Federal Court Cour fédérale

Date: 20230405

Docket: T-1686-21

Citation: 2023 FC 483

Ottawa, Ontario, April 5, 2023

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

CHRISTOPHER JOHNSON

Plaintiff

and

CANADIAN TENNIS ASSOCIATION, MILOS RAONIC, GENIE BOUCHARD, DENIS SHAPOVALOV and FELIX AUGER-ALIASSIME

Defendants

ORDER AND REASONS

I. Context

[1] Mr. Johnson, a self-represented Plaintiff who is a journalist and photographer, commenced an action alleging copyright infringement for the use of his photographs against a number of Defendants including the Canadian Tennis Association (Tennis Canada), Milos Raonic, Genie Bouchard, Denis Shapovalov and Felix Auger-Aliassime.

[2] On May 30, 2022, the Chief Justice appointed Associate Judge Coughlan as case management judge. Generally, when cases are subject to case management, no relief may be obtained without first requesting a case management conference.

[3] Unfortunately, the action has become protracted, resulting in more than ten (10) Orders, twelve (12) Directions and many case management conferences.

[4] The Plaintiff brings a motion under Rules 51 and 369 of the *Federal Courts Rules,* SOR/98-106 [*Rules*], appealing a decision rendered on January 11, 2023, by Associate Judge Coughlan. In that decision, the Plaintiff was seeking:

> (a) Leave of the Court to conduct oral examinations of the Defendants Felix Auger-Aliassime and Tennis Canada CEO and President Michael Downey in response to their refusals to comply with the Orders of June 20 and August 25, pursuant to Rules 88, 94, 97, 234, 235, 244 and 245 of the *Rules*.
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> (b) The Court to sanction the Defendant Milos Raonic for refusing to allow the Plaintiff to examine him for discovery and for failing to comply with the Order of June 20, pursuant to Rules 97, 98 and 466 of the *Rules*.
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> (c) The Court to sanction the Defendant Denis Shapovalov for failing to answer within the 30-day deadline written examination questions sent to him on September 19, and for failing to comply with the Order of June 20, pursuant to Rules 97, 98, 99 and 466 of the *Rules*.
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> (d) Leave to conduct examinations for discovery of non-parties Bernard Duchesneau, Jeff Donaldson, and Natan Levi, pursuant to Rules 233 and 238.

[5] In her decision issued on January 11, 2023, Associate Judge Coughlin dismissed the Plaintiff's motion for, *inter alia*, the following reasons:

(a) On the request to conduct oral examinations of the Defendants Felix Auger-Aliassime and Tennis Canada CEO and President Michael Downey, the Plaintiff had already served written examinations on those Defendants. Under Rule 234, a Plaintiff may not conduct both a written and an oral examination for discovery without either consent, or leave of the Court. Under Rule 235, a party may only examine an adverse party for discovery once, unless they obtain leave from the Court. Associate Judge Coughlan ruled that the Plaintiff's intent to conduct oral examination was because a large number of the Plaintiff's questions were struck or re-framed, and that the Plaintiff was not satisfied with the Defendants' responses to his written examination. As no appeal was made of the order striking or reframing the questions, and no motion was brought under Rule 97 to compel an answer to a question if one was not responded or objected to, Associate Judge Coughlan ruled that the Plaintiff's request for oral examination was because much of his original discovery questions were struck as being irrelevant and improper, and that he failed to provide any reasonable basis on which the Court might exercise its discretion to grant leave for oral discovery. The Plaintiff did not point to any specific questions or deficiencies in the answers provided by the two Defendants that warrant further discovery and the fact that he did not seek leave to bring a motion under Rule 97 seeking better answers buttressed that view. Moreover, the Plaintiff did not provide particulars of the alleged undisclosed information or the basis for his assertions.

(b) On the request to sanction M. Raonic, the Court had granted M. Raonic leave to file a motion for summary judgment. In the circumstances, M. Raonic did not have to take any steps until that motion was decided. Moreover, the Plaintiff adduced no evidence in his supporting affidavit that M. Raonic was in contempt of an Order of the Court.

(c) On the request to sanction M. Shapovalov for failing to answer within the 30-day deadline written examination questions, the reason why Mr. Shapovalov was late was because he brought a motion to strike the unanswered questions for examination. Mr. Shapovalov was therefore not in contempt of an Order of the Court.

(d) On the request for leave to conduct examinations for discovery of non-parties, the request was dismissed for the simple reason that the three non-parties were not personally

> served and allowed to participate in the motion, as required under Rule 238(2).

