

Federal Court



Cour fédérale

Date: 20230301

**Dockets: T-2051-22
T-2052-22
T-2053-22
T-2054-22
T-2055-22
T-2056-22
T-2057-22**

Citation: 2023 FC 287

Edmonton, Alberta, March 1, 2023

PRESENT: Madam Associate Judge Catherine A. Coughlan

BETWEEN:

**GUANGZHOU WANGLAOJI GRAND
HEALTH CO., LTD.**

Applicant

and

MULTI ACCESS LIMITED

Respondent

ORDER AND REASONS

[1] There are two motions before the Court: the first, filed on January 18, 2023 by the Applicant, Guangzhou Wanglaoji Grand Health Co., Ltd. (“Wanglaoji”), seeks an order setting the time, place, manner and expense of the oral examination of Mr. Chan Hung To (“Mr. Chan”) on his affidavit sworn December 2, 2022 (“Chan affidavit”).

[2] The second motion, filed by the Respondent, Multi Access Limited (“Multi Access”) on January 30, 2023, seeks leave to file a proposed substitute affidavit of Ms. Leung Kin (“Ms. Leung”), sworn January 30, 2023 (“Leung affidavit”), in substitution for Mr. Chan’s affidavit. Multi Access also seeks leave to withdraw the Chan affidavit or alternatively, to obtain an order that the cross-examination of Mr. Chan proceed by written cross-examination questions.

[3] The parties filed motion records on each motion including extensive written representations and reply representations. The motion materials included the affidavit of Sandra Ortiz sworn January 17, 2023 (“Ortiz affidavit”) and filed by Wanglaoji, and the two affidavits of Diane Hwang sworn January 30, 2023 and filed by Multi Access. Indeed, the parties expended a great deal of time and effort on motions that were largely unnecessary. In the interests of judicial economy and efficiency, I propose to deal with the two motions in one Order. My decision with respect to the first motion will be sufficient to dispose of the second motion.

I. Background

[4] The underlying Application is an appeal under section 56 of the *Trademarks Act*, R.S.C. 1985, c. T-13 and Rule 300(d) of the *Federal Courts Rules*, SOR/98-106 [“Rules”], from decisions of the Registrar of Trademarks dated August 9, 2022 in respect of eight expungement proceedings against Registration Nos. TMA410076, TMA879259, TMA879263, TMA879265, TMA892774, TMA910422, TMA910437 and TMA927934 owned by Multi Access.

[5] In proceedings before the Registrar, Multi Access filed affidavits sworn by Mr. Chan dated May 27, 2020. Mr. Chan was not cross-examined on his affidavits in that administrative proceeding. The Registrar concluded that Multi Access had established use of the Trademark.

[6] On October 7, 2022, Wanglaoji filed seven appeals of the Registrar's decision in this Court. The appeals were consolidated into a single proceeding on November 21, 2022.

[7] On December 7, 2022, pursuant to Rule 307, Multi Access served Wanglaoji with a further affidavit sworn by Mr. Chan on December 2, 2022.

[8] Beginning on December 7, 2022 and continuing on December 23, 2022 and December 29, 2022, counsel for Wanglaoji sought Mr. Chan's availability for cross-examination on his affidavit. Exhibit K to the affidavit of Sandra Ortiz reproduces an email thread between counsel concerning the availability of Mr. Chan as follows:

(a) Email from Mr. Chow dated December 7, 2022, stating:

Cristina - Please provide Mr. Chan's availability for a cross-examination on his affidavit. As well, if Mr. Chan does not understand English, kindly advise what language(s) he understands. Cantonese? Mandarin? Other?

(b) Further email from Mr. Chow dated December 23, 2022, stating:

We need to schedule the cross-examination, and hope to hear from you soon regarding Mr. Chan's availability and languages.

In terms of time of day, we propose starting at 4:30pm Vancouver / 7:30pm Toronto / 8:30am Hong Kong.

(c) Email from Cristina Mihalceanu dated December 28, 2022, stating:

I have now made inquiries on my end concerning Mr. Chan's availability for cross-examination.

