Federal Court of Appeal | Cour d'appel fédérale

Date: 20241127

Docket: A-171-24

Citation: 2024 FCA 201

Present: **RENNIE J.A.**

BETWEEN:

PROMOTION IN MOTION, INC. DBA PIM BRANDS, INC.

Appellant

and

HERSHEY CHOCOLATE & CONFECTIONERY LLC

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 27, 2024.

REASONS FOR ORDER BY: RENNIE J.A.

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REASONS FOR ORDER

RENNIE J.A.

[1] Promotion in Motion, Inc. (PIM, the appellant) moves to strike paragraphs from the memorandum of fact and law of Hershey Chocolate & Confectionary LLC (Hershey, the respondent). In those paragraphs, Hershey challenges the Federal Court's admission of fresh evidence following an informal motion brought by PIM during the hearing of PIM's appeal from a decision of the Trademarks Opposition Board (*Promotion in Motion, Inc. v. Hershey Chocolate*

& Confectionary, LLC, 2024 FC 556, *per* Tsimberis J. [FC Decision]). PIM contends that Hershey's arguments in its memorandum challenging the decision of the Federal Court to allow the evidence regarding the outcome of the motion must be brought by cross-appeal. No cross-appeal having been filed, those paragraphs should be struck.

[2] The motion to strike fails. A cross-appeal is neither necessary nor appropriate in the circumstances. The respondent's cross-motion for leave to file a cross-appeal is therefore unnecessary and is dismissed.

[3] By way of background, on the morning of the Federal Court hearing, PIM sought leave to admit fresh evidence or an adjournment of the proceedings. Although Hershey agreed to accommodate PIM's informal motion on short notice to avoid an adjournment of the proceedings, it opposed the admission of the fresh evidence, and did so as well as in its written submissions filed thereafter.

[4] The Federal Court judge reserved her decision on the motion and permitted parties to file written representations concerning the impact of the fresh evidence after the hearing. The Federal Court dealt with the fresh evidence in its reasons for judgment, finding it admissible (FC Decision, at paras. 34-40). No separate order was issued on the motion, and the judgment on the appeal does not refer to its outcome.

[5] As a preliminary matter, it is noteworthy that the complexities of the instant motion flow directly from PIM's decision to seek leave to file fresh evidence on the morning of the hearing of

its own appeal. I express no opinion on whether the Federal Court erred in allowing the appellant's motion on such very late notice. It is clear, however, that this Court has consistently and repeatedly emphasized the importance of parties advancing their best case at the earliest opportunity (*Rosenstein v. Atlantic Engraving Ltd.*, 2002 FCA 503, at para. 9). The Practice Directives of the Federal Court speak to the same effect. The timely disclosure of evidence and identification of contentious issues in advance of a hearing ensures that issues are fully argued, that no party is prejudiced and enhances the Court's ability to manage the trial or hearing process.

[6] In light of the arguments raised by the appellant, it is evident that a review of the basic principles governing appeals of evidentiary issues is in order.

[7] It is trite law that an appeal lies from the order or judgment of a court, not from the reasons given (J. Sopinka, M.A. Gelowitz & W.D. Rankin, *Conduct of an Appeal*, 5th ed. Toronto: LexisNexis, 2022, at 30 [Sopinka]). In most cases, if the reasons are right, it is likely that the judgment is correct. However, circumstances arise where the judgment is correct, but for the wrong reasons (*Breslaw v. Canada (Attorney General),* 2005 FCA 152).

[8] Consistent with this basic rule, where a court order or judgment is favourable to a party, it is not required to file a cross-appeal unless it seeks a different disposition of the final judgment (*Miller Thomson LLP v. Hilton Worldwide Holding LLP,* 2019 FCA 156 [*Hilton*]). Rule 341(1)(*b*) of the *Federal Courts Rules*, S.O.R./98-106 (FCR), on filing cross-appeals, reflects the well-established jurisprudence in this regard. Nor is a cross-appeal required where a party

advances alternative arguments to sustain a decision. A cross-appeal is only required if a different disposition is sought (*Hilton*, at para. 12) or if the alternative position would lead to a different judgment (*Canada v. Jim Shot Both Sides*, 2022 FCA 20, at para. 40 [*JSBS*]).

[9] The appellant submits that a "different disposition" means the cross-appealing party will receive remedial "real-life, practical consequences". In the instant case, those practical consequences would be that it would have the benefit of appellate review of Federal Court's decision on the motion. This argument fails.

[10] This is a misreading of Stratas J.A.'s characterization of "real-life, practical consequences", which relate to differences in the order, not its reasons (*Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72, at paras. 12, 14 [*Refugees*]). Here, there are no consequences which required a cross-appeal. The respondent was successful in Federal Court and has no interest in disturbing that outcome. It is precisely because Hershey challenges part of the reasoning and not the judgment, that the cross-appeal is improper (*Refugees*, at paras 12, 14).

[11] As a general rule, this Court does not entertain an appeal from an evidentiary ruling made during a trial, regardless of whether the motion is formal or informal, rendered orally or in writing (*Munchkin, Inc. v. Angelcare Canada Inc.*, 2021 FCA 169, *Buffalo v. The Queen*, 2001 FCA 282, at paras. 2-3 [*Buffalo*]). While paragraph 27(1)(*c*) of the *Federal Courts Act*, RSC 1985 c F-7 creates a right of appeal from interlocutory orders of the Federal Court, different rules apply where the ruling arises in the course of a trial. In these circumstances, appeals are available

only under exceptional circumstances, as required by the interests of justice (*Sawridge Band v. Canada*, 2006 FCA 228, at paras. 26-28, Sopinka, at 424). This could arise where the admissibility of the evidence would cause significant prejudice to the parties or where a final disposition on the evidentiary question may have a dramatic bearing on the length of the trial. The conjunction of these two factors – prejudice and the due administration of justice will rarely occur. That is why, for example, there are statutory guarantees of rights of appeal of evidentiary rulings in some cases. Section 37.1 of the *Canada Evidence Act*, RSC 1985 c C-5 , for example, provides an immediate right of appeal to the appellate court in matters involving informer privilege (*Basis v. the Queen*, 2009 SCC 52, at para. 19).

