Federal Court of Appeal | Cour d'appel fédérale

Date: 20250813

Docket: A-108-23

Citation: 2025 FCA 145

CORAM: **STRATAS J.A.**
LEBLANC J.A.
BIRINGER J.A.

BETWEEN:

BINAL PATEL, BALSAM SPA, a.k.a. BALSAM DAY SPA

Appellants

and

DERMASPARK PRODUCTS INC. and POLLOGEN LTD.

Respondents

Heard at Toronto, Ontario, on December 5, 2023.

Judgment delivered at Ottawa, Ontario, on August 13, 2025.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: LEBLANC J.A.
BIRINGER J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20250813

Docket: A-108-23

Citation: 2025 FCA 145

CORAM: **STRATAS J.A.**
LEBLANC J.A.
BIRINGER J.A.

BETWEEN:

BINAL PATEL, BALSAM SPA, a.k.a. BALSAM DAY SPA

Appellants

and

DERMASPARK PRODUCTS INC. and POLLOGEN LTD.

Respondents

REASONS FOR JUDGMENT

STRATAS J.A.

[1] This is an appeal from the judgment of the Federal Court (*per* Kane J.): 2023 FC 388. The Federal Court decided that the appellants were liable, jointly and severally, in the amount of $45,000, representing statutory damages of $5,000 for copyright infringement, $20,000 for trademark infringement, passing off, depreciation of goodwill and unfair competition, and

$20,000 for punitive damages. The Federal Court also awarded pre-judgment and post-judgment interest in the amount of 2% above the prime rate, compounded half yearly.

[2] The appellants appeal against the decision that they were liable and, alternatively, the amount awarded as damages and the award of compound interest.

[3] I would dismiss this appeal in its entirety. However, there is one aspect of the Federal Court's judgment—on the issue of pre-judgment interest—that requires clarification. I do this at the end of these reasons.

[4] This appeal demonstrates, as many do, that the standard of review is all-important on appeals. In many ways, the appellants would like this Court to revisit many of the issues the Federal Court decided. This we cannot do.

[5] To succeed on appeal, the appellants must show an error in law, an error in an extricable question of law on an issue of mixed fact and law, or palpable and overriding error on a question of fact or a factually suffused question of mixed law and fact. See *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 and, especially on questions of fact, *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401.

[6] Appellate courts bandy around the phrase "questions of mixed fact and law" but seldom define it, much to the prejudice of young practitioners, most of whom graduated from law schools that did not instruct them on the standard of review. For their benefit, questions of mixed

fact and law are those where appellate courts apply the law to the facts of the case. This includes so-called discretionary questions where courts apply legal standards to a set of facts: *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331, citing *Decor Grates Incorporated v. Imperial Manufacturing Group Inc.*, 2015 FCA 100, [2016] 1 F.C.R. 246 at paras. 15-29; see also *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344 at paras. 71-72.

[7] In some cases, legal questions predominate or fundamentally taint the question of mixed fact and law. In the parlance of appellate standards of review, this is called "an extricable question of law". When there is an extricable question of law, the appellate court can examine that question of law and decide it on a standard of correctness—*i.e.*, without any deference at all to the first-instance court.

[8] But where legal questions are not extricable, *i.e.*, do not predominate or fundamentally taint the question of mixed fact and law—in other words, where the question of mixed fact and law is factually suffused or the facts predominate—the appellate court can interfere only for palpable and overriding error.

[9] Palpable means obvious. And overriding means capable of changing the result of the case. As a practical matter, these two things very seldom happen together. First-instance judges almost never make obvious factual errors that can change the result of the case. Thus, reversal on this ground is rare indeed.

[10] On occasion, some have said that a lower standard, such as “unsafe verdict”, might have been better in furthering accountability and high-quality decision-making. In some countries, that is the standard. But that is not our standard. The Supreme Court decided upon “palpable and overriding error” as our standard. It has kept that standard almost for a quarter-century.

