Federal Court of Appeal | Cour d'appel fédérale

Date: 20180628

Dockets: A-35-17
A-112-18

Citation: 2018 FCA 127

Present: STRATAS J.A.

BETWEEN:

MEDIATUBE CORP.

Appellant

and

BELL CANADA

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on June 28, 2018.

REASONS FOR ORDER BY: STRATAS J.A.

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STRATAS J.A.

A. Introduction

[1] MediaTube appeals from the judgment dated January 4, 2017 of the Federal Court (*per* Locke J.) that dismissed its action for patent infringement: 2017 FC 6. It also appeals from an order dated March 29, 2018 of the Federal Court (*per* Locke J.) that dismissed its motion to vary

a confidentiality order: 2018 FC 355. This Court has consolidated the appeals. The appeals will be heard in September or October 2018.

[2] Three motions are now before the Court:

- MediaTube asks for leave to introduce a new ground into its appeal from the dismissal of its action for patent infringement: ineffective assistance of trial counsel. MediaTube wants to amend its notice of appeal, have discovery against its former counsel of record, Bereskin & Parr, and then introduce evidence of ineffective assistance into the appeal. It alleges that its former counsel was in a conflict of interest, preferred the interests of another client, and did not prosecute MediaTube's case in the Federal Court adequately. MediaTube also seeks to add to the notice of appeal other grounds of invalidity of the patent.

- Bereskin & Parr, MediaTube's former counsel, seeks leave to intervene to oppose MediaTube's motion. It denies MediaTube's allegations. It wishes to introduce evidence relevant to MediaTube's motion.

- By previous Order of this Court, MediaTube has posted security respecting the costs awarded against it by the Federal Court. In reaction to MediaTube's motion, Bell Canada now seeks an order for payment of the security to it. It also seeks an order requiring MediaTube to post security for its costs on the appeal.

[3] For the reasons that follow, MediaTube's motion will be dismissed. Bereskin & Parr's motion will be dismissed because it is moot: this Court has been able to determine the motion against MediaTube without receiving Bereskin & Parr's evidence in opposition. Finally, Bell Canada's motion partly succeeds: it is entitled to security for its costs on the appeal.

B. MediaTube's motion to introduce issues in its notice of appeal

(1) The circumstances giving rise to the motion

[4] MediaTube submits that its counsel at trial, Bereskin & Parr, was in a conflict of interest. It preferred the interests of another client, Microsoft. Because of that, MediaTube says that at trial Bereskin & Parr did not act single-mindedly in its interests. MediaTube says that Microsoft was connected to Bell Canada's allegedly infringing technology and retained Bereskin & Parr on other matters.

[5] MediaTube impugns a number of actions of its counsel and suggests that Bereskin & Parr was motivated by its interest in assisting Microsoft. As a result, its right to the effective assistance of counsel was undermined. Therefore, in its view, the judgment of the Federal Court must be set aside.

(2) The nature of the motion

[6] "Ineffective assistance of counsel" is a ground of appeal often asserted in appeals from criminal convictions. MediaTube would like to advance it here in its appeal from the dismissal of its action for patent infringement.

[7] However, at present, this ground is not before the Court. It is not in MediaTube's notice of appeal. MediaTube submits that this is understandable: it only learned of its counsel's conflict of interest in December 2017, long after it filed its notice of appeal.

[8] Therefore, MediaTube now seeks leave to amend its notice of appeal and introduce this new ground of appeal. As well, in support of this new ground, it wishes to obtain evidence from Bereskin & Parr concerning its relationship with Microsoft and Bereskin & Parr conduct of the patent infringement trial. So MediaTube also seeks an order that it be granted discovery. And it seeks an order permitting it to introduce evidence in support of this ground into the appeal.

(3) Should this Court consider this motion at this time?

[9] This motion has been brought on an interlocutory basis before a single judge. The judge can decline to deal with the motion and adjourn it to the appeal panel for its consideration.

[10] This is a discretionary decision guided by Rule 3 of the *Federal Courts Rules*, SOR/98-106—"secur[ing] the just, most expeditious and least expensive determination of every

proceeding on its merits": *Amgen Canada Inc. v. Apotex Inc.*, 2016 FCA 196, 487 N.R. 202 at para. 8.

