Federal Court  Cour fédérale

Date: 20140401

Docket: T-1416-13

Citation: 2014 FC 318

Vancouver, British Columbia, April 1, 2014

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

COORS BREWING COMPANY AND MOLSON CANADA 2005

Applicants

and

ANHEUSER-BUSCH, LLC

Respondent

REASONS FOR ORDER AND ORDER

(Delivered from the Bench at Vancouver, April 1, 2014
the Court reserving the right to correct errors in grammar,
if any, and to complete citations)

[1] The Applicants seek the expungement of the Canadian trade-mark "Grab Some Buds" registered by the Respondent. The International Trade-Mark Association sought leave pursuant to Rule 109 of the *Federal Courts Rules* to intervene. By order dated March 11, 2014, Prothonotary Lafrenière dismissed that motion. This is the appeal therefrom.

[2] Interventions are governed by Rule 109 of the *Federal Courts Rules*. The Court may give leave to intervene. Thus the decision is discretionary in nature.

[3] Appeals from decisions of prothonotaries are governed by Rule 51 of the *Federal Courts Rules* and the considerable body of jurisprudence that has developed in relation thereto. In *Merck & Co v Apotex Inc*, [2004] 2 FCR 459, the Federal Court of Appeal held that a discretionary order of a prothonotary should only be reviewed *de novo* if the questions raised in the motion are vital to the final issue in the case, or the orders are clearly wrong in that the exercise of discretion was based upon a wrong principle or upon a misapprehension of the facts. A decision on a motion for leave to intervene is not vital to the final issue in the case. Thus the question is whether the decision was based upon a wrong principle or upon a misapprehension of facts.

[4] There are number of factors the Court should take into account in determining whether or not a third party intervention should be permitted. Prothonotary Lafrenière correctly identified the factors set out by the Federal Court of Appeal in *Canadian Union of Public Employees (Airline Division) v Canadian Airlines International Ltd*, 2000 FCJ No 220, 95 ACWS (3rd) 249 [CUPE].

[5] The factors set out by the Court in that CUPE decision are:

a. Is the proposed intervener directly affected?

b. Does there exist a justiciable issue or a veritable public interest?

c. Is there an apparent lack of any other reasonable means or efficient means to submit the questions to the Court?

d. Is the position of the proposed intervener adequately defended by one of the parties to the case?

e. Are the interests of justice better served by the intervention? and

f. Can the court hear and decide the case on the merits without the help of the proposed intervener?

[6] When the application of Coors Brewing Company and Molson Canada 2005 is heard on the merits, the Court will have to consider the interpretation of subsections 30(d) and 16(2) of the *Trade-Marks Act*. The proposed intervener is a leading international association of trade-mark owners, professionals and academics. It claims that it would be uniquely situated to provide the Court with a balanced international perspective on important issues of law and policy raised in the application. Had I been deciding this matter in the first instance, I may well have granted leave as I did in *Canadian Generic Pharmaceutical Association v The Governor in Council, The Minister of Health and The Attorney General of Canada*, 2007 FC 154. Some of Canada's international treaty obligations may well be in issue. That case dealt with Article 1711 of NAFTA. I said at para 30:

> [30]… Nevertheless, the treatment of Article 1711 of NAFTA in the United States and in Mexico, both by regulation and in the case law, may be of considerable importance. In *Foscolo, mango & Co, Ltd et al v Stag Line Ltd* [1932] AC 328, 41 Lloyd's List LR 165, the House of Lords noted that domestic legislation giving effect to a treaty has, to use the words of Lord MacMillan "an international currency".

[7] However, the issue is not what I would have decided; the issue is whether Prothonotary Lafrenière got it wrong.

[8] The six factors enumerated by the Court of Appeal in CUPE are not such that a failure to meet one of the tests is fatal to the motion to intervene. Prothonotary Lafrenière's major point was that INTA had failed to demonstrate that its proposed intervention would add to the debate, a factor

that is absent. It seems to me that holding was reasonable. The parties to the application are substantial corporations and are both represented by expert advocates in the field of intellectual property. The position of the proposed intervener certainly can be adequately defended by one of the parties. The Court is certainly able to hear and decide the case on its merits without the proposed intervention.

[9] There is also the issue of the interests of justice, a point which has come up following the Prothonotary's decision. The application on the merits is now set down for hearing in Ottawa on April 15, 2014. What is at stake is the possible expungement of one trade-mark and if I were in a position to exercise my discretion anew, given that timeline I find that the interests of justice would not be better served by allowing an intervention at this late date.

[10] With respect to costs, the proposed intervener made the appeal presentable in Vancouver notwithstanding that counsel for the Applicants reside in Ottawa and counsel for the Respondent in Toronto. The Respondent has not appeared but consents to the intervention. In the circumstances, it is neither entitled to nor burdened with costs.

[11] However, the Applicants had to have counsel come to Vancouver from Ottawa. Costs normally follow the event and I see no reason to depart from that rule. Costs shall be at mid-level Column III and shall include reasonable disbursements in counsel for the Applicants having to displace herself from Ottawa to Vancouver.

ORDER

THIS COURT ORDERS that the appeal is dismissed with costs.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1416-13
STYLE OF CAUSE:	COORS BREWING COMPANY AND MOLSON CANADA 2005 v ANHEUSER-BUSCH, LLC
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	APRIL 1, 2014
REASONS FOR ORDER AND ORDER:	HARRINGTON J.
DATED:	APRIL 1, 2014

APPEARANCES:

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