II. Issue and Standard of Review

[6] As held by Justice Diner in another appeal brought by the Plaintiff under Rule 51, the standard of review is:

> [22] A prothonotary's discretionary decision is subject to the appellate standard of review set out in *Hospira Healthcare Corp v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras 27-28, 65-66, and 79 [*Hospira*]; *Canada (Attorney General) v. Iris Technologies Inc.*, 2021 FCA 244 [*Iris*] at para 33). *Hospira* held that, consistent with the standard set out by the Supreme Court in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*], questions of fact and questions of mixed fact and law are reviewable on a standard of palpable and overriding error, whereas questions of law will be reviewed on the standard of correctness.
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> [23] The Plaintiff's Appeal rests on his argument that the Prothonotary's order misapprehended the facts presented in support of his motion. As such, his burden is to show a palpable and overriding error in the Decision. The Federal Court of Appeal has explained that palpable and overriding error is a highly deferential standard of review and that "it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall." (*Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157 at para 61).

III. Analysis

A. *Arguments of Mr. Johnson*

[7] In Mr. Johnson's notice of motion and written representations in support, Mr. Johnson refers specifically to paragraphs 46, 47 and 54 of his November 21, 2022, written representations on his motion resulting in the impugned decision, as well as paragraphs 16, 26 and 28 of his

written representations in reply submitted on December 6, 2022. The Plaintiff claims that Associate Judge Coughlan must have ignored those paragraphs as they contained relevant facts that ought to have influenced the Court's discretion.

[8] Paragraphs 46, 47 and 54 of the Plaintiff's November 21, 2022 written representations on his motion state:

> 46. For example, in his sworn affidavit of September 8, 2022 (sent by email Sept. 23), Mr. Auger-Aliassime said that he posted my photograph on his official Twitter account in June 2016 and removed it on June 27, 2019. This contradicts his Dispute Note of February 2019 and Statement of Defence January 21, 2022, in which he denied infringements and any involvement with the Plaintiff and his photography, but also claimed that any photographs were removed "with haste" in 2018. All of these statements can't be true at the same time. I should have the right to find out. If not, I still won't know their positions ahead of trial.
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> 47. Furthermore, in his sworn affidavit, and in response to Judge Coughlan's revised questions:
>
> > (a) Mr. Auger-Aliassime stated that "while that photo was posted on Twitter, I had no paid sponsorship agreement with any brand/company." In fact, Tab 9 of my Affidavit of Documents contains screenshots of Mr. Auger-Aliassime in the advertising campaigns of his sponsors including Babolat tennis equipment and Tag-Heuer watches, among others, between June 2016 and June 27, 2019. I should have the right to ask him about that.
> >
> > (b) In emails and phone calls in January 2022, his agent and tax lawyer Bernard Duchesneau told me that he and his client asked ATP, Facebook and others to take actions against alleged persons "stealing the identity" of Mr. Auger-Aliassime. Some time later, these Facebook accounts apparently disappeared in 2022. But in answer to Judge Coughlan's revised question #49, Mr. Auger-Aliassime claims: "It is not possible for me to prevent people from creating fan pages in my

> name." I should have the right to ask him to clear up this mystery.
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> (c) In answer to the Court's revised question #51, Mr. Auger-Aliassime states that "I do not have any such records and have never dealt directly with any social media platform representatives in that respect." In fact, his own Affidavit of Documents contains records of these communications with Facebook. Mr. Auger-Aliassime also refers to these records in answer to the ensuing question. I should have the right to see all of these records.
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> (d) In answer to the Court's revised questions #56 and #57, Mr. Auger-Aliassime refuses to provide records and he contradicts the statements of his agent regarding the alleged "administrators" of social media accounts using his name. I should have the right to ask him more about these "administrators" because I have reason to believe that he and his "Team Felix" are doing this.
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> (e) In answer to the Court's revised question #65, Mr. Auger-Aliassime claims that "I opened a Facebook account under my name" in October 2021, which contradicts his other claims that he opened his "first" Facebook account in February 2022, after his agent exchanged communications with the Plaintiff in January 2022. I believe that he's actually been on Facebook since at least 2017. I should have the right to seek clarification of this key fact in the case.

[…]

54. Furthermore, the Plaintiff should have the right to orally examine Mr. Downey because his sworn affidavit is improper and insufficient for the following reasons:

> a) Instead of complying with the Order of August 25 and producing any unproduced records, Mr. Downey repeatedly stated versions of the refrain: "Tennis Canada is otherwise unable to locate any unproduced records within its control which are relevant to this question." In fact, Tennis Canada receives millions of dollars in taxpayer funding. They are required to keep records and documents.

b) Mr. Downey, who previously denied any involvement with the Plaintiff and his photography, admitted in answer to questions 11 and 12 that Tennis Canada did post my photographs on their official sites. But Mr. Downey provided no proof or records to support his claim that Tennis Canada removed my photographs. The Plaintiff should have the right to ask Mr. Downey to clarify these contradictions.

