Federal Court  Cour fédérale

Date: 20241220

Dockets: T-2621-23
T-1758-22

Citation: 2024 FC 2028

Edmonton, Alberta, December 20, 2024

PRESENT: Madam Associate Judge Catherine A. Coughlan

BETWEEN:

REMITBEE INCORPORATED

Applicant

and

REMITLY, INC.

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicant in Court File Nos. T-2621-23 and T-1758-22, Remitbee Incorporated [Remitbee], brings motions in each proceeding for an order consolidating the two proceedings and their evidentiary records, pursuant to Rule 105 of the *Federal Courts Rules*, SOR/98-106 [*Rules*].

[2] Remitbee argues that the two applications — Remitbee's appeals pursuant to subsection 56(1) of the *Trademarks Act*, RSC 1985, c. T-13, of decisions of the Trademarks Opposition Board [the Board] — should be consolidated because the parties, through their respective counsel, made a binding agreement to consolidate, which the Court ought to enforce. Alternatively, Remitbee asserts that the applications should be consolidated under Rule 105.

[3] As a further alternative, Remitbee asserts that the applications should be heard together or consecutively by the same Judge.

[4] The Respondent, Remitly, Inc. [Remitly], opposes the motion. While acknowledging that it was previously open to some form of consolidation, Remitly submits that the parties did not finalize an agreement to consolidate. Further, Remitly argues that the applications should not be consolidated under Rule 105 because consolidation would cause it prejudice and unnecessarily delay the resolution of both applications. Alternatively, Remitly agrees that the applications should be heard consecutively, based on their respective records.

[5] For the reasons that follow, I am satisfied that Remitbee's motion should be granted, in part, and consolidation of the two applications should be ordered.

II. Facts

A. *General Background to the Appeals*

[6] Remitbee is a Canadian company conducting business in international money transfers and currency exchanges. Remitbee identifies its parent company as Thamor Trading Corporation [Thamor].

[7] Remitly is an American organization providing global money services and transfers.

[8] The applications concern decisions from the Board. In Court File No. T-1758-22, Remitbee appeals the Board's decision in *Remitbee Incorporated And Remitly, Inc*, 2022 TMOB 126 [2022 TMOB 126], rejecting Remitbee's opposition to Remitly's application to register the REMITLY trademark (TMA1749276), thus permitting registration of the REMITLY trademark. The Notice of Application was filed on August 29, 2022. The grounds of appeal include:

A. That the Board erred in finding that Remitbee had not met the evidentiary burden to show use of the trademark at the asserted time of April 2015;

B. That the Board erred in failing to find that use of the Remitbee trademark by Thamor enured to the benefit of Remitbee; and

C. That the Board erred in failing to find that the Remitly trademark was confusing with the Remitbee trademark.

[9] Although cross-examinations have taken place in that proceeding, procedural disagreements between the parties delayed its timely progress. More particularly, the parties raised objections to procedural irregularities in the other party's application record. On March 29, 2023, Remitbee filed a motion pursuant to Rule 58 seeking to have Remitly correct irregularities in its Respondent's Record. Remitbee also sought an extension of time for filing a Requisition for Hearing. On April 11, 2023, Remitly responded with a motion seeking to require Remitbee to amend the entirety of its Applicant's Record to bring it into compliance with the *Rules*.

[10] On April 8, 2024, Madam Associate Judge Steele made an order in Court File No. T-1758-22 resolving the procedural issues between the parties [the Steele Order]. The Steele Order directed Remitbee to file a compliant electronic copy of its Applicant's Record and Book of Authorities and required Remitly to file a revised, compliant Memorandum of Fact and Law. All revised documents were to be received by the Court by April 18, 2024. Madam Associate Judge Steele further instructed the parties to confer on a hearing date. Remitbee was instructed to file a Requisition for Hearing by April 18, 2024.

