Federal Court of Appeal | Cour d'appel fédérale

Date: 20120327

Docket: A-11-12

Citation: 2012 FCA 101

Present: **MAINVILLE J.A.**

BETWEEN:

GAP ADVENTURES INC.

Appellant

and

THE GAP, INC., GAP (ITM) INC. and GAP (CANADA) INC.

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Montréal, Quebec, on March 27, 2012.

REASONS FOR ORDER BY: MAINVILLE J.A.

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REASONS FOR ORDER

MAINVILLE J.A.

[1] The appellant is the defendant to an action in the Federal Court initiated by the respondent and alleging trade-mark infringement. In the context of that action, Prothonotary Aalto issued an order granting leave to the respondents to serve and file an amended statement of claim. One of the authorized amendments is challenged by the appellant. The impugned amendment would add "online retail store services" to the plaintiffs' (here the respondents') statement of claim.

[2] The appellant appealed this order to the Federal Court, but Zinn J. dismissed the appeal for reasons cited as 2011 FC 1526 dated December 28, 2011. The appellant now appeals to this Court by notice of appeal filed January 6, 2012.

[3] In the context of this appeal, the appellant has made a motion seeking leave to present at the appeal hearing excerpts from the transcripts of the examination on discovery of Craig Ryan held on January 24, 2012 in the Federal Court proceedings. Mr. Ryan is a representative of the respondents. In his examination, Mr. Ryan stated that he personally has no knowledge of a specific meaning for the phrase or expression “online retail store services”.

[4] Though the appellant has requested that this motion be heard at the same time as the hearing on the merits of its appeal, Layden-Stevenson J.A. of our Court directed on February 29, 2012 that the motions judge will determine whether it can be disposed of in writing or by the panel assigned to hear the merits of the appeal. Following that directive, the respondents have filed their motion record and the appellant has filed reply material.

[5] After reviewing all the material concerning this motion, I have determined that it should be disposed of in writing prior to the hearing of the appeal. For the reasons further set out below, I have also determined that the motion should be dismissed with costs.

[6] New evidence is rarely presented on an appeal. This is because the function of this Court is to determine the outcome of an appeal based on the factual evidence which was before the court whose decision is being appealed. However, Rule 351 of the *Federal Courts Rules*, SOR/98-106 allows evidence to be submitted in an appeal, on leave of the Court, if special circumstances can be shown. Rule 351 reads as follows:

351. In special circumstances, the Court may grant leave to a party to present evidence on a question of fact.	**351.** Dans des circonstances particulières, la Cour peut permettre à toute partie de présenter des éléments de preuve sur une question de fait.

[7] Generally, leave may only be granted under this Rule if the factual evidence could not have been discovered earlier through reasonable diligence, is practically conclusive of an issue on appeal, and is credible; leave may also be granted if it is in the interest of justice to do so, despite these requirements not being satisfied: *Assessor for Seabird Island Indian Band v. BC Tel*, 2002 FCA 288, [2003] 1 F.C. 475 at paras 28 to 30; *Korki v. Canada*, 2011 FCA 287 at para. 12.

[8] In this case, the appellant is seeking to present evidence to support its allegations that "online retail store services" is an inherently ambiguous expression that has no commonly understood meaning: appellant's written representations, at para. 5.

[9] Though this was clearly not the thrust of the appellant's representations before the Federal Court in support of its challenge to the impugned amendment, it did allege in that court that the expression "online retail store services" is ambiguous and obscure as to its scope and has no commonly understood meaning: Appellant's written representations in the Federal Court, at para. 28, reproduced at Exhibits "B" attached to the affidavit of Lori-Anne DeBorba sworn March 7, 2012.

[10] There is therefore nothing new about this allegation, and the appellant could have submitted evidence in the Federal Court on the issue of the alleged lack of common meaning of the

expression, but did not do so. Moreover, the fact that Mr. Craig Ryan personally has no knowledge of a specific meaning for the expression “online retail store services” does not conclusively determine in this appeal whether that expression is ambiguous and obscure as to its scope such as to preclude the amendment to the Statement of Claim sought by the respondents.

[11] I therefore conclude that the appellant has not demonstrated any special circumstances allowing this Court to grant it leave to submit new evidence in this appeal. The motion will consequently be dismissed with costs to the respondents.

« Robert Mainville »

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-11-12
STYLE OF CAUSE:	Gap Adventures Inc. v. The Gap, Inc., Gap (ITM) Inc. and Gap (Canada) Inc.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	MAINVILLE J.A.
DATED:	March 27, 2012

WRITTEN REPRESENTATIONS BY:

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