Federal Court  Cour fédérale

Date: 20230504

Docket: T-17-16

Citation: 2023 FC 645

Toronto, Ontario, May 4, 2023

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

DUCKS LANE LTD., CURBEX LTD., 8314004 CANADA INC. (DBA CURBEX SUPPLY) AND 9003088 CANADA CORP. (DBA CURBEX MEDIA)

Plaintiffs/Defendants by Counterclaim

and

OUTFRONT MEDIA LLC, OUTFRONT MEDIA CANADA GP CO. AND OUTFRONT MEDIA CANADA LP

Defendants/Plaintiffs by Counterclaim

ORDER AND REASONS

[1] The Plaintiffs, Ducks Lane Ltd, Curbex Ltd., 8314004 Canada Inc (DBA Curbex Supply) and 9003088 Canada Corp (DBA Curbex Media) [collectively, Curbex] bring this motion under rule 36 of the *Federal Court Rules*, SOR/98-106, to request an adjournment of the trial of this trademark action, currently scheduled to commence on June 26, 2023.

[2] Curbex requests that the trial be deferred to a date in December 2023, or later, when the parties and the Court are available. The basis for its request is to provide additional time so that an expert recently retained by its new co-counsel can develop survey evidence, which it may seek to introduce at trial.

[3] For the reasons set out below, it is my view that Curbex has not established the exceptional circumstances required to justify a request for adjournment. Nor has it established that it will suffer an unfair prejudice. Accordingly, the motion will be dismissed with costs.

I. Background

[4] In the underlying action [Action], Curbex alleges, *inter alia*, that the Defendants, Outfront Media LLC, Outfront Media Canada GP Co and Outfront Media Canada LP [collectively, Outfront] have infringed Curbex' rights in their registered trademark, ALWAYS OUT FRONT, through the use of a confusingly similar trademark and trade name. The Action includes a counterclaim in which Outfront seeks to invalidate the ALWAYS OUT FRONT trademark.

[5] The Action was commenced in 2016 and has taken a lengthy course.

[6] On November 4, 2022, following submissions made during case management, an Order issued setting the Action down for trial, to commence on June 26, 2023 for a duration of five days.

[7] During November 2022, counsel for the parties exchanged various correspondence regarding expert reports. At that time, the Plaintiffs were of the view that expert evidence was not needed. In these exchanges, counsel for the Plaintiffs sought to obtain an agreement from the Defendants that expert evidence would not be filed. However, the Defendants would not agree, preferring to incorporate a timeline for the possible exchange of expert evidence into the pretrial schedule.

[8] By joint letter to the Court on December 12, 2022, the parties proposed, on consent, a schedule for the steps leading up to trial which provided that the parties would exchange any expert reports in chief by February 24, 2023, and any responding expert reports by April 21, 2023.

[9] On January 31, 2023, the Plaintiffs met with Paliare Roland Rosenberg Rothstein LLP [PRRR] and agreed to retain PRRR to act as co-counsel to assist with the remaining pre-trial steps and the trial.

[10] Shortly thereafter, Curbex changed its mind about delivering an expert report in chief and on February 9, 2023, relying on PRRR's advice, retained Dr. Ruth Corbin of Corbin Forensics to advise on the possibility of designing survey evidence that could assist the Court in deciding the issues in dispute. On February 9, 2023, Curbex' then acting counsel (Shift Law) advised the Defendants that Curbex was in the process of retaining co-counsel and that it may need to revisit the schedule for expert reports.

[11] On February 16, 2023, a Notice of Change of Solicitor was filed appointing PRRR as co-solicitors of record with Shift Law.

[12] On February 21, 2023, counsel for Outfront wrote to Shift Law taking issue with the form of the co-counsel appointment and confirming that it had been operating under the agreed-upon schedule for the exchange of expert reports.

[13] On February 23, 2023, the day before any evidence was to be exchanged, Shift Law responded to the correspondence proposing, *inter alia*, a two-month extension of time until April 24, 2023 for the parties to deliver expert reports in chief. The correspondence explained that additional time was needed to allow Curbex to consider whether it wanted to obtain expert evidence in view of PRRR's appointment. On February 27, 2023, counsel for the Defendants advised that they would not agree to the requested extension.

[14] As the parties could not come to an agreement on a revised schedule, on March 6, 2023, the Plaintiffs wrote to the Court to request a case management conference. On March 22, 2023, a second letter was sent to the Court advising that Curbex would be requesting an adjournment of the trial at the case management conference and that Outfront would be opposing the request.