[11] Truly, palpable and overriding error is a tough standard:

> 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), 217 O.A.C. 269 (C.A.) at paragraphs 158-59; *Waxman*, [186 O.A.C. 201 at paragraphs 278-84]. “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.

(*Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 4 B.L.R. (5th) 31 at para. 46, adopted by the Supreme Court in *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at para. 38.)

[12] Later cases have clarified that the palpable and overriding error standard can be met not only by “one decisive chop” at the “tree” but by “several telling ones”: *Mahjoub* at paras. 64-65.

[13] Examples of things that can qualify under this difficult-to-meet standard include a number of different types of errors: “obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received [not] in accordance with the doctrine of judicial notice [*R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R.

458], findings based on improper inferences [*Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161, 400 D.L.R. (4th) 723 at paras. 168-170] or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence": *Mahjoub* at para. 62. But, as said before, only errors on central points that can change the result of the case will qualify.

[14] This discussion is not meant to suggest that the judgment of the Federal Court in this case survives only because the palpable and overriding error standard is hard to meet. But it is to suggest that many of the appellants' submissions in this Court—vigorously argued and gamely pursued—run straight into this unforgiving and uncompromising standard. As a result, they must fail.

[15] The respondents are the manufacturer and distributor of facial treatment products and a related machine regulated by Health Canada. The appellants are a boutique full-service day spa, the Balsam Day Spa, and its main director and sole shareholder, Ms. Patel. The Federal Court found that the appellants used a counterfeit machine and counterfeit products—products said to be those of the respondents but were not—and counterfeit advertising contrary to the *Trademarks Act*, R.S.C. 1985, c. T-13 and the *Copyright Act*, R.S.C. 1985, c. C-42.

[16] Overall, the Federal Court repeatedly found Ms. Patel, the main witness for the appellants, not worthy of belief. At paragraph 64 of its reasons, the Federal Court found that Ms. Patel's evidence regarding the counterfeit machine she bought and used and her communications with the respondents "cannot be relied on" because her evidence was "inconsistent, evasive and evolving". At paragraph 74, the Federal Court repeats that Ms. Patel's evidence was "evolving

and inconsistent". These findings on credibility—devastating as they are—and her clear preference for the testimony of the respondents' two witnesses, Mr. Ben-Shlomo and Mr. Gurevitch (at paras. 63 and 74), are findings of fact. Thus, they can be set aside only for palpable and overriding error. Frequently findings of credibility of a key witness cast a long shadow over a case and, as far as the Federal Court was concerned, that is true in this case.

[17] In this Court, the appellants submit that the Federal Court (at para. 44) did not consider some of Ms. Patel's evidence. The thrust of their submission is that the Federal Court ignored key evidence. This, they say, is palpable and overriding error.

[18] As a matter of law, the mere non-mention of evidence, without more, does not qualify as palpable and overriding error: *Mahjoub* at para. 66. First-instance courts benefit from a rebuttable presumption that they considered and accessed all the material placed before them: *Mahjoub* at para. 67, citing *Housen* at para. 46. Also in considering submissions such as this, appellate courts must keep in mind the task of a first-instance court in drafting reasons. Reasons are best when they distil and synthesize, not when they try to be encyclopedic in recording every syllable of a multi-day trial: *South Yukon* at paras. 49-51; *Mahjoub* at paras. 69. Distilling and synthesizing is what the Federal Court did and in a permissible way.

[19] The appellants' submission that the Federal Court did not consider the evidence is belied by the fact that the Federal Court was quite painstaking in its examination of Ms. Patel's evidence: see paras. 65-76 of its reasons.

[20] The appellants also challenge the Federal Court's central finding that the machine was counterfeit. The respondents submit that this is a pure question of fact that can be set aside only for palpable and overriding error.

[21] The respondents are correct. The Federal Court made clear factual findings amply supported by the evidence in this case, much of it set out in its reasons for judgment.