[11] In Court File No. T-2621-23, Remitbee appealed the decision of the Board in *Remitly, Inc and Remitbee Incorporated*, 2023 TMOB 174 [2023 TMOB 174], allowing Remitly's opposition to the registration of the REMITBEE trademark (TMA1849817), thus refusing the REMITBEE application. On December 11, 2023, Remitbee filed a Notice of Application appealing the decision. The grounds for appeal include:

A. That the Board erred in concluding that Remitbee failed to establish use of the mark in Canada as of the claimed date of April 2015; and

B. That the Board erred in finding that use of the mark by Thamor failed to enure to Remitbee.

[12] As permitted by subsection 56 (5) of the *Trademarks Act*, on September 27, 2022, Remitbee filed one additional affidavit in Court File No. T-1758-22 to address the evidentiary deficiencies noted in the Board's decision. On January 29, 2024, Remitbee filed five additional affidavits in Court File No. T-2621-23, to address the evidentiary deficiencies identified by the Board in its October 11, 2023 decision. These latter five affidavits are only before the Court in

Court File No. T-2621-23. Remitly has not yet filed responding evidence in that proceeding, nor have cross-examinations on the affidavits been conducted.

B. *The Current Motion*

[13] On March 11, 2024, counsel for Remitbee sent a letter to counsel for Remitly, on a "with prejudice" basis. The letter sought consent from Remitly for an order consolidating the two applications, pursuant to Rule 105 of the *Rules*. In the letter, counsel for Remitbee posited that consolidation would facilitate the expeditious resolution of the applications and would allow "the Court a full appreciation of the facts and [avoid] inconsistent separate decisions on potentially different evidence." Counsel also noted that consolidation would resolve the outstanding procedural disputes in Court File No. T-1758-22, since it would permit the parties to file comprehensive, revised application records on an agreed timeline. Remitbee further opined that once consolidated, the applications should proceed under special case management. Remitbee's counsel included a draft notice of motion and draft order with his letter.

[14] On March 12, 2024, then-counsel for Remitly responded positively to the consolidation proposal. In email correspondence, then-counsel stated, "We are on the same page that consolidation is appropriate, and are glad you brought it up. We have been preparing a Notice of Motion (and accompanying draft supporting materials) ourselves. I can advise that I have instructions from my Client to proceed with consolidating T-1758-22 and T-2621-23." In the same correspondence, then-counsel for Remitly further advised that the parties agreed "in principle with the concept of consolidating the proceedings." Nevertheless and for clarity, Remitly reserved its right to request amendments to the draft notice of motion and draft order provided by counsel for Remitbee.

[15] In email correspondence dated March 15, 2024, counsel for Remitly confirmed, “I will have final instructions in regards to your draft Order on Consent for the consolidation of T-1758-22 and T-2621-23…**by end of Monday, March 18** (Eastern Time).” [Emphasis in the original.]

[16] In further “with prejudice” email correspondence dated March 18, 2024, Remitly’s then-counsel reiterated that the parties were “on the same page that consolidation…is appropriate.” The email set out “points of agreement” with respect to the draft documents and “points of concern” which warranted attention. Broadly speaking, Remitly agreed that the applications should be consolidated and that all evidence in both applications would go before a single judge of the Court, for a single hearing, resulting in one decision. Remitly proposed that the procedural motions, still under reserve, would be abandoned on a without costs basis, since the parties would file revised and extended records, thereby resolving the procedural issues in Court File No. T-1758-22.

[17] Remitly, however, did not consent to the consolidated applications proceeding under case management, and indicated a preference for a consolidated record referencing evidence already filed under Court File No. T-1758-22, rather than completing entirely new records. Remitly also sought confirmation that affiants cross-examined in Court File No. T-1758-22 would not be re-cross-examined in the consolidated applications. Indeed, Remitly noted that “while we agree that all evidence in the Consolidated Proceeding will be before a single judge, a consolidated proceeding is not an ‘open invitation’ to re-cross-examine affiants which then-counsel, Mr. Brouillette, chose not to cross-examine in T-1758-22.”

[18] There is nothing in the record before the Court to indicate that Remitbee responded to this email correspondence and the concerns raised therein by Remitly.

[19] In lengthy correspondence to the Court dated March 28, 2024, by its then-counsel, Remitly sought the assignment of a case management judge to each of the proceedings and directions as to the appropriate procedural steps to respond to Remitbee's motion to strike the affidavit of Suhuyini Abudulai filed on March 19, 2024 in both proceedings. In that correspondence to the Court, then-counsel described the proceedings as having become "chaotic". With respect to consolidation, at page 13 of the correspondence, then-counsel notes: "Further, as between counsel, exchanges were had with respect to consolidation of the proceedings, given their obvious commonality of facts and issues to be decided by the Court. Consolidation has otherwise been agreed to in principle, even if the particulars are yet to be sorted out." [Emphasis added.]

