

Federal Court



Cour fédérale

Date: 20240918

Docket: T-1184-21

Citation: 2024 FC 1471

Ottawa, Ontario, September 18, 2024

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

**ADEIA GUIDES INC. AND
ADEIA MEDIA HOLDINGS LLC**

Plaintiffs

and

**BCE INC., BELL CANADA,
BELL MEDIA INC.,
BELL EXPRESSVU LIMITED
PARTNERSHIP,
NORTHERNTEL, L.P.,
TELEFONAKTIEBOLAGET L M
ERICSSON,
ERICSSON CANADA INC.,
MK SYSTEMS USA INC.,
AND MK MEDIATECH CANADA INC**

Defendants

ORDER AND REASONS

I. Overview

[1] In their patent infringement action, the Plaintiffs moved under Rule 227 of the *Federal Courts Rules*, SOR/98-106, for an order requiring the Defendants to deliver further and better affidavits of documents and produce all relevant documents in their possession or, alternatively, entitling the Plaintiffs to cross-examine each of the Defendants on the creation of their affidavits of documents. The motion also sought, as an alternative to “all relevant documents,” a narrower scope of production limited to four categories of documents. The Defendants opposed the motion.

[2] Associate Judge Crinson, who is case managing the proceeding, dismissed the Plaintiffs’ motion, concluding that they did not show, with persuasive evidence, that any further relevant documents exist: *Adeia Guides Inc v BCE Inc*, 2024 FC 927 at para 14 [Rule 227 Order].

[3] The Plaintiffs now appeal the Rule 227 Order, arguing that the Associate Judge made a legal error by misconstruing the applicable test and that he erred by not applying the test separately to each of the four categories of documents.

[4] The Defendants submit that the Associate Judge cited and applied the correct legal test, and he did not err in his treatment of the four categories of documents. The Defendants describe that the Plaintiffs’ raised these same categories of documents on their earlier refusals motion, the outcome of which the Plaintiffs did not appeal. In the Defendants’ view, the Rule 227 motion is an attempted “end-run around” the Associate Judge’s order on the refusals motion.

[5] Having reviewed the parties' motion materials and heard their oral submissions, I am not persuaded that the Associate Judge applied an incorrect legal test or made any palpable and overriding errors in dismissing the Plaintiffs' motion. For the reasons below, the Plaintiffs' motion appealing the Rule 227 Order will be dismissed.

II. Additional Background

[6] The Plaintiffs' action was commenced in the name of Rovi Guides Inc., with TiVO LLC added as a second Plaintiff in the Amended Statement of Claim. The Plaintiffs' names were changed to Adeia Guides, Inc. and Adeia Media Holdings LLC respectively in the Second Amended Statement of Claim.

[7] The Plaintiffs assert infringement of four Canadian patents, all of which relate to providing access to recordings, delivering video programming, and receiving, transcoding, fragmenting, and distributing content. Specifically, the Plaintiffs allege that the Bell Defendants have infringed the patents through Fibe TV, Satellite TV, and Crave TV. In addition, the Plaintiffs say that the Ericsson Defendants have infringed the patents through the Mediaroom (now Mediakind) platform.

[8] The Plaintiffs allege direct infringement, as well as infringement by common design, agency, attribution, and induced infringement. The Statement of Claim survived a motion to strike in *Rovi Guides, Inc v BCE Inc*, 2022 FC 979 [*Rovi Guides*].

[9] Pursuant to the March 22, 2022 order of then Case Management Judge Aalto, the parties provided a detailed Discovery Plan to the Court. This plan included several areas in dispute, which would “be addressed through the discovery process in the normal course (for example, refusals motions or motions for further and better affidavits of documents).”

[10] The Bell, Ericsson, and Mediakind groups of Defendants subsequently furnished their affidavits of documents. While the Bell affidavit of documents initially was unsworn, they later provided a sworn affidavit.

[11] Following examinations for discovery, the Plaintiffs brought their motion before Associate Judge Crinson to compel additional discovery. They attempted to bring a Rule 227 motion at the same time. While the Associate Judge declined to hear it then, he did not preclude the Plaintiffs from bringing their Rule 227 motion later, which they did, resulting in the appeal presently before the Court.

III. Standard of Review

[12] I am satisfied that the Court’s role on this appeal of the Associate Judge’s Rule 227 Order is to consider whether he made any palpable and overriding errors in his determinations on these issues. Further, I am not persuaded that in the circumstances there are any questions of law or extricable legal principles warranting a correctness review.

[13] The standard of review applicable to a Rule 51 motion appealing a decision of an associate judge (formerly called “prothonotary”) is the appellate standard described by the

Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*] at paras 7-36. See *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras 63-65, 79 and 83.

[14] The Federal Court of Appeal has summarized the *Housen* appellate standard as follows: “questions of fact and mixed questions of fact and law are subject to the palpable and overriding error standard while questions of law, and mixed questions where there is an extricable question of law, are subject to the standard of correctness”: *Worldspan Marine Inc v Sargeant III*, 2021 FCA 130 at para 48; see also *Canada (Attorney General) v Iris Technologies Inc*, 2021 FCA 244 at para 33.

