Federal Court Cour fédérale

Date: 20250115

Docket: T-2621-23
T-1758-22

Citation: 2025 FC 81

Québec, Quebec, January 15, 2025

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

REMITBEE INCORPORATED

Applicant

and

REMITLY, INC.

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicant Remitbee Incorporated is a privately owned Canadian company and owner of the applied-for trademark REMITBEE for essentially software as a service, to facilitate electronic funds transfer via mobile apps and via the internet (application No. 1,849,817).

[2] The Respondent Remitly, Inc. is a large US based company and owner of the applied-for trademark REMITLY for mobile app software, and software as a service, for facilitating electronic funds transfer, and related financial services (application No. 1,749,276).

[3] Each party has opposed the trademark application of the other. Remitbee's opposition against REMITLY was rejected: *Remitbee Incorporated And Remitly, Inc*, 2022 TMOB 126 [*Remitbee 2022 TMOB*]. Remitly's opposition against REMITBEE was granted, resulting in the refusal of the trademark application for the mark: *Remitly, Inc and Remitbee Incorporated*, 2023 TMOB 174 [*Remitly 2023 TMOB*].

[4] Remitbee has filed applications in this Court appealing the two opposition decisions under section 56 of the *Trademarks Act*, RSC 1985, c T-13 [*TMA*]. In both appeals, Remitly has filed, as expert evidence, the affidavit of Suhuyini Abudulai dated October 26, 2022 (in Court file T-1758-22), and a second affidavit of Ms. Abudulai dated March 8, 2024 (in Court file T-2621-23). The affiant is a lawyer and certified anti-money laundering specialist, as recognized by the Association of Certified Anti-Money Laundering Specialists.

[5] Remitbee seeks to have the Abudulai affidavits struck, arguing that the affidavits do not meet the applicable test for admissibility because, notably, they are excluded by the rule against legal opinion on domestic law. Remitly submits that the admissibility and weighting of the affidavits should be left for the applications judge who will assess the merits of the appeals.

[6] At the time of the hearing of Remitbee's motions to strike, the matters were not consolidated; in the interest of judicial economy, the motions were heard together. The proceedings subsequently were consolidated: *Remitbee Incorporated v Remitly, Inc*, 2024 FC 2028 [*Consolidation Order*]. I understand the *Consolidation Order* has been appealed as of the date of the Court's instant Order and Reasons. For additional background, see paras 6-12 of the *Consolidation Order* and this Court's recent decision in *Remitbee Incorporated v Remitly, Inc*, 2024 FC 1211 at paras 4-10.

[7] Having considered the parties' motion materials and heard their oral submissions, I find that the motions will be granted and the Abudulai affidavits will be struck.

II. Remitly's expert evidence – the Abudulai affidavits – will be struck

[8] I am convinced that the Abudulai affidavits are legal opinions on domestic law. According to prevailing jurisprudence on this issue, they are thus inadmissible and should be struck as part of the Court's gatekeeping function. In the interest of preserving scarce judicial resources, I see no utility in leaving the determination of this issue to the applications judge.

[9] The first and second Abudulai affidavits describe Ms. Abudulai's qualifications and acknowledge the duty of an expert in the Federal Court. A signed Code of Conduct for Expert Witnesses is an exhibit to each affidavit. The October 26, 2022 opinion of Ms. Abudulai, also is attached as an exhibit to each affidavit. A second opinion of Ms. Abudulai dated March 4, 2024 is attached to the second affidavit. While the mandates described in these affidavits differ, the

mandate in the second Abudulai affidavit in my view largely seeks clarification of the October 26, 2022 legal opinion with reference to additional evidence.

[10] A considered review of the affidavits, including the parties' other motion materials and their written and oral submissions, leads me to conclude that Ms. Abudulai's evidence involves legal opinions about aspects of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 [*Money Laundering Act*], as they relate to the money services business [MSB] regime, including associated regulations and guidance published by the Financial Transactions and Reports Analysis Centre of Canada (also known as FINTRAC), in the context of the oppositions and Remitbee's appeals from the opposition decisions. I give two examples from the mandates in the first and second Abudulai affidavits.