[20] On April 8, 2024, following the issuance of the Steele Order, Remitly communicated to Remitbee via email purporting to "revoke Remitly, Inc.'s agreement to consolidation of T-1758-22 and T-2621-23" in light of the Steele Order. The correspondence notes that the consolidation agreement became moot once the procedural issues between the parties had been resolved. In Remitly's words: "Needless to say, the Court has now intervened with an Order which overrides any agreement between the parties."

[21] On April 18, 2024, Remitly filed a revised Memorandum of Fact and Law, as instructed, by the Steele Order.

[22] Remitbee has yet to comply with the Steele Order. Neither revised documents, nor a Requisition for Hearing have been filed. Instead, on April 17, 2024, Remitbee filed this motion to consolidate the applications. Additionally, as noted above, on April 19, 2024, Remitbee filed a motion to strike portions of an expert affidavit proposed by Remitly.

[23] On April 29, 2024, Remitly filed a Requisition for Hearing in Court File No. T-1758-22, requesting a hearing via written representations alone. Remitbee objected to the filing of the Requisition by Remitly. Remitly asserts that a hearing is the only step remaining in Court File No. T-1758-22.

III. Issues

[24] This matter raises the following issues:

1. Was there a binding agreement between the parties to consolidate the applications?

2. If not, should the applications be consolidated pursuant to Rule 105 of the *Rules*?

3. If not consolidated, how should the matters be heard, and should additional relief be granted?

IV. Law and Analysis

A. *Was there a binding agreement between the parties to consolidate the applications?*

[25] Remitbee argues that Remitly consented to the consolidation of the applications in the March 11-18, 2024 correspondence between counsel. This consent, in Remitbee's view, created

a binding agreement to consolidate between counsel and consolidation should be ordered as a result. Effectively, Remitbee asks the Court to enforce counsel's agreement.

[26] Further, Remitbee argues that the March 28, 2024 correspondence to the Court amounts to a formal admission regarding consolidation that cannot be withdrawn without leave of the Court.

[27] In response, Remitly argues that the correspondence between counsel did not result in a binding agreement. The agreement was conditional at best, and the conditions put forward by Remitly were never accepted by Remitbee. Binding agreement, in Remitly's submission, was only possible if the agreement included the procedural matters at issue between the parties. Remitly takes the position that the conditional consent to the consolidation became irrelevant once the procedural issues were resolved by the Steele Order.

[28] The parties agree that the applicable test for a binding agreement between parties is that established by the Federal Court of Appeal in *Apotex Inc v Allergan, Inc*, 2016 FCA 155 [*Allergan*].

[29] In their respective written representations, Remitly relies directly on *Allergan*, while Remitbee relies on the application of the *Allergan* test in a more recent decision: *Betser-Zilevitch v Nexen Inc*, 2018 FC 735.

[30] For a finding of a binding agreement, *Allergan* requires that the following components be present:

i. The parties had a mutual intention to create legal relations. A reasonable bystander observing the parties would conclude that both parties intended to enter into a legal agreement: *Allergan* at paras 21-22.

ii. There was consideration flowing in return for a promise: *Allergan* at para 25.

iii. The terms of the agreement were sufficiently certain, and the parties were of a common mind: *Allergan* at para 26.

iv. There was a matching offer and acceptance on all the essential terms of the agreement. Essential terms are present where a "reasonable businessperson stepping into the parties' shoes" and reviewing the agreement, would not find that something essential was left to be worked out: *Allergan* at paras 30-32.

v. Where parties are represented by counsel, both counsel must have had the authority to bind their clients, and must have done so. Language like "subject to my client's approval" or "subject to instructions" does not result in a matching offer and acceptance: *Allergan* at paras 40-43.

[31] I am satisfied that on the basis of the *Allergan* test, a reasonable bystander observing the conduct of the parties would conclude that both parties, through their respective counsel, intended to enter into a binding agreement.

[32] First, there was a clear mutual intention to consolidate the applications. This is readily apparent in correspondence between counsel where, for instance, Remitly conceded that the parties are "on the same page that consolidation is appropriate." Or, where Remitly notes that it

had been preparing its own motion materials seeking consolidation. Subsequent emails from Remitly have the tenor of a negotiation, suggesting the presence of a mutual intention. This can be discerned from the March 18, 2024 correspondence which sets out points of agreement and points of concern with Remitbee's draft motion and order.