[12] Consistent with this framework, pending appeals of interlocutory orders should be fully disposed of before trial (Sopinka, at paras. 77-78), and once commenced, the trial should not be interrupted by interlocutory appeals (*Buffalo*, at para. 3). Once a final judgment is issued, a party disagreeing with the judge's treatment of the evidence in the reasons may bring their challenge by argument in their memorandum in response to an appeal (*Froom v. Canada (Minister of Justice)*, 2004 FCA 352, at para. 11).

[13] To conclude, a respondent on an appeal which disagrees with a judge's treatment of the evidence need not file a cross-appeal unless it is seeking a different disposition of the final order (*Berenguer v. SATA Internacional – Azores Airlines*, at paras 10-11).

[14] By appealing the Federal Court's judgment, PIM opened the door for the respondent to advance additional arguments or reasons in support of the judgment appealed from (*Kligman v.*

M.N.R. (C.A.), 2004 FCA 152). That said, the ability of the respondent to do so is not unrestrained. A respondent cannot leverage or exploit its discretion to "unwind" other aspects of the judgment for which a notice of cross-appeal ought to have been filed (*JSBS*, at para 54).

[15] In its memorandum, PIM highlighted the admitted fresh evidence, consisting of registered certification marks, as the foundation of a central issue on appeal. In one of the two main issues it raises, PIM argues that this evidence demonstrates the distinctiveness of the SWISS element of PIM's SWISSKISS marks for the purposes of the confusion analysis. Thus, it is unsurprising that Hershey responded in its memorandum by taking the same position it advanced in its written submissions on the informal motion: that the appellant's fresh evidence was inadmissible.

[16] It is readily apparent that Hershey argues in support of upholding the Federal Court's order, advancing an alternative basis upon which this Court should not intervene with the Federal Court judgment on appeal (*JSBS*, at para 58). I note the following:

- Paragraph 5 outlines the respondent's position that both the Trademarks Opposition Board and the Federal Court committed no reviewable error justifying intervention;
- Paragraph 6 limits the issues on appeal to the standard of review and whether the Court committed a reviewable error;
- Paragraph 7 restates the respondent's position that the Federal Court committed no reviewable error and submits, in the alternative, that any such errors would not materially affect the disposition of the proceedings;

- Paragraphs 31 and 33-34 challenge the Federal Court judge's admission of PIM's fresh evidence on various policy bases;
- Paragraph 32 links the admission of the appellant's fresh evidence to PIM's ability to develop a new argument founding the instant appeal;
- Paragraph 34 connects the respondent's arguments in the impugned paragraphs to its prior submissions in the Respondent's Application Supplemental Memorandum; and
- Paragraph 75 simply claims relief in the form of the appeal's dismissal and costs.

[17] The respondent's written representations in reply to PIM's motion to strike mirror the foregoing position:

- Paragraphs 3 and 20 explicitly identify that the respondent is not seeking a different disposition of the judgment and that the impugned paragraphs only raise alternative grounds on which the decision should be upheld; and
- Paragraph 24 outlines the respondent's approach to the outcome of the informal motion as paralleling its treatment of other affidavits in the proceeding.

[18] In light of this, it is fair to conclude that Hershey does not seek to raise a new argument on appeal nor seek a different disposition of the Federal Court's judgment; nor does it overreach to unravel other aspects of the judgment unrelated to the question of the admissibility of the fresh evidence. There is likewise no collateral attack, contrary to PIM's contention. The ruling on

admissibility was subsumed in the Federal Court's reasons for judgment and may be challenged in Hershey's responding memorandum. There is nothing collateral or indirect about this.

[19] The appellant submits that Hershey should have sought an order to vary the judgment, pursuant to Rule 397 of the *Federal Courts Rules*, to include the outcome of the motion, thereby granting Hershey a foundation for a cross-appeal.

[20] This is nonsensical. A final judgment disposes of parties' substantive rights in a proceeding. The argument that a party is required to re-open the matter to add the outcome of a motion to preserve their right to address the evidentiary consequences of that motion in a hypothetical prospective appeal has no basis in law or common sense. If the Court were to condone such an approach, there would be no end to litigation; the stability of judgments, a cornerstone of our legal system, would be undermined.

[21] In any event, a Rule 397 motion to reconsider is not applicable in the circumstances. Rule 397 motions are available only on vary narrow grounds where an order is unsupported by the reasons (*South Yukon Forest Corporation v. Canada*, 2006 FCA 34, at para. 39), or the Court overlooked or accidentally omitted a matter that should have been addressed (*Novopharm Limited v. Janssen-Ortho Inc.*, 2007 FCA 105, at paras. 4, 6). Here, the reasons for judgment subsume the outcome of the motion. Nothing was overlooked or omitted.

[22] The motion to strike will, therefore, be dismissed with costs fixed in the amount of $1,500. Hershey's cross-motion will be dismissed without costs.

"Donald J. Rennie"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-171-24
STYLE OF CAUSE:	PROMOTION IN MOTION, INC. DBA PIM BRANDS, INC. v. HERSHEY CHOCOLATE & CONFECTIONERY LLC

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	RENNIE J.A.
DATED:	NOVEMBER 27, 2024

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