As you may know, Mr. Chan, as the Director of Multi Access Limited, is responsible for the company's business management and strategy, which includes maintenance and protection of the company's intellectual property rights and portfolio. Meanwhile, the

day-to-day operation of the company's affairs and business, including the manufacturing, packaging, advertising and worldwide export, distribution and sale of the company's products (e.g. WLK herbal tea), is delegated to the company's staff. As you will appreciate, most, if not all, of the facts in the affidavit were obtained from information contained in the relevant books and records of the company that were kept and compiled in the ordinary course of business.

Moreover, in light of Mr. Chan's position with the company and his responsibilities, his availability is quite limited, particularly at times suitable for our respective legal teams located in Toronto and Vancouver given the time differences to Hong Kong local time. Further, as Mr. Chan would require a translator, making arrangements for translation would also be very complex and cumbersome.

For efficiency purposes, and in light of the time difference and Mr. Chan's schedule, we therefore propose to conduct the cross-examination by questions in writing. If you are not willing to proceed in writing, please let us know if you will consent to an extension of time for us to file a substitute affidavit (restricted to the same substance as Mr. Chan's affidavit).

- (d) Email from Mr. Chow dated December 29, 2022, stating:

We have considered your email. As Mr. Chan swore the affidavit in this proceeding, we are entitled to cross-examine him under the Rules and plan to do so in an oral cross-examination. We do not consent to an extension of time for a substitute affidavit, nor do we agree to conduct the cross-examination of Mr. Chan by questions in writing.

*Regarding the time differences, we proposed that the cross-examination start at 8:30am Hong Kong / 7:30pm Toronto which is reasonable. If you and your client prefer an alternate start time, we will consider it. **No alternate start time has been proposed.***

*As to the arrangements for translation, that will be for us to coordinate. We simply need to know what language(s) Mr. Chan understands. You have failed to provide a response. **Please advise immediately what language(s) your client understands so that we can secure a translator for the cross-examination.***

Inote that we first asked for Mr. Chan's availability over three weeks ago on December 7. Mr. Chan is presently not being asked to fly to Canada to attend an in-person examination. Rather we are proposing that the examination occur by videoconference.

***We ask again that you provide Mr. Chan's availability.** If Mr. Chan's availability is not provided by Tuesday January 3, 2023, we reserve the right to bring a motion seeking an order for the cross-examination and will seek costs against your client.*

[Emphasis in Original.]

- (e) Email from Cristina Mihalceanu dated January 3, 2023, stating:

As you know, the Trademark Office in the underlying section 45 proceedings found that the herbal tea product was sold with Version 1 packaging based on Mr. Chan's original affidavits (sworn May 27, 2020), and largely considered the Version 2 packaging as irrelevant to the disposition of the section 45 issues. We disagree with your client's position in these appeals that there was any ambiguity in the evidence concerning the Version 1 packaging. The further affidavit of Mr. Chan (sworn December 2, 2022) confirms the facts in the original affidavits that Version 1 was indeed used during the relevant timeframe, and is consistent with the Trademark Office's decision.

In light of the reasons set out in my email dated December 28, 2022, we have offered to proceed with Mr. Chan's cross-examination in writing, or to file a substitute affidavit (restricted to the same substance as Mr. Chan's affidavit). However, you have taken the position that you will not agree to conduct the cross-examination of Mr. Chan by questions in writing, nor consent to an extension of time for a substitute affidavit, even though the timing for conducting the cross-examinations has not yet passed and there is no suggestion of prejudice to your client with proceeding in the manner we proposed.

Assuming you are not willing to reconsider your position, we hereby withdraw the affidavit of Mr. Chan (sworn December 2, 2022) in these appeals such that neither party can rely on it. In light of this withdrawal, there is accordingly no need to schedule a cross-examination or bring your proposed motion.

[Emphasis in Original.]

[9] On January 18, 2023, Wanglaoji filed the within motion seeking an order setting the time, place, manner and expense of an oral examination of Mr. Chan and for an order that Multi Access provide Mr. Chan's availability for cross-examination and indicate the language(s) he understands.

[10] On January 30, 2023, Multi Access filed its motion seeking to substitute the Chan affidavit with Ms. Leung's affidavit and for leave to withdraw Mr. Chan's affidavit or permit cross-examination in writing.