[33] Second, while counsel for Remitly argued that there was no consideration for the agreement because the procedural motions were ultimately disposed of by the Steele Order, I do not agree. In my view, at the time the parties entered into the agreement, consideration was present. In return for consolidation, both parties indicated a willingness to abandon their respective procedural motions. Remitly also suggests that the motions be abandoned on a without costs basis. The fact of the subsequent Steele Order does not negate the existence of consideration at the time of the agreement.

[34] Third, I am satisfied that the essential terms of the agreement were sufficiently certain. The parties agreed on consolidation and that the applications would proceed on a common record. There was also an agreement between the parties that consolidation would alter procedural aspects of the applications, including the form of the records. Remitly's statement in correspondence that they are "glad" that Remitbee raised consolidation is indicative of a common mind between the parties.

[35] Fourth, the correspondence between the parties evinces a matching offer and acceptance on the essential terms. The central term of the agreement relates to the consolidation of the applications, and how the applications will be heard. Consolidation of the applications is agreed to, with both applications to be heard by a single judge, on a single evidentiary record. Procedural elements relating to further cross-examinations and striking the parties' respective

application records in Court File No. T-1758-22 remain unsettled, but in my view, those are not central or essential to the agreement between counsel. Rather, the procedural terms arise in consequence of the consolidation agreement, not the other way around as Remitly suggests. While the Steele Order does render some elements of the agreement moot, the elements that it affects are ancillary to the substance of the agreement dealing with consolidation.

[36] While Remitly argues that a matching offer and acceptance are not present because Remitbee did not respond or agree to some of the terms that it proposed in the March 18, 2024 correspondence, I do not agree. In my view, this argument overstates the minor nature of these terms. Ultimately, there was acceptance by Remitly of the essential terms of Remitbee's offer, relating to consolidation. In any case, from my review of the correspondence, it is not apparent that Remitly considered the procedural terms to be "deal breakers". Rather, there is continued negotiation on the exact form that the procedural elements will take.

[37] Fifth, both the tenor and content of the correspondence suggest that counsel had the authority to bind their respective clients to the agreement. The parties have not argued otherwise. Indeed, the initial email from Remitbee's counsel noted that the proposal to consolidate is made "on behalf" of his client. Counsel for Remitly's authority to bind his client to the agreement can also be found in his initial response where, counsel states outright "I can advise that I have instructions from my Client to proceed with consolidating T-1758-22 and T-2621-23." In subsequent emails, counsel for Remitly notes that he will "need to seek instructions from my Client with respect to ***your*** [Remitbee's] version of the draft consent Order to consolidate" [emphasis in original]. However, this confirmation is sought only on non-essential terms of the agreement. Given the initial statement from counsel for Remitly, I am satisfied that counsel had

the authority to bind his client in a matching offer and acceptance on the essential terms of the agreement to consolidate.

[38] In all of these circumstances, I am satisfied that a fair application of the *Allergan* test yields an agreement between the parties to consolidate that was binding. I acknowledge that non-essential terms of the agreement relating to the procedural aspects of consolidation remained unsettled, however, the essential terms relating to consolidation and the manner in which the applications would progress were firmly understood as between the parties. Further, both counsel had authority to bind their clients.

[39] This conclusion is sufficient to dispose of this motion. However, for the sake of completeness, I will consider whether consolidation is appropriate under Rule 105.

B. ***Should the applications be consolidated pursuant to Rule 105 of the Rules?***

[40] Remitbee submits that the factors considered under Rule 105 weigh heavily in favour of consolidating the applications. Further, Remitbee says that consolidation will advance the interests of justice and the expeditious resolution of both proceedings. The status quo, Remitbee argues, would be very prejudicial to it because of the potential for inconsistent decisions.

[41] While conceding that there are features of the applications that favour consolidation, Remitly argues against consolidation on the basis of prejudice. Apart from the prejudice, consolidation would not promote the expeditious determination of the proceedings because Court File No. T-1758-22 is ready for hearing whereas Court File No. T-2621-23 is still at the evidentiary stage.

