

Federal Court



Cour fédérale

Date: 20220630

Docket: T-1184-21

Citation: 2022 FC 979

Ottawa, Ontario, June 30, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

ROVI GUIDES, INC.

Plaintiff

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

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an appeal brought by the Defendants 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. [“Bell Mediakind” or

“Defendants”) pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*] in this patent infringement action [Bell Mediakind Action]. The appeal is from two parts of the Order of Case Management Judge Aalto [CMJ], dated March 22, 2022 [Order]. First, the appeal is from the CMJ’s dismissal of the Defendants’ motion to strike the Plaintiff’s Statement of Claim [SOC] against the Defendants Telefonaktiebolaget L M Ericsson, Ericsson Canada Inc., MK Systems USA Inc., and MK Mediatech Canada Inc. [collectively Mediakind] for alleged failure to plead material facts supporting its claims for infringement. The Defendants also appeal the Order of the CMJ refusing to strike the Plaintiff’s allegations of infringement by common design and agency as disclosing no reasonable cause of action. In the alternative the Defendants had sought further particulars from the CMJ, which request was refused, from which refusal the Defendants do not appeal.

II. Facts

[2] The underlying action in this appeal is one of two patent infringement actions commenced by the Plaintiff [“Rovi Guides Inc.” or “Rovi”]. The two are case managed together. The underlying action in the case at bar is against the Bell Mediakind Defendants. The other Rovi action is against Videotron Inc. (T-841-21) [Videotron Action].

[3] In each action, four patents are alleged to be infringed, although the patents in each are different. The patents in both actions relate to digital entertainment technologies which include Interactive Program Guides [IPG] and various features of the IPG. IPGs allow users to find programming, navigate from one channel to the next or one source to the next, search for content, record content, view content remotely, and more.

[4] The technologies in the Bell Mediakind Action are described in detail in the SOC and relate to Bell subscription-based television through platforms known as Bell Crave TV, Bell Fibe TV and Bell Satellite TV. The SOC is 61 pages long, and has attached four schedules containing another 207 pages of “non-limiting” particulars of the infringement which cover all asserted claims. The Defendants do not have a license from Rovi for Rovi’s asserted patent technology.

[5] The Defendants moved pursuant to Rule 221 of the *Federal Courts Rules*, seeking to strike Rovi’s claim against Mediakind on the ground there are no or insufficient material facts to support its allegations of infringement. In addition, Bell Mediakind sought to strike many paragraphs of the claim and/or words on various grounds but in essence, on the basis of a lack of material facts.

[6] In the alternative, Bell Mediakind sought particulars pursuant to Rule 181 for the impugned paragraphs.

[7] The motions to strike or alternatively for particulars brought by Bell Mediakind in this Bell Mediakind Action, and by Videotron in the Videotron Action, were heard one after the other. The CMJ dismissed both motions although he granted limited relief in the case at bar and struck the phrase “at least” from the SOC. Videotron and Bell Mediakind have both appealed to this Court. The Court is giving judgment in the Videotron appeal simultaneously with its judgment in this Bell Mediakind appeal.

A. *The CMJ's Order*

[8] On March 22, 2022, the CMJ dismissed the Defendants' motion to strike Mediakind as defendants. While the CMJ struck some phrases, and ordered limited particulars for a few paragraphs, he dismissed the remainder of both Bell Mediakind's motion to strike and for particulars.

[9] The CMJ Reasons in this case followed those issued in the Videotron Action. The CMJ noted the order issued in the Videotron Action canvasses a number of issues common to Bell Mediakind's motion in this action. Importantly and therefore, the CMJ adopted in this case his reasons in the Videotron Action, to the extent they canvass the test for particulars and striking out causes of action, and therefore did not repeat those Reasons in his Reasons in the case at bar.

[10] Regarding the striking of Mediakind as defendants, the Defendants submit the SOC contains no material facts concerning the conduct of Mediakind that allegedly amounts to infringement. They submit that because the Mediakind defendants do not provide television services in Canada they cannot infringe the asserted claims directly, by inducement, agency, common design or otherwise.

[11] However, and importantly, at paragraph 51 of the SOC, Rovi pleads as a material fact that on January 18, 2018, the Defendant Bell made an announcement that Bell would offer "enhanced, personalized and converged multiscreen TV experience" arising from its relationship

with various of the Mediakind entities. This pleading must be accepted as true, and there is no suggestion otherwise.

[12] The content of the agreement between Bell and Mediakind has not been disclosed by the Defendants. It is common ground Rovi has no knowledge of its provisions. Rovi pleads as much which again must be and is accepted as true. Rovi concedes it does not know the precise roles each of the Mediakind entities play in the various TV platforms in issue but asserts such information is within the knowledge of the Defendants.

[13] As with the Videotron Action, the CMJ noted that Rovi provided non-limiting particulars of infringement in four schedules attached to its SOC. For the reasons in the Videotron Action, the CMJ also found the non-limiting schedules of particulars should not be struck nor would further particulars be ordered because Rovi pleaded a reasonable cause of action and provided sufficient particulars.

[14] However, the CMJ found some limitations should be placed on Rovi's SOC in the action in the case at bar and held the phrase "at least" should be removed. This phrase is found throughout the SOC and is used in connection with Mediakind by referring to (1) "Bell (and/or Mediakind for *at least* Fibe TV)" or (2) "in respect of *at least* Fibe TV". The CMJ found the phrase "at least Fibe TV" invites a fishing expedition to determine if other television-based platforms of Bell about which Rovi has not pleaded any material facts also infringe. Therefore, the CMJ struck the phrase "at least" wherever it is found with respect to the two phrases above. Otherwise, Bell Mediakind's motion was dismissed.

