Federal Court Cour fédérale

Date: 20240523

Docket: T-533-19

Citation: 2024 FC 779

Ottawa, Ontario, May 23, 2024

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

VERMILLION NETWORKS INC.

Applicant

and

CENOVUS ENERGY INC.

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In this motion, Vermillion Networks Inc. appeals the May 11, 2023 Order of Associate Judge Coughlan dismissing Vermillion's motion for leave to file additional evidence in the underlying proceeding to expunge two trademark registrations owned by Cenovus Energy Inc.: rule 51 of the *Federal Courts Rules*, SOR/98-106.

[2] Vermillion argues that Associate Judge Coughlan overlooked uncontradicted evidence that was not previously available and erred in law by incorrectly assessing the relevance of the additional evidence.

[3] Cenovus counters that the additional evidence is neither necessary nor relevant; leave to admit it will delay the proceeding significantly which otherwise is ready for hearing.

[4] I find that Vermillion's rule 51 motion must be dismissed because it has failed to show that Associate Judge Coughlan made any palpable and overriding error in her Order. I provide next a contextual background for this finding, followed by a discussion of the applicable appellate standard to a rule 51 motion and its application to this motion.

II. Context

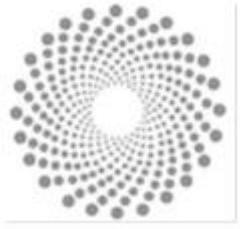
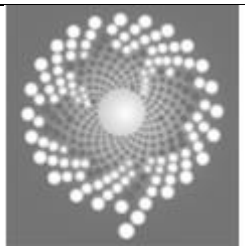
[5] Vermillion works in the field of sustainable development, providing licences to companies it endorses as being sustainable, while Cenovus is a large oil company.

[6] In its underlying application filed in March 2019 and amended in June 2023, Vermillion seeks to expunge two trademark registrations owned by Cenovus. Vermillion asserts non-registrability, non-distinctiveness, abandonment, non-entitlement, and bad faith with reference to subsection 18(1) of the *Trademarks Act*, RSC 1985, c T-13.

[7] The impugned registrations owned by Cenovus are registration Nos. TMA874,310 and TMA874,307 for cenovus ENERGY & Design. Registration No. TMA874,307 involves a colour claim.

	
TMA874,310	TMA874,307

[8] Vermillion owns trademark registration Nos. TMA891,721 and TMA894,117 for Swirl Design. Vermillion also alleges the use of unregistered variations of the registered trademarks, as depicted below. I refer to all four marks collectively as the Vermillion Swirl Design Marks.

			
TMA891,721	TMA894,117		

[9] I note that the Vermillion registrations were the subject of a non-use challenge under section 45 of the *Trademarks Act*, resulting in their eventual amendment with respect to the services only: *Vermillion Networks Inc v Essilor Group Canada Inc*, 2024 FC 382 at para 2 of the judgment.

[10] In the present expungement application, Vermillion served the affidavit of Mr. Wade Ferguson, its director, in December 2019. Cross-examinations on the parties' evidence, including on Mr. Wade's affidavit, were completed in 2021.

[11] In February 2023, Vermillion sought leave under subrule 84(2) of the *Rules* to admit two further affidavits of Mr. Wade. Briefly, these affidavits contain Trademarks Opposition Board decisions, clarifications of a prior affidavit, evidence of licensed use of the Vermillion Swirl Design Marks by another company, evidence of the parties' channels of trade, and a breakdown of sales and advertising related to the Vermillion Swirl Design Marks, among other things.

[12] Associate Judge Coughlan dismissed Vermillion's motion for leave to admit the additional affidavits, concluding that the interests of justice were not served by the admission of the evidence. She found: the proposed new evidence was not relevant to the underlying application; Cenovus has a right to proceed to a hearing without further delay; Vermillion could have obtained the evidence earlier with due diligence; and the admission of evidence would not be proportional to the nature of the proceeding.

III. Discussion

A. *Applicable Appellate Standard*

[13] The appellate standard applies to appeals under rule 51. This means that the Court will consider whether questions of fact and mixed questions of fact and law involve any palpable and overriding errors, while questions of law, including those extricable from mixed questions, are

subject to the standard of correctness: *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras 65, 79, 83, citing *Housen v Nikolaisen*, 2002 SCC 33; *Worldspan Marine Inc v Sargeant III*, 2021 FCA 130 at para 48.

