Federal Court of Appeal

Cour d'appel fédérale

Date: 20160823

Docket: A-5-16
A-33-16

Citation: 2016 FCA 209

Present: WEBB J.A.

BETWEEN:

VENNGO INC.

Appellant

And

CONCIERGE CONNECTION INC. c.o.b. PERKOPOLIS, MORGAN C. MARLOWE and RICHARD THOMAS JOYNT

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on August 23, 2016.

REASONS FOR ORDER BY: WEBB J.A.

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REASONS FOR ORDER

WEBB J.A.

[1] Venngo Inc. (Venngo) had commenced a trademark infringement action in the Federal Court. The action was dismissed on December 5, 2015. Venngo has appealed that judgment (Appeal file number: A-5-16). Following the decision on the infringement action, the Federal Court issued an order with respect to costs. Venngo has also appealed that order (Appeal file number: A-33-16). As a result, the appeals A-5-16 and A-33-16 both arise from the one action – one appeal from the decision dismissing the action and the other from the costs order.

[2] By an order of this Court dated April 19, 2016 these appeals were consolidated. Following the consolidation of the appeals, Venngo brought a motion for an order extending the time within which it could serve its memorandum of fact and law. An extension of time was granted, albeit a shorter extension of time than Venngo had requested. Venngo then filed and served two memoranda of fact and law – a 30 page memorandum in relation to A-5-16 and a 16 page memorandum in relation to A-33-16.

[3] The respondents have brought this motion to strike these memoranda on the basis that because the appeals were consolidated Venngo should only have filed one memorandum and not two.

[4] Rule 70 (4) of the *Federal Courts Rules*, SOR/98 – 106 provides that “a memorandum (exclusive of Part V [list of authorities] and appendices) shall not exceed 30 pages in length”. The respondents are claiming that, by filing two memoranda that contain a total of 46 pages, Venngo has circumvented this rule without the approval of this Court.

[5] Venngo has argued that even though the appeals were consolidated it still has the right to file a 30 page memorandum in relation to each appeal.

[6] Rule 105 provides that:

105 The Court may order, in respect of two or more proceedings,	**105** La Cour peut ordonner, à l’égard de deux ou plusieurs instances :
(*a*) that they be consolidated, heard together or heard one immediately after the other;	*a*) qu’elles soient réunies, instruites conjointement ou instruites successivement;

(*b*) that one proceeding be stayed until another proceeding is determined; or	*b*) qu'il soit sursis à une instance jusqu'à ce qu'une décision soit rendue à l'égard d'une autre instance;
(*c*) that one of the proceedings be asserted as a counterclaim or cross-appeal in another proceeding.	*c*) que l'une d'elles fasse l'objet d'une demande reconventionnelle ou d'un appel incident dans une autre instance.

[7] In the Rules there is a distinction drawn between matters that are consolidated and those that are heard together. Venngo has argued that when two matters are consolidated only one appeal book will be filed but otherwise it is still entitled to file two memoranda (one memorandum for each appeal). The only other steps remaining for an appeal are the filing of the book of authorities and the argument. Since the argument would presumably be the same whether the appeals are consolidated or heard together, the only other step that could be affected by whether the appeals are consolidated or heard together is the filing of the book of authorities. In my view, it would not be necessary to consolidate appeals simply to have a common book of authorities. If appeals will be heard together, it would seem logical that one joint book of authorities could be used for all of the appeals that will be heard together. Likewise, if the parties are unable to agree upon a single joint book of authorities, each party could file a book of authorities that would be used for all of the appeals that would be heard together. As a result, the only difference between consolidating appeals and having appeals heard together, according to Venngo, would be the number of appeal books that would be filed.

[8] I do not agree that this is the result of consolidation. If the only difference between consolidating proceedings and having them heard together is in relation to the number of appeal books that are to be filed, then there would be no substantive distinction between consolidating

appeals and having them heard together. Whether one appeal book is filed or two appeal books are filed is of little consequence if the total number of pages is approximately the same. If filing two appeal books would result in a significant duplication of documents, there may be other ways to avoid such duplication, other than consolidating proceedings. In my view, the Rules do not provide for a consolidation of proceedings just to reduce the duplication of documents that could occur if two or more appeal books are filed.

[9] The effect of a consolidation of proceedings is that the proceedings are to be treated as if they are one for the purposes of applying the Rules. In *Wood v. Farr Ford Ltd.*, [2008] O.J. No. 4092, 67 C.P.C. (6th) 23, Quinn J. noted in paragraph 26 that:

> 26 Although it has been said that "[t]he difference between consolidation and an order directing the trial of actions together is more technical than real" (see *The Civil Litigation Process*, *ibid.*), I think the difference can be quite real if the matter is addressed promptly. Actions ordered tried together largely offer a savings of time and money, and enhanced convenience, at the trial stage. However, consolidation provides those features from an earlier stage in the proceedings, including: one set of pleadings, affidavits of documents, discoveries and pre-trial memoranda and one pre-trial.

[10] This confirms that a consolidation would mean that there is only one memorandum to be filed in relation to the consolidated appeal.