[15] The “palpable and overriding error” standard of review is highly deferential. Further, palpable means an obvious error, while an overriding error is one that affects the decision-maker’s conclusion: *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 [*Mahjoub*] at paras 61-64; see also *NCS Multistage Inc v Kobold Corporation*, 2021 FC 1395 at paras 32-33.

IV. Analysis

[16] I find that the Associate Judge did not err in his articulation of the legal test nor did he apply a higher evidentiary threshold for meeting the test. In other words, no question of law arises. I also determine that the Associate Judge did not err in his treatment of the four categories of documents at issue on the Rule 227 motion. In short, I am not convinced that he made any

palpable and overriding errors in his analysis. I deal with each issue in turn, followed by a post-hearing development that does not change the outcome of this motion.

A. *No question of law*

[17] The Plaintiffs argue that the Associate Judge erred in law by concluding their evidence was not persuasive that any further relevant documents exist. In doing so, they say, the Associate Judge imposed a higher evidentiary burden on the Plaintiffs than the threshold of “likely” existence in the applicable test. I disagree.

[18] There is no dispute that the Associate Judge recognizes the appropriate test articulated by this Court in *Hutton v Sayat*, 2020 FC 1183 [*Hutton*] at paras 32-33. To compel a further and better affidavit of documents under Rule 227, the moving party must show that (i) further documents likely exist, (ii) the documents reasonably might be supposed to contain essentially relevant information, and (iii) necessary power, possession or control.

[19] I have paraphrased the test for conciseness because only the first element of the test is relevant here. *Hutton* adds that to establish likely existence there must be persuasive evidence that the documents are available and have not been produced, rather than speculation, intuition or guesswork.

[20] The Plaintiffs submit that the Associate Judge made a conclusory statement that demonstrates he was looking for proof of existence of relevant documents, rather than sufficient evidence that would permit him to infer their likely existence. Reviewing the Rule 227 Order in a

“holistic, organic and fair way,” I cannot agree: *Pfizer Canada Inc v Teva Canada Limited*, 2016 FCA 161 at para 68.

[21] The Associate Judge was aware that there is no elevated standard of proof and that the requisite evidence merely must establish the further documents likely exist: Rule 227 Order, at para 5, citing *Paid Search Engine Tools, LLC v Google Canada Corporation*, 2021 FC 515 at para 15. In canvassing applicable jurisprudence, the Associate Judge refers again to likely existence in paragraph 8 of the Rule 227 Order. He finds specifically at paragraph 13 that, “the proposed evidence is not persuasive that further relevant documents likely exist.”

[22] That the Associate Judge omitted the word “likely” in his conclusion in paragraph 14 is no more, in my view, than imprecise wording that the Plaintiffs have read literally and in isolation, contrary to the guidance of the Federal Court of Appeal in *Millennium Pharmaceuticals Inc v Teva Canada Limited*, 2019 FCA 273 [*Millennium*] at para 9. As *Mahjoub*, above teaches (at para 69), “...the craft of writing reasons [...] is an imprecise art suffused by difficult judgment calls that cannot be easily second-guessed.”

[23] Having found that the Associate Judge committed no legal error, the question of the application of the test becomes one of mixed fact and law which attracts the palpable and overriding error review standard to which I turn next.

B. *No palpable and overriding error*

[24] The Plaintiffs take issue with the Associate Judge's treatment of the four categories of documents. They submit that he made conclusory statements that do not provide sufficient reasons to show he considered them separately or to permit meaningful appellate review. I disagree.

[25] The Rule 227 Order describes the four categories of documents at paragraph 2. Briefly, they are (1) Crave TV technical documents, (2) communications between the Defendants, (3) contractual documents between the Defendants, and (4) negotiation/procurement documents describing the relationship between the Defendants.

[26] The Associate Judge notes (at para 3) that following discussion between the parties in early 2023 about the sufficiency of documentary production, the Plaintiffs' counsel signalled a willingness to "canvass these deficiencies during examinations for discovery and reserve all rights in that respect."

[27] In connection with the test under Rule 227 for compelling a further and better affidavit of documents, the Associate Judge also discusses (at paras 6-7) the second element of the test related to relevant information. Relevant documents are those that reasonably might be supposed to contain information that directly or indirectly may enable a party to advance their case or damage their adversary's case or lead to a train of inquiry that could have either of these consequences. As the Associate Judge notes *Hutton* guides (at para 36) that an outside chance a

document might lead to useable information is insufficient and, further, a possible train of inquiry does not permit a fishing expedition.

[28] In my view, the Associate Judge is uniquely placed to assess whether the Plaintiffs' arguments and supporting evidence on their Rule 227 motion are in the nature of speculation, intuition and guesswork, as he finds them to be (at para 11), for at least two reasons. First, the Associate Judge is presumed familiar with the proceedings by virtue of his case management role: *Apotex Inc v Wellcome Foundation Limited*, 2003 FC 1229 at para 7. Second, and more to the point, he recently dealt with the Plaintiffs' refusals motion where the four categories of documents were in issue and relevance was a key consideration.

