

Federal Court



Cour fédérale

Date: 20090522

Docket: T-436-05

Citation: 2009 FC 538

Ottawa, Ontario, May 22, 2009

PRESENT: The Honourable Frederick E. Gibson

BETWEEN:

**VARCO CANADA LIMITED,
VARCO, L.P.,
WILDCAT SERVICES, L.P. and
WILDCAT SERVICES CANADA, ULC**

**Plaintiffs/
Defendants by Counterclaim**

and

**PASON SYSTEMS CORP and
PASON SYSTEMS INC.**

**Defendants/
Plaintiffs by Counterclaim**

REASONS FOR ORDER AND ORDER

Introduction

[1] These reasons and order follow the hearing on the 11th of May, 2009, of a motion for an order under Rule 51 of the *Federal Courts Rules*¹ allowing an appeal from an Order of Prothonotary

¹ SOR/98-106.

Milczynski made the 22nd of April, 2009, in which the learned Prothonotary dismissed the Defendants' motion for an Order bifurcating issues of liability from issues of quantum of recovery arising from the Plaintiffs' claim for damages and profits for patent infringement. The bifurcation order was sought pursuant to Rule 107 of the *Federal Courts Rules*.

[2] Rule 107 reads as follows:

107. (1) The Court may, at any time, order the trial of an issue or that issues in a proceeding be determined separately.

(2) In an order under subsection (1), the Court may give directions regarding the procedures to be followed, including those applicable to examinations for discovery and the discovery of documents.

107. (1) La Cour peut, à tout moment, ordonner l'instruction d'une question soulevée ou ordonner que les questions en litige dans une instance soient jugées séparément.

(2) La Cour peut assortir l'ordonnance visée au paragraphe (1) de directives concernant les procédures à suivre, notamment pour la tenue d'un interrogatoire préalable et la communication de documents.

Background

[3] This action was commenced by the filing of a Statement of Claim on the 8th of March, 2005. The Plaintiffs claim damages and profits for patent infringement. More specifically, the Plaintiffs allege infringement of Canadian Patent No. 2,094,313 relating to automatic drilling systems used in drilling rigs to regulate the release of a drill string to achieve an optimal rate of penetration.

[4] The Defendants' Statement of Defence and Counterclaim was filed on the 25th of April, 2005. A series of motions, orders and appeals from those orders followed in rapid succession.

[5] Case Management of the action was ordered on the 3rd of November, 2005, and Prothonotary Milczynski has been performing case management functions since that time. She is thus very familiar with this proceeding.

[6] On the 10th of March, 2009, an Amended Statement of Claim was filed. Counsel for the Defendants urges that the amendments "... add allegations of infringement and claims for damages and profits in respect of activities in other countries [that is to say, countries other than Canada], including the United States, Mexico, Argentina and Australia" and that, in the result, the complexity of the action is significantly increased. Thus, he urges, the recent amendments to the Statement of Claim triggered the motion for bifurcation. Counsel for the Plaintiffs disagrees that the amendments add jurisdictions and thus increase the complexity of the action. Rather, he urges, the amendments merely "clarify" the scope of the action. In the Reasons for Order that is here under appeal, Prothonotary Milczynski expresses the same view of the impact of the amendments as that urged by counsel for the Plaintiffs.

[7] The first round of examinations for discovery has recently been completed, subject to outstanding motions to require answers to questions where answers were refused to be provided.

The Decision Under Appeal

[8] The substance of Prothonotary Milczynski's decision that is before the Court is quite brief. It follows:

The Defendants have raised the matter of bifurcation with the Plaintiffs on a number of occasions earlier in the proceeding, but it was only after the Statement of Claim was recently amended to clarify that the damages sought by the Plaintiffs' related to their allegations of the Defendants' infringing activity in Canada (the manufacture of the Defendants' drilling equipment) and to the monies earned as a result of that infringing activity - in Canada and in the Defendants' export markets outside Canada, did the Defendants bring this motion. The proceeding has, however, had a long history of interlocutory proceedings since the action was commenced in 2005, as both parties have outlined in their written representations.

Nonetheless, at any time in a proceeding, if the Court is satisfied that bifurcation is appropriate in the circumstances, such order may be granted. The onus is on the moving party to satisfy the Court, on a balance of probabilities, that in light of the evidence and all of the surrounding circumstances that bifurcation of the issues of liability and damages would more likely than not, lead to the most just, expeditious and least expensive determination of the proceeding on its merits.