[11] In *Amgen*, this Court summarized some of the specific factors related to Rule 3 that can affect the exercise of its discretion (at para. 10):

> Where the motion is clear-cut or obvious, it might as well be decided right away. Efficiency and judicial economy support this: *Collins v. Canada*, 2014 FCA 240, 466 N.R. 127 at paragraph 6; *Canadian Tire Corp. Ltd. v. P.S. Partsource Inc.*, 2001 FCA 240, 267 N.R. 135. However, if reasonable minds might differ on the outcome of the motion, the ruling should be left to the panel hearing the appeal: *McKesson Canada Corporation v. Canada*, 2014 FCA 290, 466 N.R. 185 at paragraph 9; *Gitxaala Nation v. Canada*, 2015 FCA 27, at paragraph 7. Sometimes the novelty, quality or incompleteness of the submissions may make it sensible to leave the motion for the appeal panel to determine: *Gitxaala Nation*, above at paragraphs 9-12.

(See also *Canada (Attorney General) v. Oshkosh Defense Canada Inc.*, 2018 FCA 102 at paras. 40-42.)

[12] Another factor is whether an advance ruling would allow the hearing to proceed in a more timely and orderly fashion: *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, 479 N.R. 189 at para. 11, citing *Collins v. Canada*, 2014 FCA 240, 466 N.R. 127 at para. 6 and *McConnell v. Canada (Canadian Human Rights Commission)*, 2004 FC 817, 51 C.H.R.R. 228, aff'd 2005 FCA 389.

[13] In the specific context of interlocutory motions to amend a notice of appeal to introduce a new ground of appeal, this Court considered, in addition to much of the above, the following:

> …a motions judge should keep front of mind the demarcation of tasks between a motions judge and an appeal panel. The line drawn between the motions judge's task and the appeal panel's task depends on the certainty of the matter. Where it is clear cut or obvious that the new ground will fail, the motions judge should not allow it to enter the appeal. If, on the other hand, reasonable minds could differ on the merits of the new ground, the motions judge should allow the new ground to enter the appeal, leaving its ultimate resolution to the panel hearing the appeal. By way of analogy on evidentiary points, see *Collins v. Canada*, 2014 FCA 240 at paragraph 6.

(*McKesson Canada Corporation v. Canada*, 2014 FCA 290, 466 N.R. 185 at para. 9.)

[14] This Court exercises its discretion to determine MediaTube's motion at this time. A number of considerations support this. Judicial economy favours determining it now, especially since the central question concerns what issues are to be decided in the appeal. Resolving the scope of the appeal now will allow the appeal hearing to proceed in a more timely and orderly way. This is particularly important where this ground of appeal—if allowed to proceed—would consume the resources of an innocent party, Bell Canada, caught in the cross-fire between MediaTube and Bereskin & Parr. Further, the evidence and submissions before the Court on this motion are comprehensive and so the Court is empowered to rule on the matter. Finally, as will be seen, the outcome of MediaTube's motion is clear-cut.

(4) The evidentiary basis for MediaTube's motion

[15] The evidentiary basis for MediaTube's motion is supplied by the affidavit of MediaTube's Chief Executive Officer, Mr. Lloyd.

[16] Bell Canada attacks the credibility of Mr. Lloyd, noting the Federal Court's findings that he plays "fast and loose with the facts," "there is reason to doubt his frankness," his "memory of dates and events is unreliable," and is prone to overstatement. In effect, Bell Canada asks this Court to give Mr. Lloyd's affidavit no weight at all.

[17] Mr. Lloyd blames his poor performance in the witness box on Bereskin & Parr's poor work in preparing him, a symptom, he says, of Bereskin & Parr's conflict of interest stemming from divided loyalties.

[18] I am not prepared to deny Mr. Lloyd's affidavit any weight. It would be a mistake to assume that a witness, found in the past not to be credible, is automatically not credible in every last aspect of later testimony. Nevertheless, the Federal Court's findings serve as a warning: this Court must be cautious when relying upon the statements in Mr. Lloyd's affidavit.

(5) The principles governing whether a party should be allowed to amend a notice of appeal

[19] A notice of appeal may be amended under Rule 75. Rule 75 allows the Court, on motion, to "allow a party to amend a document, on such terms as will protect the rights of all parties."

[20] While there are many decisions of this Court dealing with Rule 75 in the context of trial pleadings, only once has this Court set out in considered form the principles that should apply on a motion under Rule 75 to amend a notice of appeal:

> …[T]he principles that apply to the amendment of trial pleadings set out in *Canderel Ltd. v. Canada*, [1994] 1 F.C. 3 (C.A.) apply, with minor modification, to the amendment of a notice of appeal. Guiding me in the translation of the *Canderel* principles to the amendment of a notice of appeal is the interpretive rule, Rule 3. Rule 3 injects into the analysis the concepts of fairness, avoidance of delay, cost-effectiveness, and a preference for adjudication of the real merits of cases.
>
> As in the case of amendments to trial pleadings, the Court, faced with a motion to amend a notice of appeal, must ask whether the amendment is directed to the real merits at stake in the case. In considering this, the Court must understand the nature of the parties' case, assess whether the amendment is relevant to the determination of that case, and, where a new ground of appeal is being asserted, ask whether that ground can possibly succeed.
>
> …
>
> However, that is not the end of the matter. Under Rule 75, the Court can refuse an amendment if the moving party has been dilatory, or considerations of fairness or prejudice lean against the amendment and those considerations cannot be satisfactorily addressed by way of terms. In many cases, the Court allows amendments on terms. The imposition of terms is a handy tool to promote fairness and mitigate prejudice, while allowing the court to get at the real issues in the case.

