J.A. then considered United Kingdom and European authorities in order to identify characteristics and requirements of disclosure by prior use or sale. These are:

- 1- Sale to the public or use by the public alone is insufficient to prove anticipation. Disclosure of the invention is required to constitute anticipation under paragraph 28.2(1)(a).
- 2- For a prior sale or use to anticipate an invention, it must amount to “enabling disclosure”.
- 3- The prior sale or use of a chemical product will constitute enabling disclosure to the public if its composition can be discovered through analysis of the product.
- 4- The analysis must be able to be performed by a person skilled in the art in accordance with known analytical techniques available at the relevant time.
- 5- In the context of patent anticipation under paragraph 28.2(1)(a), when reverse engineering is necessary and capable of discovering the invention, an invention

becomes available to the public if a product containing the invention is sold to any member of the public who is free to use it as she or he pleases.

6- It is not necessary to demonstrate that a member of the public actually analysed the product that was sold.

7- The amount of time and work involved in conducting the analysis is not determinative of whether a skilled person could discover the invention. The relevant consideration, in this respect, is only whether inventive skill was required.

8- It is not necessary that the product that is the subject of the analysis be capable of exact reproduction. It is the subject-matter of the patent claims (the invention) that must be disclosed through the analysis.

Baker Petrolite at para. 42.

[41] In *Wenzel Downhole Tools Ltd. v. National-Oilwell Canada Ltd.*, 2011 FC 1323, 401 F.T.R. 74 (*Wenzel FC*), aff'd at, 2012 FCA 333, [2014] 2 F.C.R. 459, the Federal Court had to deal with facts which had many points in common with the present case. An inventor conceived a bi-directional thrust bearing assembly for use with downhole drilling motors, that is a bearing assembly for use with a motor located in the wellbore powered by the energy of flowing drilling mud and which turned a shaft that is connected to the drill bit. The invention was the subject of the '630 patent.

[42] A second inventor conceived a similar device, the 3103 assembly, which contained the elements of the invention claimed in the '630 patent. The second inventor, Mr. Ken Wenzel – the brother of the first inventor – produced a full scale, hand-drawn layout drawing of the 3103 assembly which he provided to a fabricator. A draftsman at the fabricator produced parts and layout drawings as part of the fabrication process. The device was tested in the fabricator's shop

and was then shipped to Texas where it was rented to a customer who used it in its operation. The issue was whether these facts were sufficient to anticipate the '630 patent.

[43] The Federal Court found that anticipation had been established, a conclusion which this Court affirmed in *Wenzel Downhole Tools Ltd. v. National-Oilwell Canada Ltd.*, 2012 FCA 333, [2014] 2 F.C.R. 459. In particular, the Federal Court found that “An analysis of the 3103 assembly drawing would have therefore disclosed the essential elements of the '630 Patent and enabled the skilled person to perform the invention”: see *Wenzel FC* at para.122.

[44] I am not suggesting that *Wenzel FC* is a perfect fit with the facts of this case. I raise it simply to make the point that the Prothonotary was perhaps hasty in concluding that there were no material facts that could remedy Enercorp’s admittedly deficient original proposed amendment. The facts and the result in *Wenzel FC* and in *Baker Petrolite* suggest the kinds of facts which Enercorp may be able to plead in this case.

[45] The Court’s analysis in *Wenzel FC* also dealt with a number of possible defences to disclosure by use or publication, such as a confidentiality agreement (express or implied), and experimental use. This is material to the extent that it might be argued that Enercorp has not negated these defences. A party seeking an amendment, particularly in a case where the relevant facts arise from a transaction to which the moving party is a stranger is not required to negative all possible defences.

[46] The portions of the examination for discovery of Mr. Hemstock, which were before the Prothonotary, contained admissions which might support a plea of disclosure to the fabricator by provision of information including sketches required to fabricate the prototype, possible disclosure by the MDR and disclosure by use to the wellsite operator. The fact that there are possible defences arising from these facts is a matter going to the defence of the proposed amendments and not to the right to advance those allegations by means of an amendment to the pleadings.

[47] As a result, I am of the view that the Prothonotary fell into palpable and overriding error in finding, as the Federal Court put it at paragraph 49 of its Reasons, that a legally sufficient amendment was not possible, which is a conclusion of mixed fact and law. The record before her disclosed facts which provided a credible basis for granting Enercorp leave to reapply so that her conclusion that a legally sufficient amendment was not possible was, at the least, premature.

[48] Without pronouncing myself on the sufficiency of the revised proposed amendment, I would allow the appeal and grant Enercorp leave to reapply to amend its statement of defence and counterclaim by filing a fresh notice of motion seeking leave to amend its statement of defence and counterclaim within seven days of the date of the order of this court. I would suggest that Enercorp might benefit from reading *Baker Petrolite* and *Wenzel FC* and drafting its proposed amendment in light of the teachings of those cases.

[49] At the hearing of the appeal, Enercorp argued that any scheduling difficulties which would arise if the appeal were allowed could be minimized by directing that the fresh motion for

leave to amend should be decided by the Trial Management Judge who has already been named and has been dealing with pre-trial issues. While this might solve one problem, it might create others. Should the amendment to the statement of defence and counterclaim be allowed, there will be a series of other issues to be resolved relating to further production of documents, further examinations for discovery and ruling on such refusals as there might be at the resumed examinations for discovery. These are not typically the work of the Trial Management Judge. I would therefore remit the matter to the Prothonotary for a ruling on Enercorp's revised proposed amendment to its pleadings.

[50] The Prothonotary also ruled that Enercorp's original proposed amendment was frivolous and vexatious. That finding, based as it was on Enercorp's original proposed amendment, does not preclude granting leave to Enercorp to reapply to amend its statement of defence and counterclaim.

[51] The Prothonotary also dismissed Enercorp's motion to examine Mr. Bill Rollins on the basis that she had refused Enercorp's motion for leave to amend. In light of the fact that I would grant Enercorp leave to reapply, I would set aside the Prothonotary's decision on this issue and leave the matter to be re-decided by the Prothonotary's in light of her decision with respect to Enercorp's revised motion to amend.

[52] At the hearing of the appeal, SDI argued that it would suffer prejudice if the amendments were allowed. As I understood the argument, it was that a trial date has been fixed for some time now and that allowing Enercorp's amendment would likely require a new trial date to be set.

While I acknowledge that there remains little time to do the things which might be required if the Prothonotary allows Enercorp's revised proposed amendment and ancillary relief, the question as to whether the trial date has to be pushed back will have to be decided in light of the parties' success in getting those things done, assuming good faith on both sides. To the extent that a decision to allow Enercorp's revised proposed amendment will result in costs thrown away, SDI will have the opportunity to raise that issue with the Prothonotary at the appropriate time.

[53] I would award Enercorp its costs in this Court and in the Federal Court.

“J.D. Denis Pelletier”

J.A.

“I agree
Yves de Montigny J.A.”

“I agree
Mary J.L. Gleason J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE SOUTHCOTT OF THE FEDERAL COURT, DATED JULY 5, 2018, DOCKET NO. T-598-15)

DOCKET: A-225-18

STYLE OF CAUSE: PROGRESS ENERGY CANADA LTD. v. SPECIALIZED DESANDERS INC. and ENERCORP SAND SOLUTIONS INC.

AND DOCKET: A-224-18

STYLE OF CAUSE: ENERCORP SAND SOLUTIONS INC. v. SPECIALIZED DESANDERS INC. and PROGRESS ENERGY CANADA LTD.

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: NOVEMBER 5, 2018

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
GLEASON J.A.

DATED: NOVEMBER 23, 2018

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