In determining whether or not to exercise its discretion to order bifurcation of the issues of liability and damages, there are a number of factors the Court may consider, including:

- (i) The complexity of the case;
- (ii) Whether the issues of liability are clearly distinct from issues of remedy and damages;
- (iii) Whether the issues of liability and damages are interwoven to such a degree so that no time or great expense will be saved;
- (iv) Whether a decision relating to liability will likely put an end to the action altogether;
- (v) Whether the parties have already devoted resources to all of the issues;
- (vi) Whether the splitting of the action will save time or lead to unnecessary delay;

- (vii) Whether the parties will suffer any advantage or prejudice by the granting of the order; and
- (viii) Whether bifurcation will result in the most just, expeditious and least expensive disposition of the proceeding.

In this case, I am not satisfied on the record filed by the Defendants that bifurcation should be ordered. As set out in the Plaintiffs' written representations at paras.40-70, which I accept, there is nothing particularly unusual about this case, either in the complexity of the issues or the scope of the productions. I agree that if bifurcation were ordered in this case, it would be difficult not to order it in every case. I am also not satisfied that any real economy would be achieved in that the issue of the patent's validity on the grounds of obviousness will raise the factor of commercial success, which in turn, will require some measure of financial disclosure in any event.

I am also not satisfied that bifurcation at this juncture will lead to any savings of costs and time since the parties have been preparing on the basis of a trial on all issues and are at the stage of examinations for discovery. The recent amendments that add jurisdictions may increase the volume of documents to be produced and some examinations, but I do not see that outweighing the interest of expeditious resolution of all issues in a single trial or the prejudice that will arise by the delay in the event liability is established.

[emphasis added]

[9] As Prothonotary Milczynski noted, she accepts the Plaintiffs' Written Representations at paragraphs 40 to 70 of their memorandum which was before her. She annexed those paragraphs to the Order here under appeal. I will do the same. Those paragraphs appear as a Schedule to these reasons and order.

Standard of Review

[10] In *Merck & Co., Inc. v. Apotex Inc.*², the Federal Court of Appeal clarified the standard of review in matters such as this established in *Canada v. Aqua-Gem Investments Ltd.*³ when it wrote at paragraph [19]: “... Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless: (a) the questions raised in the motion are vital to the final issue of the case, or (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.”

[11] It was not questioned before the Court that the questions here raised are not vital to the final issue of the case. Rather, counsel for the Defendants urged that the Order under appeal is “clearly wrong”.

[12] In *Weatherford Artificial Lift Systems Canada Ltd. et al. v. Corlac Inc. et al.*⁴, Justice Mandamin wrote at paragraphs 26 to 28 of his Reasons:

The role of a case management judge was discussed by Justice Rothstein for the Federal Court of Appeal in *Sawridge Band v. Canada*, ... He stated:

We would take this opportunity to state the position of this Court on appeals from orders of case management judges. Case management judges must be given latitude to manage cases. This Court will interfere only in the clearest case of a misuse of judicial discretion.

² [2004] 2 F.C.R. 459.

³ [1993] 2 F.C. 425 (C.A.).

⁴ 2008 F.C. 1271, November 19, 2008.

Justice Gibson in *Microfibres Inc. v. Anabel Canada Inc.* ... considered the role of a prothonotary to be of similar importance. He stated:

I conclude that Mr. Justice Rothstein's comments should apply by analogy to discretionary decisions prothonotaries make in the course of case management in complex matters such as this. Case management prothonotaries must be given latitude to manage cases in the same manner in which case management judges are entitled to such latitude. ... Case Management prothonotaries, like case management judges are familiar with the proceedings that they are managing to a degree that a trial judge, sitting on appeal from a prothonotary's discretionary decision in such a context, usually cannot be.

In my view, the Prothonotary was exercising his discretion in making a case management decision when he decided against the Defendants' application for leave to serve and file the Amended Statement of Defence and Counterclaim. He was familiar with the course of the proceedings and the procedural complexities involved in the action. ...

[citations omitted]

[13] I am satisfied that precisely the same, modified only as to context, must be said here.

