Date: 20070510

Docket: T-697-02

Citation: 2007 FC 504

[ENGLISH TRANSLATION]

BETWEEN:

OSMOSE-PENTOX INC.

Applicant

and

SOCIÉTÉ LAURENTIDE INC.

Respondent

REASONS FOR ORDER

PROTHONOTARY MORNEAU

[1] This is a motion by the applicant, Osmose-Pentox Inc. (hereinafter Osmose), in which it is seeking to have me recused as manager of this case on the grounds that the facts raised in this motion establish a reasonable apprehension of bias against it on my part.

Preliminary objections by the respondent

[2] In its response record regarding this motion, the respondent, Société Laurentide Inc. (hereinafter Laurentide), raises a series of preliminary objections that should, in its view, lead me to, among other remedies, strike the entire motion, strike all or some of the affidavits in support of it, or disqualify counsel in Osmose's record or the legal firm of Dagenais Jacob.

[3] Although the preliminary objections specifically identified in the paragraph above present serious aspects, I will nonetheless dismiss them following consideration. More specifically, the facts that Ms. Dagenais swore an affidavit in support of this motion and that she was cross-examined regarding it does not lead me to disqualify her legal firm given that this motion was argued by an attorney retained specifically by Osmose for that purpose. I also find that Ms. Dagenais can be seen as being sufficiently removed from the current debate to avoid having her law firm disqualified.

[4] Moreover, by not setting aside any material element submitted by Osmose, the Court can, in the interest of the administration of justice, immediately examine the merits of the motion filed by Osmose.

Factual and procedural contexts behind the motion

[5] The main elements of these contexts seem to be as follows:

[6] As I had the opportunity to note in my decision on December 14, 2005, the two parties are competitors in the field of wood preservatives.

[7] In an action initiated in 2002, Osmose accused Laurentide of having usurped its rights by using the trademark “Conservator”.

[8] In defence and counterclaim, Laurentide denied any infringement and argued that the Osmose trademark is invalid and must be struck.

[9] In its action, Osmose sought as remedy the profits that Laurentide may have made by its infringing actions.

[10] Not satisfied with the affidavit of documents produced in that regard by Laurentide in early 2003 following a deadline set by the Court in an order dated February 21, 2003, Osmose filed a motion on May 5, 2003, to force Laurentide to file a more complete affidavit of documents.

[11] Osmose at first bases its motion for recusal in part on my alleged statements at that hearing on May 5, 2003, and discussions for an out-of-court settlement on May 13 of the same year.

[12] The fact that I was a mediator at the time on May 13, 2003, and that I then continued to act as an adjudicator on motions allegedly also places me in a conflict of interest and allegedly led me, according to Osmose, to contravene the rule that a mediator cannot subsequently act as an adjudicator in the same case.

[13] Finally, as a third ground for recusal, Osmose cites certain paragraphs from my order on December 14, 2005, to claim that those paragraphs, by themselves or combined with the statements made on May 5, 2003, show that there is a reasonable apprehension of bias on my part.

Analysis

[14] For the following reasons, I feel that Osmose has not established evidence of a real likelihood of bias on my part.

[15] Regarding the concepts of impartiality and bias, it is appropriate to begin our analysis with the following statements by the Supreme Court of Canada in *R.* v. *S. (R.D.),* [1997] 3 SCR 484, at page 528:

> In *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 685, Le Dain J. held that the concept of impartiality describes a "state of mind or attitude of the tribunal in relation tot he issues and the parties in a particular case". He added that "[t]he word 'impartial' . . . connotes absence of bias, actual or perceived". See also *R. v. Généreux*, [1992] 1 S.C.R. 259, at p. 283. In a more positive sense, impartiality can be described -- perhaps somewhat inexactly -- as a state of mind in which

> the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions.
>
> In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues.

[16] As for the "test" or criterion applicable to an assessment of a reasonable apprehension of bias, Bastarache J. of the Supreme Court recently noted the following:

> The test for apprehension of bias takes into account the presumption of impartiality. A real likelihood or probability of bias must be demonstrated? *(R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para 112 and 113).
>
> (Emphasis added)

[17] In *R. v. S. (R.D.)*, at page 532, the Supreme Court noted as follows how thorough it must be in concluding that there is bias:

> Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice.
>
> (Emphasis added)

[18] At the same time, the Court indicates that the careful consideration in question is entirely dependent in each case on the evidence submitted by the party raising the reasonable apprehension of bias:

> The onus of demonstrating bias lies with the person who is alleging its existence: *Bertram*, supra, at p. 28; *Lin*, supra, at para. 30. Further, whether a reasonable apprehension of bias arises will depend entirely on the facts of the case.