c) In further answer to my question 12, Mr. Downey tried to mislead the Court by misrepresenting my email of December 20, 2018, in which I tried to establish facts and build better relations with Tennis Canada. He twisted the meaning of my phrase "and my posts were removed". He replaced my "comma" with a "period" in order to alter the meaning of a sentence. He also omitted the final sentence of my paragraph, in which I wrote: "Tennis Canada, its employees and players cannot post my work, remove those posts, and then demand the copyright holder send screenshots as proof." Indeed, my final sentence puts the previous two sentences into a different context than that which the Defendants wrote in their answer. This is an attempt to mislead the Court. The Plaintiff should have the right to demand he answer questions properly and truthfully.

d) In addition, Mr. Downey wrote: "Tennis Canada is unable to locate any unproduced records involving the removal of the photos." Thus Tennis Canada has failed to provide evidence to prove their claims that they removed my photographs. In fact, they never returned my materials to me, as required by the Copyright Act. In bad faith, the Defendants have either deliberately concealed any information about alleged removals or deleted it from their records, computer files or elsewhere within their possession or control. The Plaintiff and the Court still cannot determine who removed my photographs, or if they were ever removed. Since this is crucial to the Defendants' argument based on "limitation periods", the Plaintiff should have the right to question them about what exactly happened and when.

e) Mr. Downey claimed that Tennis Canada's website "is public and that removal has been public information from the date it occurred until the present." The Plaintiff should have the right to ask Mr. Downey to explain how something (such as an article or post) which doesn't exist on the internet can somehow be "public information". By that logic, everything that also doesn't exist on the internet is also somehow "public information". This seems absurd.

f) Mr. Downey's motion to strike prevented me from asking about how the Defendants derive benefit and unjust profits from social media accounts that use the names of the Defendants in order to promote the Defendants. This is crucial to the advancement of my case. But in answer to questions #15 and #19 about these social media accounts and platforms, Mr. Downey merely answered: "No, Tennis Canada is not aware of and is unable to locate any record of engaging in such communications." This is not true. Thus the Plaintiff should have the right to demand a truthful answer.

g) In answer to question 20, Mr. Downey tried to mislead the Court by falsely claiming that the Plaintiff "repeatedly breached settlement privilege by publicly disclosing the details of without prejudice settlement negotiations, often inaccurately." In fact, the Defendants have refused to engage in any real, meaningful settlement negotiations whatsoever in accordance with Rule 257 of the Federal Courts Rules. When my lawyer in Toronto reached out to him to initiate negotiations, Mr. Hafso made false claims on behalf of his clients which tried to mislead her. The Plaintiff submits that combative, antagonistic, harassing and deceitful communications are not "settlement negotiations" simply because it's convenient for the Defendants to call them that. Thus it's incorrect to claim "settlement privilege" over egregious behavior. If Mr. Downey wants to prove or expand upon his allegation, then he can do that during an oral examination.

h) Instead of answering questions, Mr. Downey demonstrated a hostility toward journalists and a disregard for factual reality and the Charter. Since Mr. Downey is not a trained journalist or journalism professor, he lacks professional authority to criticize public interest journalism by a company in competition with his own media organization which has sought to destroy my organization. Mr. Downey also failed to demonstrate how my organization's journalism is "often" inaccurate or against the law in Canada, where the Charter protects journalists from attempts at harassment, intimidation and muzzling. If Mr. Downey wants to prove or expand upon his allegation, then he can do that during an oral examination.

i) Instead of telling the truth, Mr. Downey used his answers to make false and unproven accusations to harm the Plaintiff and his reputation before the Court. "His communications have been extremely lengthy, cover many irrelevant topics, and are difficult to follow," wrote Mr. Downey, without explaining how the Plaintiff's emails are against the law or in violation of the Copyright Act or the Federal Courts Rules. I should have the right to ask him to prove or explain his damaging allegations.

j) Instead of providing records or new information, Mr. Downey attempted to mislead and waste the Court's time by presenting "exhibits" of dozens of screenshots already contained in the Affidavit of Documents. These screenshots actually advance the legal position of the Plaintiff, not the Defendants, because they demonstrate the infringing behavior of the Defendants and their associates.

k) Mr. Downey produced no records whatsoever in answer to the Court's revised question 21, which stated: "Tennis Canada is to make reasonable efforts to identify any unproduced records within its control regarding communications between Tennis Canada and others regarding blocking Christopher Johnson on social media at any material time, and if so produce them subject to claims of privilege." I should have the right to discover this information, which is crucial to demonstrate how the Defendants took heavy-handed measures to effectively blacklist

me and prevent me from working on the international tennis tour and at events owned or operated by Tennis Canada. It would not serve justice for the Court to allow the Defendants to conceal this information.