(*McKesson*, above at paras. 7-8 and 10.)

(6) The relevance of delay on the part of MediaTube in bringing this motion

[21] On May 14, 2018, MediaTube brought this motion to amend its notice of appeal. This was over fifteen months after it issued its notice of appeal on February 3, 2017 and over six months after the parties have filed their memoranda of fact and law.

[22] In its motion, MediaTube seeks, among other things, to add to its notice of appeal two grounds for invalidating the patent, anticipation and obviousness. It could have included these grounds when issuing its notice of appeal but it decided not to. Since then, all that has changed is MediaTube's counsel. This is not a material change. Allowing the two new grounds will cause more delay and expense in this already-delayed appeal. Thus, I dismiss this aspect of MediaTube's motion.

[23] Is the ground of ineffective assistance of counsel similarly barred? I think not. The only evidence before the Court, albeit in Mr. Lloyd's affidavit, is that only in December 2017 did MediaTube learn that Bereskin & Parr represented Microsoft. Only then did it form the view that Bereskin & Parr had been in a conflict of interest.

[24] Bell Canada does not take serious issue with this fact. It is also corroborated by the sudden flurry of correspondence concerning this issue sent by MediaTube soon afterward.

[25] True, it took the intervention of this Court by way of direction to require MediaTube to decide quickly whether it should bring this motion, but this alone does not support a valid objection that MediaTube has been too dilatory.

(7) The key issues to be considered in this motion

[26] In light of the factors in *McKesson* and the considerations under Rule 3, MediaTube's motion turns on whether the ground of ineffective assistance of counsel can possibly succeed

based on the material placed before the Court on this motion and considerations of fairness, avoidance of delay and cost-effectiveness.

(8) The ground of ineffective assistance of counsel

(a) The origin, rationale and content of the ground

[27] The ground of ineffective assistance of counsel was first recognized in appeals from criminal convictions. It is derived from subsection 650(3) of the *Criminal Code*, R.S.C. 1985, c. C-46, sections 7 and 11(*d*) of the Charter, and an accompanying evolution of the common law: *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520 at para. 24.

[28] The criminal cases on point—far more numerous than the civil cases—shed light on the nature of the ground.

[29] Perhaps the best explanation appears in *G.D.B.*, above. In *G.D.B.*, the Supreme Court held that for this ground to succeed, the appellant must show that counsel's acts or omissions constituted incompetence and a miscarriage of justice resulted: see also *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35, 85 O.A.C. 186 (C.A.), substantially adopted by the Supreme Court

[30] *G.D.B.* tells us that an appellant's threshold for success is very high. There is a "strong presumption" that counsel's conduct fell within the "wide range" of "reasonable professional assistance": *G.D.B.* at para. 27. In the absence of a miscarriage of justice, the question of the

competence of counsel is usually a matter of professional ethics and is not a question for the appellate courts to consider: *G.D.B.* at para. 5.

[31] The Supreme Court did not flesh out the meaning of the words "strong," "wide," and "reasonable." Nor did it need to: any lawyer or judge with a passing familiarity with trials understands that once a court's decision is known, using hindsight to second-guess the trial decisions of counsel is all too easy: *R. v. Archer* (2005), 202 C.C.C. (3d) 60, 34 C.R. (6th) 271 at para. 119 (C.A.). It is notorious that different counsel will handle situations in different ways and normally most of the ways will be the product of reasonable judgment calls: *North American Financial Group Inc. v. Ontario Securities Commission*, 2018 ONSC 136 at para. 122; *R. v. White* (1997), 32 O.R. (3d) 722 at p. 745, 99 O.A.C. 1 at para. 64 (C.A.). The words used in the presumption—"strong," "wide," and "reasonable"—make the ground of ineffective assistance of counsel most difficult to establish.

[32] The finality of decisions must count for much. As well, it is not the function of appellate courts to second-guess the tactical and strategic decisions of trial counsel. And for good reason.

