Court of King's Bench of Alberta

Citation: Vermillion Networks Inc v Vermilion Energy Inc, 2024 ABKB 222

Date: 20240416
Docket: 1601 14977
Registry: Calgary

Between:

Vermillion Networks Inc, Vermillion Institute and Vermillion Communities Incorporated

Plaintiffs

- and -

Vermilion Energy Inc, Vermilion Resources Ltd, and Vermilion Energy Trust

Defendants

Reasons for Judgment
of the
Associate Chief Justice
D.B. Nixon

I. Introduction

[1] In 2022, I found that Wade Ferguson, and entities that he controlled, had established a pattern of persistent, repeated bad litigation behaviour: see ***Vermillion Networks Inc v Vermilion Energy Inc***, 2022 ABQB 287 [***Vermillion Networks***]. As a result, I imposed interim court access restrictions on Wade Ferguson and certain corporations that he controlled.

[2] The Plaintiffs in the underlying Action have three entities within their group that use the term "Vermillion" in their corporate names. Those corporations are Vermillion Networks Inc, Vermillion Institute, and Vermillion Communities Incorporated. All these entities are owned and

controlled by Wade Ferguson (collectively, the "**Ferguson Entities**"). While the Ferguson Entities are legally distinct in a formal sense from Wade Ferguson himself, he is the person who functionally directs their litigation activities. "Operationally, the Ferguson Entities are his puppets": ***Vermillion Networks*** at para 132.

[3] After the ***Vermillion Networks*** decision was issued, the parties were given an opportunity to make submissions regarding the issue of whether the interim court access restrictions should be indefinite. That is the focal point of this Application.

II. Issue

[4] Should Wade Ferguson and the Ferguson Entities be subject to indefinite court access restrictions and a formal "vexatious litigant" designation?

III. Facts

[5] As touched on above, the Ferguson Entities in the underlying Action use the term "Vermillion" in their corporate names.

[6] The Defendants in the underlying Action have three entities within their corporate group that use the term "Vermilion" in their corporate names. Those entities are Vermilion Energy Inc, Vermilion Resources Ltd, and Vermilion Energy Trust (collectively, the "**Energy Entities**"). As is evident, the names of the Ferguson Entities and the Energy Entities are very similar, which is part of the underlying issue.

[7] In an effort to provide Wade Ferguson with an opportunity to address matters, I directed him as follows:

> a. Mr. Ferguson and the Ferguson Entities [were] permitted the opportunity to make submissions as to why they should not be subject to indefinite court access restrictions [...] provided their documents are filed and served on or before May 24, 2022.
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> b. The Energy Entities will have the opportunity to respond to the submissions of Mr. Ferguson and the Ferguson Entities, if any, provided their documents are filed and served on or before June 28, 2022.
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> c. Pending a final determination of the vexatious litigant issue, I impose[d] interim court access restrictions on Mr. Ferguson and the Ferguson Entities commencing immediately. Wade Keenan Ferguson and his entities, Vermillion Networks Inc, Vermillion Institute, and Vermillion Communities Incorporated, [were] prohibited from initiating any litigation in the Court of [King's]'s Bench of Alberta, directly or indirectly, without first obtaining leave of the Court.
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> [See ***Vermillion Networks*** at para 138.]

[8] The above directives were included in an Order dated April 20, 2022 (the "**April 2022 Order**"): see para 3 of the April 2022 Order.

[9] On May 20, 2022, Wade Ferguson filed with the Court of Appeal (but did not serve) a Notice of Appeal, appealing the portion of the ***Vermillion Networks*** decision that imposed

interim court access restrictions. However, he neither appealed the deadlines set out in the ***Vermillion Networks*** decision nor sought to stay the decision.

[10] On May 23, 2022, Wade Ferguson wrote to counsel for the Energy Entities requesting permission to serve his materials via email. Counsel for the Energy Entities agreed to this request.

[11] Notwithstanding the opportunity provided to the Plaintiffs to address the court access issue, neither Wade Ferguson nor the Ferguson Entities filed with the Court or served anything on the Defendants before the close of the Court on May 24, 2022. However, during the evening of May 24, 2022 through May 26, 2022, Wade Ferguson sent a torrent of emails to the Energy Entities and the Court (collectively, the "**Torrent of Communications**"). The Torrent of Communications included the following.

a. Separate emails to counsel for the Energy Entities, as follows:

   (i) serving an unfiled Fifth Supplemental Response Affidavit of Wade Ferguson;

   (ii) serving a filed report of Dr. Skinner;

   (iii) serving a filed affidavit of Kristin Robertson;

   (iv) serving the Notice of Appeal (previously un-served);