l) Instead of producing the communications involving himself and other parties, including Tennis Canada executive Jennifer Bishop, who blocked me on social media, Mr. Downey merely answered: “Tennis Canada is unable to locate any unproduced records within its control which are relevant to this question.” I should have the right to ask about the involvement of Ms. Bishop, a lawyer who was the Chair of Tennis Canada, and thus one of the most powerful officials in Canadian sports.

m) Mr. Downey gave the same evasive answer to the Court’s revised question 22, which requires Tennis Canada to make “reasonable efforts” to prove how the Plaintiff allegedly behaved in an “inappropriate or aggressive manner towards Tennis Canada personnel at any material time.” This demonstrates that Tennis Canada cannot or will not provide evidence to support the false narrative they have used for several years to bully, harass and intimidate the Plaintiff instead of paying him for his work. Thus I should have the right to ask him why he’s fabricating a false narrative about me.

n) Mr. Downey’s answers to the Court’s revised questions 23 and 24 contradict his previous claims and his false accusations in answer to question 20 and other questions. Instead of producing any unproduced records or information, Mr. Downey repeats the Defendants’ statement in their responding motion of August 10 that they don’t plead that I somehow harassed or defamed them, or that I was “at war” with Tennis Canada while allowing them to use my photographs for free. “I am advised by Counsel that Tennis Canada has not pled such allegations in its Statement of Defence,” wrote Mr. Downey. “Tennis Canada is unable to locate any unproduced records within its control which are relevant to this question.” Therefore, since the Defendants don’t plead harassment or defamation, and cannot prove their false

accusations, the Plaintiff respectfully asks the Court to consider whether it's fair and just to allow Mr. Downey and Mr. Hafso to disparage me in order to tarnish my reputation before the Court with impunity.

o) Contradicting his previous "answer", Mr. Downey in bad faith used his answer to the Court's revised question 25 to attack the Plaintiff. "There are extensive records of the Plaintiffs disparaging comments about Tennis Canada and other Defendants which have been produced in both Tennis Canada and the Plaintiff's document production. Tennis Canada is unable to locate any further unproduced records within its control which are relevant to this question." Since Mr. Downey has not, in fact, produced "extensive" records, the Plaintiff should have the right to question him about this.

p) Instead of providing evidence in answer to question 40, Mr. Downey repeats: "Tennis Canada is unable to locate any further unproduced records within its control which are relevant to this question." Therefore, if Tennis Canada and the Defendants, as per their August 10 motion, don't plead "defamation" or "harassment", then Mr. Downey should have to explain to me orally why he is disparaging me in answer to question 25 and other questions.

q) In answer to the Court's revised questions 26, 28 and 29, Mr. Downey merely repeated versions of his frequent response that: "Tennis Canada is unable to locate any such unproduced records in its control." In fact, Mr. Auger-Aliassime mentioned ATP security officer Bob Campbell in his sworn affidavit. Furthermore, the emails of Mr. Auger-Aliassime's agent and tax lawyer Bernard Duchesneau also mentioned their involvement with Mr. Campbell. Further still, the Defendants have previously made accusations against the Plaintiff in regards to Katie Spellman, who told the Plaintiff that he couldn't photograph Tennis Canada events, and Tennis Canada social media coordinator Jeff Donaldson, who allegedly posted the Plaintiff's photographs on Tennis Canada's official websites

> and social media accounts. Information regarding the Defendants' involvement with Mr. Campbell, Ms. Spellman, Mr. McIntyre, Mr. Donaldson and Mr. Levi is crucial to the advancement of the Plaintiff's case. I should have the right to ask for more information about this. I also respectfully ask the Court to consider punishing Mr. Downey for providing untruthful answers to the revised questions in the Court's Order of August 25.
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> r) In answer to the Court's revised question 36 and the Plaintiff's questions 37, Mr. Downey merely refers to existing information and records in his Affidavit of Documents. Furthermore, the Defendants on August 10 claimed the issue of service was "moot" because they have vigorously defended this Action. I should have the right to ask Mr. Downey about how they tried to evade service of Federal Court documents.
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> s) Finally, at the end of his answers, Mr. Downey strangely provided exhibits with a large number of screenshots which demonstrate the infringing behavior of Tennis Canada employees, contributors and associates. This evidence was already before the Court and contained in the Affidavit of Documents.