[33] In trials, turbulence and tumult often reign. Problems and questions often pop up unexpectedly, sometimes several at a time, often in need of quick answer. Some answers require knowledge of fine law and minutiae in the case, with nuances both elusive and tricky. Others draw upon something quite different, an art both mysterious and imprecise: assessing and predicting human behaviour. During trial, while events swirl about, ever present are the clients, sometimes anxious, sometimes emotional, always deeply invested in the case. Days go by to the

exhaustion of all. Then the end is reached—except for the judge who is tasked to write the decision. Months can pass. During that time, memories fade while others are distorted by hope and expectation. At last, the decision arrives and with it, clarity and definitiveness. Some have won; some have lost. And some of the losers, looking for any way they can to reverse the decision, and armed with 20/20 hindsight, fuelled by disappointment, conclude that their lawyers were ineffective.

[34] Therefore, courts must be on guard to ensure that the ground of ineffectiveness of counsel does not become too easy a route to a complete re-do of a trial. Appropriately, the Supreme Court has set the threshold for success at a high level.

[35] The foregoing discussion of the ground in criminal cases applies equally to the ground in civil cases. But civil cases involve additional, special considerations.

(b) The ground in civil cases

[36] In civil cases, it is very difficult to successfully advance the ground of ineffective assistance of counsel. Perhaps this is shown by the scarcity of case law: this Court has considered it in a meaningful way only once in the last 47 years: *Hallatt v. Canada*, 2004 FCA 104, [2004] 2 C.T.C. 313.

[37] There are many possible reasons why this ground seldom succeeds in civil cases.

[38] In many civil cases, the right to liberty of the litigants is not at stake. Charter rights and statutory rights, which support the existence of the ground in criminal cases, are often not present in civil cases. See *Hallatt* at para. 21.

[39] The interest of litigants in civil cases is often financial. Thus, "other remedies [are] in place that a losing litigant may invoke to recover the loss claimed at trial if ineffective assistance can be established" such as an "action against the counsel whose conduct he impugns": *D.W. v. White* (2004), 189 O.A.C. 256 at para. 51 (C.A.); see also *Hallatt* at para. 21 and *Mallet v. Alberta*, 2002 ABCA 297, [2003] 8 W.W.R. 271 at paras. 60-61.

[40] Further, when the ground of ineffective assistance is raised in civil appeals, it is something between a party and its trial lawyer, not the opposing party. Here, "the rights of others," namely the opposing parties, "are inevitably and inextricably involved": *Dominion Readers' Service Ltd. v. Brant* (1982), 140 D.L.R. (3d) 283 at p. 291, 41 O.R. (2d) 1 at pp. 9 (C.A.). They are caught up in a mess not of their own making and they want to see off the mess and receive the benefit of the judgment they have won. And it must be remembered that "the Court must keep in mind…that it is primarily concerned with the rights of litigants and not with the conduct of solicitors": *Simpson v. Sask. Govt. Ins. Office* (1967), 61 W.W.R. 741 at pp. 750, 65 D.L.R. (2d) 324 at p. 332 (Sask. C.A.). This differs somewhat from criminal cases where the Crown, among other things, must consider the public interest and the administration of justice, be alert to miscarriages of justice, and act as a minister of justice: *Boucher v. The Queen*, [1955] S.C.R. 16, 110 C.C.C. 263.

[41] As a result, giving effect to the ground in civil matters is "rare indeed": *Dominion Readers' Service,* above at p. 291 D.L.R., p. 9 O.R. Most cases suggest that the ground succeeds in "the rarest of cases," which is just about the highest threshold imaginable under our law: *SMTCL Canada v. Master Tech Inc.*, 2017 ONCA 744; *8150184 Canada Corp. v. Rotisseries Mom's Express Ltd.*, 2016 ONCA 115; *White v. Conception Bay South (Town)*, 2013 NLCA 10, 103 A.P.R. 325; *Wood v. Van Bibber*, 2013 YKCA 15, 348 B.C.A.C. 98; *Patient X v. College of Physicians and Surgeons of Nova Scotia*, 2015 NSCA 41, 89 Admin L.R. (5th) 327; *Gilgorevic v. McMaster*, 2012 ONCA 115, 109 O.R. (3d) 321 at paras. 45-65.

[42] The cases show that in order to meet the "rarest of cases" threshold in the civil context, an appellant must demonstrate some exceedingly special interest or truly extraordinary situation.

[43] A special interest may be present where the wronged clients are vulnerable persons—such as children or persons under mental disability—who have a unique and profound interest in the outcome of litigation that is qualitatively different from a financial interest, and their interests were appallingly treated by their lawyer: *D.W.* at para. 55. In such cases, the ground of ineffective assistance of counsel may be the only remedy available to them. They are not likely to have the ability, gumption and wherewithal to pursue other recourses, such as suing their negligent lawyer.