[22] Of relevance to its later award of punitive damages, the Federal Court found that the appellants knew or should have known that the machine they were using was counterfeit. They were aware of the respondents' machine and its price but went to a third-party online site to buy another machine for one-fifth of the price of the respondents' machine and, thus, "should have been alerted to the risk that this was a counterfeit product": Federal Court's reasons at paras. 62-76 and 147, particularly para. 67. The individual respondent, Ms. Patel, was "reckless in her purchase and ignored red flags that would have alerted a reasonable buyer to make inquiries and/or to not purchase the products". All of these are factual findings based on the evidence and cannot be set aside or recharacterized in a more favourable light.

[23] Ms. Patel was aware of the price of the respondents' genuine products, and she wanted them to enhance the services to her clients but did not want to pay that price: Federal Court's reasons at para. 147.

[24] On the issue of damages, the appellants say that the respondents did not prove damages and, alternatively, the Federal Court erred in its award of damages.

[25] As the Federal Court noted, the damages in this case are not the sort that can be proven in a concrete way, such as by looking at receipts. They consist of more intangible things but very important things, such as the respondents' reputation and goodwill. It is trite that the use of counterfeit machines and counterfeit products, alongside the distribution of literature purporting to be that of the respondents, has every potential to harm reputation and goodwill. As a matter of fact, the Federal Court found that harm to be present and added that it is difficult to determine the extent of infringement and the harm it caused.

[26] These findings, factual in nature, cannot be set aside based on the evidentiary record in this case and the standard of palpable and overriding error.

[27] And as a matter of law, the Federal Court correctly concluded that where the extent of infringement and the harm it caused is difficult to establish, lump sum damages (sometimes misdescribed as nominal damages), estimated as best as one can, may be appropriate. See *Penvidic Contracting Co. v. International Nickel Co. of Canada*, [1976] 1 S.C.R. 267 at 279-280; *Lululemon Athletica Canada Inc. v. Campbell et al.*, 2022 FC 194; *Ragdoll Productions (UK) Ltd. v. Jane Doe*, 2002 F.C.T. 918, [2003] 2 F.C. 120 (and see paras. 49-50 on the misdescription of these damages as "nominal"); *101100002 Saskatchewan Ltd. v. Saskatoon Co-operative Association Limited*, 2022 SKCA 12. Damages of this sort can only be awarded where there is "some evidence on which it can be concluded that the claimant sustained damage and some evidence as to the nature of the damage": *0867740 B.C. Ltd. v. Quails View Farm Inc.*, 2014 BCCA 252 at para. 46; *Saskatoon Co-op* at para. 23. That standard is more than met here.

[28] The Federal Court observed (at para. 136) that the lost sale of even one of the respondents' machines is $22,000. We are in the realm of a "lost sale" because the appellants bought a counterfeit machine rather than buying the respondents' machine. And the net revenue from the sale of the counterfeit products and services—revenue denied to the respondents—was around $2,000 (at para. 146). In the end, the Federal Court awarded the respondents $25,000 in compensatory damages, an amount barely beyond $24,000. Not much at all was given for harm to reputation and goodwill. Even if we were to delve into this issue without affording the Federal Court any deference, these facts amply demonstrate the acceptability of the damages award.

[29] In this Court, the appellants also challenge the Federal Court's decision to make Ms. Patel personally liable along with the corporate appellant. Ms. Patel was only a director and shareholder of the corporate appellant which owned and operated the Balsam Day Spa. They say that there was no factual or legal basis to visit liability upon her.

[30] The leading case in this Court on the possible liability of directors and shareholders for a corporate liability is *Mentmore Manufacturing Co. v. National Merchandise Manufacturing Co.* (1978), 40 C.P.R. (2d) 164 (F.C.A.).