[19] In *Droit de la Famille -1559 (C.A.)*, [1993] R.J.Q. 625, at page 633, Delisle J., writing for the majority of the Court of Appeal of Quebec, after noting the now famous words of De Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, (1978) 1 S.C.R. 369, at pages 394-95, analyzes the reasonable apprehension of bias using the following pragmatic approach:

> [TRANSLATION]
>
> To be grounds for recusal, the apprehension of bias must thus:
>
> *(a)* be reasonable, in that it must be an apprehension that is both logical, i.e. that is inferred from serious grounds, and objective, i.e. that would be shared by the person described in (*b*) below, if placed in the same circumstances; it cannot be a matter of a slight, frivolous or isolated apprehension;
>
> *(b)* be from a person who is:
>
> (1) sensible, not overly sensitive, not scrupulous, anxious, naturally worrisome or quick to blame;
>
> (2) well-informed, having studied the matter carefully and realistically, i.e. free of all emotion; the motion for recusal cannot be impulsive or a means of choosing the person to preside over the debates; et
>
> *(c)* based on serious grounds; an analysis of this test must be very demanding based on whether or not debates will be recorded and whether there is a right to appeal.
>
> (Emphasis added)

[20] Armed with these principles, we can now examine the grounds raised by Osmose in support of its motion.

[21] Regarding the hearing on May 5, 2003, I will not repeat or comment on the statements that denounced by Osmose's affiants. It must be recognized that those statements or comments by the Court at that time, at least for the hearing on May 5, 2003, only reflect part of the context and that a random reading and consideration of those statements from May 5 and 13, 2003 would not lead a reasonable, objective and well-informed person to conclude that there is a real likelihood of bias (the test to be met).

[22] What the Court sought to accomplish impartially on May 5, 2003, despite the reticence expressed by Osmose, was simply what is set out in the letter and spirit of the order issued on May 5, namely to adjourn the Osmose motion and call the two parties to a discussion session on the following May 13, when the out-of-court settlement of the matter would be on the agenda. At that time, the Court had in mind Rule 3 of the *Federal Courts Rules* (the Rules) and the interests of the administration of justice.

[23] That order on May 5, and its preamble, read as follows:

> [TRANSLATION]
>
> Motion by the applicant [Osmose] seeking:
>
> A) An order made by the Court to have the pleadings of the respondent [Laurentide] struck in whole or in part;

B) An order to have an accurate or complete affidavit of documents served and filed by the respondent;

C) An order for the respondent to pay costs;

D) Any other order that the Court deems necessary for the applicant to be relieved of the rules of procedure that would contravene the presentation of this motion;

[Rules 222, 223 and 227 paragraphs (b), (c) et (d) of the *Federal Courts Rules* (1998)]

ORDER

The applicant's motion is adjourned *sine die*.

The parties and their counsel are hereby summoned to a discussion session on May 13, 2003 at 10:00. In the meantime, the parties shall exchange all documents that they feel in good faith could help in the eventual settlement of this matter, as discussed in Court on May 5, 2003.

In the meantime, the deadline set out in the order by the Court on February 21, 2003 is suspended, under Rule 3 and in the interests of the administration of justice, which requires at the least that the parties meet the Court face to face.

(Emphasis added)

[24] That order was never appealed by Osmose.

[25] On May 13, 2003, despite a careful mediation approach by the Court, it became clear that the parties would not reach a settlement in the matter. As this gradually became clear, along with the fact that Osmose was apparently recording the debates, the Court was led to end the exercise. That was all.

[26] The Osmose motion that was adjourned by the order on May 5, 2003, was then brought back to the attention of the Court and, on July 16, 2003, I made an order in which I allowed in part the Osmose motion to have Laurentide serve it a more complete affidavit. An appeal by Osmose of that order was dismissed with costs by a judge of this Court on September 5, 2003.

[27] My adjudication on July 16, 2003, and my other adjudications thereafter lead us to consider Osmose's second ground for recusal, namely that the role of adjudicator after acting as mediator is prohibited and that that situation puts me in a conflict of interest.

[28] That second ground certainly does not meet the required test.

[29] It must be understood that the wording of Rules 47 and 386 establishes that the Court may, of its own initiative, summon the parties to a dispute resolution conference.