The Defendants' Allegations

[14] Before me, counsel for the Defendants urged that Prothonotary Milczynski erred in dismissing the Defendants' motion for bifurcation to the extent that she was clearly wrong, in the sense that the exercise of her discretion was based upon a wrong principle or upon a misapprehension of the facts in that:

- a) she misapprehended the evidence in finding that, on a balance of probabilities, a bifurcation order would not leave to savings of cost or time;
- b) she misapprehended the evidence in failing to recognize that the Plaintiffs' recent amendments to its pleading significantly increased the complexity of this action by the addition of new jurisdictions, and that such increased complexity in the context of this proceeding favours bifurcation;
- c) she misapprehended the evidence in failing to consider the Plaintiffs' prior conduct in another matter that was before this Court, which conduct would disentitle the Plaintiffs to claim equitable relief such as profits, thereby resulting in a saving of time and resources in the conduct of this case, even if the Plaintiffs succeed on liability;
- d) she erred in law in holding that there is a substantial overlap between issues of commercial success and damages, such that these issues are not readily separable by bifurcation; and
- e) she erred in law, misapprehended the evidence, and exercised her discretion based on a wrong principle in adopting and accepting the Plaintiffs' written representations at paragraphs 40 to 70 of their Memorandum that was before her and as set out in the Schedule to these reasons and order.

Analysis

[15] I reiterate the words of Justice Mandamin quoted above. In my view, Prothonotary Milczynski was exercising her discretion in making a case management decision when she

decided against the Defendants' application for bifurcation. She was familiar with the course of these proceedings and the procedural complexities involved in this action. In these circumstances, it would be inappropriate for me to interfere with the learned Prothonotary's decision unless that decision reflects on its face a clearest case of a misuse of judicial discretion. I am satisfied that this is not such a case.

[16] As earlier noted and as quoted from the Prothonotary's reasons, the Prothonotary was satisfied that the recent amendments to the Statement of Claim herein were to "... clarify that the damages sought by the Plaintiffs related to their allegations of the Defendants' infringing activity in Canada (the manufacture of the Defendants' drilling equipment) and to the monies earned as a result of that infringing activity – in Canada and in the Defendants' export markets outside Canada, ...". In this regard, the Prothonotary preferred the submissions before her on behalf of the Plaintiffs over those that were before her on behalf of the Defendants, thus including a preference for the Plaintiffs' interpretation of the facts of this matter, as they impact on any possible savings of cost or time, over the interpretation urged on behalf of the Defendants. Precisely the same must be said regarding the impact of the amendments to the Statement of Claim on the complexity of this matter, that is to say, that the amendments did not materially increase the complexity and thus did not work in favour of bifurcation.

[17] While the Prothonotary's Order does not make reference to the Plaintiffs' prior conduct that is commented on in the related file T-1845-05 in this Court, I am satisfied that it is entirely speculative to conclude that such conduct and this Court's commentary on it would be found to

disentitle the Plaintiffs to claim equitable relief such as profits, thereby resulting in a savings of time and resources, in the view of the Defendants, in the conduct of this case, even if the Plaintiffs were to succeed on liability. I am satisfied that that speculative allegation is a matter for another day and quite appropriately was not commented on by the Prothonotary in the context of her Reasons on the motion before her.

[18] With great respect, I am in no position, despite the Defendants' submissions before me, to conclude that the Prothonotary erred in law in concluding that the Defendants were wrong in stating that, in this case, matters of infringement and whether the underlying patent is valid are "... separate and distinct from the assessment of the remedies claimed." Based upon the materials before me and the submissions of counsel before me, I cannot but conclude that the Prothonotary's conclusion that "bifurcation of liability and damages would do little to narrow the scope of discovery for trial" was reasonably open to her. With great respect, the Prothonotary simply did not conclude that there is a "substantial" overlap between issues of commercial success and damages.

[19] Finally, it is, with great respect, specious to urge that the Prothonotary erred in law, misapprehended the evidence and exercised her discretion based on a wrong principle in adopting and accepting the Plaintiffs' written representations at paragraphs 40 to 70 of their memorandum that was before her. The learned Prothonotary only accepted the Plaintiffs' written representations in those paragraphs. She did not go so far as to "adopt" them.

Conclusion

[20] For the foregoing reasons, this appeal will be dismissed.