(1) Legal Principles

[42] Rule 105 provides as follows:

Consolidation of proceedings	Réunion d'instances
105 The Court may order, in respect of two or more proceedings,	**105** La Cour peut ordonner, à l'égard de deux ou plusieurs instances :
(a) that they be consolidated, heard together or heard one immediately after the other;	**a)** qu'elles soient réunies, instruites conjointement ou instruites successivement;
(b) that one proceeding be stayed until another proceeding is determined; or	**b)** qu'il soit sursis à une instance jusqu'à ce qu'une décision soit rendue à l'égard d'une autre instance;
(c) that one of the proceedings be asserted as a counterclaim or cross-appeal in another proceeding.	**c)** que l'une d'elles fasse l'objet d'une demande reconventionnelle ou d'un appel incident dans une autre instance.

[43] Consolidation of proceedings is discretionary and can take the forms set out above. In exercising its discretion, the Court is guided by the policy priorities underlying Rule 105: "the avoidance of a multiplicity of proceedings and the promotion of expeditious and inexpensive determination of those proceedings": *Global Restaurant Operations of Ireland Ltd v Boston Pizza Royalties Ltd Partnership*, 2005 FC 317 at para 11 [*Global Restaurant*].

[44] An important question for the Court to consider is "[w]ould consolidation provide the most efficient resolution of the matters in issue?": *Sanofi-Aventis Canada Inc v Novopharm Limited*, 2009 FC 1285 at para 15 [*Sanofi-Aventis*]. The Federal Court of Appeal has also cautioned that consolidation is not appropriate where "most of the paper for the [applications] has been filed": *Janssen Inc v Abbvie Corporation*, 2014 FCA 176 at para 8.

[45] Factors the Court should consider on a consolidation motion include whether there are "common parties, common legal and factual issues, similar causes of action, parallel evidence and the likelihood that the outcome of one case will resolve the other case," as well as possible prejudice to the parties: *Global Restaurant* at para 11.

[46] As the Federal Court of Appeal teaches, prejudice to the parties is a factor that "carries great weight": *Apotex Inc v Bayer Inc*, 2020 FCA 86 at para 46 [*Bayer*]. A finding by the Court that one party would be prejudiced by consolidation works against granting such an order: *Sanofi-Aventis* at para 11. The moving party bear the onus to satisfy the Court that consolidation would not be prejudicial by establishing that: "(a) it will suffer prejudice under the status quo of separate hearings; and, (b) the responding parties will not suffer prejudice if consolidation occurs": *Sanofi-Aventis* at para 25. The severity and nature of the possible prejudice are also relevant: *Bayer* at para 46. "Mere inconvenience" does not constitute prejudice to a party; something more is required: *Sanofi-Aventis* at para 11.

[47] It is noteworthy that courts have also found that inconsistency in findings of fact between two similar proceedings "does not necessarily constitute prejudice": *Sanofi-Aventis* at para 12. In *Mon-Oil Ltd v Canada* (1989), 26 CPR (3d) 379, 27, FTR 50 (FCTD), at para 5, Justice Cullen observed:

> [5] . . . Inconsistent findings of fact may well occur but vigilant counsel and a vigilant court can minimize that possibility, and in any event is not a sufficient ground to warrant consolidation.

(2) Analysis

[48] I am satisfied that the factors enunciated in *Global Restaurant* weigh in favour of consolidation.

[49] First, there is considerable commonality between the two applications. Remitbee and Remitly are the only parties in both proceedings, and the applications deal with identical subject matter. The factual circumstances of the applications are connected, as are the legal issues. Both legal issues in Court File No. T-2621-23 — the use of the trademark by Remitly on the claimed date and the use of the trademark by Thamor — are present in Court File No. T-1758-22. The issue of confusion between the trademarks, however, is unique to Court File No. T-1758-22.

[50] Second, given the similarities between the applications, it is highly likely that the evidence in one will also assist in the determination of the other. Indeed, it is noteworthy that in the 2023 TMOB 174 proceeding, Remitly sought the admission into evidence of an affidavit filed by Remitbee in the 2022 TMOB 126 proceeding. In admitting the affidavit, the Board acknowledged the similarities in issues and facts between the two proceedings in respect of use of the trademark by Remitbee.

[51] Third, it is also likely that the outcome of one application will resolve the other. As noted by Remitly at paragraph 59 of its written representations, the outcome of Court File No. T-1758-22 will entirely resolve or significantly narrow the dispute in Court File No. T-2621-23.