[44] An extraordinary situation may be present where there is fraud or conduct tantamount to fraud, such as where the opposing party undermines the effectiveness of opposing counsel by supplying an inducement, such as a bribe, to disregard his or her duty or is otherwise complicit

with opposing counsel: *D.W.* at para. 55; *Saskatchewan Valley Land Co. v. Willoughby* (1913), 24 W.L.R. 40, 6 Sask. L.R. 62 (S.C.). While one might assert this as "ineffective assistance of counsel," it is perhaps better seen as the sort of fraud that can vitiate a judgment: *Imperial Oil Ltd. v. Lubrizol Corp.* (2000), 6 C.P.R. (4th) 417 (F.C.); *Pfizer Canada Inc. v. Canada (Minister of Health)*, 2011 FCA 215, 420 N.R. 337 at paras. 20-21; *Federal Courts Rules*, SOR/98-106, Rule 399(2)(*b*).

(c) Can a conflict of interest on the part of counsel be relied upon in support of the ground?

[45] Case law in the criminal context suggests that a conflict of interest can be relied upon in support of the ground of ineffective assistance of counsel. Effective assistance requires that counsel have an undivided loyalty to the client: *R. v. Widdifield* (1995), 25 O.R. (3d) 161 at pp. 171-72, 100 C.C.C. (3d) 225 at pp. 234-235 (C.A.); *R. v. Baharloo*, 2017 ONCA 362, 348 C.C.C. (3d) 64 at para. 29.

[46] Perhaps the clearest indication of this is found in *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631 at para. 38. There, the Supreme Court confirmed that after a trial, an appellant can raise opposing counsel's conflict of interest "as a ground to set aside the trial judgment."

(d) What sort of conflict of interest will establish the ground?

[47] MediaTube submits that an apparent conflict of interest, not just an actual conflict of interest, can give rise to the ground of ineffective assistance of counsel: MediaTube's written

representations at paras. 55-57. This submission flies in the face of decisions of the Supreme Court and at least two other appellate courts.

[48] There is much case law on the circumstances that will suffice to disqualify counsel during a pending case, *i.e.*, before the court has rendered judgment, due to a conflict of interest. This case law is aimed at eliminating the risk of miscarriages of justice when counsel in conflict of interest—or on the verge of one—are allowed to continue. Thus, the case law and the tests in it are prophylactic in approach.

[49] An example of this prophylactic approach is *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, [2013] 2 S.C.R. 649. *McKercher* concerned the disqualification and removal of counsel from acting further in a pending case. In order to advance the prophylactic approach, the Supreme Court considered that a "substantial risk that the lawyer's representation of the client would be materially and adversely affected" would be sufficient ground to disqualify and remove the counsel. For the purposes of disqualifying and removing counsel, it regarded the presence of "substantial risk" as tantamount to an actual conflict (at para. 38).

[50] After a judgment has been rendered, different considerations apply. The Supreme Court has confirmed this: *Neil* at para. 38. After judgment has been rendered, the test for a conflict of interest that can set aside a trial judgment "is more onerous" than that before judgment in a pending case. Post-judgment, counsel's alleged conflict of interest "is no longer a matter of taking protective steps" but a matter of "[reversing] of a court judgment."

[51] The Supreme Court's holding in *Neil* is bolstered by three strong decisions of two provincial appellate courts: *Widdifield*, above at pp. 175-178 O.R., pp. 237-239 C.C.C. ; *R. v. Silvini*, (1991) 5 O.R. (3d) 545, 50 O.A.C. 376 (C.A.) and *R. v. Barbeau* (1996), 110 C.C.C. (3d) 69, 50 C.R. (4th) 357 (Que. C.A.). Each explains and confirms that a post-judgment assessment of a conflict of interest is more onerous than a pre-judgment assessment.

[52] This difference is supported by the need to respect the finality of judgments and to prevent the ground of ineffective assistance of counsel from becoming too easy a route to the setting aside of a judgment. Whether there was a risk of a conflict is irrelevant: the judgment has been handed down and either there was a conflict or there was not. And, if there was a conflict, it only matters whether or not the conflict adversely affected the party's interests: *Widdifield,* above at p. 175-176 O.R., p. 239 C.C.C.

[53] What is the test to be followed in the post-judgment assessment when ineffective assistance of counsel is alleged for the first time on appeal?

[54] In *Neil* (at para. 39), the Supreme Court adopted the test set out in *R. v. Graff*, 1993 ABCA 57, 80 C.C.C. (3d) 84: the appellant "must show more than a possibility of conflict of interest; while actual prejudice need not be shown, the appellant must demonstrate the conflict of interest and that the conflict adversely affected the lawyer's performance on behalf of the appellant." See also *Baharloo,* above at para. 30. The adverse effect is an actual, proven one. A "substantial risk" of an adverse effect—the standard that applies to disqualification during a pending hearing before judgment—is not enough.