[15] The CMJ also noted, as he did in the Videotron Order, that this is a case managed action. The discovery process would be closely monitored by the Court to ensure it does not devolve into an unfocused and overreaching exercise. This was noted in the Reasons of the CMJ, who also ruled that a detailed discovery plan will be developed and approved by the Court prior to the commencement of the discoveries. Further, to the extent that it may be necessary to control the discoveries and limit any refusals, the discoveries may take place when the Court is available to make rulings on areas of questioning as the discoveries unfold.

[16] Therefore, the CMJ Ordered:

- A. The Statement of Claim shall be amended in accordance with his Order.
- B. Costs in the cause.
- C. A case conference will be convened to discuss next steps.

[17] Bell Mediakind appeals the Order of the CMJ seeking:

- A. An Order setting aside, in part, the Order of March 22, 2022;
- B. An Order under Rule 221(1) of the *Federal Courts Rules* striking the Plaintiff's Statement of Claim against the Mediakind Defendants for failing to plead material facts disclosing a reasonable cause of action;
- C. An Order under Rule 221(1) of the *Federal Courts Rules* striking the allegations of infringement by common design and agency;
- D. The Defendants' costs of this motion; and
- E. Such further and other relief as this Honourable Court may deem just.

III. Issue

[18] The sole issue on this appeal is whether the CMJ erred in dismissing Bell Mediakind's motion to strike Rovi's SOC against Mediakind. The Defendants do not challenge the CMJ's dismissal of their alternative claim for particulars.

IV. Standard of Review

[19] On an appeal from a discretionary order of a Prothonotary under Rule 51, the Court applies the standards of review established in *Hospira Healthcare Corp. v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras 68-69 and 79 [*Hospira*]. There, a five Judge panel of the Federal Court of Appeal determined this Court may only interfere with a discretionary decision of a Prothonotary where there is a palpable and overriding error on a question of fact or mixed fact and law. Correctness is the standard of review for extricable errors of law.

[20] This standard is established by the Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*]:

1 A proposition that should be unnecessary to state is that a court of appeal should not interfere with a trial judge's reasons unless there is a palpable and overriding error. The same proposition is sometimes stated as prohibiting an appellate court from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion.

[...]

8 On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness: *Kerans, supra*, at p. 90.

[...]

10 The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error": *Stein v. The Ship "Kathy K"*, 1975 CanLII 146 (SCC), [1976] 2 S.C.R. 802, at p. 808; *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298, 2000 SCC 12, at para. 42; *Ryan v. Victoria (City)*, 1999 CanLII 706 (SCC), [1999] 1 S.C.R. 201, at para. 57. While this standard is often cited, the principles underlying this high degree of deference rarely receive mention. We find it useful, for the purposes of this appeal, to review briefly the various policy reasons for employing a high level of appellate deference to findings of fact.

[...]

36 [...] Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises*, supra, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

[Emphasis added]

[21] Importantly, the Federal Court of Appeal in *Hospira* specifically ruled that decisions of Case Management Judges including Prothonotaries are no longer subject to *de novo* hearings on appeal to the Federal Court:

[64] These circumstances “fundamentally shift the parameters of the debate” regarding the standard applicable to discretionary orders of prothonotaries. In my respectful opinion, the supervisory role of judges over prothonotaries enunciated in Rule 51 no longer

requires that discretionary orders of prothonotaries be subject to *de novo* hearings. That approach, as made clear by Low J. in *Zeitoun*, is one that has been overtaken by the evolution and rationalization of standards of review and by the presumption of fitness that both judges and masters are capable of carrying out the mandates which the legislator has assigned to them. In other words, discretionary orders of prothonotaries should only be interfered with when such decisions are incorrect in law or are based on a palpable and overriding error in regard to the facts.

[Emphasis added]

[22] Justice Stratas in *Canada v South Yukon Forest Corporation*, 2012 FCA 165 explains

what the Applicant must show to establish a palpable and overriding error on appeal:

[46] Palpable and overriding error is a highly deferential standard of review: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Peart v. Peel Regional Police Services* (2006) 2006 CanLII 37566 (ON CA), 217 O.A.C. 269 (C.A.) at paragraphs 158-59; *Waxman, supra*. “Palpable” means an error that is obvious. “Overriding” means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[Emphasis added]

[23] Justice Stratas provides additional guidance in *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157:

[61] Palpable and overriding error is a highly deferential standard of review: *Benhaim v. St. Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at para. 38; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall. See *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at para. 46, cited with approval by the Supreme Court in *St. Germain*, above.

[62] “Palpable” means an error that is obvious. Many things can qualify as “palpable.” Examples include obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received in

accordance with the doctrine of judicial notice, findings based on improper inferences or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence.

[63] But even if an error is palpable, the judgment below does not necessarily fall. The error must also be overriding.

[64] “Overriding” means an error that affects the outcome of the case. It may be that a particular fact should not have been found because there is no evidence to support it. If this palpably wrong fact is excluded but the outcome stands without it, the error is not “overriding.” The judgment of the first-instance court remains in place.

[65] There may also be situations where a palpable error by itself is not overriding but when seen together with other palpable errors, the outcome of the case can no longer be left to stand. So to speak, the tree is felled not by one decisive chop but by several telling ones.

[Emphasis added]

[24] On an appeal under Rule 51, a case management judge is assumed to be very familiar with the particular circumstances and issues in a proceeding and therefore, a case management judge’s decision must be afforded deference, especially on factually suffused questions, see *Hughes v Canada (Human Rights Commission)*, 2020 FC 986 [per Little J] at para 67 [*Hughes*]; *Sawridge Band v R*, 2001 FCA 338, at para 11; and *Merck & Co v Apotex Inc.*, 2003 FCA 438, at para 12.