Costs

[21] Costs would normally follow the event. Counsel for the Plaintiffs urged that costs, fixed in the amount of \$3,000.00, should be made payable by the Defendants, forthwith. Counsel for the Defendants urged that, as in the case of Prothonotary Milczynski's Order leading to this appeal, costs should be made payable in the cause. I am satisfied that appeals such as this, where the likelihood of success has been, I am satisfied, minimal, should be discouraged by costs orders. In the circumstances, I will order that costs of this motion in appeal will be payable to the Plaintiffs in any event of the cause. Such costs shall be subject to taxation.

ORDER

THIS COURT ORDERS that this appeal by way of motion under Rule 51 of the *Federal Courts Rules* is dismissed. The Plaintiffs are entitled to their costs to be taxed, payable by the Defendants, in any event of the cause.

“Frederick E. Gibson”

Deputy Judge

Docket: T-436-05

SCHEDULE
TO THE REASONS FOR ORDER AND ORDER
DATED MAY --, 2009

756

5

a. The case is not complex

40. Pason has filed no evidence from anyone, other than a legal secretary, as to the relative complexity of this case. The sole affiant from Pason does not address this issue. There is, in fact, no evidence from any witness that the issues in this proceeding are more complex than those raised in the numerous patent trials that are heard and determined by the Court without bifurcation.

41. The best evidence as to the relative complexity of the case weighs against bifurcation. The companion U.S. Action, which involved identical legal issues and the issue of remedy, was tried in nine days before a jury in Denver.

42. As to the specific arguments raised by Pason:

- (a) Apportionment: Pason has not adduced any evidence to support its submission that "there will be complex issues of apportionment of revenues made by the Defendant." Moreover, this argument is specious. Varco is not claiming that Pason has infringed the claims of the 313 Patent by selling "all of the equipment on a drilling rig." The allegation of infringement relates specifically to the sale or rental of the Pason AutoDriller;
- (b) Entitlement: There is no evidence on this motion that it will be difficult for Varco to adduce evidence relating to its activities in foreign countries, if at all, or that the production of such evidence and the resulting discovery will unduly delay this proceeding; and
- (c) Costs: Issues relating to Pason's costs have always been at issue in this action. Pason should have already produced documents relevant to the issues of costs in its affidavit of documents. The fact that Pason has not produced these documents, and has therefore failed to comply with its production obligations under the *Rules*,

cannot be a relevant basis for granting a bifurcation order. Further there is no evidence to support Pason's assertion that "this will be made all the more complex if the Defendants are required to produce such information for each foreign country now raised in the Amended Statement of Claim".

43. At paragraph 32, Pason states, without evidence or explanation, that "additional discovery will be required of both the Plaintiffs and the Defendants" in order to adduce the evidence necessary to assess the appropriate remedy in this case. It is common ground that the parties have already conducted substantial discovery on the issue of remedy. Varco submits that the only additional discovery required will be the second round of discovery to address further questions arising out of answers to undertakings or answers questions compelled to be answered. If Pason's submission is that it has conducted an inadequate discovery on the issue of remedy, and therefore needs a "second chance" to get it right, this cannot be the basis for an order of bifurcation.

44. Pason's submissions at paragraphs 33 to 35 of its written representations relating to the relative complexity and volume of evidence that will result from the recent amendment to the statement of claim is entirely unsupported by evidence. In addition, the amendments are confirmatory ones which clarify and relate to Varco's allegations of infringing activity, namely, the manufacture of the Pason AutoDriller in Canada and consequently, the damages flowing from its export from Canada. Further, there is no evidence to support Pason's statement that "[e]xtensive discovery will be required to address [Varco's] claims for profits or damages" in foreign countries, including the United States.

45. Pason's submission at paragraph 36 that this case has been procedurally complex is also specious. The information in paragraph 9 under the heading "history of the proceeding" has deliberately been presented in such a way as to make the history of this action appear complex. There have only been four pleadings motions: (1) a motion in 2005 to strike Pason's allegation of inequitable conduct; (2) two motions in 2005 to strike certain paragraphs of the Amended Statement of Defence and Counterclaim; and (3) a motion in 2009 to amend the statement of claim.

46. There is no evidence to support Pason's argument that further motions are likely to occur in this proceeding which will cause "further delay." The upcoming refusals motions are

contemplated by the existing scheduling order. Pason cannot rely on its appeal of the order granting leave to Varco to amend the statement of claim or on any intended appeal of the order sought on this motion as a basis for bifurcation.

