

Federal Court of Appeal



Cour d'appel fédérale

Date: 20131203

Docket: A-19-12

Citation: 2013 FCA 287

**CORAM: PELLETIER J.A.
DAWSON J.A.
TRUDEL J.A.**

BETWEEN:

KELLY PROPERTIES

Appellant

and

**CANADIAN COUNCIL OF PROFESSIONAL
ENGINEERS**

Respondent

Heard at Ottawa, Ontario, on December 3, 2013.

Judgment delivered from the Bench at Ottawa, Ontario, on December 3, 2013.

REASONS FOR JUDGMENT OF THE COURT BY:

PELLETIER J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Ottawa, Ontario, on December 3, 2013).

PELLETIER J.A.

[1] We are of the view that the Trial judge committed a palpable and overriding error when he found that the additional evidence tendered by the respondents would have materially affected the outcome before the Trade Marks Opposition Board (TMOB) had it been before the hearing officer.

[2] The thrust of the evidence of Mr. Neth and Mr. McMartin was to interpret the scope and effect of the Alberta *Engineering and Geoscience Professions Act*, R.S.A. 2000, c. E-11, the legislation which governs the practice of engineering in Alberta. This legislation was in evidence before the hearing officer.

[3] The opinion of the two witnesses as to the interpretation of the statute is irrelevant. Similarly, the Guidelines used by Association of Professional Engineers and Geoscientists of Alberta (the Association) simply represent the Association's opinion as to the meaning of the Alberta statute and are equally irrelevant.

[4] The additional affidavits, those of Ms. Roberts and Messers. Haddock and Barbeau added no new material facts to the record. As a result, The Federal Court judge ought to have reviewed the TMOB's decision or a standard of reasonableness.

[5] Despite Mr. Marcera's spirited argument, we have not been persuaded that the decision of the TMOB is unreasonable. In particular, the TMOB was aware of the affect of the trademark upon first impression as indicated in paragraphs 71 and 79 of its decision.

[6] As a result, the appeal will be allowed with costs, the judgment of the Federal Court will be set aside and giving the judgment that the Federal Court ought to have given, the appeal from the TMOB will be dismissed with costs.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-19-12

STYLE OF CAUSE: KELLY PROPERTIES v.
CANADIAN COUNCIL OF
PROFESSIONAL ENGINEERS

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: DECEMBER 3, 2013

REASONS FOR JUDGMENT OF THE COURT BY: PELLETIER J.A.
DAWSON J.A.
TRUDEL J.A.

DELIVERED FROM THE BENCH BY:
PELLETIER J.A.

APPEARANCES:

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Adam Tracey

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KELLY PROPERTIES

John Macera

FOR THE RESPONDENT
CANADIAN COUNCIL OF
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PROFESSIONAL ENGINEERS