[25] Bell Mediakind submits the errors committed by the CMJ are errors of law and therefore the correctness standard applies to all issues.

[26] Rovi submits the standard of review is palpable and overriding error for an appeal of a prothonotary’s discretionary order, absent an error in law or on an extricable legal principle, in my view correctly citing to *Hospira, supra*. As in its submissions in the Videotron Action, Rovi

also relies on *Elbit Systems Electro-optics Elop Ltd. v Selex ES Ltd.*, 2016 FC 1129 [*Elbit*] where

Justice Martineau states:

[17] The Federal Court of Appeal concluded that the *Housen* standard should be applied in reviewing discretionary decisions of judges and prothonotaries. This standard establishes that with respect to factual conclusions reached by trial judges, the applicable standard is that of palpable and overriding error, and with respect to questions of law and questions of mixed fact and law, where there was an extricable legal principle at issue, the applicable standard is that of correctness: *Hospira* at para 66, citing to paras 19 to 37 of *Housen*; para 69; para 71, citing to paras 25 to 29 of *Imperial Manufacturing Group Inc v Decor Grates Incorporated*, 2015 FCA 100, [2016] 1 FCR 246 79; para 74, citing to para 12 of *Turmel v Canada*, 2016 FCA 9, 481 NR 139; and para 79.

[18] In the present case, since the Prothonotary did not make any error while describing the applicable test and legal principles governing the striking out of a pleading under Rule 221, and since the defendant is challenging the Prothonotary's application of Rule 221 on the specific facts of the case, the applicable standard of review for such question of mixed fact and law should be that of palpable and overriding error. No final decision has been made by the Prothonotary on the merit of the allegations of infringement and induced infringement made by the plaintiff in its statement of claim. I doubt very much that the issues raised today by the defendant in this appeal truly deal with a pure question of law or an extricable legal principle at issue.

...

[37] The role of the Motions Judge in deciding the merit of an appeal of a discretionary order of a prothonotary is limited to verify whether a reviewable error has been made by the prothonotary (*Hospira* at paras 64, 69, 78 and 79). In the case at bar, it was not plain and obvious for the Prothonotary that the impugned paragraphs of the statement of claim should be struck out under Rule 221 because they disclosed no reasonable cause of action or were otherwise deficient. In the absence of an error on a question of law or an extricable legal principle, intervention is warranted only in cases of palpable and overriding error by the Prothonotary. This is not the case here and I have no reason to intervene today in the exercise of the Prothonotary's discretion to refuse to strike a proceeding.

[27] Respectfully, given the foregoing jurisprudence including *Elbit*, and because the Defendants are challenging the Prothonotary's discretionary application of Rule 221 to the facts of this case, I conclude the applicable standard of review is that for questions of mixed fact and law, namely palpable and overriding error.

V. Relevant Provisions

[28] Rule 51(1) of the *Federal Courts Rules*:

Appeal

51 (1) An order of a prothonotary may be appealed by a motion to a judge of the Federal Court.

Appel

51 (1) L'ordonnance du protonotaire peut être portée en appel par voie de requête présentée à un juge de la Cour fédérale.

[29] Rule 181 of the *Federal Courts Rules*:

Particulars

181 (1) A pleading shall contain particulars of every allegation contained therein, including

(a) particulars of any alleged misrepresentation, fraud, breach of trust, wilful default or undue influence; and

(b) particulars of any alleged state of mind of a person, including any alleged mental disorder or

Précisions

181 (1) L'acte de procédure contient des précisions sur chaque allégation, notamment:

a) des précisions sur les fausses déclarations, fraudes, abus de confiance, manquements délibérés ou influences indues reprochés;

b) des précisions sur toute allégation portant sur l'état mental d'une personne, tel un déséquilibre mental, une incapacité mentale ou une

disability, malice or fraudulent intention.

intention malicieuse ou frauduleuse.

Further and better particulars

Précisions supplémentaires

(2) On motion, the Court may order a party to serve and file further and better particulars of any allegation in its pleading.

(2) La Cour peut, sur requête, ordonner à une partie de signifier et de déposer des précisions supplémentaires sur toute allégation figurant dans l'un de ses actes de procédure.

[30] Rule 221(1) of the *Federal Courts Rules*:

Motion to strike

Requête en radiation

221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it

221 (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas:

(a) discloses no reasonable cause of action or defence, as the case may be,

a) qu'il ne révèle aucune cause d'action ou de défense valable;

(b) is immaterial or redundant,

b) qu'il n'est pas pertinent ou qu'il est redondant;

(c) is scandalous, frivolous or vexatious,

c) qu'il est scandaleux, frivole ou vexatoire;

(d) may prejudice or delay the fair trial of the action,

d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;

(e) constitutes a departure from a previous pleading, or

e) qu'il diverge d'un acte de procédure antérieur;

(f) is otherwise an abuse of the process of the Court,

f) qu'il constitue autrement un abus de procédure.

and may order the action be dismissed or judgment entered accordingly.

Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

Evidence

Preuve

(2) No evidence shall be heard on a motion for an order under paragraph (1)(a).

(2) Aucune preuve n'est admissible dans le cadre d'une requête invoquant le motif visé à l'alinéa (1)a).

VI. Analysis

A. *Did the CMJ err in dismissing Bell Mediakind's motion to strike Rovi's SOC for failure to plead sufficient material facts?*

[31] The CMJ at page 4 of the Order adopted the test for striking out causes of action, as well as the test for particulars in his Order in the Videotron Action. Therefore, the CMJ states the test "will not be repeated here."