[30] Those rules read as follows:

47. (1) Unless otherwise provided in these Rules, the discretionary powers of the Court under these Rules may be exercised by the Court of its own initiative or on motion.	**47.** (1) Sauf disposition contraire des présentes règles, la Cour exerce, sur requête ou de sa propre initiative, tout pouvoir discrétionnaire que lui confèrent les présentes règles.
(2) Where these Rules provide that powers of the Court are to be exercised on motion, they may be exercised only on the bringing of a motion.	(2) Dans les cas où les présentes règles prévoient l'exercice d'un pouvoir discrétionnaire sur requête, la Cour ne peut exercer ce pouvoir que sur requête.
386. (1) The Court may order that a	**386.** (1) La cour peut ordonner qu'une

proceeding, or any issue in a proceeding, be referred to a dispute resolution conference, to be conducted in accordance with rules 387 to 389 and any directions set out in the order.	instance ou une question en litige dans celle-ci fasse l'objet d'une conférence de règlement des litiges, laquelle est tenue conformément aux règles 387 à 389 et aux directives énoncées dans l'ordonnance.
(2) Unless the Court orders otherwise, a dispute resolution conference shall be completed within 30 days.	(2) Sauf ordonnance contraire de la Cour, la conférence de règlement des litiges ne peut s'étendre sur plus de 30 jours.

[31] Moreover, Rule 387 states that a resolution conference is conducted by a case manager, in this case me in principle.

[32] The beginning of Rule 387 reads as follows:

387. A dispute resolution conference shall be conducted by a case management judge or prothonotary assigned under paragraph 383(*c*), who may	**387.** La conférence de règlement des litiges est présidée par un juge responsable de la gestion de l'instance ou le protonotaire visé à l'alinéa 383*c*), lequel
(…)	(…)

[33] It is therefore possible, under the letter and spirit of the rules, for a resolution session to be conducted by a prothonotary during the interlocutory stage. If the session does not result in a resolution, the prothonotary may continue to manage and hear motions in that case. Any other conclusion would undermine the scheme set out in Rule 386 *et seq*.

[34] As for the prohibition in Rule 291, it is clear that it refers to judge hearing the merits. Rule 391 reads as follows:

391. A case management judge who conducts a dispute resolution conference in an action, application or appeal shall not preside at the hearing thereof unless all parties consent.	**391.** Le juge responsable de la gestion de l'instance qui tient une conférence de règlement des litiges dans le cadre d'une action, d'une demande ou d'un appel ne peut présider l'audience que si toutes les parties y consentent.

[35] Regarding the creation of any conflict of interest as a result of the dynamic discussed above, I do not see any because I had no personal or other interest in favouring either party in any of the exercises of adjudication or mediation.

[36] That brings us to the third ground for recusal raised by Osmose. As indicated previously, this ground is that certain paragraphs of my order on December 14, 2005, on their own or in conclusion with the statements made on May 5, 2003, and those made on May 13, 2003, were such that they meet the test.

[37] I do not at all agree.

[38] Here again, I do not intend to repeat or comment further on what my decision on December 14, 2005 established. Most of the paragraphs denounced by Osmose are in the third part of my decision, in which I explained at length the reasons that led me at that time, of my own initiative under Rules 47 and 107, to order that the proceedings be severed so the questions of liability, i.e. the question of infringement of the disputed Osmose trademark and that of the

invalidity of that trademark, could be decided first and the question of remedies (profits or damages) could be determined in a separate proceeding if the Court found that the trademark was valid and that there had been infringement.

[39] I will simply note that, on March 1, 2007, Hugessen J. of this Court somewhat restored my order to sever from December 14, 2005 after the matter was brought to his attention by Laurentide, who was acting on the invitation of De Montigny J. of this Court, who had previously overturned (see 2006 FC 386) my order to sever on the grounds that, in doing so, I had acted against the order by Gauthier J. of this Court who, in February 2003, had dismissed a similar order sought by Laurentide.

[40] In an *obiter dictum* in his decision, however, De Montigny J. indicated that Hugessen J., who works with me in managing this case, had the necessary authority to order such a severing. In part, De Montigny J. stated the following:

> [33] (…) Much emphasis was placed on the fact that the respondent's lack of cooperation was the primary cause of the delays and the complexity of the proceedings, far more than the applicant's choice to opt for the profits allegedly made by the respondent. The assessment made by the prothonotary of the best procedure to follow in resolving the matter as fairly and effectively as possible, and the reasons which led him to make that choice, seem to the Court to be at the heart of his discretion as a case manager, and this Court will only intervene with great hesitation and in the clearest cases on appeal from this type of decision. Despite the efforts made by the applicant in its written and oral submissions, it did not persuade the Court that the prothonotary made an obvious error in his assessment of the facts.