   (v) a response to an email from counsel for the Energy Entities which had noted that the ***Vermillion Networks*** Decision did not allow for the filing of affidavits or expert reports, and required submissions to be filed and served by May 24, 2022 (noting it was 6:35 p.m., well after closure of the Court filing window, and no written submissions had been received);

   (vi) serving a replacement copy of the unfiled Fifth Supplemental Response Affidavit of Wade Ferguson; and

   (vii) serving unfiled written submissions (which eventually were sent by Wade Ferguson well after the close of business, at 12:01 am on May 25, 2022).

b. Separate emails to the Court delivering the same materials referenced in (a), above.

c. Wade Ferguson also wrote to the Court asking that it have regard to the Fifth Supplemental Reply Affidavit and his written submissions, notwithstanding the material was not being filed by the deadline stipulated in the April 2022 Order.

d. Wade Ferguson sought the consent of Energy Entities to a fiat for the late filing of his materials, but the Energy Entities declined on the basis that they believed a fiat was not the appropriate procedure for a missed court-ordered deadline. During this exchange, in response to a repetition of a request from Energy Entities' counsel that Wade Ferguson not purport to represent the Energy Entities' position to the Court at any time, Wade Ferguson denied having ever received such a request before and accused the Energy Entities of "continuing a pattern established by your clients' affiant in which she made many bald assertions about things that (she said) had been done and said, but could not back them up with documentary proof when invited to do so in cross-examination". In response, counsel for the Energy Entities provided a copy of a prior email request from August 2021 and advised it would not debate the matter further.

e. On May 26, 2022, Wade Ferguson wrote to Energy Entities' counsel again. He also wrote to the Court about a proposed fiat application.

[12] On May 27, 2022, Wade Ferguson submitted an Urgent Request form for a fiat, seeking to file the Fifth Supplemental Reply Affidavit and his written submissions. In the form, he explained that he missed the deadline for filing same because, among other things, he had a multitude of other deadlines to meet.

[13] On January 11, 2023, Wade Ferguson filed an application seeking to vary paragraph 3 of the April 2022 Order (the "**January 2023 Application**"). The variation requested was to extend the deadline for his submissions as to why he should not be subject to indefinite court access restrictions. In the January 2023 Application, he also sought to increase the page limits.

[14] In support of the January 2023 Application, Wade Ferguson filed several additional affidavits.

[15] On March 23, 2023, I granted Wade Ferguson leave to file an additional 10 pages of submissions and granted the Energy Entities the right to respond. Subsequently, Wade Ferguson filed his Sixth and Seventh Supplemental Affidavits (collectively, the "**Supplemental Affidavits**").

IV. Analysis

A. The Law

[16] The current Alberta Court of King's Bench approach to when a Court may impose prospective court access restrictions pursuant to *Judicature Act* ss. 23-23.1 was recently confirmed by the Alberta Court of Appeal in ***Weidenfeld v Alberta (Minister of Seniors, Community and Social Services)***, 2023 ABCA 353 [***Weidenfeld***]. Guiding principles include:

1. whether or not a person should be subject to prospective litigation gatekeeping pursuant to *Judicature Act* ss. 23-23.1 is a backwards looking exercise that focuses on the record of the abusive litigant(s);
2. that record may include activities in other jurisdictions and before tribunals;
3. litigation and litigant management steps require the Court identify certain forms of abusive activity itemized in *Judicature Act* s. 23(2) and detailed in case law such as ***Unrau v National Dental Examining Board***, 2019 ABQB 283 at para 565 [***Unrau #2***];
4. abusive litigation conduct must be "persistent";
5. when evaluating whether court access restrictions should be imposed, "focused" evidence is required, rather than "... an encyclopedia of every last detail about the litigant's litigation history ..."; and
6. court access restrictions are a "last ditch" step that may only be imposed after other litigation management approaches have failed, and when less intrusive alternatives, such as case management, are ineffective.

[17] The *Judicature Act* enables the Court to extend court access restrictions to additional entities or individuals who are associated with abusive behaviour: *Judicature Act*, RSA 2000, C J-2 at ss. 23.1(4). Justice Jones in ***Docken v Anderson***, 2023 ABKB 515 at paras 16-22 recently

investigated application of *Judicature Act* s. 23.1(4) and concluded that the correct approach is via the following analysis:

1. a court evaluates whether *Judicature Act* ss 23-23.1 court access restrictions are appropriate for the "primary" abusive litigant following the criteria detailed above, and if so, then;
2. the court investigates whether the candidates for *Judicature Act* s. 23.1(4) court access restrictions are "associated" with the targets of the "primary" abusive litigant's *Judicature Act* s. 23.1(1) court access restriction order; and
3. the court determines whether that "association" is one that relates to and/or furthers the abusive conduct of the "primary" abusive litigant that led to the "primary" abusive litigant's *Judicature Act* s. 23.1(1) court access restrictions.