[9] As for paragraphs 16, 26 and 28 of Mr. Johnson's Written Representations in Reply submitted on December 6, 2022, they state:

> 16. Since 2018, the Defendants and their solicitors have prohibited me from directly contacting these non-parties. On behalf of his clients, Mr. Hafso in 2019 threatened to have me jailed for "contempt of court" if I tried to contact Mr. Levi and Mr. Donaldson. He then obtained an order of the Provincial Court on June 26, 2019 which barred me from contacting Mr. Levi, Mr. Donaldson and others connected with Tennis Canada.
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> Judge F.C. Fisher's order also required Mr. Hafso to receive service and contact these parties on my behalf. Thus on Nov. 2, 2022, I wrote directly to Mr. Hafso: "In reference to the Case Management Conference, and the Provincial Court action, I'd like to ask you to provide the full contact details for Jeff Donaldson and

Natan Levi, since I will seek leave from the Court to conduct examinations of them for discovery." But Mr. Hafso refused to do this. "I believe your request is premature as no such leave has been granted to date," he wrote on Nov. 2.

Moreover, I tried to serve Bernard Duchesneau, but he told me to contact Mr. Hafso. Thus, on April 4, I sent Mr. Hafso my written examination questions for Mr. Duchesneau. But Mr. Hafso objected to this. "I confirm receipt of a written examination directed to non-party, Bernard Duchesneau," Mr. Hafso wrote on April 5. "I write to advise that request is refused. Leave of the Federal Court is required to examine a non-party pursuant to Rule 238. I am not aware of any such leave being granted".

[…]

26. The Defendants, who are concealing relevant information from the Court, are cherry picking from hundreds of email exchanges since 2018 which would not have been necessary if they had paid their bills in the first place. They have taken our exchanges in March 2022 out of context in order to mislead the Court:

> a) On March 29, after receiving their Affidavit of Documents, I asked Mr. Hafso's Defendants for more information and documents. "Kindly note that these documents and materials are insufficient to prove your claims asserted in the Statement of Defence," I wrote. "Thus I respectfully request all evidence, information and documentation regarding the accusations that the Defendants have made against me in their Statements of Defence and Affidavit of Documents, including the accusations and claims made through lawyers Alexandra Shelley, David Outerbridge, Blake Hafso, Mark Feigenbaum and Bernard Duchesneau. In good faith, I believe I have the right to request documentation of all communications involving Tennis Canada personnel, players, associates or contributors (full-time, part-time, paid or unpaid) regarding anything related to the Plaintiff Christopher Johnson."
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> b) In her Order of August 25, 2022, the Case Management Judge also ordered Mr. Hafso's Defendants to answer this question and produce this information. They refused to do this.

> c) In bad faith, the Defendants chose to conceal evidence of their infringing behavior and egregious conduct towards me. On March 29, Mr. Hafso wrote: "In light of the foregoing we will not be providing any records or information in response to your March 29, 2022 emails at this time." Mr. Hafso added: "I also provide notice that we may apply for summary dismissal or other similar summary adjudication." This supported a suspicion that the Defendants had no real intention to answer questions truthfully and provide all relevant documents within the deadlines.
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> d) On March 30, I responded: "Please also cite the rules to which you rely upon in order to refuse or decline my respectful requests for more particular information regarding your assertions and claims in your Statement of Defence." I then cited Rules 234, 236, 240, 242 and 243.
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> e) Instead of acting in good faith, Mr. Hafso's Defendants took extensive measures to conceal relevant information. They also refused for several months to answer my written examination questions submitted on March 30 and April 18. Now Mr. Shapovalov has refused for more than 75 days to answer my questions that are based on his questions for me, which I answered.
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> […]
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> 28. I did not have "full awareness" of all the games that the Defendants and their solicitors would play to make a mockery of the discovery process. In good faith, I hoped that the Defendants would answer my written questions truthfully within the 30-day deadline. They did not do this.

[10] In his written representations on this motion, Mr. Johnson restates the arguments he has previously made in his prior motions, including that the Defendants have refused to pay him despite their violation of the *Copyright Act*, R.S.C., 1985, c. C-42, that they have refused to

respond to his written questions in discoveries, that they delayed the proceedings thereby inflating costs, and that they concealed information.

[11] Mr. Johnson's written representations then proceed to a paragraph by paragraph indictment of the Associate Judge's decision and Order of January 11, 2023, stating that the Associate Judge punished him for following her previous orders and rewarded the Defendants for failing to truthfully answer the questions put to them in written examination.

[12] Mr. Johnson submits that the Associate Judge did not advise him that he could file a motion under Rule 97(b) to compel answers from the Defendants, or that he could appeal a previous Order dated August 25, 2022, striking many of his questions for lack of relevance. Instead, Mr. Johnson argues that the Associate Judge forbade the parties from bringing any motion without first requesting a case management to seek her permission. Mr. Johnson also submits that the Associate Judge instructed him to request leave to conduct further examinations, but then her Order of January 11, 2022, dismissed that request. In essence, Mr. Johnson submits that he is allowed a proper discovery process and that the Associate Judge's Order, as well as previous ones, ignored the rules and misapprehended the facts.

