Federal Court of Appeal | Cour d'appel fédérale

Date: 20240125

Docket: A-181-21

Citation: 2024 FCA 19

CORAM: **GLEASON J.A.**
WOODS J.A.
MACTAVISH J.A.

BETWEEN:

GREENBLUE URBAN NORTH AMERICA INC.

Appellant

and

DEEPROOT GREEN INFRASTRUCTURE, LLC and DEEPROOT CANADA CORP.

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on January 25, 2024.

REASONS FOR ORDER BY: THE COURT

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REASONS FOR ORDER OF THE COURT

[1] The appellant has brought a motion seeking both an extension of time within which to bring its motion and an order varying this Court's judgment in *Greenblue Urban North America Inc. v. Deeproot Green Infrastructure, LLC*, 2023 FCA 184 (the Judgment), to change the disposition to allow the appeal as opposed to dismissing it.

[2] For the reasons that follow, this motion will be dismissed, with costs.

[3] The appellant says that this Court failed to deal with its arguments on overbreadth in its Reasons for Judgment. It claims that, had these arguments been addressed, the appeal would have been allowed due to the lack of an upper limit to the term “at least approximately 85%” soil volume in Claim 1 in Canadian Patents 2,552,348 and 2,829,599 (collectively, the Patents). In its view, this lack of an upper limit renders the claims invalid for overbreadth since they include 100% soil volume, which is impossible.

[4] There is no merit to the appellant’s assertions in this regard. There are also several reasons why this motion should be dismissed.

[5] First, the appellant’s motion was brought well outside the applicable ten-day time limit provided in Rule 397(1) of the *Federal Courts Rules*, SOR/98-106 (*Federal Courts Rules*).

[6] Although Rule 8 of the *Federal Courts Rules* allows the Court to extend the time limits provided in the Rules, such an extension is not appropriate here. The case law establishes that extensions may be granted in circumstances where the party seeking the extension shows that granting it is in the interests of justice. The relevant circumstances to establish this include whether: (1) the party had a continuing intention to pursue the matter, which commenced before the relevant time limit expired; (2) there is a reasonable explanation for the delay; (3) there is some merit to the party’s application; and (4) there is no prejudice to the opposite party: *Rafique v. Canada (National Revenue)* 2023 FCA 112, 2023 A.C.W.S. 2239 at paras. 2-3; *Canada (Attorney General) v. Larkman*, 2012 FCA 204, [2012] 4 C.N.L.R. 87 at paras. 61 and 62; *Canada (Attorney General) v. Hennelly*, [1999] F.C.J. No. 846, 224 N.R. 399 at para. 3.

[7] Here, the appellant says that it delayed in bringing its motion to vary the Judgment because the matter was complex and it wanted to settle the issue before seeking leave to appeal to the Supreme Court of Canada. Neither assertion holds weight.

[8] There is no evidence that the appellant formed an intention to bring this motion within the relevant ten-day time limit or, indeed, at any time before it prepared the motion materials. Thus, it fails to meet the first criterion for the requested extension. While this is a sufficient basis for dismissing this motion, we briefly set out additional reasons why it should be dismissed.

[9] The appellant also does not meet the second criterion for the extension of time because its explanation for the delay in bringing this motion is not reasonable. The appellant was represented by experienced counsel, who should have easily been able to grasp within the required ten days whether an issue was unaddressed by the Court, had this been the case. Moreover, there is no rational connection between the deadline for seeking leave to appeal to the Supreme Court of Canada and the deadline to bring a Rule 397 motion.

[10] Likewise, the third criterion for the extension is absent because there is no merit to the appellant's claims.

[11] The Court did deal with the appellant's overbreadth arguments that the claims were broader than the invention made, as the appellant eventually conceded in paragraphs 4 to 6 of its reply submissions on this motion. These were the bulk – if not the totality – of the appellant's submissions on the point to this Court.

[12] The appellant now says that, in addition to asserting that the claims were broader than the invention made (which raises a factual issue), it also alleged that the claims were overbroad because they disclose an error of construction (and thus a question of law).

[13] This argument is without merit as, reading the Patents with a mind willing to understand, as the Court must do, an upper limit sufficient to allow for the structure of the cell must be understood to be part of Claim 1 in the two Patents. As the respondents rightly note, a patent is not invalid merely because it leaves open to the skilled person to avoid known unsuitable choices: *Burton Parsons Chemicals, Inc. v. Hewlett-Packard (Canada) Ltd.* (1974), [1976] 1 S.C.R. 555 at 565-566, 54 D.L.R. (3d) 711 at 717-718; *AFD Petroleum Ltd. v. Frac Shack Inc.*, 2018 FCA 140, 295 A.C.W.S. (3d) 840 at para. 57.

[14] This motion will accordingly be dismissed, with costs.

"Mary J.L. Gleason"
J.A.

"Judith Woods"
J.A.

"Anne L. Mactavish"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-181-21
STYLE OF CAUSE:	GREENBLUE URBAN NORTH AMERICA INC. v. DEEPROOT GREEN INFRASTRUCTURE, LLC and DEEPROOT CANADA CORP.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER OF THE COURT BY:	GLEASON J.A. WOODS J.A. MACTAVISH J.A.
DATED:	JANUARY 25, 2024

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