[32] I therefore turn to the Reasons in the Videotron Action. There the CMJ cites to the test for motions strikes, including *La Rose v Canada*, 2020 FC 1008 [*La Rose*] where Justice Manson held at para 16: "whether it is plain and obvious that the pleadings disclose no reasonable cause of action, or that the claim has no reasonable prospect of success (*Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at 980; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17 [*Imperial Tobacco*]). The threshold to strike a claim is high and the matter must proceed to trial where a reasonable prospect of success exists."

[33] The following are the CMJ's statement of the relevant legal principles on the issue of striking in more detail as taken from the Order in the Videotron Action:

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....

Rovi alleges five infringing actions by Videotron as follows: direct infringement by Videotron; infringement by common design; induced infringement; agency; and direct infringement as a result of attribution of Comcast or subscribers' actions. Of these causes of action, Videotron takes issue with infringement by common design and infringement by attribution. Videotron argues they are not recognized in Canadian law and ought to be struck.

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However, there is ample authority for the proposition that a novel cause of action should not be struck at this stage of the proceeding [see, for example, *Nevsun Resources Ltd v Araya*, 2020 SCC 5, and *La Rose v Canada*, 2020 FC 1008]. In the latter case, the Honourable Justice Michael Manson set out the general guidelines on a motion to strike as follows:

[16] The test on a motion to strike is whether it is plain and obvious that the pleadings disclose no reasonable cause of action, or that the claim has no reasonable prospect of success (*Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at 980; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17 [*Imperial Tobacco*]). The threshold to strike a claim is high and the matter must proceed to trial where a reasonable prospect of success exists.[17] The material facts pleaded in the Statement of Claim must be taken as true, unless the allegations are based on assumption and speculation (*Operation Dismantle v The Queen*, [1985] 1 SCR 441 at para 27 [*Operation Dismantle*]). It is incumbent on the Plaintiffs to clearly plead the facts in sufficient detail to support the claims and the relief sought. The material facts form the basis upon which to evaluate the possibility of the success of the claim (*Imperial Tobacco*, above at para 22; *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at paras 16-17, leave to appeal to SCC refused, 36889 (23 June 2016)).[18] Further, the pleadings must be read as generously as possible, erring on the side of permitting a novel but arguable claim to proceed to trial (*Imperial Tobacco* at para 21; *Atlantic Lottery v Corp Inc v Babstock*, 2020 SCC 19 at para 19 [*Atlantic Lottery*]).[19] The test on a motion to strike considers the context

of the law and the litigation process. It “operates on the assumption that the claim will proceed through the court system in the usual way – in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedents” (*Imperial Tobacco* at para 25). These are the principles applicable to Videotron’s motion to strike Rovi’s pleas of attribution and common design.

[34] There is no dispute and I accept the foregoing extract from *La Rose* accurately sets out the test on a motion to strike.

[35] The CMJ also correctly canvasses the test on a motion for particulars at pages 9-10 of his Order. The CMJ holds that when faced with a motion for particulars, the Court asks two questions (*Throttle Control Tech Inc v Precision Drilling Corporation*, 2010 FC 1085 [per Zinn J] at para 10):

- 1) Are the alleged particulars requested material facts or are they evidence? The former may be ordered whereas the latter should not.
- 2) Are the particulars requested necessary for the purpose of being able to respond to the pleading?

[36] Bell Mediakind submits the CMJ erred in declining to strike the claim against Mediakind because he applied the legal test applicable to a demand for particulars to their motion to strike. Therefore, Bell Mediakind submits the CMJ committed an extricable error of law (*Housen, supra* at para 27; *Film City Entertainment Ltd. v Chinatown Electronics Centre Ltd.*, 2008 FC 778 [per Heneghan J] at para 10).

[37] I have concluded the applicable test is palpable and overriding error, and I do so given the jurisprudence, and because the issue raised by Bell Mediakind involves a question of mixed fact and law concerning the application of principles to the facts of this particular case. This is confirmed by the Order of the CMJ, where he acknowledges at page 4 that the Defendants sought two forms of relief: a motion to strike and, in the alternative, particulars.

[38] Bell Mediakind points to the following as instances where they submit the CMJ applied considerations regarding a motion for particulars to their submission that Rovi had not pleaded sufficient material facts.

[39] The first instance pointed to by Bell Mediakind is at page 7 of the CMJ's Order:

Bell makes much of the fact that neither they nor Mediakind know what it is that Mediakind does to infringe and that references to “platforms” is vague and imprecise. **There is no evidence that they do not know.** Bell and Mediakind are in the business of providing television programming of many sorts. It ill befits them to complain they cannot understand the patents in suit and the voluminous allegations and facts in the claim and the examples of infringement in the schedules.

Save and except for the portions of the claim described above, the remaining parts of the motion are dismissed...

[Emphasis added by the Defendants]

[40] With respect, this is a summary paragraph dealing with both issues, striking and particulars. The CMJ addressed Bell Mediakind's allegation it does not know how it is alleged to infringe Rovi's patents – essentially they do not “know what it is that Mediakind does to infringe.” The CMJ then notes if this is the case, there is “no evidence that they do not know”.

This is a finding that sufficient facts and particulars are pleaded in the SOC. The CMJ's reasons answer both the motion to strike and the related motion for particulars. I see nothing untoward the CMJ's reasons in this respect. The answer to the motion to strike is found in the CMJ's conclusion Bell Mediakind has sufficient knowledge and particulars of the cause of action asserted to proceed to file its Statement of Defence. Therefore, the CMJ's conclusion is not an example of the CMJ applying considerations relevant to a motion for particulars to the motion to strike.