47. There is no evidence that the issues in this action are sufficiently complex to warrant an order of bifurcation. This factor favours an order dismissing Pason's motion.

b. Liability and damages are intertwined

48. Pason is wrong in stating that in this case matters of infringement and whether the underlying patent are valid are separate and distinct from the assessment of the remedies claimed.

49. Pason has raised as a defence, the invalidity of the 313 Patent. Among other things, Pason argues that the invention of the 313 Patent would have been obvious to a person of ordinary skill in the art.

50. One of the factors that a Court may consider in assessing obviousness is the commercial success of the invention. As Varco advised Pason in 2006, the question of commercial success is an issue in this action by virtue of Pason raising the defence of obviousness. Pason's sales figures are therefore a proper subject of discovery with respect to liability. For that reason, bifurcation of liability and damages would do little to narrow the scope of discovery for trial.

51. This factor also favours an order dismissing Pason's motion.

c. Whether a decision on liability would put an end to the trial

52. Pason argues that in circumstances where a decision on liability will put an end to a proceeding, bifurcation is favoured. Taken to its logical conclusion, this argument suggests that every case initiated in the Federal Court that involves a consideration of liability and remedy should be bifurcated. This argument is wrong.

53. In paragraph 43, Pason seeks to reargue its opposition to Varco's motion to amend the statement of claim. Pason argues that it is likely that Varco is unlikely to succeed on its claims of infringement relating to the export of Pason AutoDrillers to foreign countries because "Pason has never exported an entire system."

54. As this Court has already determined, a patentee is entitled to seek relief for infringement of a Canadian patent where an infringing product is made in Canada and exported for sale or use in other countries. The patentee is entitled to be compensated for all damages flowing from the infringement of a patent within Canada, including profits lost on sales outside Canada.

AlliedSignal Inc. v. DuPont Canada Inc., [1993] F.C.J. No. 866 at para. 43 (F.C.T.D.); var'd [1993] F.C.J. No. 1216 (F.C.T.D.); aff'd [1995] F.C.J. No. 744 (F.C.A.); leave to appeal refused [1995] S.C.C.A. No. 282 (S.C.C.), VBOA, Tab 6

AlliedSignal Inc. v. DuPont Canada Inc., [1998] F.C.J. No. 190 at para. 33 (F.C.T.D.); aff'd [1999] F.C.J. No. 38 (F.C.A.), VBOA, Tab 7

55. Further, as this Court has already held, it is not obvious that the proposed amendments to the statement of claim are likely to fail. In fact, it is clear that Varco is entitled to claim damages and/or lost profits relating to acts of infringement that occur in Canada, including the manufacture of infringing devices which are rented or sold abroad. Pason manufactures all of its infringing AutoDrillers in Canada and the Pason AutoDrillers are rented or sold to Pason's foreign affiliates in countries including the United States, Mexico, Argentina and Australia.

Holt Examination, q. 135-140, 1540-1550, *Lombardi Affidavit*, Exhibits "D" and "E", VMR, Tabs 1D and 1E, pp. 78-80, 489-494

56. This factor also favours an order dismissing Pason's motion.

d. The parties have already devoted substantial resources to issues of remedy

57. The major consideration for severance under Rule 107 is the extent to which significant savings of costs and time would result from the bifurcation of the action. The traditional savings to be considered are savings in discovery of documents and examinations for discovery.

Fero Holdings Ltd. v. Blok-Lok Ltd., [2003] F.C.J. No. 502 at para. 5 (F.C.T.D.), VBOA, Tab 8

Markesteyn v. Canada, [2001] F.C.J. No. 1149 at para. 29 (F.C.T.D.), VBOA, Tab 9

58. Fairness and justice, however, are not to be sacrificed for expediency. Indeed, "even a modest degree of prejudice may outweigh any expediency expected from severance."

Realsearch Inc., *supra* at para. 17

- 16 -

Merck & Co. v. Brantford Chemicals Inc., *supra* at para. 10
General Refractories Co. of Canada v. Venturedyne Ltd., [2001]
O.J. No. 746 at para. 37, VBOA, Tab 10

59. Pason first raised the issue of bifurcation four years ago. The examinations for discovery which Pason describes as “extensive and time consuming” have been so precisely because the parties have canvassed *all* issues relating to liability and remedy.