[31] The appellants do not challenge *Mentmore* or the criteria set out in it. Thus, they do not raise a legal issue here. But even if they did, they would be met with the doctrine of horizontal *stare decisis*.

[32] The general rule is that we are bound by an earlier decision on point—here *Mentmore*—and must follow it: *R. v. Sullivan*, 2022 SCC 19, [2022] 1 S.C.R. 460 at paras. 73-78; *Miller v. Canada (Attorney General)*, [2002] FCA 370, 220 D.L.R. (4th) 179. We can depart from an earlier decision only if asked to do so and only if there is "manifest error" in the sense that the earlier decision overlooked a relevant statutory provision or a case that ought to have been followed: *Miller* at paras. 10 and 22. And, in an exception not potentially relevant in this case, departures from past decisions in public law matters may be warranted where there are "evolving legislative and social facts" that add up to profound "social change" or there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate": *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342 at para. 36; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 at para. 44; *Miller* at para. 22. As said above, the appellants have not raised any of these. But even if they had, they are not present here.

[33] I note that *Mentmore*, although decided nearly a half-century ago, continues to be applied without question in the Federal Court system: see, e.g., *Louis Vuitton Malletier SA v. Singga Enterprises (Canada) Inc.*, 2011 FC 776; *Biofert Manufacturing Inc. v. Agrisol Manufacturing*, 2020 FC 379 at paras. 161-162; *Boulangerie Vachon Inc. v. Racioppo*, 2021 FC 308; *Trans-High Corporation v. Conscious Consumption Inc. et al.*, 2016 FC 949. Contrary to the views of some, precedents are never issued with a "best before" date stamped on them. And good wisdom is timeless. So absent demonstration of manifest error or some sort of epic change in social circumstances, old stuff binds us just as much as the new.

[34] In *Mentmore* (at p. 171), the Court recognized the "general rule" that officers, directors and shareholders of a corporation "enjoy the benefit of the limited liability afforded by incorporation". But the Court also noted that competing against that general rule is the "principle that everyone should answer for…tortious acts". The Court's legal test for personal liability must be a "balancing act" that leaves "room…for a broad appreciation of the circumstances of each case to determine whether as a matter of policy they call for personal liability".

[35] In *Mentmore* (at p. 174), this Court settled upon the following test:

> …there must be circumstances from which it is reasonable to conclude that the purpose of the director or officer was not the direction of the manufacturing and selling activity of the company in the ordinary course of his relationship to it but the deliberate, wilful and knowing pursuit of a course of conduct that was likely to constitute infringement or reflected an indifference to the risk of it.

[36] The appellants did not raise the legal question whether the Federal Court's use of *Mentmore* was correct or whether *Mentmore* is still good law. Nevertheless, a quick review of the case law shows that *Mentmore* remains good law. Our Court has not modified or qualified *Mentmore* in any way. And *Mentmore* has not been overtaken by later Supreme Court authority. Indeed, *Mentmore* is consistent with the principles set out in the Supreme Court's decisions in *Kosmopoulos v. Constitutional Insurance Co.*, [1987] 1 S.C.R. 2 and *Cinar Corporation v. Robinson*, 2013 SCC 73, [2013] 3 S.C.R. 1168.

[37] In *Kosmopoulos*, the Supreme Court affirmed, both in law and on the facts of that case, the "general rule" that a corporation is a legal entity distinct from its shareholders: *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.). While it considered the law at that time to be following

"no consistent principle", it took a stab at the relevant test: when the *Salomon* principle would yield a result "too flagrantly opposed to justice, convenience or the interests of the Revenue". *Mentmore* is consistent with that formulation and, helpfully, is more detailed.

[38] In *Cinar*, the Supreme Court (at para. 60) quoted the very passage above from *Mentmore*, with unequivocal approval, and cited no other case. We must conclude that *Mentmore* remains the governing authority and the Federal Court was right to apply it.