[41] The second instance pointed to by Bell Mediakind is at pages 4-5 of the CMJ's Order where the CMJ states:

In addition, the defendants seek to strike many paragraphs of the claim and/or words here and there on various grounds but, in essence, on the basis of a lack of material facts. Alternatively, the defendants seek particulars of the impugned paragraphs. **The defendants have not provided any evidence that they do not know the case they have to meet or that the particulars sought are not within their knowledge.**

[Emphasis added by the Defendants]

[42] In this respect, Rovi correctly submits the bolded portion emphasized by Bell Mediakind is preceded by the sentence: "Alternatively, the defendants seek particulars of the impugned paragraphs." The bolded sentence in my view properly highlights the complete absence of evidence from Bell Mediakind to support ordering further particulars. This is simply a response to the Defendants' motion for particulars. There is no merit to the proposition it entails any misapplication of the well-known test to strike out pleadings set out in detail by the CMJ (by incorporation from the Videotron Action which I set out earlier). Considering the paragraph as a

whole, this is not an example of the CMJ applying considerations relevant to a motion for particulars on the motion to strike.

[43] Given the above, and with respect, there is no basis for Bell Mediakind's submission that the CMJ "applied the legal test applicable to a demand for particulars to the Defendants' motion to strike". With respect these are simply instances of Bell Mediakind attempting to "slice and dice" the Order in an unsuccessful effort to manufacture an extricable question of law. I find nothing untoward, and certainly no palpable and overriding error in the CMJ's citing and applying the agreed legal tests for both a motion to strike and a motion for particulars as he did in this case.

[44] Bell Mediakind also submit a plaintiff is required to plead material facts supporting patent infringement and must set out "the constituent elements of each cause of action or legal ground raised" (*Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 19). I agree. That said the CMJ found Rovi pleaded sufficient material facts and provided sufficient particulars to support its claim. That was the finding of the CMJ, and with respect I am not persuaded the CMJ made a palpable and overriding error in respect of either.

[45] In this connection it must be recalled that a motion to strike is a serious remedy – often described as a "draconian measure" – that should only be taken in the "clearest and most obvious cases" (*Apotex Inc v Syntex Pharmaceuticals International Ltd*, 2005 FC 1310 [per Blanchard J] at paras 31-33). In addition, as Justice Addy explained many years ago, in a case found in the Defendants' own authorities: "[i]f a party is disentitled from obtaining particulars of an

opponent's pleading he is, of course, precluded from requesting that the pleading be struck out for lack of particulars" (*Caterpillar Tractor Co v Babcock Allatt Ltd*, [1983] 1 FC 487, at para 7). That indeed is the case here – Bell Mediakind were refused particulars and did not appeal that determination, yet rather inconsistently assert the SOC should be struck for lack of material facts.

[46] The CMJ's findings that sufficient material facts are pleaded and that the Defendants are not entitled to additional particulars, are consistent with each other. These findings of the Prothonotary are entitled to deference on this appeal under Rule 51, as summarized in *Hughes* at para 67. While the CMJ's reasons are necessarily brief, the Federal Court of Appeal has ruled that "detailed reasons are not required in a prothonotary's order" (*Maximova v Canada (Attorney General)*, 2017 FCA 230 at para 11). This is the case because "Prothonotaries deal with an extraordinary volume of procedural issues" (*Novopharm Ltd v Nycomed Canada Inc*, 2011 FC 109 [per Mandamin J] at para 22 [*Novopharm*]). I note "[i]t would be intolerable, and the wheels of justice would grind most slowly indeed, if each discretionary order had to be accompanied by a full set of motivated reasons in order to discourage the unsuccessful party from appealing and inviting the Court to exercise its discretion anew," (*Novopharm, supra*).

[47] Respectfully, the heavy burden before the CMJ was on Bell Mediakind to establish Rovi's claim "has no reasonable prospect of success", and that Bell Mediakind lacked sufficient particulars to enable it to move to the next step and file a Statement of Defence. Bell Mediakind did not discharge this burden on the facts of this case. While the Defendants did not appeal the CMJ's determination concerning particulars, I am unable to find the CMJ made any palpable and overriding error in respect of either determination.

[48] It also seems to me Bell Mediakind's allegations are an attempt to relitigate the allegations they made before the CMJ, and to do so on a *de novo* basis contrary to *Hospira's* determination (cited above at para 21) that appeals under Rule 51 are no longer determined on a *de novo* basis.

B. *Has Rovi pleaded sufficient material facts against Mediakind?*

[49] Bell Mediakind also submits "even if one assumes Rovi has pleaded sufficient material facts to advance its allegations against Bell, no such material facts are pleaded against Mediakind and Ericsson." Bell Mediakind continues:

31. Rovi pleads that "Mediakind's use, manufacturing, distributing, offering for sale, selling, supplying and otherwise making available Mediaroom and Mediafirst to Bell as part of its Fibe TV service" constitutes direct infringement of the Asserted Patents. However, these verbs are mere recitations of categories of conduct which could amount to infringement in any case, if that conduct was tied to the essential elements of the asserted claims. Nowhere in the pleading does Rovi plead: (1) what the "Mediaroom" and "Mediafirst" platforms are alleged to do; (2) what features of Mediaroom and Mediafirst are alleged to infringe the Asserted Patents, or (3) how the incorporation of these "platforms" into Fibe TV is alleged to infringe the Asserted Patents. Accordingly, nothing ties Mediaroom or Mediafirst to the essential elements of any of the asserted claims, let alone all 111 of them.

