

**Date: 20091102**

**Docket: T-1579-06**

**Citation: 2009 FC 1119**

**Ottawa, Ontario, November 2, 2009**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

**ATOMIC ENERGY OF CANADA LIMITED**

**Plaintiff**

**and**

**AREVA NP CANADA LTD. and SOCIÉTÉ DES  
PARTICIPATIONS DU COMMISSARIAT  
À L'ÉNERGIE ATOMIQUE**

**Defendants**

**REASONS FOR ORDER AND ORDER**

[1] The Defendants brought a motion for summary judgment. Reasons for Order and Order issued on September 30, 2009. The Order dismissed the Plaintiff's claim. The Plaintiff AECL moves for reconsideration pursuant to Rule 397 of the *Federal Courts Rules* on the ground that the Order "does not accord with the Reasons, which only make findings in respect of three of AECL's five claims." The two claims of the Plaintiff which it says were not dealt with in the Reasons are: (1) the claim that the Respondents'

trade-mark registration No. TMA 651,852 is invalid, and (2) the alleged depreciation of the value of goodwill attaching to the Plaintiff's trade-mark registration No. TMA 160,039.

[2] The Defendants submit that the Order is consistent with the Reasons that issued. They submit that the Plaintiff "is not seeking to clarify or include terms omitted from the Order, but rather is improperly seeking to appeal the decision made by the Court." They further submit that the Plaintiff, in the materials filed in support of the motion for reconsideration, states that it is seeking an order pursuant to Rule 397(2) which deals with clerical mistakes, errors or omissions and the Defendants assert that no such error or omission is made.

[3] The Defendants make two additional submissions. They note that at the hearing they informed the Court that they would consent to the dismissal of their counterclaim if the main action was dismissed in its entirety, but the Order is silent in this respect. Lastly, the Defendants seek clarification of the Order as to costs; they are seeking costs on a solicitor-client basis.

[4] Rule 397 provides as follows:

397. (1) Within 10 days after the making of an order, or within such other time as the Court may allow, a party may

397. (1) Dans les 10 jours après qu'une ordonnance a été rendue ou dans tout autre délai accordé par la Cour, une partie

serve and file a notice of motion to request that the Court, as constituted at the time the order was made, reconsider its terms on the ground that

(a) the order does not accord with any reasons given for it; or

(b) a matter that should have been dealt with has been overlooked or accidentally omitted.

(2) Clerical mistakes, errors or omissions in an order may at any time be corrected by the Court.

peut signifier et déposer un avis de requête demandant à la Cour qui a rendu l'ordonnance, telle qu'elle était constituée à ce moment, d'en examiner de nouveau les termes, mais seulement pour l'une ou l'autre des raisons suivantes :

a) l'ordonnance ne concorde pas avec les motifs qui, le cas échéant, ont été donnés pour la justifier;

b) une question qui aurait dû être traitée a été oubliée ou omise involontairement.

(2) Les fautes de transcription, les erreurs et les omissions contenues dans les ordonnances peuvent être corrigées à tout moment par la Cour.

[5] Justice Pelletier in *Halford v. Seed Hawk In.*, 2004 FC 455, 31 C.P.R. (4<sup>th</sup>) 569 noted that Rule 397 is a defined exception to the doctrine of *functus officio* which provides that a Court cannot revisit its decision once it has been made.

[6] The Plaintiff references both subparagraphs of Rule 397 in its motion materials. It is evident that there has been no clerical mistake, error or omission in the Order that would warrant the intervention the Plaintiff seeks nor, despite referencing this subparagraph, does the Plaintiff make any real submission that such an error occurred.

[7] However, it is clear that the Order that issued on September 30, 2009, does not accord with the reasons given for it. The Plaintiff correctly observes that the Reasons make findings with respect to only three of the issues in dispute: trade-mark infringement, passing off, and copyright infringement. Those findings as set out in the Reasons are as follows:

[29] Accordingly, I find that AREVA has established that there is no genuine issue for trial with respect to AECL's allegation of trade-mark infringement, and AECL's claim of trade-mark infringement is dismissed.

...

[33] Accordingly, I find that AREVA has established that there is no genuine issue for trial with respect to AECL's allegation of passing-off and the claim of passing-off is dismissed.

...

[38] Accordingly, AREVA has established that there is no genuine issue for trial with respect to AECL's allegation of copyright infringement and its claim must be dismissed.

The Reasons do not deal with the two issues set out in the claim and summarized at paragraph 1 above. Accordingly, the Order does not accord with the reasons given for it and must be reconsidered to reflect the Reasons.

[8] The Defendants did advise the Court that it was agreeable to having its Counterclaim dismissed without costs if the main action was dismissed in its entirety. The fact that no such Order issued is indicative of the fact that it was not intended in the Reasons to dismiss the action in its entirety.

[9] There is no basis on which to revisit the issue of costs. The parties made submissions on costs at the hearing of the motion and the Order reflects my decision on that issue – the Defendants are to have their costs associated with the claims that have been dismissed and on the summary judgment motion in accordance with Rule 407. They are not entitled to solicitor-client costs.

**ORDER**

**THIS COURT ORDERS AND ADJUDGES that:**

1. The Order of the Honourable Mr. Justice Zinn dated September 30, 2009 is reconsidered and pursuant to Rule 397(1)(a) is amended to read as follows:
  1. The Defendants' motion for summary judgment pursuant to Rule 216 of the *Federal Courts Rules* in respect of trade-mark infringement, passing-off, and copyright infringement is allowed;
  2. The Plaintiff's claims for trade-mark infringement, passing-off, and copyright infringement are dismissed;
  3. This action shall proceed to trial on the Plaintiff's claim for depreciation of goodwill pursuant to section 22 of the *Trade-Marks Act*, and on the Plaintiff's claim that the registration of the A Design Mark is invalid; and on the Defendants' Counterclaim;
  4. The Defendants are entitled to their costs on this motion and with respect to the claims of the Plaintiff that have been dismissed.
2. There are no costs awarded on the motion for reconsideration.

“Russel W. Zinn”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1579-06

**STYLE OF CAUSE:** ATOMIC ENERGY OF CANADA LIMITED v.  
AREVA NP CANADA LTD. and SOCIÉTÉ DES  
PARTICIPATIONS DU COMMISSARIAT  
À L'ÉNERGIE ATOMIQUE

**PLACE OF HEARING:** Toronto, Ontario

**DATES OF HEARING:** June 29, 2009

**REASONS FOR ORDER  
AND ORDER:** ZINN J.

**DATED:** November 2, 2009

**APPEARANCES:**

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Joseph R. Marin

FOR THE PLAINTIFF

May Cheng  
Leanne Shaughnessy

FOR THE DEFENDANTS

**SOLICITORS OF RECORD:**

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