[13] Mr. Johnson then submits that the Defendants did not comply with the Orders of the Associate Judge, including deadlines to respond to written examination, and therefore ought to have been sanctioned by the Court.

[14] Finally, Mr. Johnson submits that he should be allowed to examine non-parties, because he was prohibited from contacting them by the Defendants and their solicitors, as well as by an Order of the Provincial Court of June 26, 2019.

B. *There is no error of law or palpable and overriding error of fact*

[15] The current motion is an example of the unfortunate consequences that may arise when individuals are self-represented. There is no doubt that litigation is complex, and that representation is not always accessible. While the Court must give some latitude to self-represented litigants to address the possible imbalance between the parties, and perhaps, to the extent possible, apply the Rules flexibly, self-represented litigants must nevertheless conform to the Rules.

[16] I have reviewed Mr. Johnson's written representations, and particularly considered the specific paragraphs he noted (and cited above). For the following reasons, those paragraphs and the additional written representations submitted by Mr. Johnson on this motion under Rule 51 to appeal the Order of the Associate Judge, do not demonstrate that the Associate Judge made an error of law or a palpable and overriding error of fact in exercising her discretion to dismiss the Plaintiff's motion.

(1) The request to conduct oral examinations

[17] Mr. Johnson sought leave to conduct oral examinations of the Defendants Felix Auger-Aliassime and Tennis Canada CEO and President Michael Downey. To be clear, Mr. Johnson

did not bring a motion, nor seek in the alternative, a remedy under Rule 97(b) to compel answers to questions improperly objected or improperly responded, or to compel answers to additional questions that arise by virtue of the answers given.

[18] The issue with this particular motion is that Mr. Johnson's request did not comply with several Rules of the *Federal Courts Rules*. First, under Rule 88 and Rule 234, a party is allowed to conduct an examination for discovery orally, or in writing. Rule 234 specifically provides that if a party intends to proceed with both, consent of the person being examined is required, or leave of the Court must be obtained. Rule 235 also provides that a party may only be examined for discovery once. [Emphasis added]

[19] In this case, Mr. Johnson decided to proceed with a written examination, for strategic or other reasons. Mr. Johnson's choice to proceed in that manner led to the following consequences: a) he could not examine orally the adverse party without consent or leave of the Court; b) his decision to proceed by written examination was his only opportunity to examine the adverse party (unless he obtained leave).

[20] Of course, if Mr. Johnson's attempt to obtain relevant information by written examination was impossible because of the Defendants' objections to questions, or by failure to properly respond to relevant questions, Mr. Johnson had a recourse under Rule 97. That Rule provides that the Court may order the adverse party to re-attend examination (Rule 97(a)), or to answer a question that was objected to or not properly answered (Rule 97(b)), or to respond to additional questions that arise as a result of the answers given (Rule 97(b)). While Mr. Johnson brought a

motion under Rule 97 generally, he did not seek that specific remedy nor provide evidence that would have allowed the Associate Judge to rule in his favour.

[21] In her decision dismissing Mr. Johnson's request, the Associate Judge explained that from the outset, he was informed by the Defendants that they would not consent to both a written examination and an oral examination.

[22] After the Plaintiff elected to proceed with a written examination, the Defendants brought a motion to strike many of Mr. Johnson's questions. In two Orders dated August 25, 2022, the Associate Judge struck many questions, and reformulated many others. Mr. Johnson did not appeal the Orders of August 25, 2022, under Rule 51.

[23] After the Orders of August 25, 2022, the Defendants provided their responses to the remaining questions.

[24] Unhappy with the responses, Mr. Johnson filed a motion to conduct oral examinations. Because the file is under case management, the Associate Judge refused the filing of the motion before a case management conference was held. After the case management conference, Mr. Johnson was allowed to file his motion to conduct oral examinations but also sought two additional reliefs: a) the Court to sanction some Defendants; b) leave of the Court to conduct the examinations of non-parties. This is the motion that the Associate Judge decided on January 11, 2023.

[25] During the same case management conference, the Defendants were granted leave to file a motion for summary judgment. The filing of that motion suspended the timetable established by the Court for the following steps of the litigation, including the timeline for the Defendants to file their responses to the written examination.

[26] An order under Rules 97, 234 and 235 granting leave to order a person to re-attend examination, to order a person to attend an oral examination, or to order a person to respond to additional written questions, is not automatic nor easily obtained (*Nautical Data International, Inc v Navionics, Inc*, 2017 FC 756 (CanLII) at para 24). The party requesting relief must demonstrate that the questions are relevant and that the answers are necessary for the purposes of trial, in the sense that the question proves, or disproves an allegation of fact in the Plaintiff's statement of claim (*Levi Strauss & Co v Lois Can. Inc.* (1987), 16 C.P.R. (3d) 287 (Fed. T.D.); *Poly Foam Products v Indusfoam Can. Inc.* (1986) 6 F.T.R. 201 (T.D.)).