32. Instead, the pleading contains the generic statement that "Mediakind's use, manufacturing, distributing, offering for sale, selling, supplying, and otherwise making available Mediaroom and Mediafirst to Bell as part of its Fibe TV service constitutes making, constructing, using, and/or selling under the terms of the Patent Act." Further "details" provided by Rovi at paragraph 73 are identical to the allegations of direct infringement against Bell's television services, despite the fact that the "Mediaroom" and "Mediafirst" platforms are different technologies and are not alleged to be television services. The pleading contains further generic allegations against Mediakind and Ericsson, including providing the platforms to others, testing for quality control,

demonstrating the platforms in various contexts, possessing the software, and executing the software installed on the platforms. These allegations are identical to the allegations made against Videotron for direct infringement in respect of Illico TV and Helix TV, further demonstrating the generic nature of these claims and failure of Rovi to provide any material facts specific to Mediakind or Ericsson's activities.

[50] Notably, in the case at bar the SOC is 61 pages in length, and has attached four schedules containing 207 pages setting out "non-limiting" particulars of infringement for each of the asserted claims of the patents. The CMJ found upon his analysis Rovi pleaded reasonable causes of action and provided sufficient particulars.

[51] The Defendant's argument is dealt with by the CMJ:

First, with respect to Mediakind, the essence of the argument of the defendants is that the claim has no material facts concerning the conduct of Mediakind that amounts to infringement as they do not provide television services in Canada and therefore they cannot infringe the asserted claims directly, by inducement, agency, common design or otherwise.

In particular, the Mediakind entities are described in paragraphs 46 – 53 of the claim. Specifically, paragraph 51 pleads as a material fact that an announcement was made that Bell would offer "enhanced personalized and converged multiscreen TV experience" arising from a relationship with various of the Mediakind entities. Rovi concedes that it does not know the precise roles each of Mediakind entities plays in the various TV platforms in issue but that such information is within the knowledge of the defendants.

As with the Videotron Action, Rovi has provided non-limiting particulars of infringement in four schedules attached to the claim. For the reasons in the Videotron Action, the non-limiting schedules of particulars will not be struck nor will further particulars be ordered. This is not a case where a party makes an open-ended pleading in the hope of finding a cause of action through the discovery process. Rovi has pleaded a cause of action and has provided particulars. However, as detailed below, some limitations

should be put on the pleading. The only particulars of infringement that are referenced in the schedules are the only particulars to which the defendants need respond. It would be beneficial, however, for Rovi to stipulate what other functionalities infringe without adding hundreds more pages of particulars. Those details can be obtained on discovery. The discovery process will not be used as a fishing expedition to try and determine if other aspects of the patents are infringed apart from what has been pleaded.

[52] The CMJ found the Mediakind entities are described in paragraphs 46 to 53 of the claim and specifically, paragraph 51 pleads as a material fact that an announcement was made that Bell would offer “enhanced personalized and converged multiscreen TV experience” arising from a relationship with various of the Mediakind entities. This pleading by Rovi must be accepted as true under Rule 221(2). With respect, these agreements are pleaded – and must be accepted as true - to establish the link between Mediakind and the other Defendants in this patent infringement suit.

[53] The details of the agreement or agreements between the Defendants are not known to Rovi or this Court. However, Rovi pleads in relation to “Mediakind’s use, manufacturing, distributing, offering for sale, selling, supplying and otherwise making available Mediaroom and Mediafirst to Bell as part of its Fibe TV service”. Once again on its motion to strike, the Defendants must accept the truth of this pleading as to use, manufacturing and etc.

[54] The issue before the CMJ was whether the pleadings provided sufficient material facts to enable the Defendants to file their Statement(s) of Defence. The CMJ found the pleadings were sufficient and dismissed the motion to strike. He also applied the correct test on the alternative

motion for particulars and dismissed that as well, finding in effect the Defendants may now properly defend.

[55] Once again, I am asked to come to a different conclusion than the CMJ on the pleadings and particulars in this patent action. The findings of the CMJ are heavily factually suffused, and as noted above, such determinations by the CMJ are no longer reviewed by judges of this Court on a *de novo* basis. Instead, they are tested on the standard of palpable and overriding error. Equally importantly, the CMJ's findings, are entitled to deference. I will give them such deference in this case.

[56] I should add that here, and generally regarding section VI.A. above, Rovi's counsel submitted the allegedly missing material facts on the "how" and "what" of the infringement are in fact pleaded through multiple paragraphs of the SOC: regarding the "what" at paragraphs 9 to 12, 50 to 53, 57, 69; regarding direct infringement at paragraphs 72 to 74; regarding induced infringement at paragraphs 80, 82; and the "how" at paragraph 92. I am of the view they set out material facts relating to the claimed infringements.

[57] Upon this review, given my findings above and the deference owed to the prothonotary in a case like this, I reiterate I am not persuaded the CMJ made any error or palpable and overriding error in dismissing the Defendants' challenge to the pleadings. Therefore, the appeal in this respect is dismissed as well.

C. *Striking the allegations of infringement by common design and agency*

[58] The Defendants also argue the allegations in the Plaintiff's SOC concerning common design and agency should be struck.

[59] With respect to common design, the Defendants ask the Court to strike for the reasons advanced by Videotron in Videotron's related appeal "which are incorporated herein by reference", see Bell Mediakind's Memorandum at paragraph 37. To recall, in the Videotron file T-184-21, I found no merit in its request to strike the allegations of common design. I will repeat those Reasons here:

[44] To start with, here are the CMJ's actual reasons for not striking the common design pleadings as disclosing no reasonable cause of action:

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Infringement by common design arises where one party is found to be a joint tortfeasor when another party commits the tort in furtherance of a common plan. An essential element of the common design is that the parties must agree on a common action and the act of infringement must be in furtherance of that agreement. There must be a common design to do the act that is alleged to infringe.