[29] I add that the Plaintiffs have not pointed to any jurisprudential support for their argument that the Associate Judge was required to address each category of documents separately in his reasons. A holistic, organic and fair review of the Rule 227 Order leads me to conclude that his finding of a lack of persuasive evidence of the likely existence of further, relevant documents applies to all four categories.

[30] The Plaintiffs also take issue with the Associate Judge's reference (at para 11) to a "paucity of documents" (i.e. "an alleged 'paucity of documents' does not establish there are additional documents") when in some cases there were no documents produced, the latter straining credulity they say. In addition, the Plaintiffs point to the 13 documents that the Defendants produced in category 1 at the same time as they provided their responding Rule 227 motion material as indicative of the likely existence of further documents which they say the

Associate Judge should have addressed, the lack of doing so resulting in palpable and overriding error.

[31] Dealing first with the “paucity of documents” reference, I find that, in itself, it does not represent a reversible error when considered in the context the numbers of documents actually produced by various groups of Defendants. At its worst, the phrase represents a byproduct, artefact or imperfection of the Associate Judge’s distillation and synthesizing of reams of complicated data into brief, comprehensible reasons: *Millennium*, above at para 9.

[32] Regarding the 13 documents in category 1, I note that they comply with 1(a) of the Associate Judge’s March 18, 2024 Order flowing from the Plaintiffs’ refusals motion. There is no evidence that they were produced as part of the Defendant’s responding Rule 227 motion material, or the Plaintiffs’ motion material for that matter.

[33] Regardless, the Associate Judge is presumed to have considered all the evidence before him: *Millennium*, above at para 11. Further, “a non-mention in reasons does not necessarily lead to a finding of palpable and overriding error”: *Mahjoub*, above at para 66. A focus on what a decision does not say or could have said or should have said differently may be an unduly narrow one, depending on the circumstances.

[34] In the end, I find that the Plaintiffs have attempted to reargue their case on this appeal, and, in the process, they ask the Court to reweigh the evidence which is not the role of an appellate court: *Alcon Canada Inc v Actavis Pharma Company*, 2015 FCA 191 at para 26.

C. *Post-hearing development*

[35] Following the hearing of this Rule 51 motion, the parties corresponded with the Court about the production of 55 additional documents by Mediakind on July 30, 2024, the day before the Plaintiffs were to conduct follow-up examination for discovery of Mediakind's corporate representative. I determine that this development does not change the outcome of this motion.

[36] The Plaintiffs recognize that the new productions were not before the Associate Judge on the Rule 227 motion nor before the Court on this Rule 51 motion. The Plaintiffs nonetheless take the position that the documents are relevant to the current state of productions and to the "existence of additional contractual documents between the defendants."

[37] The Defendants describe that the documents were produced at the Plaintiffs' request without any acknowledgement of relevance by the Defendants. Further, the parties agreed to postpone the follow-up examination for discovery.

[38] Where the parties have agreed, as here, to resolve their disputes as part of a discovery plan, I am not persuaded that of the production of these new documents, in itself, is evidence that further, relevant documents likely exist. In addition, notwithstanding the inconvenience of the adjournment, it provides the Plaintiffs with the opportunity to respond to or address the documents in the follow-up examination.

V. Conclusion

[39] I conclude that the Associate Judge has not made any palpable and overriding error warranting the Court's intervention. For the above reasons, the Plaintiffs' appeal of the Rule 227 Order will be dismissed.

[40] On the issue of costs, the parties expressed their agreement on a lump sum award of \$2,000 to the successful party in any event of the cause, payable in the usual course (i.e. not forthwith). Exercising my discretion, I award the Defendants costs in the amount of \$2,000 in any event of the cause, payable by the Plaintiffs in the usual course.

ORDER in T-1184-21

THIS COURT ORDERS that:

1. The Plaintiffs Rule 51 motion, appealing the decision in *Adeia Guides, Inc v BCE Inc*, 2024 FC 927, is dismissed.
2. The Defendants are awarded costs in the amount of \$2,000 in any event of the cause, payable by the Plaintiffs in the usual course.

"Janet M. Fuhrer"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1184-21

STYLE OF CAUSE: ADEIA GUIDES INC. AND, ADEIA MEDIA HOLDINGS LLC v BCE INC., BELL CANADA, BELL, MEDIA INC., BELL EXPRESSVU LIMITED, PARTNERSHIP, NORTHERNTEL, L.P., TELEFONAKTIEBOLAGET L M ERICSSON, ERICSSON CANADA INC., MK SYSTEMS USA INC., AND MK MEDIATECH CANADA INC

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JULY 26, 2024

ORDER AND REASONS: FUHRER J.

DATED: SEPTEMBER 18, 2024

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