"PRIMA FACIE CASE" v."SERIOUS QUESTION TO BE TRIED"

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On January 18, 1989 the Federal Court of Canada, appeal division, in the case of *Turbo Resources Limited -and- Petro-Canada Inc.*, Court No A-163-88, lifted some of the uncertainties existing before that court in matters relating to interlocutory injunctions.

The Appelant was an Alberta corporation engaged in the business of refining and marketing petroleum products in Canada, including the marketing of packaged automotive agent lubricants which it or its predecessor commenced selling to the public under the mark "TURBO" in l967. The said trade mark was registered for wares including motor and engine oil.

In the late Fall of l986, the Respondent circulated a brochure in which it announced a new brand: Premium Turbo Tested Motor Oil. The existence of this brochure came to the Appelant's attention in January l987. A cease and desist letter dated June 23, l987 was sent by the Appelant's solicitors. The Respondent did market a one litre black plastic container of motor oil on which appeared the words: "Super Turbo Tested". It would appear that the Respondent wished to continue its activities: hence these proceedings.

At trial, Justice Addy dismissed the application by Turbo Resources Limited for an interlocutory and interim injunction. He proceeded to determine at the outset whether there was an obligation on the Appellant to establish "a strong *prima facie* case" or whether the Court had merely to be satisfied that there was "a serious question to be tried, in the sense that the action was neither frivolous nor vexatious". He explained at some length why he preferred to apply the *prima facie* case test in the circumstances of this case rather than the "serious question to be tried" test of *American Cyanamid Co. v. Ethicon Ltd.*, (1975) A.C. 396 (H.L.). He acknowledged some scope for granting an interlocutory injunction in certain rare occurrences even though a *prima facie* case might not be fully established, but would otherwise require the discretion to be exercised in the traditional manner that prevailed prior to 1975.

Justice Stone giving judgment for the Federal Court of Appeal did not agree with the learned and very experienced Motions Judge. After reviewing the case law where this question was discussed, he decided that the appeal he was dealing with should be approached at the outset on the basis of *American Cyanamid* threshold test, i.e. whether or not there exists a serious question to be tried.

The object of an interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. This need of the plaintiff must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertakings in damages if the uncertainty were resolved in the defendant's favour at trial. The court must weigh one need against another and determine where "the balance of convenience" lies.

In an attempt to formulate the main features of the factors to be taken into consideration in deciding whether or not to issue an interlocutory injunction, Justice Stone gave the following list:

(a) Where a plaintiff's recoverable damages resulting in the contimuance of the defendant's activities pending trial would be an adequate remedy that the defendant would be financially able to pay, an interlocutory injunction should not normally be granted;

(b) Where such damages would not provide the Plaintiff an adequate remedy but damages (recoverable under the plaintiff's undertaking) would provide the defendant with such a remedy for the restrictions on his activities, there would be no ground for refusing an interlocutory injunction;

(c) Where doubt exists as to the adequacy of these remedies in damages available to either party, regard should be had to where the balance of convenience lies;

(d) Where other factors appear to be evenly balanced, it is prudent to take such measures as will preserve the status quo;

(e) Where the evidence on the application is such as to show one party's case to be disproportionately stronger than the other's, this factor may be permitted to tip the balance of convenience in that party's favour provided the uncompensatable disadvantage to each party would not differ widely;

(f) Other unspecified special factors may possibly be considered in the particular circumstances of individual cases.

The Court of Appeal followed a different path and arrived at the same conclusion as did the Trial Division: in both instances the application was refused.

Justice Stone considered that there existed a serious question to be tried and went on to evaluate the balance of convenience. He concluded that all in all he was satisfied that the balance of convenience lied in favour of the Respondent. The interlocutory injunction had been in his opinion rightly refused by Mr. Justice Addy. The appeal was therefore dismissed with costs.

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