

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20110318**

**Docket: A-121-11**

**Citation: 2011 FCA 107**

**Present: PELLETIER J.A.**

**BETWEEN:**

**PHOSTECH LITHIUM INC.**

**Appellant**

**and**

**VALENCE TECHNOLOGY, INC.**

**Respondent**

Heard at Ottawa, Ontario, on March 17, 2011.

Order delivered at Ottawa, Ontario, on March 18, 2011.

**REASONS FOR ORDER BY:**

**PELLETIER J.A.**

**Date: 20110318**

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**BETWEEN:**

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**Appellant**

**and**

**VALENCE TECHNOLOGY, INC.**

**Respondent**

**REASONS FOR ORDER**

**PELLETIER J.A.**

[1] I am satisfied that the test for the granting of a stay has been met.

[2] The question of a serious issue to be tried is a low threshold. The issue of the construction of claim 3 is a matter of law and it appears to me that the appeal on this point is not frivolous.

[3] As for irreparable harm, I am satisfied that if the stay is not granted, Phostech Lithium Inc. (Phostech) will suffer irreparable harm in the form of the loss of the P1 business currently carried out from its premises in St. Bruno by reason of the loss of the key components of the business namely, key personnel, scarce suppliers, and customers whose time requirements are time sensitive.

[4] The balance of convenience is in favour of Phostech. Phostech and the respondent Valence Technology, Inc. (Valence) do not compete in the same market so that the only inconvenience to it, if the appeal is ultimately dismissed, is a longer period with respect to which it will be entitled to a monetary remedy. On the other hand, Phostech's P1 business will be lost and the business of its customers will be affected to a greater or lesser degree.

[5] That said, on the current state of the law, the granting of a stay amounts to a licence to continue infringing Valence's patent. Valence must be protected from any greater loss as a result of the Court's intervention.

[6] There will therefore be an order in the following terms:

The execution of the judgment of Madam Justice Gauthier, rendered on February 17, 2011 in Court file T-219-07 will be stayed, until the hearing of this matter by this Court, such stay to be effective as of the date when all of the following conditions have been satisfied:

- 1- Phostech will provide Valence with a written undertaking as to damages, in a form acceptable to Valence's solicitors, in the event its appeal is dismissed.
- 2- Phostech will provide Valence with a written undertaking, in a form acceptable to Valence's solicitors, that it will make no distributions to its shareholders or to non-profit entities, and that it will not make any expenditures other than in the normal course of its usual business activities as long as this stay is in effect.

- 3- Phostech will deposit with the registry of the Federal Court of Appeal a bond, in a form acceptable to Valance's solicitors, in favour, in the amount of \$250,000.
  
- 4- Within 7 days counsel for Phostech and Valence will jointly submit a timetable with respect to the steps remaining to be taken in the appeal with a view to having this matter heard in Montreal in the week of June 6, 2011. If the counsel are unable to agree, the Court will fix the timetable without reference to the parties.

"J.D. Denis Pelletier"

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-121-11

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

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** March 17, 2011

**REASONS FOR JUDGMENT BY:** PELLETIER J.A.

**DATED:** March 18, 2011

**APPEARANCES:**

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FOR THE APPELLANT

Ronald Dimock  
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FOR THE RESPONDENT

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