[52] Fourth, the matter of prejudice ultimately favours Remitbee. Both parties assert prejudice. Remitbee argues that it will suffer prejudice if the *status quo* is maintained because of the possibility of inconsistent results. Remitbee posits that the differences in the evidentiary records

on the same issues could result in the applications being decided on different standards of review. For example, the additional evidence filed in Court File No. T-2621-23 (which is not filed in Court File No. T-1758-22), may, if found to be material to the decision under appeal, result in a *de novo* standard of review applied in Court File No. T-2621-23 but not in Court File No. T-1758-22. The absence of evidence on the latter application may result in a review on a reasonableness standard. If that should occur, and issue estoppel applies, Remitbee says it may be denied the opportunity to fully argue the application in Court File No. T-2621-23. Pointing to this Court's decision in *Takeda Canada Inc v Apotek Inc*, 2023 FC 63 at para 29, Remitbee notes that because the proceedings involve the same parties and the same issues, findings of fact in Court File No. T-1758-22 will bind the parties on the second appeal under the principles of issue estoppel. Remitbee asserts such a result would be unfair.

[53] Remitly argues it will be prejudiced from consolidation because Remitbee will have another opportunity to file and rely on additional evidence in Court File No. T-1758-22 when it failed to advance that evidence at the appropriate juncture. Permitting consolidation, Remitly argues, effectively allows Remitbee to split its case. Having had the opportunity to review Remitly's written representations filed in Court File No. T-1758-22, Remitbee filed five new affidavits in Court File No. T-2621-23 to remedy the deficiencies noted in the evidentiary record. Thereafter, Remitbee sought consolidation so that it could use the newly filed evidence to shore up its weak evidentiary record in Court File No. T-1758-22.

[54] Remitbee rejects that allegation and submits that it only became aware of evidentiary deficiencies in its application record when the second TMOB decision was released in October 2023, long after it had filed its evidence in Court File No. T-1758-22. In that decision, the Board

concluded that Remitbee's lack of evidence concerning its relationship with Thamor and its failure to answer proper questions in cross-examinations, justified an adverse inference that Remitbee did not control the quality or character of services of the trademark. Remitbee argues that it was unaware of the lacuna in its evidentiary record when it filed its evidence in Court File No. T-1758-22. The five new affidavits responded to the Board's adverse inference.

[55] The hearing in Court File No. T-1758-22 will, in all likelihood, completely resolve the legal issues in Court File No. T-2621-23, since the issues are virtually identical between the matters. I am satisfied that a decision on the same issues, based on different evidence, with the possibility that some of the evidence will not be heard by the Court, prejudices Remitbee and goes beyond an inconsistency in findings of fact that issue estoppel could mitigate.

[56] As for Remitly's assertion of prejudice, it will have to deal with the additional evidence filed by Remitbee at some juncture. Equally, Remitly will have the opportunity to file additional evidence, conduct cross-examinations on the new evidence, and reply to Remitbee's representations.

[57] Lastly, the interests of justice and judicial economy favour consolidation. Remitbee argues that consolidation is in the interests of justice because it would provide the most expeditious manner of hearing the applications. Both applications would be heard in a single hearing by a single judge. Remitly, counters that consolidation would have the effect of delaying the timely resolution of Court File No. T-1758-22, and result in the parties having to "essentially throw away everything that has been done up to now and incur more costs."

[58] There is no doubt that this motion comes rather late in the day, and consolidation will delay the timely resolution of Court File No. T-1758-22, which is largely ready for hearing. I note, however, that a hearing date has yet to be fixed, and that the lateness of the consolidation motion owes something to the fact that there were negotiations between the parties to consolidate on consent. Moreover, while I acknowledge that additional work may be required by Remitly, I do not agree that it means throwing away all the work that has been done to date. That is an overstatement. In light of the substantial similarities between the applications, any additional drafting required will not rise to the extent that Remitly suggests. Consolidation of the applications, although delaying resolution in Court File No. T-1758-22, could constitute a better use of Court resources because of the commonalities between the applications.

(3) Conclusion

[59] The factors under the Rule 105 analysis weigh in favour of consolidation. There is considerable commonality between the applications, and Remitbee has persuasively argued that it would face prejudice if the *status quo* were maintained. Remitly's arguments relating to prejudice, while concerning, can be addressed through case management.