[11] In the first affidavit, Ms. Abudulai describes the mandate as including the following key question: "Based on my review of the documents listed in Appendix "A" attached to this report, was Remitbee properly registered/operating/lawfully operating as an MSB in each of 2015, 2016, and 2017 and compliant with the Act [i.e. the *Money Laundering Act*]?" I note that the documents listed in Appendix "A" comprise evidence in the opposition, as well as Remitly's written representations before the Trademarks Opposition Board [TMOB] (i.e. in *Remitbee 2022 TMOB*). In my view, this is a question of mixed fact and law, involving the application of domestic law in the form of the *Money Laundering Act* (and associated regulations and guidance) to the facts proven in the opposition proceeding, something that is well within the purview of the Court on appeal, without assistance, even in the case of complex legislation.

[12] Similarly, as described by Ms. Abudulai in her second affidavit, the mandate includes the following key question: “Whether Remitbee’s additional evidence identified in Appendix “A” to my 2024 Expert Report (the “Remitbee Additional Evidence”) changes my opinion in the 2022 Expert Report that Remitbee was not entitled to offer money remittance services between April14, 2015 and February 26, 2019 (the “Applicable Period”) and, as such, if Remitbee breached its obligation to register as a money services business (“MSB”) pursuant to the PCMLTFA [i.e. the Money Laundering Act] and its associated regulations.” Two other mandate questions involve consideration of whether Remitbee’s activities fall within the ambit of an MSB, or comply with MSB record-keeping requirements, under the *Money Laundering Act*. These questions also involve the application of domestic law to the proven facts.

[13] Applicable Federal Court of Appeal jurisprudence, which binds the Federal Court, is clear in my view, that “questions of domestic law (as opposed to foreign law) are not matters upon which a court will receive opinion evidence[; s]uch matters clearly fall within the purview of the court’s expertise and opinion evidence on these issues would usurp the court’s role as expert in matters of law”: *Canada (Board of Internal Economy) v Canada (Attorney General)*, 2017 FCA 43 [*Internal Economy*] at para 18 (citations omitted). See also *International Air Transport Association v Canadian Transportation Agency*, 2022 FCA 211 [*2022 IATA*] at paras 51-52 (aff’d 2024 SCC 30 [*2024 IATA*]), citing *Internal Economy* at para 18.

[14] While I agree with Remitly that *Internal Economy* (at para 29) also notes the Court’s discretion to strike an affidavit or part of it should be exercised sparingly and only in exceptional circumstances, as I further explain below, I find that to exercise my discretion here would be in

the interest of justice and would facilitate the timely and orderly hearing of Remitbee's appeals: *Armstrong v Canada (Attorney General)*, 2005 FC 1013 at para 40; *Canada (Attorney General) v Quadrini*, 2010 FCA 47 at para 18.

[15] According to *Internal Economy* (at para 17*)*, expert opinion evidence, as an exception to the rule against opinion evidence, may be necessary to provide the trier of fact with a technical or scientific basis, for example, against which to assess the adduced evidence. The admissibility of such expert evidence is determined with reference to the *Mohan* criteria of relevance, necessity in assisting the trier of fact, the absence of any exclusionary rule, and a properly qualified expert: *R v Mohan*, 1994 CanLII 80 (SCC), [1994] 2 SCR 9.

[16] Before turning to the *Mohan* test, I pause to note that, in my view, the Federal Court of Appeal's earlier decision in *International Air Transport Association v Canada (Transportation Agency)*, 2020 FCA 172, does not assist the Respondent because it concerns expert evidence on questions of foreign versus international law.