[15] On March 27, 2023, during a combined case management/trial management conference, the Court proposed a modified schedule that would preserve the trial date and allow Curbex to deliver any expert report by April 14, 2023 and for any responding expert reports to be delivered by June 9, 2023.

[16] On March 31, 2023, counsel for Curbex advised that Dr. Corbin would be unable to complete a report by April 14, 2023 because of "intervening travel and file commitments" and that it would be filing the present motion to adjourn the trial.

II. Analysis

[17] Pursuant to rule 36(1) of the *Federal Courts Rules*, the Court has discretion to adjourn hearings on such terms as it considers just.

[18] The Court has identified relevant factors to consider when determining whether to grant an adjournment, which include: the prejudice that would be caused to one or more of the parties; the prejudice to the Court in losing a hearing date; and, the public interest in a timely conclusion to litigation: *Jim Shot Both Sides v Canada*, 2021 FC 282 at para 25, citing *McFadyen v Canada (Attorney General)*, 2009 FC 78 at para 23.

[19] In its Notice to the Profession dated May 8, 2013, the Court provides guidance on when a request for adjournment can be made. As stated in the Notice, the Court operates on a "guaranteed, fix-date system". A request for adjournment should only be made where there are "exceptional and unforeseen circumstances":

> The Federal Court operates on a guaranteed, fix-date system. When the Court has fixed a date for trial or for a hearing parties are expected to proceed on that date. Adjournments cause inconvenience and expense. Court resources are not used efficiently as there often is not sufficient time to schedule another matter to take the place of the adjourned hearing.
>
> Nevertheless, the Court recognizes that there may be exceptional and unforeseen circumstances, including those that are outside the control of a party or its counsel, in which it may be reasonable to request an adjournment.

[20] The need for exceptional circumstances and affidavit evidence to detail the reasons for a request for adjournment has also been emphasized in the jurisprudence: *Mason v Canada*, 2015 FC 926 at para 19.

[21] In this case, I agree with Outfront, the circumstances are neither exceptional nor unforeseen. They are the result of choices made by Curbex during the course of the litigation. While the Plaintiffs assert that they are unsophisticated and inexperienced litigants and that their primary counsel does not have trial experience, Curbex' choice of counsel was their own as was their late decision to retain co-counsel with greater trial experience. There can be no debate that Curbex has been represented throughout the course of the proceeding amid no allegations of incompetence by counsel. Curbex could have chosen to retain additional counsel when initial steps and decisions were being made with respect to the expert evidence, but chose to wait to do so. They cannot now claim exceptionality from circumstances of their own making.

[22] Further, while Curbex may be seeking to raise an argument of reverse confusion in the Action, which has not featured significantly in Canadian trademark jurisprudence, I do not consider this to render the Action so complex and unusual as to rise to the level of unforeseen or exceptional circumstances. Indeed, prior to PRRR's involvement, the parties were of the view that no expert evidence was required and remain in agreement that a modest trial schedule of five days for evidence and argument is all that is necessary.

[23] Notably, reverse confusion is not specifically alleged in the Plaintiffs' pleadings and it is unclear at this stage whether any expert evidence of the type proposed by the Plaintiffs would be helpful to the case (*Masterpiece v Alavida Lifestyles*, 2011 SCC 27).

[24] The Plaintiffs assert that they will suffer prejudice if the requested adjournment is not granted, as they will be unable to put their best foot forward for the trial. They assert the Court will be deprived of the possibility of obtaining expert evidence as to the issues in dispute, and whether there is reverse confusion in the manner considered in *A&W Food Services of Canada Inc v McDonald's Restaurants of Canada Ltd*, 2005 FC 406.

[25] However, in this case, the expert report in question is only a possibility. As conceded by counsel for the Plaintiffs, Dr. Corbin has not yet prepared a report or even developed the survey in question. There is no basis upon which to conclude that the results of the survey will be helpful to the proceeding.

[26] As stated in *Robertson v Her Majesty the Queen*, 2009 TCC 364 at paragraph 10, where the opinion of a proposed expert is not yet known, there can be no asserted value attributed to that evidence. If an adjournment were to be granted every time a party decided to pursue additional evidence, then adjournments would no longer be exceptional and delay would become the norm:

> [10] I do not find any merit in the suggestion that to deny the adjournment in this case will deprive the trial judge of valuable evidence. Judges decide cases on the evidence that the parties put before them. If an adjournment were to be granted every time a party decided to look for another witness who might support his case then delay would become the norm. This argument loses any

> force that it might otherwise have when one considers that apparently even the appellants' counsel does not know, and will not know for some time, what opinion Mr. Lytwyn might actually arrive at. ...