[11] For the reasons that follow, Wanglaoji's motion is allowed. Multi Access's motion is dismissed.

II. Issues

[12] The two motions raise three issues:

1. Does Wanglaoji have the right to an oral cross-examination of Mr. Chan?
2. Should Multi Access be granted leave to withdraw the Chan affidavit in substitution for the Leung affidavit?
3. Should Wanglaoji be granted an extension of time to file its record?

III. Analysis

- (1) Wanglaoji's right to an oral cross-examination of Mr. Chan

[13] I start my analysis by confirming the right of a party in this Court to cross-examine a party adverse in interest on its affidavit. Rule 83 provides cross-examination as of right on affidavits served in a motion or application.

[14] In their representations, both parties presented considerable argument on the proceedings before the Registrar and the contents of Mr. Chan's 2020 affidavits as compared to his December 2, 2022 affidavit. Wanglaoji advanced arguments highlighting the differences in Mr. Chan's evidence before the Registrar and the evidence filed in this Court. In contrast, Multi Access advanced arguments, which suggest that proceedings before the Registrar are simply an administrative procedure for clearing the trademarks register of "deadwood" or registrations of trademarks that have fallen into disuse. Such proceedings, Multi Access asserts do not require "evidentiary overkill". Those submissions miss the mark. Where a request to cross-examine is not frivolous or otherwise an abuse of process, a party seeking to cross-examine a deponent need not justify its decision to do so. Equally, a party filing an affidavit in support of its position cannot demand a reason from the examining party before submitting to cross-examination.

[15] As to the mode of cross-examination, Rule 88 provides that cross-examination on an affidavit may be conducted orally or in writing. As to which party is entitled to determine the mode, the Court in *Azouz v Canada (Attorney General)*, 1999 Carswell Nat 1998 (FC), offers some guidance. In that case, Mr. Justice Lemieux concluded that cross-examination in writing constitutes an exception to the examining party's right to cross-examine an affiant by way of oral examination [emphasis added]. As this Court noted in *Sterling v Lower Nicola First Nations*, [2018] FCJ No 1337 (FC), Lemieux J.'s conclusion "signals that the examining party is entitled to select whether a cross-examination is conducted orally or in writing, unless a court orders

otherwise, and that an order limiting the examiner's choice of cross-examination format is an exception to the examiner's right to oral cross-examination" (para 9).

[16] The evidence provided in the Ortiz affidavit and reproduced above makes clear that Wanglaoji sought an oral cross-examination and communicated that position to Multi Access's counsel the very day the Chan affidavit was served. Some three weeks later, Multi Access responded and proposed a written cross-examination. I will deal with Multi Access's preference for written cross-examination later in this Order but I can find no principled reason why Wanglaoji should be denied its right to an oral cross-examination.

[17] I am satisfied that Wanglaoji has a right to an oral cross-examination of Mr. Chan.

- (2) Should Multi Access be granted leave to withdraw the Chan affidavit in substitution for the Leung affidavit?

[18] Multi Access responded to Wanglaoji's motion, with its own motion to simultaneously withdraw the Chan affidavit and substitute it for the Leung affidavit. Ms. Leung's proposed affidavit, sworn on January 30, 2023, is attached to the affidavit of Diane Hwang, an articling student in the offices of DLA Piper, counsel to Multi Access. Multi Access argues that Ms. Leung has first hand knowledge of the matters in contention and assisted Mr. Chan in "compiling, inter alia, the representative products, invoices and global sales figures that are appended to the Original Chan Affidavits." Further, Multi Access asserts that with the filing of Ms. Leung's affidavit, the Chan affidavit will be rendered redundant and hence, the Court should permit to withdraw an otherwise redundant affidavit.

[19] Multi Access also asserts, rather boldly, that Wanglaoji will not be prejudiced by the substitution because it will have the opportunity cross-examine Ms. Leung, orally. Further, Multi Access suggests that if the Court does not grant leave to withdraw the Chan affidavit, Wanglaoji may cross-examine Ms. Leung orally and Mr. Chan in writing.