[18] While the *Judicature Act* also permits the Court to act on its own motion (ss. 23.1(1), 23.1(4)), the Alberta Court of Appeal in ***Jonsson v Lymer***, 2020 ABCA 167 [***Lymer***] has "read down" and largely eliminated that jurisdiction.

[19] The scope of the duty of procedural fairness varies, depending on various factors including the nature of the decision being made: ***Baker v Canada (Minister of Citizenship and Immigration)***, [1999] SCJ No 39 (SCC) at paras 21 – 28. Additional factors may include notice that the decision is going to be made, disclosure of the information on which the decision will be based, the right to be heard, the right to counsel, the right to give evidence, and reasons.

[20] In the context of court access restrictions, courts generally follow a procedure by which they: (i) issue a decision imposing interim court access restrictions and identifying *indicia* of abusive litigation; (ii) invite written submissions from the affected parties; and then (iii) issue a further judgment which finally determines whether the parties' conduct is a sufficient basis for imposing prospective or indefinite court access restrictions: ***Unrau #2*** at paras 16, 932 – 935, citing ***Hok v Alberta***, 2016 ABQB 651, leave to appeal refused 2016 ABCA 63, leave to appeal refused [2017] SCCA No 222. As noted above, this approach has been confirmed by the Alberta Court of Appeal: ***Weidenfeld***.

B. The Application of the Law to the Facts

[21] First, this Court has already made critical findings of fact and law in ***Vermillion Networks*** at para 132:

> ... Mr. Ferguson and the Ferguson Entities have a proven pattern of repeated, largely unsuccessful, persistent litigation failures, including repeated, persistent re-litigation of issues.
>
> ... The Action against the Energy Entities is a collateral attack on matters previously decided by the [Trade Mark Opposition Board] and contain issues which are exclusively under the Federal Courts jurisdiction. Mr. Ferguson and the Ferguson Entities are engaged in "forum shopping" by moving disputes into new jurisdictions to avoid litigation management and res judicata.
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> ... The Action against the Energy Entities is an extension and expansion upon the existing pattern of bad litigation by Mr. Ferguson and the Ferguson Entities.

[22] I reviewed the Supplemental Affidavits and other items in evidence. Focusing on the Supplemental Affidavits, I am of the view that those documents contain hearsay, potential breaches of settlement privilege on behalf of a third party, purported legal analysis from Wade Ferguson (which is not properly a part of an affidavit), unsupported claims, and assumptions or predictions about what opposition or decision-making bodies in other proceedings are thinking. Further, in the Supplemental Affidavits, Wade Ferguson continues to characterize several of his ongoing legal actions as successes, including one matter which is not yet concluded. In short, Wade Ferguson is rejecting the characterization of his litigation activities made in ***Vermillion Networks***. I do not accept Wade Ferguson's position or his evidence. Rather than disclosing success, I find the Supplemental Affidavits disclose additional improper content and evidence of ongoing abusive litigation behaviour.

[23] Based on my review of the record, Wade Ferguson's continuing litigation misconduct is apparent. I outlined some of his recent conduct in my review above of the Torrent of Communications. These activities extend the previous well-established patterns of repeated, persistent litigation misconduct that were identified in ***Vermillion Networks***. I now examine how the patterns identified in ***Vermillion Networks*** continue in this current *Judicature Act* ss 23-23.1 process.

[24] In the ***Vermillion Networks*** decision, a deadline of May 24, 2022, was imposed to "file and serve" submissions as to why Wade Ferguson and the Ferguson Entities should not be subject to indefinite court access restrictions. In response, Wade Ferguson requested consent to an extension from the Energy Entities, which was declined. He then unilaterally wrote to the Court to make the same request, and was advised by the Court that the filing of an appeal or bringing a stay application would be required for such a request.

[25] Wade Ferguson later appealed a portion of the ***Vermillion Networks*** decision. However, he did not appeal the deadline imposed. Instead, he filed and served his materials late. That appeal is suspended and has not progressed pending this decision.

[26] Wade Ferguson cited various excuses for his lateness, including "three major deadlines set for May 20, 2022". Based on my review of his history on this file, he regularly misses deadlines due to his extreme litigation workload. I infer that he brings this burden on himself, particularly since much of his late materials to the Court are simply immaterial to the issue at hand, or a collateral attack on ***Vermillion Networks***.

[27] Rather than focusing on the written submissions he was permitted to make, I find that Wade Ferguson spent his time developing various extraneous documents. This included the "development" of a purported expert report and an affidavit from his ex-wife.

[28] Wade Ferguson also made claims of discrimination and lack of procedural fairness previously. He claims that his misconduct in prior years was generally due to an autism diagnosis and other medical conditions. However, while he asserts that the courts should accommodate him because he is unable to properly navigate the court system and *Rules*, he has also provided evidence that he has worked for a law firm in British Columbia and is perfectly competent.