60. It was the understanding of both parties going in to the examinations for discovery of the corporate representatives that all issues were on the table. Counsel to Pason specifically advised counsel to Varco before the examination of Pason’s corporate representative that he “was not revisiting the issue of bifurcation.” As Pason goes to great lengths to point out in paragraph 15 of its written representations, 42% of the examination of its corporate representative related to issues of remedy.

61. There is absolutely no evidence to support Pason’s bald assertion in paragraph 45 that if a bifurcation order does not issue there will be delays in bringing this matter to trial, and its bald assertion in paragraph 47 that “[e]xtending the discoveries and increasing the number of issues in this proceeding will inevitably increase the number of interlocutory disputes between the parties.”

62. The only recent interlocutory disputes are either ones that have been scheduled (i.e., refusals motions) or should have been resolved on consent (i.e., recent pleadings motion). The history of this proceeding does not support a conclusion that this proceeding has been any more contentious than other patent infringement proceedings that proceed to trial on all issues.

63. Pason’s submission that it will have to retain financial expert witnesses unless a bifurcation order is issued is highly surprising. This action has been extant for four years and remedies have always been at issue. Pason’s failure to retain expert witnesses in a timely fashion cannot be a basis for granting a bifurcation order.

64. The cases cited by Pason at paragraph 49 are entirely distinguishable from the present case. First, there is no evidence that examinations for discovery have “become bogged down” as in the *Osmose-Pentox* case. On the contrary, the parties have consented to a scheduling order, have met the deadlines that have passed, and are not requesting that the order be varied.

65. Further, as submitted above, the passages upon which Pason seeks to rely are general "motherhood" statements that could, taken out of context, apply to any case. The relevant considerations are the facts of the present case.
66. Pason argues that absent a bifurcation order, it could be required to produce some 9,800 invoices. First, these invoices are relevant to the issues in the statement of claim as originally framed and should already have been produced. Pason cannot rely on its failure to comply with the *Rules* as the basis to request a bifurcation order.
67. Second, there is no evidence that producing those invoices would involve anything other than rote photocopying or would be in any other way "overly onerous."
68. Pason argues at paragraph 51 that, absent a bifurcation order, if the Defendants succeed at trial, the time and funds spent on discovery will have been wasted. This argument is entirely divorced from the facts of this case. The parties have *already* spent significant time and funds on discovery of issues relating to remedy. There is no evidence that there will be any appreciable savings of time or resources going forward if the Court orders bifurcation.
69. Bifurcation at this stage of the proceeding would therefore be entirely inappropriate, since the parties have already incurred the costs that bifurcation is designed to avoid.
- Ilva Saronno S.p.A. v. Privilegiata Fabbrica Maraschino*
"Excelsior", [1998] F.C.J. No. 1500 at para. 20 (F.C.), VBOA,
Tab 11
- General Refractories, supra* at para. 34
- Benisti Import-Export Inc. v. Modes TXT Carbon Inc.*, 2005 FC
1587 at paras. 27-29 (Proth.), VBOA, Tab 12
70. Moreover, bifurcation in this case would not save any time because the issue of liability is intertwined with the issue of Pason's profits. Pason has raised the defence of obviousness, and therefore evidence of commercial success is relevant to the determination of liability. Bifurcation of the issues of liability and recovery would therefore do little to narrow the scope of discovery or trial.
- Dimplex North America Ltd. v. CFM Majestic Inc.*, 2003 FC 1226
at paras. 8-9 (F.C.), VBOA, Tab 13
71. This factor also favours an order dismissing Pason's motion.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-436-05

STYLE OF CAUSE: VARCO CANADA LIMITED, VARCO, L.P.,
WILDCAT SERVICES, L.P. and
WILDCAT SERVICES CANADA, ULC v.
PASON SYSTEMS CORP and PASON SYSTEMS INC.

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 11, 2009

**REASONS FOR ORDER
AND ORDER:** Gibson D. J.

DATED: May 22, 2009

APPEARANCES:

Peter R. Wilcox and Justin G. Necpal FOR THE PLAINTIFFS

Peter W. Choe and James Blonde FOR THE DEFENDANTS

SOLICITORS OF RECORD:

TORYS LLP FOR THE PLAINTIFFS
Barristers and Solicitors
Toronto, Ontario

GOWLING LAFLEUR HENDERSON LLP FOR THE DEFENDANTS
Barristers and Solicitors
Toronto, Ontario