

**Date: 20091201**

**Docket: A-89-09**

**Citation: 2009 FCA 352**

**CORAM: BLAIS C.J.  
NOËL J.A.  
LAYDEN-STEVENSON J.A.**

**BETWEEN:**

**TRACTOR SUPPLY CO. OF TEXAS, LP and  
TRACTOR SUPPLY COMPANY**

**Appellants**

**and**

**TSC STORES L.P.**

**Respondent**

Heard at Toronto, Ontario, on December 1, 2009.

Judgment delivered from the Bench at Toronto, Ontario, on December 1, 2009.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**LAYDEN-STEVENSON J.A.**

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**REASONS FOR JUDGMENT OF THE COURT**  
**(Delivered from the Bench at Toronto, Ontario, on December 1, 2009)**

**LAYDEN-STEVENSON J.A.**

[1] This is an appeal of an interlocutory decision of a judge of the Federal Court (the application judge) dismissing an appeal of a Prothonotary's decision dismissing the plaintiffs' motion to strike portions of the defendant's statement of defence and counterclaim. The Federal Court decision is reported at (2009) 341 F.T.R. 157; 72 C.P.R. (4<sup>th</sup>) 75.

[2] The issue concerns the concept of abuse of process, specifically whether it is available as both a shield (a procedural defence) and a sword (a tort). The plaintiffs argue that the Federal Court lacks jurisdiction to entertain an actionable tort of abuse of process and that in any event, the respondent has not pleaded the constituent elements to support the assertion of such a tort.

[3] The Prothonotary concluded that there is “a sufficient nexus between the trade-marks matters in issue and the abuse alleged for this Court to consider the matter on its merits.”

[4] The application judge reviewed the Prothonotary’s decision and concluded that it was not plain and obvious that the respondent could not succeed given the existing state of the law in this respect. We are not persuaded that he erred in arriving at that conclusion.

[5] In our view, the Supreme Court’s comment at paragraph 52 of *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 is applicable. There, the Court stated:

The fact that a pleading reveals “an arguable, difficult or important point of law” cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

[6] The appeal will be dismissed with costs.

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“Carolyn Layden-Stevenson”

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:**

A-89-09

**(AN APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE RUSSELL OF THE FEDERAL COURT, DATED FEBRUARY 12, 2009, IN FILE DOCKET NO. T-1804-07)**

**STYLE OF CAUSE:**

TRACTOR SUPPLY CO. OF TEXAS, LP and TRACTOR SUPPLY COMPANY v. TSC STORES L.P.

**PLACE OF HEARING:**

TORONTO, ONTARIO

**DATE OF HEARING:**

DECEMBER 1, 2009

**REASONS FOR JUDGMENT OF THE COURT BY:**

(BLAIS C.J., NOËL & LAYDEN-STEVENSON JJ.A.)

**DELIVERED FROM THE BENCH BY:**

LAYDEN-STEVENSON J.A.

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