[20] Finally, Multi Access asserts that in refusing to permit written cross-examination of Mr. Chan or substitution of Ms. Leung, Wanglaoji “has failed to be reasonable” and is being “uncooperative, obstructionist, and seemingly attempting to unnecessarily increase the cost and inconvenience to Multi Access, with no real desire to get to the heart of the issues before the Court.”

[21] I do not accept any of Multi Access’s arguments.

[22] Whether to permit a party to withdraw an affidavit is a discretionary decision of the Court. As this Court noted in *Law Society of Upper Canada (Minister of Citizenship & Immigration)*, 2006 FC 1042 at para 29, the determining factor for the Court is the clear existence of prejudice to the party seeking to withdraw if leave is not given. Here, Multi Access has not adduced any evidence of prejudice whatsoever. Multi Access’s motion must fail on that basis alone.

[23] In any case, the email thread between counsel reproduced above, discloses that this is not a case where an affiant has fallen ill or has left the employ of the party on whose behalf the affidavit was sworn. In those situations, prejudice of the sort necessary to permit the Court to exercise its discretion may be found. Here, the justifications offered to substitute affidavits and refuse oral cross-examination do not rise above mere inconvenience to the affiant. This surely does not justify the relief Multi Access seeks.

[24] I am satisfied that the request to withdraw the Chan affidavit is an ill-disguised attempt to shield Mr. Chan from cross-examination. Based on the record before me, I am unable to come to any other conclusion. The jurisprudence of this Court and others is clear; a Court should not exercise its discretion to permit the withdrawal of an affidavit merely to prevent cross-examination: *Canadian Motion Picture Distributors Assn v Partners of Viewer's Choice Canada*, [1996] FCJ No 498 (Fed CA) (QL); *Boehringer Ingelheim (Canada) Ltd v Pharmacia Canada Inc*, 2003 FCA 151 (CA); *Syntex Inc v Canada (Minister of National Health and Welfare)* (1995), 60 CPR (3d) 518, 94 FTR 215 (FCTD); and *ROM Construction Ltd v Heeley* (1982), 1982 CanLII 1140 (AB QB), 136 DLR (3d) 717 (Alta QB).

(3) Should Wanglaoji be granted an extension of time to file its record?

[25] Having concluded that Wanglaoji is entitled cross-examine Mr. Chan, orally, the Applicant is entitled to an extension of time to serve and file its Applicant's Record to twenty (20) days following the completion of cross-examination of Mr. Chan on his affidavit.

IV. Costs

[26] Both parties seek costs of their respective motions. As Wanglaoji is the successful party, it is entitled to its costs. I will exercise my discretion to set costs in the lump sum amount of \$2,000.00 inclusive of tax and disbursements.

**ORDER in T-2051-22, T-2052-22, T-2053-22, T-2054-22, T-2055-22, T-2056-22 and
T-2057-22**

THIS COURT ORDERS that:

1. The Applicant's motion is allowed.
2. The Respondent's motion is dismissed.
3. The Respondent shall produce Mr. Chan for cross-examination as follows:
 - i. Time: 4:30pm PST (Vancouver, BC) / 7:30pm EST (Toronto, ON) / 8:30am HKST (Hong Kong) on a date agreed by the parties;
 - ii. Place: by videoconference;
 - iii. Manner: oral cross-examination;
 - iv. Expenses: no travel expenses payable to Mr. Chan; and
 - v. Within seven (7) days of this Order, the Respondent shall provide Mr. Chan's availability for cross-examination and indicate the language(s) that he understands.
5. The Applicant shall serve and file its Record twenty (20) days after the completion of the cross-examination of Mr. Chan.

6. The Applicant shall have costs fixed at \$2,000.00 inclusive of tax and disbursements.

"Catherine A. Coughlan"

Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS: T-2051-22, T-2052-22, T-2053-22, T-2054-22, T-2055-22, T-2056-22 and T-2057-22

STYLE OF CAUSE: GUANGZHOU WANGLAOJI GRAND HEALTH CO., LTD. v MULTI ACCESS LIMITED

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

ORDER AND REASONS: COUGHLAN A.J.

DATED: MARCH 1, 2023

WRITTEN REPRESENTATIONS BY:

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