[27] Before the Associate Judge, Mr. Johnson's justification for requesting an oral examination was that he had a right to a proper discovery process and it would be otherwise unfair to deny it to him; and that the Court struck almost all of his questions.

[28] At paragraph 38 of his written representations in this motion to appeal the Associate Judge's Order of January 11, 2023, Mr. Johnson submits that he did not seek oral discovery because the questions were struck, but "because the Defendants have failed to truthfully answer my unstruck written questions, and also the Court's reframed questions".

[29] In her January 11, 2023 decision, the Associate Judge ruled, at paragraph 9, that the Plaintiff "did not provide any reasonable basis on which the Court might exercise its discretion to grant leave for oral discovery. While he asserts that further discovery is required to ensure a fair trial, he does not point to any specific questions or deficiencies in the answers provided by the two Defendants that warrant further discovery."

[30] Mr. Johnson did point, in several paragraphs in his written representations (and cited above), to specific questions that in his view, were not answered truthfully by the Defendants or were deficient. However, as held by the Associate Judge, these paragraphs do not constitute evidence that the Defendants are "hiding information" or "hiding the truth" as Mr. Johnson argues, nor demonstrate that the answers warrant oral examination as requested. Rather, the answers perhaps demonstrate that the Defendants made contradictory or inconsistent statements. Moreover, they represent the evidence on which the Defendants intend to rely on at trial. However, the questions and answers pointed to by the Plaintiff in those paragraphs do not demonstrate that the Order compelling the Defendants to attend an oral examination is necessary.

[31] More importantly, those paragraphs do not demonstrate that the Associate Judge erred or made a palpable and overriding error in exercising her discretion not to grant Mr. Johnson's request or leave to conduct oral discovery.

[32] The present motion might be the result of a misunderstanding of the rules of discovery, and Mr. Johnson's expectations in that regard. Contrary to what Mr. Johnson appears to believe, discoveries are not intended to establish the "truth", or "clean up this mystery", but rather "to

render the trial process fairer and more efficient by allowing each party to inform itself fully prior to trial of the precise nature of all other parties' positions so as to define fully the issues between them" (*Canada v Lehigh Cement Limited*, 2011 FCA 120 at para 30). Consequently, the fact that Mr. Johnson believes that the Defendants were not truthful in their responses and provided inconsistent statements, is not a ground for oral discovery. It is rather evidence on which the Plaintiff can rely in cross-examination of the Defendants at trial, in order to impeach their credibility.

[33] The Associate Judge held at paragraph 9 that Mr. Johnson simply did not provide a reasonable basis on which the Court could exercise its discretion to grant leave for oral discovery. In the end, the Associate Judge ruled:

> [12] I am not persuaded the interests of justice weigh in favour of granting leave for oral discovery. The Plaintiff elected to proceed with written discovery knowing that the Defendants would likely resist further oral discovery. That was his choice and he proceeded with full knowledge of the consequences. Further, although the Plaintiff is self-represented, the evidence on this motion makes plain that he has had the benefit of legal advice from counsel.
>
> [13] As case management judge, I must also consider the principle of proportionality in litigation. The Plaintiff has had his discovery of the two Defendants. Many of his questions were struck as improper or irrelevant. No appeal was taken and no relief was sought under Rule 97. The principle of proportionality weighs against further discovery and I am dismissing the Plaintiff's motion for further oral discovery.

[34] Having considered the arguments of Mr. Johnson in this motion, as well as the arguments made before the Associate Judge, I cannot find that an error of law or a palpable and overriding error was made by the Associate Judge in her consideration of the legal and factual issues. She

properly applied the principles, including the interests of justice and proportionality, in exercising her discretion.

[35] If Mr. Johnson has some relevant questions to ask the Defendants that arise as a result of their answers to the written examination, including that the Defendants improperly refused any undertaking to disclose and provide additional documents, the recourse for Mr. Johnson is not for an oral examination under Rule 234. Mr. Johnson's recourse is to bring a motion under Rule 97(b), and convince the Court to exercise its discretion and grant an Order compelling the Defendants to answer questions improperly objected to and respond to any proper question arising from their answers. But that was not the request made by Mr. Johnson to the Associate Judge and is not subject to the current motion.

[36] Mr. Johnson also appears to accuse the Associate Judge for having failed to advise him that he could bring an appeal of her order of August 25, 2022, striking many of his questions in written examination, and failing to advise him to bring a motion under Rule 97. However, that is not the role of the Court.