[11] In *Chen v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1573, [2005] 3 F.C.R. 82, Russell J. noted that:

> 62 The final aspect of the relief that the Applicants seek in this motion (in the event that conversion, joinder and consolidation are allowed) is leave to amend the pleadings in IMM-577-04, IMM-1467-04, IMM-576-04 and IMM-10140-03 into one statement of claim.

> 63 In my view, leave to amend on the facts before me follows inevitably from conversion and consolidation….

[12] Since having one statement of claim would inevitably follow from the consolidation of proceedings, likewise filing one memorandum would also inevitably follow from a consolidation of appeals.

[13] I do not accept Venngo's argument that it is entitled to file a memorandum in relation to each appeal. Appeals are consolidated because they are related and it would be more efficient to have two or more appeals continue as if they were a single appeal. In this case, the order consolidating these appeals noted that "the files are factually and legally related". Because the files are related, they can proceed as if they are one appeal.

[14] The logical consequence of Venngo's position is that if three appeals were consolidated it would be entitled to file, in total, 90 pages of memoranda, if four appeals were consolidated it would be entitled to file, in total, 120 pages of memoranda and so on depending on the number of appeals that were consolidated. This cannot be the consequence of a consolidation of proceedings.

[15] As a result the memoranda that have been filed by Venngo are to be stricken from the record and Venngo shall, on or before September 23, 2016, file one memorandum in relation to the consolidated appeal that complies with the Rules.

[16] Venngo has, in any event, requested that it be allowed to file a memorandum that exceeds 30 pages. However, it has not provided sufficient justification for permitting it to do so. Simply stating that because it has already written 46 pages it should be allowed to file a memorandum of the same length is not sufficient to determine why Venngo would not be able to reduce the overall length of its memorandum to 30 pages as required by the Rules.

[17] In *Forestethics Advocacy Assn. v. Canada (Attorney General)*, 2014 FCA 182, Stratas J.A. noted that:

> 21 Rule 70 of the *Federal Courts Rules*, *supra* specifies that the page limit is 30 pages. It repeats the word "concise" three times. The 30 page limit and the thrice-repeated requirement of conciseness apply to even the most complex, high-stakes appeals on the merits. Accordingly, the presence of "important and complicated questions," by itself, does not justify an increase in the page limit: *Canada v. General Electric Capital Canada Inc.*, 2010 FCA 92 at paragraph 5.
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> 22 Rule 70 also uses the word "memorandum," not "encyclopaedia." The aim of Rule 70 is to have counsel advance only central and important points, not everything that can possibly be imagined. The best memoranda target the controlling idea of the case -- the particular part of the legal test upon which the case will turn. Then, after a smattering of orienting information, they deploy only the facts and authorities relevant to their position on the controlling idea. And throughout, they supply accurate citations so we can verify what we have been told and investigate the finer details.
>
> 23 Sadly, that is not the norm. All too often, we are dragged through blizzards of trivia, ponderous explanations of the elementary or inconsequential, bald assertions without demonstration or citation, repetitive submissions, block quotes of boggling length, and summary after summary of case law with no selection, distillation or synthesis. These bloat the page count and dissipate the force of the argument, sometimes to the vanishing point. My former colleague, Justice John Evans, who read thousands of memoranda during his exemplary career, put it well:
>
>> Conciseness is a virtue which is always in demand but, in my experience, often conspicuous by its absence from memoranda of fact and law filed in this Court. I do not recall an occasion when I thought that the expansion of a memorandum by another 10 pages would have improved things. Quite the contrary, in fact.

> (*Sawridge Band v. Canada*, 2006 FCA 52 at paragraph 20; see also Justice John I. Laskin, "Forget the Windup and Make the Pitch: Some Suggestions for Writing More Persuasive Factums" (1999) 18 Adv. Soc. J. No. 2, at pages 3-12 and Justice Marvin A. Catzman, "The Wrong Stuff: How to Lose Appeals in the Court of Appeal" (2000) 19 Adv. Soc. J. No. 1 at pages 1-5.)
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> 24 For these reasons, requests to increase the 30 page limit in this Court are "granted sparingly" and are exceptional: General Electric, supra at paragraph 5.

[18] Venngo has not identified why the arguments that it wants to raise would be any more complex than any other arguments in other appeals where the parties are able to reduce the memorandum to the required length. Therefore, the memorandum to be filed by Venngo shall not exceed 30 pages as provided in the Rules.

[19] As a result, the motion is granted and the memoranda as filed by Venngo are stricken from the record. Venngo shall, on or before September 23, 2016, file one memorandum of fact and law for the consolidated appeal that complies with the Rules. Venngo shall pay the costs of this motion to the respondents, fixed in the amount of $1,500.

"Wyman W. Webb"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-5-16 A-33-16
STYLE OF CAUSE:	VENNGO INC. v. CONCIERGE CONNECTION INC. c.o.b. as PERKOPOLIS, MORGAN C. MARLOWE and RICHARD THOMAS JOYNT

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	WEBB J.A.
DATED:	AUGUST 23, 2016

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