[17] Further, in dismissing the appeal from the more recent decision in *2022 IATA*, above, the Supreme Court of Canada deals specifically with the test for expert evidence on questions of international law. Justice Rowe, on behalf of the Court, observes that "from time to time difficult and contentious questions of international law will arise where judges will be assisted in carrying out their functions by appropriate expert evidence" and determines that the *Mohan* test "should be applied in the context of international law as it is in other circumstances where expert evidence is sought to be admitted": *2024 IATA*, above at paras 72-73. According to Justice Rowe

(at para 79), the question of whether to admit expert evidence on questions of international law ultimately "is best left as a matter of judicial discretion rather than being subject to a fixed and invariable rule," noting that (at para 77) a key consideration in the assessment is whether, on the proven facts, a judge can form their own conclusions without help. The Court makes no similar pronouncements regarding expert opinion evidence on domestic law.

[18] Remitly relies on *Internal Economy* (at para 29) for the proposition that the discretion to strike an affidavit or part of it should be exercised sparingly and only in exceptional circumstances. While I do not disagree, I note that this is precisely what the Court did in *Internal Economy* (at para 33). I find then Justice de Montigny's reasons (at paras 30-32) apt here. First, the Abudulai affidavits are replete with legal opinion and ought to be stopped in their tracks.

[19] Second, I note that there has been no-cross examination to date on either Abudulai affidavit. I further note that, although the time for cross-examination on the first Abudulai affidavit has expired, given the different stages of the appeals, I note that Remitbee was represented by previous counsel at that time. If the affidavits were to stand, however, Remitbee may be constrained, for tactical reasons, not only to conduct cross-examination(s) but also to retain its own expert and to file a responding affidavit, all of which and more flowing from these steps could distract the Court from its core task on the appeals from the underlying opposition decisions.

[20] Circling back to the *Mohan* criteria, I disagree with Remitbee that the Abudulai affidavits are not relevant, especially in the context of the now-consolidated proceedings, or at the very

least in respect of *Remitly 2023 TMOB*. The issue of the applicability of the *Money Laundering Act* and MSB regime was squarely before the TMOB in *Remitly 2023 TMOB* because they were referred to in the ground of opposition based on paragraph 30(b) of the *TMA* in the Statement of Opposition.

[21] Leaving aside the issue of a properly qualified expert, which has not been advanced in these motions, I find the second and third criteria are intertwined. The affidavits are not necessary because, dealing as they do with opinions on matters of domestic law, they clearly fall within the purview of the court's expertise; hence they are excluded. Further, as this Court previously has observed, it is for "judges are to determine compliance with legal definitions, for which expert witnesses should not give evidence" (i.e. here, whether Remitbee was an MSB): *Association of chartered Certified accountants v The Canadian Institute of Chartered Accountants*, 2016 FC 1076 at para 30.

[22] That is not to say, however, that the outcome alone of these motions will constrain Remitly necessarily from putting the substance of the expert's opinions on the *Money Laundering Act* and MSB regime before the Court in the Respondent's memorandum of fact and law and in oral argument, relying on the law and authorities: *Internal Economy*, above at para 23; *2024 IATA*, above at para 74.

III. Conclusion

[23] For the above reasons, Remitbee's motions will be granted and the first and second Abudulai affidavits will be struck.

[24] Both parties request lump sum costs, albeit for different amounts. I exercise my discretion under rule 400 of the *Federal Courts Rules*, SOR/98-106, in awarding Remitbee, as the successful party, lump sum costs in the amount of $3,000.00 all-in, which amount is reasonable in my view, payable by Remitly.

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

THIS COURT'S ORDER is that:

1. The Applicant's motions are granted.
2. The affidavits of Suhuyini Abudulai dated October 26, 2022 (in Court file T-1758-22), and March 8, 2024 (in Court file T-2621-23), are struck from the record.
3. The Applicant is awarded all-in lump sum costs in the amount of $3,000.00 payable by the Respondent.

"Janet M. Fuhrer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2621-23 AND T-1758-22
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PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
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