[14] A discretionary decision of an associate judge, such as whether to grant leave to admit new evidence under subrule 84(2), raises questions of mixed fact and law, unless there is an extricable legal question: *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 [*Mahjoub*] at para 72.

[15] In my view, the Associate Judge made no palpable and overriding error in respect of the factors to consider on this motion. It was a mixed question involving the application of legal principles to the facts; no extricable question of law arose: *Del Ridge Homes Inc v Ledgemark Homes Inc*, 2022 FC 566 [*Del Ridge*] at para 27; *Skechers USA Canada Inc v Canada (Border Services Agency)*, 2023 FC 1455 at para 19.

[16] Had the applicable test been altered in its application, that could have given rise to an extricable legal question: *Del Ridge*, above at para 27. I am satisfied the Associate Judge did not deviate from the test in any material way. The Associate Judge's reference to rule 3 was appropriate, contrary to Vermillion's submission, because it governs the interpretation and application of all rules. That the application of a legal test could have resulted in a different outcome is a mixed question.

[17] The standard of palpable and overriding error is highly deferential. It is not the role of this Court to reweigh the evidence, fill in gaps in the Associate Judge's reasons or consider them divorced from the evidentiary record: *Hébert v Wenham*, 2020 FCA 186 at para 13.

[18] Rather, Vermillion must demonstrate an obvious error or series of errors that affected the outcome of the Order in the context of Associate Judge Coughlan's weighing of the factors she considered relevant to the evidence before her: *Mahjoub*, above at paras 61-64. It did not meet its burden.

[19] I turn next to overlaying principles applicable to subrule 84(2).

B. *Subrule 84(2) Principles*

[20] I am not persuaded that Associate Judge Coughlan erred, at paragraphs 7 to 11 of the Order, in identifying the test for leave to admit new evidence. The general legal principles are not in dispute between the parties.

[21] Subrule 84(2) provides that a party who has cross-examined a deponent of an affidavit filed in a motion or application may not file subsequently an affidavit in that motion or application, except with the consent of all other parties or with leave of the Court.

[22] The test for admitting new evidence under subrule 84(2) and rule 312 is the same; subrule 84(2), however, is intended to address matters arising during cross-examination which could not

have been foreseen reasonably: *Robert Mondavi Winery v Spagnol's Wine & Beer Making Supplies Ltd*, 2001 CanLII 22119 (FC) at paras 21-22.

[23] Subrule 84(2) cannot be relied on to repair answers on cross-examination or split a party's case: *Salton Appliances (1985) Corp v Salton Inc*, 2000 CanLII 14828 (FC) at para 18; *Inverhuron & District Ratepayers' Assn v Canada (Minister of The Environment)*, 2000 CanLII 14848 (FC) [*Inverhuron*] at para 10. Affidavit evidence within the parties' contemplation at the time the proceeding commenced is not the proper subject for leave under subrule 84(2); parties are obligated to put their best case forward at the first opportunity: *Inverhuron*, above at paras 6, 8-10.

[24] The Court may consider the factors of the relevance of the proposed evidence, the absence of prejudice to the opposing party, whether the proposed evidence assists the Court in making its final determination, whether the evidence was available or could have been anticipated earlier, and whether the proposed evidence serves the interests of justice: *Bauer Hockey Ltd v Sport Maska Inc (CCM Hockey)*, 2020 FC 1123 at para 6, citing *Gemak Trust v Jempak Corp*, 2020 FC 644 at para 75; *Havi Global Solutions LLC v IS Container PTE Ltd*, 2020 FC 803 [*Havi*] at paras 6, 59-61.

[25] Each case will involve a different weighing of all factors considered, depending on the underlying facts; it is not a mechanical exercise involving a set test or formula: *Campbell v Electoral Canada*, 2008 FC 1080 at paras 25-27. The failure to establish any one factor is not necessarily determinative: *Havi*, above at para 58.

C. *Application of the Legal Principles to the Facts*

[26] With the above principles in mind, I turn my attention to whether Associate Judge Coughlan made any palpable and overriding errors. I find that she did not.