(2) The request to have Mr. Raonic sanctioned by the Court

[37] Mr. Johnson submits that Mr. Raonic should be sanctioned for not responding to his written examination within the timeframe established by the Court.

[38] However, the Associate Judge granted Mr. Raonic leave to file a motion for summary judgment. The filing of the motion suspended the Court's previous timeline for Mr. Raonic to respond to Mr. Johnson's written examination.

[39] The Associate Judge properly applied the legal principles applicable to the suspension of steps in a legal proceeding when a notice of motion is filed.

[40] In addition, Mr. Johnson's request is essentially to declare Mr. Raonic in contempt of an order of the Court. That is a serious matter requiring evidence, potentially a hearing and proof beyond a reasonable doubt, under Rules 466-470.

[41] In this case, there is simply not sufficient evidence for such a sanction. Mr. Johnson relies in part on Mr. Raonic's failure to attend an oral examination. However, Mr. Raonic was never served with a direction to attend under Rule 91 and therefore did not breach Mr. Johnson's right to oral examination.

[42] I note that in his written representations, at paragraphs 88-89, Mr. Johnson submits that he asked the Associate Judge how to order Mr. Raonic to be examined, but the Associate Judge never instructed him to serve a direction to attend under Rule 91. Again, it is not the Court's role to advise the parties.

[43] Therefore, the Associate Judge did not make an error of law or a palpable and overriding error of fact in refusing to sanction Mr. Raonic.

(3) The request to sanction Mr. Shapovalov

[44] Mr. Shapovalov brought a motion to strike some of Mr. Johnson's written questions sent for his examination. Mr. Johnson's request for him to be sanctioned for his failure to respond to his written examination fails for the same reasons as those noted for Mr. Raonic. Mr. Shapovalov did not breach the Order of the Court dated June 20, 2022, which was suspended when the motion to strike was filed.

[45] The Associate Judge further considered evidence before her suggesting that there had been communications between Mr. Johnson and counsel for Mr. Shapovalov on outstanding matters, including responses to the unanswered questions.

[46] The Associate Judge therefore did not err in law, nor make a palpable and overriding error in her consideration of the evidence, in dismissing Mr. Johnson's request that the Court sanction Mr. Shapovalov.

(4) Request for leave to examine non-parties

[47] Rule 238(2) is clear. A party to an action that wishes to examine a non-party for discovery, must be serve that non-party personally with the notice of motion for leave to examine. That was not done in this case.

[48] Mr. Johnson submits that counsel for the Defendants has the full-contact details of the individuals for whom he seeks leave of the Court to examine, but that counsel refused to provide

them. While that may be true, the fact remains that the non-parties were not personally served, contrary to Rule 238(2).

[49] If the Plaintiff is incapable of serving the non-parties that he would like to seek leave of the Court to examine, a recourse exists under Rule 136, for example, to substitute service or be dispensed with service. Proper evidence must be adduced, however, for the Court to exercise discretion to order substitution or dispense with service. In this case, not only was the request for substitute or dispense of service never made, but there is no evidence of even an attempt at service of the present motion to have the non-parties examined. Therefore, the Associate Judge simply could not grant the request of Mr. Johnson, in the circumstances that it was made.

IV. Conclusion

[50] After considering all the submissions and evidence in this motion, I cannot agree that an error of law or a reviewable error was made by the Associate Judge. The Associate Judge correctly set out the law, and made no reviewable error in her appreciation of the facts or the law. The appeal is accordingly dismissed with costs.

[51] As stated, Mr. Johnson is self-represented, and the Court does not expect that he will be familiar with and understand all of the applicable Rules as well as the Court's process. However, and while the Court may be flexible in the name of access to justice, the Court cannot provide legal advice to parties nor exempt parties from the application of the Rules (*Brauer v Canada*, 2021 FCA 198 at para 8; *Fitzpatrick v Codiac Regional RCMP Force, District 12*, 2019 FC 1040 at para 19).

[52] As stated to the Plaintiff in other decisions of the Court, the Plaintiff is encouraged to consult the Federal Court's website containing a significant amount of information on how to comply with Court procedures.

ORDER in T-1686-21

THIS COURT'S JUDGMENT is that:

1. The Plaintiff's motion is dismissed, with costs.

"Guy Régimbald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1686-21
STYLE OF CAUSE:	CHRISTOPHER JOHNSON v CANADIAN TENNIS ASSOCIATION, MILOS RAONIC, GENIE BOUCHARD, DENIS SHAPOVALOV and FELIX AUGER-ALIASSIME

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	RÉGIMBALD J.
DATED:	APRIL 5, 2023

WRITTEN REPRESENTATIONS BY:

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