[39] The appellants attempt to distinguish *Mentmore* by honing into an isolated feature in *Boulangerie Vachon*, above. The appellants say that in *Boulangerie Vachon* there was incorporation for improper purposes. But in the present case, the incorporation was legitimate.

[40] True, that distinction is present. But on the point that is relevant to this case—when personal liability for a corporation's liability can be visited upon a director, officer or shareholder of the corporation, *i.e.*, the *Mentmore* test—*Boulangerie Vachon* is exactly on point. The Federal Court (at para. 150) correctly so found.

[41] In no way can the Federal Court be said to have misunderstood the *Mentmore* test. And in its application of that legal test to the facts of this case—here a question of mixed fact and law suffused by facts—the Federal Court did not commit palpable and overriding error.

[42] The appellants say that it is not enough to visit personal liability upon an officer, director or shareholder merely because that person happened to be the one who triggered the

corporation's decision or merely because she is the directing mind of the corporation. For this proposition, they correctly cite *Boulangerie Vachon* at para. 121.

[43] But the Federal Court did not do that. It relied on an entire constellation of facts that are admissible under the *Mentmore* test (at para. 153). Ms. Patel was the "operator", "sole shareholder" and "directing mind" of the corporation operating as the Balsam Day Spa. She operated the business of the corporation in a very "hands-on" manner. She made all the relevant decisions in this case, sometimes with her husband's infrequent and minor help. She was the person who did all the investigations, activities and decisions leading up to the purchase of the counterfeit machine and products. She closed her mind to other alternatives and was indifferent to the risks arising from her conduct. No one else was involved. Indisputably, these facts trigger the potential consequence of personal liability under the *Mentmore* test.

[44] In substance, the appellants' submissions try to have this Court re-decide this matter, reweigh the evidence relevant to the *Mentmore* test, or re-evaluate the Federal Court's findings on Ms. Patel's credibility. But under the standard of palpable and overriding error, that we cannot do.

[45] The appellants also challenge the Federal Court's decision to award punitive damages. Here again, they do not point to any legal error on the part of the Court. They could not do so. The Federal Court followed *Biofert*, above, which faithfully set out the Supreme Court's principles for the awarding of punitive damages in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 196.

[46] Here again, the appellants seem to be trying to encourage this Court to reweigh the facts, a task which, under the standard of palpable and overriding error, it does not do.

[47] The appellants also suggest that the Federal Court's decision might make it "become [the] norm to order punitive damages" in a case such as this, a result "which is contrary to Supreme Court's jurisprudence". But when one looks at the entire array of facts in this case—a rather unusual one—that is not so.

[48] In deciding to award punitive damages, the Federal Court relied on several findings of fact (at para. 146): Ms. Patel's risky and reckless behaviour, her ignoring of "red flags" that should have tipped her off that she was buying a counterfeit machine, her knowledge of the respondents' products and machine and their prices before she bought counterfeit items, the need for a real machine given that it was regulated by Health Canada for safety purposes and her "cavalier" attitude towards that as she used the counterfeit products and machine on her clients, the perpetuation of her conduct for two years, her denial of any trademark or copyright infringement until the hearing, and her testimony which was inconsistent, vague and evasive. It added (at para. 146) that her conduct could not be excused as naïve. Rather (at para. 147) she was "a business owner with responsibilities that she ignored". Finally, the amount of statutory and compensatory damages awarded was "not sufficient to sanction [the] conduct" (at para. 147). All these findings were grounded in the evidentiary record. There is no palpable and overriding error.

[49] Finally, the appellants challenge the award of compound interest. Awards of compound interest are often made to create an incentive for a party to pay a judgment quickly: *AstraZeneca Canada Inc. and AstraZeneca Aktiebolag v. Apotex Inc. and the Minister of Health*, 2011 FC 663; see also *Beloit Canada Ltée v. Valmet Oy* (1995), 94 FTR 102, 61 C.P.R. (3d) 271 (F.C.A.). Here again, I see no legal error on the part of the Federal Court.