[27] Vermillion's arguments on this motion seek to reargue the motion that was before the Associate Judge. As mentioned above, it is not this Court's role on an appeal involving an assessment of whether the Associate Judge made any palpable and overriding error to assess whether she was correct. Vermillion's submissions, however, encourage the Court to do the very thing the jurisprudence guides against, notwithstanding Vermillion's submission (at paragraph 26 of its representations on the rule 51 motion) that the Associate Judge correctly identified the applicable legal principles but incorrectly applied them.

[28] I am not persuaded that Associate Judge Coughlan erred in her consideration of the possible consolidation of this matter, that is T-533-19, with another matter involving these parties, namely, T-340-22. Rule 105 stipulates that the Court may order consolidation, that matters be heard together, or that they be heard one after the other. Because the Court controls its own process, the Court can give directions to the parties about the timing and conduct of remaining steps in the proceedings to promote efficiency: *Mazhero v Fox*, 2014 FCA 219 at paras 2-6. Contrary to Vermillion's argument, there is nothing in the rules or jurisprudence, however, necessitating the same evidence in proceedings subject to a rule 105 order.

[29] Although the Associate Judge erred in characterizing the application as one for judicial review, nothing turns on it in my view. In other words, while it may be a palpable error, it is not an overriding one. Proceedings based on a breach of the *Trademarks Act* may be brought by way of action or application: *BBM Canada v Research In Motion Limited*, 2011 FCA 151 at para 32. That Vermillion brought its expungement proceeding by way of application, instead of as an action, may be viewed as an intention to proceed expeditiously on a written record, including cross-examination on affidavit evidence, as opposed to an action involving live evidence.

[30] Vermillion argues that the Associate Judge supplanted the role of the application judge in weighing evidence by assessing and assigning weight to the evidence. I disagree. The Associate Judge, who is presumed to have reviewed all the evidence before her, noted the relevant dates applicable to each of the grounds of expungement and assessed the relevance of the proposed new evidence in that context. That she did not do so as meticulously as Vermillion would have liked by referring to each component of the fresh evidence with reference to each of what it describes as the "*Havi* factors" (i.e. the factors identified in *Havi*, above at para 6) does not in itself point to palpable and overriding error. By this submission, Vermillion demands a level of perfection that is not warranted here, in my view.

[31] Further, I find that Vermillion's submission is inconsistent because the role of the Associate Judge on a subrule 84(2) motion engages a contextual balancing or weighing exercise: *Havi*, above at para 58. Vermillion's submission to the effect that relevance is a matter of degree is without merit. In exercising her discretion, the Associate Judge was permitted to find that

some or all of the evidence was relevant or not. This is what she did with reference to the claimed grounds of expungement and the applicable relevant dates.

[32] Vermillion acknowledges that the factors identified in *Havi* are not a list of criteria to be met nor are they discrete, mandatory requirements of a conjunctive test (at paragraph 25 of its written representations). It asserts, however, that the Court is required to consider each of the listed factors in deciding whether to grant leave for filing additional evidence. While the latter statement is not inconsistent with *Havi*, I am not persuaded in any event that the Associate Judge did not consider these factors.

[33] I agree with Cenovus (at paragraph 27 of its written representations) that the Court has broad discretion in weighing the factors enumerated in *Havi* when arriving at a conclusion and that this discretion is incompatible with a mechanical application of any set test or formula. Further, the factors are not exhaustive, and the jurisprudence does not dictate how they are to be weighed. To reiterate, that falls within the Associate Judge's discretion. Regardless, the Associate Judge's reasons demonstrate in my view that she considered the very factors Vermillion advocates she should have considered (e.g. paragraphs 9, 21-43 of the Order).

[34] In addition, that the Associate Judge did not draw the inferences Vermillion would have preferred does not mean in itself that she erred in drawing the inferences she did: *National Bank of Canada v Lavoie*, 2013 FC 642 [*National Bank*] at para 30. Nor am I persuaded that she so erred. Although *National Bank* concerned a judicial review as opposed to an appeal, I find the

principles articulated in paragraph 30 nonetheless applicable to an appeal involving the deferential palpable and overriding error standard.

[35] Considering the Associate Judge's reasons holistically in the context of Vermillion's proposed new evidence, I am not persuaded in the end that the Court's interference with the Order is warranted.