[60] Accordingly, the applications will be consolidated and will be heard on a common record. For clarity, the common record shall include the evidence filed in the 2022 TMOB 126 proceeding and the 2023 TMOB 174 proceeding, the evidence filed in Court File Nos. T-1758-22 and T-2621-23, including any transcripts of cross-examinations on the evidence.

[61] The parties are granted leave to serve and file a single Application Record and Memorandum of Fact and Law not to exceed 45 pages. The balance of Remitbee's motions are dismissed.

[62] In view of my conclusions above, there is no need to address the third issue of an alternative form of hearing the two applications and I decline to do so.

V. Costs

[63] Both parties seek their costs of the motions. If successful, Remitbee argues that an elevated lump sum award is warranted because consolidation was agreed to and the motions should not have been brought or opposed. Remitbee seeks $10,000.00 payable forthwith.

[64] Remitly argues that the costs of these motions are complicated and offered three approaches for the Court's consideration: First, if Remitbee is successful on the motions, it should be responsible for Remitly's costs thrown away for cross-examinations and its preparation of its record in Court File No. T-1758-22, which will have to be re-done.

[65] Second, if the Court orders the alternative relief that both parties sought, that is, the motions be heard consecutively or together but on separate records, no costs should be ordered for or against either party.

[66] Third, if the motions are dismissed, Remitly should have its costs fixed at $5,000.00.

[67] In any case, Remitly says costs should not be punitive and there is no basis for an elevated costs award to Remitbee.

[68] Rule 400 provides the Court with full discretionary power over the amount and allocation of costs as well as the determination of by whom they are to be paid: Rule 400(1) of the *Rules*; *Consorzio del prosciutto di Parma v Maple leaf meats*, 2002 FCA 417 at para 9. This discretion is guided by the factors set out in Rule 400(3), which include, among others, (a) the result of the proceeding; (c) the importance and complexity of the issues; (g) the amount of work; (i) the impact of the parties' conduct on the proceeding; (j) the failure to admit anything that should have been admitted; and (o) any other matter considered relevant.

[69] As to quantum, the Court has discretion to fix costs by reference to Tariff B, grant a lump sum award in lieu, or grant a combination thereof: Rule 400(4).

[70] Generally, when fixing a costs award, the Court must bear in mind the three-fold objectives of "providing compensation, promoting settlement and deterring abusive behaviour": *Air Canada v Thibodeau*, 2007 FCA 115 at para 24.

[71] Here, I am satisfied that Remitbee, as the successful party is entitled to its costs of the motions. The parties had agreed to consolidate and the motions were unnecessary. That aside, I am not persuaded that elevated costs are warranted nor am I of the view that costs should be payable forthwith.

[72] In the circumstances, Remitbee shall have its costs fixed at $5,000.00, inclusive of taxes and disbursements, payable in the cause.

ORDER in T-2621-23 and T-1758-22

THIS COURT ORDERS that:

1. The applications in Court File Nos. T-1758-22 and T-2621-23 are hereby consolidated, pursuant to Rule 105(a) of the *Rules*, under Court File No. T-2621-23, and will be heard on a common record [Consolidated Proceedings].

2. For clarity, the common record, referenced above at paragraph 1, shall include the evidence filed in the 2022 TMOB 126 proceeding and the 2023 TMOB 174 proceeding, the evidence filed in Court File Nos. T-1758-22 and T-2621-23, including any transcripts of cross-examinations on the evidence.

3. All further materials shall be filed on Court File No. T-2621-23.

4. The style of cause of the Consolidated Proceedings shall be:

Dockets: T-2621-23
T-1758-22

BETWEEN:

REMITBEE INCORPORATED

Applicant

and

REMITLY, INC.

Respondent

5. The remainder of the motions are dismissed.

6. Remitbee shall have costs fixed in the sum of $5,000.00, inclusive of taxes and disbursements, payable in the cause.

7. The parties shall confer and, within 20 days of the date of this Order, provide the Case Management Judge with a proposed timetable leading to the requisition of a hearing.

"Catherine A. Coughlan"
Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-2621-23 AND T-1758-22
STYLE OF CAUSE:	REMITBEE INCORPORATED v REMITLY, INC.
DATE OF HEARING:	NOVEMBER 26, 2024
PLACE OF HEARING	VIDEOCONFERENCE
ORDER AND REASONS:	COUGHLAN A.J.
DATED:	DECEMBER 20, 2024

APPEARANCES:

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