[55] This test is quite congruent with cases such as *D.W.*, *Saskatchewan Valley Land Co.*, *Imperial Oil*, and *Pfizer Canada*, above, which all suggest that conduct tantamount to a fraud on the court process wholly subverts the integrity of that process and the judgment resulting from that process. Such conduct places the court in the position where it cannot countenance or condone that conduct by leaving the judgment on the books. Equally, counsel who have reduced their performance due to an actual conflict of interest thereby betraying their clients have wholly subverted the integrity of the court process. In such circumstances, the judgment is tainted fatally and must be set aside.

[56] Bell Canada submits that MediaTube's motion should be dismissed because the alleged conflict of interest in this case does not matter: MediaTube would have lost at trial anyway. It points to admissions made by MediaTube's Chief Executive Officer and certain findings made by the Federal Court.

[57] I reject the submission. In advancing the ground of ineffective assistance of counsel, "the appellant need not demonstrate that, but for the ineffective assistance of counsel, the verdict would have been different": *Baharloo*, above at para. 30. If MediaTube can prove that there was an actual conflict of interest and that the conflict adversely affected its counsel's performance on its behalf, it does not matter whether the conflict affected the outcome of the trial. As I have explained, a judgment obtained under a process whose integrity has been wholly subverted is tainted fatally. The conflict in and of itself supplies the element of "miscarriage of justice" necessary for the ground to be sustained: *Widdifield*, above at p. 173 O.R., p. 237 C.C.C.;

Baharloo, above at para. 30. Regardless of the merits, a judgment that is the product of a miscarriage of justice cannot stand.

(e) Evidentiary and procedural considerations

[58] In prosecuting the ground of ineffective assistance of counsel, the appellant will have to adduce evidence in support of the ground. This is possible: this Court has the power to receive evidence on appeal: *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 53(1). In adducing evidence, the appellant does not need to satisfy the stringent test for fresh evidence in *Palmer v. The Queen*, [1980] 1 S.C.R. 759: see, *e.g.*, *R. v. McKellar* (1994), 19 O.R. (3d) 796 at p. 799, 34 C.R. (4th) 28 at p. 31 (C.A.) and *Barbeau*, above at pp. 78-79 C.C.C, pp. 367-368 C.R. The evidence is not directed to a finding on the merits that was made at trial but instead challenges the very validity of the trial process.

[59] MediaTube believes that Bereskin & Parr have more evidence that will be of assistance to it on the alleged conflict of interest. It complains that Bereskin & Parr have not answered all of its questions. As a result, it seeks discovery. It asks for an order from this Court to this effect.

[60] MediaTube did not point to any Rules that would allow this Court to authorize the conducting of discoveries. This is no surprise: discovery is a mechanism that exists in first-instance courts, not appellate courts: see, *e.g.*, *Atchison v. Manufacturers Life Insurance Company*, 2003 ABCA 196, [2003] 10 W.W.R. 463 at paras. 28-36; *Conceicao Farms Inc. v. Zeneca Corp.* (2006), 83 O.R. (3d) 792, 272 D.L.R. (4th) 545 at paras. 15-19 (C.A.).

[61] This Court does have a broad plenary power to regulate its own practices and procedures: *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 218, 141 C.P.R. (4th) 165 at para. 17 and authorities cited therein. There may be an exceptional case where this Court, using its plenary powers, may be able to fashion procedures in order to do justice in a particular case. But this is not one of them.

[62] There is a perfectly adequate forum for a litigant like MediaTube who is subject to a monetary judgment and who wishes to discover evidence of ineffective assistance: an action for negligence, breach of fiduciary duty, or both in the provincial superior court. There, full discovery can be had. If the litigant proves the cause of action, it can obtain up to full compensation—the amount of the monetary judgment in the Federal Courts system. If necessary and warranted, the litigant can come back and move for the judgment in the Federal Court to be set aside.

(f) Should MediaTube's notice of appeal be amended to add this ground?

[63] Given the principles governing amendments to notices of appeal and considering the circumstances of this case, the central question is whether, based on the evidence MediaTube has adduced on this motion, the ground of ineffective assistance of counsel can possibly succeed.

[64] MediaTube submits that its trial counsel, Bereskin & Parr, was ineffective because of a serious conflict of interest.