[34] That being said, however, I must subscribe to the applicant's argument regarding the prothonotary's lack of power in the very special context of this matter. Rule 50(1)(g) expressly provides that the prothonotary can make no order the effect of which is to stay, set aside or vary an order of a judge, except for an order made pursuant to paragraphs 385(a), (b) or (c). The wording of this provision reads as follows:

50. (1) Prothonotaries - A prothonotary may hear, and make any necessary orders relating to, any motion under these Rules other than a motion	50. (1) Protonotaires - Le protonotaire peut entendre toute requête présentée en vertu des présentes règles - à l'exception des requêtes suivantes - et rendre les ordonnances nécessaires s'y rapportant :
***	***
g) to stay, set aside or vary an order of a judge, other than an order made under paragraph 385 (a), (b) or (c)	g) une requête pour annuler ou modifier l'ordonnance d'un juge ou pour y surseoir, sauf celle rendue aux termes des alinéas 385a), b) ou c)

[35] Accordingly, as Madam Justice Gauthier did not make her order as a case manager, the prothonotary could not vary it or set it aside by another order. Rule 47 (and hence rule 107) can be of no assistance to him, since rule 50 is specifically to the opposite effect, within the meaning of rule 47. Moreover, it is significant that a prothonotary is given the power to vary an order by a judge when it was made in the context of powers exercised by him or her as a case manager. From this it must necessarily follow that the prothonotary does not have such a power when the judge's order was made in some other capacity.

[36] Although this result may seem excessively formalistic, it is not without consequence, at least in this case. It should be borne in mind that, in his order of October 24, 2003, the Chief Justice designated Mr. Justice Hugessen to manage this proceeding, with the assistance of Prothonotary Morneau.

> Accordingly, it is always possible for Mr. Justice Hugessen to vary the order by Madam Justice Gauthier, on the prothonotary's recommendation or of his own motion, and order that the proceeding be severed.

[41] As for Hugessen J., his decision (see 2007 FC 242) reads as follows:

> **REASONS FOR ORDER AND ORDER**
>
> [1] The defendant [Laurentide] in this trade mark infringement action moves for severance of the issues of validity and infringement from those relating to remedy.
>
> [2] An earlier motion to the same effect was refused by a judge of this Court more than four years ago. Since that time not only has a lot of water flowed under the bridge but the parties have engaged in almost unceasing guerilla warfare relating to interlocutory matters so that the action is still nowhere near to being ready for trial. The matter is case managed by a prothonotary and the latter, of his own motion, for reasons correctly applying the criteria which the Court has developed under Rule 107, made an Order essentially identical to that now being sought. An appeal to a judge of this Court was allowed solely on the ground that the prothonotary had exceeded his jurisdiction in varying an Order previously made by a judge. A further appeal to the Federal Court of Appeal was unsuccessful save for a matter not relevant to the present reasons.
>
> [3] In my view this is clearly a case for severance. The initial decision refusing such relief was made in circumstances quite different from those which obtain now and it is common ground that the refusal of severance (similarly to the granting of it) does not prevent the Court from revisiting the question as the case develops. Both the prothonotary and the judge who heard the appeal from the latter's Order were of the opinion that the circumstances were appropriate for severance. So am I. Examinations for discovery have become bogged down in matters relating to the defendant's profits from the alleged infringement. An accounting for profits is a notoriously

> cumbersome and lengthy procedure and it is very common for this Court in intellectual property cases to order that validity and infringement be dealt with prior to damages or profits, which will often, in any event be made the subject of a reference. The first stage of the trial may well render the second stage unnecessary and should in any event be less lengthy and costly.
>
> [4] There will be an Order to that effect; costs will be in the discretion of the judge who presides the first stage of the trial.
>
> **ORDER**
>
> **THIS COURT ORDERS that**
>
> 1. Issues of infringement and validity are severed from issues relating to damages or profits and will be decided first.
>
> 2. Costs to be in the discretion of the trial judge.
>
> (Emphasis added)

(On March 5, 2007, Osmose appealed this decision by Hugessen J.)

[42] Moreover, even admitting the Osmose approach that it was my decision on December 14, 2005, that sparked things off, that crystallized for Osmose what was apparently only seen until then as partial suspicions, the fact nonetheless remains that it was not until February, or March 2007 that Osmose formally materialized its grounds for recusal. Significant time passed between December 2005 and February 2007, which leads me to note that this motion by Osmose is late and that this additional ground is sufficient on its own to result in the dismissal of this motion (see article 236 of Quebec's *Code of Civil Procedure* and *Doyle* v. *Sparling*, [1992] R.J.Q. 11 (C.A.Q.)).

[43] In closing, and for more certainty, any other ground for recusal raised by Osmose in its motion and not specifically discussed here is dismissed.

[44] The motion by Osmose seeking my recusal as manager of this case is therefore dismissed. As for costs, in the exercise of my discretion under Rule 400 *et seq.*, I am of the view that Laurentide is entitled to the maximum costs on column III of Tariff B of the Rules.

"**Richard Morneau**"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-697-02
STYLE OF CAUSE:	OSMOSE-PENTOX INC. Applicant and SOCIÉTÉ LAURENTIDE INC. Respondent
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	April 30, 2007
REASONS FOR ORDER:	PROTHONOTARY MORNEAU
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