[27] As noted by the Defendants, Curbex could have decided to deliver an expert report or to retain Dr. Corbin at any time before February 2023, and to retain PRRR sooner. Similarly, it could have canvassed alternative experts who might have been able to meet the February 24, 2023 or April 14, 2023 deadlines. Indeed, there is no evidence before me that Dr. Corbin is the only expert that can prepare the report the Plaintiffs seek, nor is there any evidence from Dr. Corbin to demonstrate whether she made any efforts to expedite her work.

[28] The Plaintiffs assert that if the Defendants had agreed to the amended schedule they proposed in February 2023, or proposed an acceptable revised pre-trial schedule, an adjournment would not have been required for expert evidence to be available at trial. While I agree that the Defendants did not make any effort to discuss an alternative schedule, the Plaintiffs' assertion does not explain their own lack of activity from the time they proposed the schedule in February 2023 to date.

[29] The amended schedule provided by the Plaintiffs proposed that Dr. Corbin's evidence would be available by April 24, 2023. Yet, it has been nearly three months since Dr. Corbin was retained and, as acknowledged by the Plaintiffs, Dr. Corbin has not yet prepared her report or even designed the survey evidence on which she proposes to provide her opinion. Indeed, when the Court proposed a revised schedule that was only ten days shorter than the one requested by the Plaintiffs, the Plaintiffs indicated that Dr. Corbin could not make the deadline because she

had other intervening travel and file commitments. There was no evidence from Dr. Corbin on the motion to explain this further.

[30] To date, there is still no timeline proposed for the completion of Dr. Corbin's report. The lack of urgency exhibited by the Plaintiffs and their expert does not accord with the exceptional relief they are seeking, or the prejudice claimed.

[31] The Plaintiffs contend that the prejudice they will suffer in being deprived of an opportunity to present their best case far outweighs any prejudice to the Defendants as none has been shown. They argue that as the trial is only of a short duration (5 days) there will be limited prejudice to the Court in adjourning the trial to a later date.

[32] However, I do not agree that unfair prejudice to Curbex has been established as the prejudice proposed is based on an assumption that may not take place and is grounded in circumstances caused by Curbex' own actions.

[33] Further, there remains a public interest in proceeding forward with litigation in a timely manner. This includes the interest of the Defendants to obtain finality to claims made against them.

[34] I agree with Outfront that to grant an adjournment of six months or more with the possibility that Curbex may not deliver any expert report would run contrary to this pubic

interest and put the administration of justice in disrepute. It would cause inherent prejudice to Outfront and the Court that may be for no reason.

[35] Requesting an adjournment is not a trivial matter (*Dr. Reddy's v Janssen*, 2023 FC 448 [*Dr. Reddy's*] at para 17; *UHA Research Society v Canada*, 2014 FCA 134 at paras 9-10) and should not be based on speculation (*Dr. Reddy's* at para 37).

[36] The Court must be satisfied that the requested adjournment advances the interests of justice. Where the expert evidence in question is still unknown and there is no certainty that any expert evidence will be introduced into the proceeding, there is no basis to assess whether the adjournment will amount to anything of value, or to ground the exceptional relief requested. The asserted benefit to the Court has not been made out.

[37] For all of these reasons, the motion is dismissed and the schedule for the trial shall remain unaltered.

[38] As Outfront was the successful party on this motion, it is entitled to costs. While Outfront requested an award of $15,000, it did not support this request with a Bill of Costs. In consideration of the Tariff, the nature and steps taken on the motion, in my view $10,000 is more appropriate and shall be awarded to Outfront, in any event of the cause.

ORDER IN T-17-16

THIS COURT ORDERS that:

1. The motion is dismissed and the trial of this matter shall proceed as currently scheduled.

2. Costs of the motion are awarded to the Defendants in an amount fixed at $10,000 in any event of the cause.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-17-16
STYLE OF CAUSE:	DUCKS LANE LTD., CURBEX LTD., 8314004 CANADA INC. (DBA CURBEX SUPPLY) AND 9003088 CANADA CORP. (DBA CURBEX MEDIA) v OUTFRONT MEDIA LLC, OUTFRONT MEDIA CANADA GP CO. AND OUTFRONT MEDIA CANADA LP
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 27, 2023
ORDER AND REASONS:	FURLANETTO J.
DATED:	MAY 4, 2023

APPEARANCES:

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