The leading authority on the tort of common design emanates from the UK Supreme Court. In *Sea Shepherd UK v Fish & Fish Ltd*, [2015] UKSC 10, the UK Supreme Court reviewed the principles of joint tortfeasance by common design. The Court observed:

55. It seems to me that, in order for the defendant to be liable to the claimant in such circumstances, three conditions must be satisfied. First, the defendant must have assisted the commission of an act by the

primary tortfeasor; secondly, the assistance must have been pursuant to a common design on the part of the defendant and the primary tortfeasor that the act be committed; and, thirdly, the act must constitute a tort as against the claimant. ...

In Canada, this Court has considered common design for patent infringement in two cases: *Packers Plus v Essential Energy*, 2017 FC 1111 [Packers Plus] and *Genentech v Celltrion*, 2019 FC 293 [*Genentech*].

In *Packers Plus*, the defendant supplied the system which, when used in open hole fracturing, fell within the relevant claims of the patent in suit. The defendant's system was used by the company who owned and operated the wells for the fracturing operation. The defendant was also involved in pre-installation planning and design, assembling, installing, and operating the equipment, and providing an on-site supervisor. The Honourable Justice James O'Reilly held the defendant was not liable as a participant in a common design. He stated:

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48. In terms of liability for acting in concert with others, Packers has not pointed to any legal support for that theory of liability. Packers points to the well-known English case of *Fabio Perini SPA v. LPC Group PLC*, [2009] EWHC 1929 (Eng. Patents Ct.). There, Justice Floyd found that a company that installed a machine on the defendant's premises and enabled it to be operated according to the patented method was jointly liable with the defendant for infringement (at para 179). That finding was cited, in obiter, by Justice Johanne Gauthier in *Bauer Hockey Corp. v. Easton Sports Canada Inc.*, 2011 FCA 83 (F.C.A.) at para 75. However, there is no authority in Canadian law for the proposition that a person can be found liable for infringement on the theory of common design. At

common law, however, parties who act in concert to commit a tortious act can each be found liable if all of the parties involved arrived at an agreement to carry out the tort (*Sea Shepherd UK v. Fish & Fish Ltd.*, [2015] UKSC 10 (U.K. S.C.) at para 40).

49. However, there is simply no evidence showing any such agreement between Essential and the other companies with whom it acted — operating companies, drilling companies, or fracturing companies. Therefore, Essential cannot be found liable for infringement based on a common design. [Emphasis added.]

In *Genentech*, Her Honour Prothonotary Aylen (as she then was) found the plea of common design in relation to patent infringement to be sufficiently pleaded. She noted:

40. This Court has previously held that while the concept of infringement by common design has not been applied in the context of a patent infringement action, its existence under Canadian law has been recognized. [...]

41. In *Hoffmann-La Roche et al v. Sandoz Canada Inc* (Order dated November 15, 2018), I held that the use of the phrase “acting in concert” would fall within the concept of infringement by common design, as conceptually they are no different. As the claim was novel, I held that it should not be struck on a pleadings motion.

42. In this case, the Plaintiffs seek to plead that CTHC was acting in concert with the Additional Defendants toward the common goal of bringing HERZUMA to market, with each of CTHC and the Additional Defendants undertaking various steps in furtherance of that common goal, as detailed in the pleading and noted, in part, above.

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43. CTHC takes issue with the sufficiency of the material facts pleaded in the proposed amended pleadings, arguing that the proposed pleadings do not go far enough to particularize what acts each of CTHC and the Additional Defendants will do or have done in furtherance of the common design. I reject this assertion. I am satisfied that by delineating the roles of each of CTHC and the Additional Defendants in bringing HERZUMA to market, the Plaintiffs have pleaded a minimum level of sufficient material facts to support this cause of action against CTHC and so as to enable me to conclude that the proposed allegation is not doomed to fail. In reaching this finding, I am mindful that this allegation is premised, in large part, on acts that have not yet occurred, which is not surprising in an action under the Regulations. To require too high of a threshold for sufficient material facts in the circumstances would, in many circumstances, be unfair.

44. I am also satisfied that the allegation of acting in concert should be permitted to move forward against CTHC notwithstanding that the Additional Defendants have not been joined to the actions, as there is nothing in the case law relied upon by the parties that suggests that all potential joint tortfeasors must be impleaded to sustain a cause of action against one of them. [Emphasis added.]

In light of these authorities, the door is open to plead common design in a patent infringement action. That cause of action will not be struck.

[45] With respect, I see no palpable error, let alone any palpable and overriding error, in either the CMJ's statement of the legal test to determine if common design should be struck, or the consideration and application of the tests by the CMJ on the facts of this case.

[46] In citing Justice Manson’s Decision in *La Rose* at paragraph 16, the CMJ concluded, correctly in my view, the test on a motion to strike for disclosing no reasonable cause of action “is whether it is plain and obvious that the pleadings disclose no reasonable cause of action, or that the claim has no reasonable prospect of success (*Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at 980; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17 [*Imperial Tobacco*]). The threshold to strike a claim is high and the matter must proceed to trial where a reasonable prospect of success exists.” The parties agreed on this law.

[47] It is not disputed that the burden was on Videotron to establish Rovi’s claim “has no reasonable prospect of success” per *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17 [*Imperial Tobacco*]. In this connection, the Supreme Court confirms there is a heavy burden on the moving party, stating “[t]he approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial,” per *Imperial Tobacco* at para 21.