IV. Conclusion

[36] I conclude that Vermillion has failed to show that the Associate Judge made any palpable and overriding errors in her Order. For the above reasons, Vermillion's rule 51 motion will be dismissed with costs to Cenovus in the mid-range of Column III of Tariff B.

JUDGMENT in T-533-19

THIS COURT'S JUDGMENT is that:

1. The motion of Vermillion Networks Inc. appealing the May 11, 2023 Order of Associate Judge Coughlan is dismissed.
2. Cenovus Energy Inc. is awarded costs of this motion in the mid-range of Column III of Tariff B, payable by Vermillion Networks Inc.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Federal Courts Rules*, SOR-98/106.**
***Règles des Cours fédérales*, DORS-98/106.**

General principle **3** These Rules shall be interpreted and applied **(a)** so as to secure the just, most expeditious and least expensive outcome of every proceeding; and **(b)** with consideration being given to the principle of proportionality, including consideration of the proceeding's complexity, the importance of the issues involved and the amount in dispute.	**Principe general** **3** Les présentes règles sont interprétées et appliquées : **a)** de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible; **b)** compte tenu du principe de proportionnalité, notamment de la complexité de l'instance ainsi que de l'importance des questions et de la somme en litige.
Appeal **51 (1)** An order of a prothonotary may be appealed by a motion to a judge of the Federal Court.	**Appel** **51 (1)** L'ordonnance du protonotaire peut être portée en appel par voie de requête présentée à un juge de la Cour fédérale.
When cross-examination may be made **84 (1)** A party seeking to cross-examine the deponent of an affidavit filed in a motion or application shall not do so until the party has served on all other parties every affidavit on which the party intends to rely in the motion or application, except with the consent of all other parties or with leave of the Court. **Filing of affidavit after cross-examination** **(2)** A party who has cross-examined the deponent of an affidavit filed in a motion or application may not subsequently file an affidavit in that motion or application, except with the consent of all other parties or with leave of the Court.	**Contre-interrogatoire de l'auteur d'un affidavit** **84 (1)** Une partie ne peut contre-interroger l'auteur d'un affidavit déposé dans le cadre d'une requête ou d'une demande à moins d'avoir signifié aux autres parties chaque affidavit qu'elle entend invoquer dans le cadre de celle-ci, sauf avec le consentement des autres parties ou l'autorisation de la Cour. **Dépôt d'un affidavit après le contre-interrogatoire** **(2)** La partie qui a contre-interrogé l'auteur d'un affidavit déposé dans le cadre d'une requête ou d'une demande ne peut par la suite déposer un affidavit dans le cadre de celle-ci, sauf avec le consentement des autres parties ou l'autorisation de la Cour.
Consolidation of proceedings	**Réunion d'instances**

105 The Court may order, in respect of two or more proceedings, **(a)** that they be consolidated, heard together or heard one immediately after the other; **(b)** that one proceeding be stayed until another proceeding is determined; or **(c)** that one of the proceedings be asserted as a counterclaim or cross-appeal in another proceeding.	**105** La Cour peut ordonner, à l'égard de deux ou plusieurs instances : **a)** qu'elles soient réunies, instruites conjointement ou instruites successivement; **b)** qu'il soit sursis à une instance jusqu'à ce qu'une décision soit rendue à l'égard d'une autre instance; **c)** que l'une d'elles fasse l'objet d'une demande reconventionnelle ou d'un appel incident dans une autre instance.
Additional steps **312** With leave of the Court, a party may **(a)** file affidavits additional to those provided for in rules 306 and 307; **(b)** conduct cross-examinations on affidavits additional to those provided for in rule 308; or **(c)** file a supplementary record.	**Dossier complémentaire** **312** Une partie peut, avec l'autorisation de la Cour : **a)** déposer des affidavits complémentaires en plus de ceux visés aux règles 306 et 307; **b)** effectuer des contre-interrogatoires au sujet des affidavits en plus de ceux visés à la règle 308; **c)** déposer un dossier complémentaire.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-533-19
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PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 12, 2023
JUDGMENT AND REASONS:	FUHRER J.
DATED:	MAY 23, 2024

APPEARANCES:

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Martha J. Savoy Clare Robinson	FOR THE RESPONDENT

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Gowling WLG Ottawa, Ontario	FOR THE RESPONDENT