

Federal Court of Appeal



Cour d'appel fédérale

Date: 20121205

Docket: A-112-12

Citation: 2012 FCA 319

**CORAM: NADON J.A.
SHARLOW J.A.
DAWSON J.A.**

BETWEEN:

THE DEVIL'S MARTINI

Appellant

and

BACARDI & COMPANY LIMITED

Respondent

Heard at Toronto, Ontario, on December 5, 2012.

Judgment delivered from the Bench at Toronto, Ontario, on December 5, 2012.

REASONS FOR JUDGMENT OF THE COURT BY:

SHARLOW J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, on December 5, 2012)

SHARLOW J.A.

[1] This is an appeal of an interlocutory order in an appeal to the Federal Court from the Trade-Marks Opposition Board (2011 TBOB 65). The Board allowed in part the application of The Devil's Martini Inc. to register the trade-mark THE DEVIL'S MARTINI in respect of certain goods. On June 20, 2011, Bacardi and Company Limited filed an application in the Federal Court to appeal the decision of the Board (Federal Court File T-1013-11).

[2] The Devil's Martini Inc. filed a motion in the Federal Court for an order permitting it to cross-examine on two affidavits that had been filed on behalf of Bacardi and Company Limited in the proceedings before the Board. That motion was dismissed by Prothonotary Aalto on November 29, 2011, but he granted The Devil's Martini Inc. an extension of time to January 31, 2012 to file other evidence in the Federal Court in support of its defence of the Board's order. Apparently, The Devil's Martini Inc. filed no evidence in the Federal Court within that time.

[3] The disposition of the motion to permit cross-examination on the affidavits filed before the Board turned on Prothonotary Aalto's interpretation of an agreement of counsel to defer the cross-examination. Prothonotary Aalto construed the agreement as delaying the cross-examinations while the Board proceedings were in progress, but not after Board had rendered its decision.

[4] The Devil's Martini Inc. appealed the order of Prothonotary Aalto. That appeal was dismissed by Justice Near on March 27, 2012. The Devil's Martini Inc. now appeals to this Court.

[5] The principal issue in this Court is whether, with respect to the interpretation of the agreement of counsel, Justice Near correctly selected and applied the applicable standard of review. Having reviewed the record and considered the submissions of the parties, we conclude that he did so. Accordingly, there is no basis for appellate intervention on that issue.

[6] A second issue arises as to whether Justice Near erred in law when he failed to consider, independently of the principal issue, the motion of The Devil's Martini Inc. for a further extension

of time to file evidence in the Federal Court. We have concluded that he did err in that respect, and that this is a matter that should be dealt with now. We will do so.

[7] For these reasons, the appeal will be allowed with respect to the extension of time and otherwise dismissed. An order will be made extending to February 4, 2013 the time for filing the evidence of The Devil's Martini Inc. in the Federal Court. Costs of this appeal will be awarded to Bacardi and Company Limited.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-112-12

**(APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE NEAR, DATED
MARCH 27, 2012, IN DOCKET NO. T-1013-11)**

STYLE OF CAUSE:

THE DEVIL'S MARTINI v.
BACARDI & COMPANY LIMITED

PLACE OF HEARING:

Toronto, Ontario

DATE OF HEARING:

December 5, 2012

REASONS FOR JUDGMENT OF THE COURT BY:

(NADON, SHARLOW & DAWSON
J.J.A.)

DELIVERED FROM THE BENCH BY:

SHARLOW J.A.

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