[65] Bereskin & Parr represented MediaTube in its action against Bell Canada for patent infringement. During much of this retainer, it also represented Microsoft and filed several trademark applications on its behalf. Citing *McKercher* at para. 28, MediaTube submits that it is irrelevant that Bereskin & Parr's representation of Microsoft was unrelated to the patent infringement proceeding. Bell Canada's product said to cause the infringement, Fibe TV, used certain Microsoft software known as Mediaroom. Thus, says MediaTube, Bereskin & Parr had an interest in soft-peddling MediaTube's case in the infringement action in order to protect Microsoft's commercial interests and to advance its own interests.

[66] MediaTube submits that Bereskin & Parr did just that: it "pulled its punches" and failed to advance a theory of infringement based on Microsoft's software, underplayed the role of Microsoft's software, failed to conduct adequate discovery on certain materials and answers (known in the Federal Court as the "corrected information") that Bell Canada gave concerning how Fibe TV worked and that curiously left out Microsoft's role, failed to advise MediaTube that an expert during trial would concede that there was no infringement if Bell Canada's materials and answers were correct, and failed to adequately prepare MediaTube's Chief Executive Officer for his testimony in court. In the end, says MediaTube, the compromise of its interests and the impairment of its right to effective assistance of counsel is shown by the fact that Bereskin & Parr, without instructions from MediaTube, conceded non-infringement during closing argument.

[67] Based on the record filed on this motion, it would require speculation on my part to leap to the conclusion MediaTube's counsel was in an actual conflict of interest and that the conflict adversely affected its counsel's performance on its behalf.

[68] MediaTube seems to concede this. Overall, in its written representations, MediaTube puts its case no higher than the fact that "serious questions" are raised by the circumstances. And, knowing its evidence is insufficient, it seeks a discovery order from this Court against its former counsel, Bereskin & Parr.

[69] If proceedings are brought elsewhere, MediaTube perhaps might discover the evidence necessary to prove its case—or perhaps not. But, for present purposes, the evidence is insufficient before me to establish that the ground of ineffective assistance of counsel can possibly succeed.

[70] There is no evidence that counsel was aware of the fact that Bereskin & Parr had filed trademark applications on behalf of Microsoft. Absent that knowledge, there is no basis to suggest that counsel had any incentive to soft-peddle MediaTube's case or do anything other than put MediaTube's interests first.

[71] The allegation that Bereskin & Parr soft-peddled when it conceded non-infringement falls away when one sees the testimony of MediaTube's Chief Executive Officer. He testified that MediaTube may never have pursued its infringement claim in hindsight and with the benefit of Bell's full disclosure: Examination of Douglas Lloyd, September 16, 2016 at p. 759.

[72] There is no evidence that the Microsoft trademark filings were of such significance that counsel was in an actual conflict of interest or that the filings involved anything more than administrative work.

[73] As mentioned above, the "substantial risk" standard in *McKercher* applies to the pre-judgment assessment of whether counsel should be removed. But after judgment, the standard is an actual conflict of interest and an actual adverse effect on counsel's performance on behalf of its client: see discussion at para. 54 above. This being said, I cannot say on this evidentiary record that it is possible to argue that there was even a "substantial risk" within the meaning of *McKercher* that Bereskin & Parr's representation of MediaTube was materially and adversely affected.

[74] Various matters raised by MediaTube, such as insufficient discovery and insufficient witness preparation, smack of second-guessing counsel's judgment calls and overlooking that Bereskin & Parr was subject to budgetary limitations MediaTube imposed upon it: see the closing submissions of MediaTube, October 17, 2016, at pp. 2461-2462.

[75] Overall, it must be recalled that counsel enjoy a "strong presumption" that their conduct fell within the "wide range" of "reasonable professional assistance": *G.D.B.* at para. 27. As explained, this is a very high standard. The evidence filed on this motion does not rebut this presumption. It is not possible on this evidentiary record to argue that counsel "pulled their punches" while representing MediaTube or that their performance was adversely affected by a conflict of interest.

[76] In conclusion, this proposed ground of appeal is not arguable. It would "complicate and protract" the appeal "needlessly and pointlessly": *Teva Canada Ltd. v. Gilead Sciences Inc.*, 2016 FCA 176 at para. 28. Therefore, leave to amend the notice of appeal will be denied.

(g) Other relief sought by MediaTube

[77] At trial, MediaTube admitted that there was no patent infringement. It seeks leave to withdraw these admissions.

[78] MediaTube seeks withdrawal of the admissions on the basis that the admissions were the product of its counsel's conflict of interest. The above analysis undermines this basis.

[79] Of course, it still remains open to MediaTube to quash the judgment of the Federal Court on the grounds it has raised in its notice of appeal. Nothing in these reasons should be taken as saying otherwise.

[80] Therefore, MediaTube's motion is dismissed.