[50] Specifically, I see nothing in the case the appellants cite, *Apotex Inc. v. Eli Lilly and Company*, 2018 FCA 217, that supports their view that, as a matter of law, compound interest was not possible in this case. Nor is there any palpable and overriding error in the Federal Court‘s exercise of discretion to award compound interest. Indeed, the facts relied upon by the Federal Court on the issue of punitive damages also amply support the award of compound interest.

[51] As to the rate of interest, the respondent Pollogen is based in Israel and the respondent DermaSpark Products Inc. does business throughout Canada. The appellants are based in Ontario, although some of the infringing use of the respondents’ copyright and trademarks was in the advertising, promotion and sale of products online. It cannot be said that the causes of action in this case arise exclusively in Ontario. As a result, subsection 36(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 applies. Under subsection 36(2), “[a] person who is entitled to an order for the payment of money in respect of a cause of action arising outside a province or in respect of causes of action arising in more than one province is entitled to claim and have included in the order an award of interest on the payment at any rate that the Federal Court of Appeal or the Federal Court considers reasonable in the circumstances”. Similarly, under

subsection 36(5), the Federal Court can allow interest for periods other than those specified under subsection 36(2), based on “any...relevant consideration”. On the rather unusual and extreme facts of this case, one that amply justifies an award of punitive damages, the Federal Court “consider[ed] it reasonable in the circumstances” based on “relevant consideration[s]” to make the interest award it did. I cannot say that that award is vitiated by palpable and overriding error. The award must stand.

[52] One remaining issue needs to be addressed. The parties agree that the Federal Court erred in another part of its judgment on the issue of compound interest. I disagree. The Federal Court did not err. But a small clarification of the meaning of the Federal Court’s judgment should be made so that no one misunderstands the Federal Court’s judgment.

[53] Paragraph 6 of the Federal Court’s judgment reads as follows:

> 6. The Defendants [here the appellants] shall jointly and severally pay to the Plaintiffs [here the respondents]:
>
> • prejudgment interest from February 2, 2022 pursuant to the *Federal Courts Act*, R.S.C. 1985, c. F-7 as amended, compounded half yearly at a rate of 2% above prime; and
>
> • post-judgment interest pursuant to the *Federal Courts Act* compounded half yearly at a rate of 2% above prime.

[54] Under paragraph 36(4)(*a*) of the *Federal Courts Act*, prejudgment interest is not to be awarded on exemplary or punitive damages.

[55] Paragraph 6 of the Federal Court's judgment does not necessarily infringe paragraph 36(4)(*a*). But there is an ambiguity: the Federal Court has left it unclear as to what parts of the monetary award in its judgment are subject to prejudgment interest.

[56] The precise text of the Federal Court's judgment should be read, interpreted and applied with the background law in mind, here paragraph 36(4)(*a*). Doing this, I find that paragraph 6 of the Federal Court's judgment should be read as imposing prejudgment interest on all damages except for the amount ($25,000) awarded for punitive damages.

[57] Given the foregoing reasons, the Federal Court's judgment, now clarified by these reasons, is unimpeachable and clear.

[58] Therefore, I would dismiss the appeal with costs.

"David Stratas"

J.A.

"I agree.
René LeBlanc J.A."

"I agree.
Monica Biringer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-108-23
STYLE OF CAUSE:	BINAL PATEL, BALSAM SPA, A.K.A. BALSAM DAY SPA v. DERMASPARK PRODUCTS INC. AND POLLOGEN LTD.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 5, 2023
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	LEBLANC J.A. BIRINGER J.A.
DATED:	AUGUST 13, 2025

APPEARANCES:

Alnaz I. Jiwa	FOR THE APPELLANTS
Michael Chevalier	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Jiwa Law Office Scarborough, ON	FOR THE APPELLANTS
Pinto Legal Montreal, QC	FOR THE RESPONDENTS