

In the Court of Appeal of Alberta

Citation: JL Energy Transportation Inc v Alliance Pipeline Limited Partnership, 2024 ABCA 175

Date: 20240527
Docket: 2401-0050AC
Registry: Calgary

Between:

JL Energy Transportation Inc.

Applicant
(Appellant)

- and -

Alliance Pipeline Limited Partnership, Alliance Pipeline Ltd., Alliance Pipeline L.P., Alliance Pipeline Inc., Aux Sable Liquid Products LP (formerly known as Alliance Pipeline NGL, LP) and Aux Sable Liquid Products Inc. (formerly known as Alliance Pipeline NGL Inc.)

Respondents
(Respondents)

The Court:

**The Honourable Justice Jo'Anne Streckaf
The Honourable Justice Elizabeth Hughes
The Honourable Justice Jolaine Antonio**

**Memorandum of Judgment
Delivered from the Bench**

Application for Leave to Reconsider a Previous Decision

**Memorandum of Judgment
Delivered from the Bench**

Hughes, JA (for the Court):

[1] The applicant, JL Energy Transportation Inc. (“JL”) applies for permission to argue on appeal that *Secure Energy Services Inc v Canadian Energy Services Inc*, 2022 ABCA 200 (*Secure Energy*) should be reconsidered under Rules 14.46 and 14.72 of the *Alberta Rules of Court*, Alta Reg 124/2010.

[2] The specific issues the applicant asks to be reconsidered, are the following:

- (a) that the *Limitations Act*, RSA 2000, c L-12, applies to claims for a remedy for an act of infringement of the *Patent Act*, RSC 1985, c P-4 brought in Alberta, not the six-year limitation period specified under s. 55.01 of the *Patent Act* (*Secure Energy* at paras 19-22); and
- (b) that “the continued use of property, including intellectual property, does not constitute an ongoing tort” (*Secure Energy* at para 30).

[3] By way of background, JL is appealing summary dismissal of its claim against a number of defendants concerning the defendants’ use of intellectual property: *JL Energy Transportation Inc v Alliance Pipeline Limited Partnership*, 2024 ABKB 72 (*JL Energy ABKB*). The appeal is scheduled to be heard in December 2024. JL’s grounds of appeal include that the chambers judge erred in summarily dismissing its claim on the basis of the *Limitations Act*.

[4] The chambers judge held that *Secure Energy* was binding on her, and for that reason she concluded that the two-year limitation period under the *Limitations Act* applies to claims for patent infringement (*JL Energy ABKB* at paras 49-51 citing *Secure Energy* at paras 16-24) and that the defendants’ breaches arising from its use of the technology or infringement of JL’s patents were not continuous breaches (*JL Energy ABKB* at paras 100-108 citing *Secure Energy* at para 30).

[5] This Court’s function on an application to reconsider is not to determine whether the previous case was “wrongly decided”, rather this Court’s function is to “determine whether [the case] should be reconsidered”: *Edmonton (Police Service) v Deluca*, 2020 ABCA 31 at para 6; *AC and JF v Alberta*, 2020 ABCA 251 at para 5; *Peters v Atchooay*, 2021 ABCA 237 at para 4; *Lawrence v Alberta (Director of SafeRoads)*, 2023 ABCA 271 at para 14. As a general rule, leave to reconsider a binding precedent “will be granted in very limited circumstances” subject to consideration of the following six factors (*R v Effert*, 2010 ABCA 144 at para 5; *Deluca* at para 8):

- i. the age of the decision;
- ii. treatment of the issues by other appeal courts;
- iii. whether there was “some simple, obvious, demonstrable flaw” in the previous decision;
- iv. whether some binding statute or authority has been overlooked;
- v. whether the earlier decision has created settled expectations or resulted in other cases being settled or decided in a particular way; and
- vi. whether the earlier decision was a memorandum of judgment delivered from the bench or a reserved, circulated judgment.

[6] In *R v Parranto*, 2021 SCC 46 at para 27, in the context of reconsidering sentencing precedents, the Supreme Court found all the above criteria are relevant save the sixth. In the circumstances of this case, we find nothing turns on the sixth criterion.

[7] JL argues that the test is met here because *Secure Energy* is a recent decision that has not become settled law, to date it has only been relied on (for the two issues set out above) in the decision under appeal, there are no other appellate authorities directly on this issue and both issues have simple, obvious and demonstrable flaws.

[8] The Respondents submit the application should be dismissed because JL has failed to identify any obvious, demonstrable flaw in the *Secure* decision.

[9] We are satisfied it is appropriate to grant leave to argue that *Secure* should be reconsidered. The application is granted.

Application heard on May 23, 2024

Memorandum filed at Calgary, Alberta
this 27th day of May, 2024

Hughes J.A.

Appearances:

A.P. Wilson, KC
C.E. Stokes
D.J. Marshall (no appearance)
C. Huang
 for the Applicant

M.R. Lindsay, KC
A.W. Wilkinson
K. Harder (no appearance)
M. Herron (no appearance)
 for the Respondents, Alliance Pipeline Limited Partnership, Alliance Pipeline Ltd.,
 Alliance Pipeline L.P., Alliance Pipeline Inc.

R.F. Smith, KC (no appearance)
K Moffet-Burima
S.J. Frazer
C.M. Nimmo
 for the Respondents, Aux Sable Liquid Products LP, Aux Sable Liquid Products Inc.