C. Bell Canada's security for costs motion

[81] Under this Court's Order dated July 7, 2017, MediaTube paid $1,364,582 into Court as security for the costs awarded against it in the Federal Court. In reaction to MediaTube's motion, Bell Canada has moved for an order that the security be paid out to it forthwith.

[82] Effectively, this is a request that the Court's Order of July 7, 2017 be varied. I reject the request. The circumstances that gave rise to that Order have not materially changed and so a variation is not warranted: *Del Zotto v. M.N.R.*, [1995] 3 F.C. 507, 100 F.T.R. 15.

[83] Bell Canada seeks an order for security for costs for the appeal. The reasons set out in the July 7, 2017 Order support such an order.

[84] Bell Canada submits that the security should be in the amount of $26,254. Having regard to the amounts in the Tariff and to the fact that, as discussed below, the costs of MediaTube's motion are to be paid within thirty days and will not be part of any ultimate costs award in the appeal, I consider $12,000 to be more appropriate. The July 7, 2017 Order provided that MediaTube's failure to post security within a period of time would allow Bell Canada to move for dismissal of MediaTube's appeal. I provide for the same here.

D. Costs of the motions

[85] Bell Canada enjoyed mixed success in its security for costs motion. I shall grant it one-half of its costs on this motion, calculated in accordance with column III of the Tariff.

[86] Bell Canada has been wholly successful in opposing MediaTube's motion. It seeks solicitor and client costs. I reject this request. MediaTube's motion, while unsuccessful, cannot be considered so bereft of merit that it is vexatious. However, on this motion, Bell Canada is an innocent party caught up in a dispute between MediaTube and its trial counsel. In the

circumstances, it deserves an enhanced costs award, though not as significant as solicitor and client costs. In my discretion, I shall grant it costs in the all-inclusive, fixed amount of $5,000, an amount that is in excess of what would be taxable under column III of the Tariff. This shall be payable within thirty days in any event of the cause, failing which Bell Canada may move for the dismissal of the appeals.

[87] Bereskin & Parr's motion will be dismissed on account of mootness. However, MediaTube's motion forced Bereskin & Parr to bring its motion and MediaTube's motion has been dismissed. I note that if MediaTube asserts its allegations against Bereskin & Parr in another forum, the work the parties did on Bereskin & Parr's motion to intervene may be used in that forum and may be the subject of a costs award in that forum. Therefore, in these circumstances, I decline to make any award of costs concerning Bereskin & Parr's motion.

E. Scheduling matters

[88] The Court's scheduling order of May 7, 2018 remains in effect and is unchanged. In the requisition for hearing, the parties have provided their availability for a hearing of the consolidated appeals in September or October 2018. Their attention is drawn to *UHA Research Society v. Canada (Attorney General)*, 2014 FCA 134. If their availability has changed, they had better inform the Judicial Administrator immediately. An order setting a hearing date, once issued, will not lightly be changed: *UHA Research* at paras. 8-10.

[89] The Court has been concerned about the delay in hearing the appeal in file A-35-17, a file that was ready for hearing seven months ago. For this reason, it set very short, difficult deadlines for the filing of the materials in these motions. This Court wishes to express its appreciation to counsel for their compliance with these deadlines and the very high professional standard of their materials.

F. Disposition

[90] MediaTube's motion will be dismissed with costs to Bell Canada in any event of the cause in the all-inclusive, fixed amount of $5,000, payable within thirty days, failing which Bell Canada may move for the dismissal of the appeals.

[91] Bereskin & Parr's motion will be dismissed without costs.

[92] Bell Canada's motion will be granted in part with one-half of its costs of its motion, calculated in accordance with column III of the Tariff. Within thirty days, MediaTube shall post security for the cost of the appeals in the amount of $12,000, failing which its appeals shall be dismissed.

[93] The parties agree that NorthVu Inc. should be removed as an appellant in both appeals. I will so order.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-35-17 AND A-112-18
STYLE OF CAUSE:	MEDIATUBE CORP. v. BELL CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	JUNE 28, 2018

WRITTEN REPRESENTATIONS BY:

Marcus Klee Sean Jackson	FOR THE APPELLANT
Steven G. Mason Fiona Legere Bart Nowak	FOR THE RESPONDENT
Paul Le Vay Carlo Di Carlo	FOR THE PROPOSED INTERVENER

SOLICITORS OF RECORD:

Aitken Klee LLP Ottawa, Ontario	FOR THE APPELLANT
McCarthy Tétrault LLP Toronto, Ontario	FOR THE RESPONDENT
Stockwoods LLP Toronto, Ontario	FOR THE PROPOSED INTERVENER