[48] Videotron agreed – as it must – that infringement by common design is recognized by the UK Supreme Court in *Fish & Fish Ltd v Sea Shepherd UK*, [2015] UKSC 10 [*Sea Shepherd*]. However, Videotron submits common design in the UK only applies where a narrow set of defined requirements are met. Indeed, Videotron “accepts that, if material facts are provided for each requirement, this cause of action may be sustained in Canada at the pleading stage” [Emphasis in original], see para 47 of Videotron’s written submissions before this Court.

[49] However, and citing to paragraph 58 of *Sea Shepherd*, Videotron submits a “primary tortfeasor” is a requirement of the tort of common design. In this case, Videotron says Rovi has not identified a primary tortfeasor directly infringing for the purposes of its “common design” allegations. Videotron therefore submitted the CMJ erred in allowing the common design cause of action to proceed.

[50] In response, Rovi submits Videotron’s use of the term “primary tortfeasor” is not substantiated in the law. I agree. In this connection, Rovi points to paragraph 55 of *Sea Shepherd* where in fact Lord Neuberger did not use the term “primary tortfeasor” to mean the two parties to the common design each had to be independently tortious. Rather, the term “primary tortfeasor” is used to identify the party to the common design that joins the defendant in the tort (but is not named as a defendant).

[51] Notably, as set out at paragraph 38 of *Sea Shepherd*, Lord Sumption approvingly quotes Lord Neuberger from *Vestergaard Frandsen A/S v Bestnet Europe Ltd*, [2013] 1 WLR 1556 at para 34: “in order for a Defendant to be party to a common design, she must share with the other party, or parties, to the design, each of the features of the design which make it wrongful. If, and only if, all those features are shared, the fact that some parties to the common design did only some of the relevant acts, while others did only some other relevant acts, will not stop them all from being jointly liable.” [Emphasis added]

[52] Moreover, in Canadian jurisprudence the BC Supreme Court in *ICBC v Stanley Cup Rioters*, 2016 BCSC 1108 [*ICBC*], relies upon the principles set out in *Sea Shepherd* in considering the joint liability of tortfeasors. *ICBC* was cited approvingly by the Supreme Court of Canada, in *Montréal (Ville) v Lonardi*, 2018 SCC 29 at paragraph 66, which described the holding as where tortfeasors: “had joined forces to flip a car over or had otherwise acted in concert with other individuals who were vandalizing a vehicle at the same time as them, the Court held them jointly liable.”

[53] I note neither the Supreme Court of Canada nor the BC Supreme Court requires a “primary tortfeasor” who performed all acts necessary to damage any vehicle.

[54] Therefore I reject Videotron’s argument that there is a requirement in Canadian and UK law for a “primary tortfeasor”, and its concomitant argument that a pleading of common design requires the identification of a “primary tortfeasor.”

[55] Respectfully, I also agree with Rovi’s submission that the question of whether pleading common design discloses a valid cause of action is also not entirely at issue in this appeal. I say this because Videotron admitted at paragraph 47 of its memorandum “if material facts are provided for each requirement, this cause of action may be sustained in Canada at the pleading stage”.

[56] To conclude on common design, I am unable to find either error, or palpable error, or palpable and overriding error in the statement of, or in the consideration and application by the CMJ of the *La Rose* principles on striking this pleading as disclosing no reasonable cause of action. The CMJ found the allegation of common design should not be struck and I agree with that determination. Thus, the appeal alleging infringement by common design discloses no cause of action is dismissed.

[60] As to agency, in fact the Defendants made no detailed submissions in their Memorandum or oral argument except as part of their submissions on direct infringement and infringement by inducement. It does not appear they dispute that infringement by agency is or may be a reasonable cause of action; rather it appears they allege a lack of material facts regarding agency in the SOC and schedules of particulars.

[61] The CMJ dismissed all of the Defendants' claims regarding the sufficiency of pleadings which of course included those related to agency as well as direct infringement and infringement by inducement.

[62] The agency pleading is once again tied to Bell's announcement of its agreement(s) with Mediakind, the contents of which are not known to Rovi. The CMJ was not persuaded to either strike or order further particulars with respect to agency any more than he was persuaded to do either regarding direct infringement or infringement by inducement. I am not persuaded the pleadings of agency in the SOC should be treated differently from those of direct infringement and infringement by inducement. Therefore, this aspect of the present appeal is also dismissed.

VII. Conclusion

[63] Bell Mediakind have failed to establish the CMJ made any error or palpable and overriding error in dismissing the motion to strike for lack of material facts, or in dismissing their request to remove Mediakind from the SOC, or in relation to the pleadings of common design and agency. The Defendants did not appeal the CMJ's determination concerning particulars or otherwise. Therefore, this appeal will be dismissed.

VIII. Costs

[64] The parties agreed at the hearing that the unsuccessful party should pay the successful party an all inclusive lump sum cost award of \$3,500.00, which in my view is reasonable. I will therefore make such a cost award payable by the Defendants to the Plaintiff.

JUDGMENT in T-1184-21

THIS COURT'S JUDGMENT is that:

- 1 The Defendants' appeal is dismissed.
- 2 The Defendants shall pay to the Plaintiff an all-inclusive lump sum cost award of \$3,500.00

"Henry S. Brown"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1184-21

STYLE OF CAUSE: ROVI GUIDES, INC. 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: HELD BY WAY OF VIDEOCONFERENCE

DATE OF HEARING: MAY 31, 2022

JUDGMENT AND REASONS: BROWN J.

DATED: JUNE 30, 2022

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