[29] One of the lawyers at that British Columbia law firm is Daniel Moseley. He has sworn that Wade Ferguson can appropriately: (i) identify legal tests, principles, and optional tactics; (ii) conduct the legal research necessary to manage client risks; and (iii) determine when assistance is required from other practitioners. Mr. Moseley also states that Wade Ferguson possesses a

legal knowledge base equivalent to that of a second-year associate. I find this evidence directly contradicts the assertion by Wade Ferguson that he has a need for accommodation.

[30] Based on my review of the record, it is evident that Wade Ferguson has previously made claims of discrimination and lack of procedural fairness. In my view, his claims of discrimination are not supported. Further, his discrimination claims align with his history of broadly pleading other serious allegations such as abuse of process and bad faith. This is another instance where Wade Ferguson has a pattern of persistent, abusive, litigation conduct.

[31] Although Wade Ferguson claims that he has "learned hard lessons" that he does not wish to repeat, I find his recent conduct (which I reviewed above) reveals that he is, in fact, repeating bad behaviours. Amongst other things, this is evidenced by: (i) his Torrent of Communications and (ii) his continued flogging of his failures as successes, despite this Court in ***Vermillion Networks*** having found the opposite as fact and law. I view these activities as an illustration of Wade Ferguson's ongoing pattern of persistent and repeated collateral attacks on court decisions.

[32] Regrettably, Wade Ferguson fails to acknowledge that the sheer amount of litigation in which he and the Ferguson Entities have been involved is a problem. Instead, he asks the Court to consider his "outcome rate". While Wade Ferguson paints himself as successful, I have already commented above that he, in my view, continues to flog his failures as successes. I do not accept his characterizations.

[33] Based on my review of the record before me, I find Wade Ferguson's characterization of his litigations as successes as being self-serving and usually wrong. Further, I find his comments in this regard a diversion from the abuse he has imposed on Defendants in general and the Court. The manner in which litigation is conducted is equally a basis for court access restrictions as the (lack of) merit of any proceedings: ***Unrau #2***.

[34] In summary, I find that Wade Ferguson has not demonstrated any credible reason why the interim court access restrictions should be lifted. To the contrary, pre-filing restrictions appear to be the only effective way of ensuring that Wade Ferguson's ongoing pattern of bad litigation is managed.

[35] Based on past conduct, I expect that Wade Ferguson will reject these findings, and claim he is being denied "access to justice". In my view, he does not understand the concept. To emphasize the point, "access to justice" does not mean that Wade Ferguson is entitled to litigate matters in a court any manner he wishes without regard to: (i) the needs of other litigants; (ii) the merits of his claims; and (iii) the need for civil (non-abusive) conduct. This issue has been addressed in ***British Columbia (Attorney General) v Council of Canadians with Disabilities***, 2022 SCC 27. In that case, Wagner CJC at para 1 indicated that courts are obliged to triage abusive litigation, because that touches on "access to justice":

> Access to justice depends on the efficient and responsible use of court resources. Frivolous lawsuits, endless procedural delays, and unnecessary appeals increase the time and expense of litigation and waste these resources. To preserve meaningful access, courts must ensure that their resources remain available to the litigants who need them most - namely, those who advance meritorious and justiciable claims that warrant judicial attention. [Emphasis added.]

V. Next Steps

[36] Wade Ferguson asserts that indefinite court access restrictions should be not imposed because other options, such as a "sanction regime", procedural orders, and case management would effectively manage his vexatious conduct. While I acknowledge his assertions, these suggestions by Wade Ferguson would foist the burden of his persistent bad behaviour on the Court and other litigants.

[37] The availability of case management has been restricted in recent years: see Notice to the Profession and Public "*Case Conferences Prior to Case Management in Civil and Family Law Matters*", dated October 9, 2019; and Alberta Court of Queen's Bench News & Announcements dated August 31, 2020. Given these judicial limitations, it is not realistic to expect that each case filed by Wade Ferguson or the Ferguson Entities could be subject to case management.

[38] Further, Wade Ferguson's litigation conduct illustrates that "case management" would predictably fail. Case management, at a fundamental level, still requires that participants in a case managed proceeding will follow court directions. Unfortunately, Wade Ferguson does not follow court instructions, or court *Rules*. Rather, he takes whatever steps he thinks appropriate, as "a means to his end".

[39] In my view, "court access restrictions" pursuant to *Judicature Act* ss 23-23.1 would appropriately place the burden on Wade Ferguson to apply for leave to commence proceedings and continue existing matters. As a first step, that approach better ensures that opposing parties are not forced to respond to Wade Ferguson's established pattern of persistent and repeated frivolous and improper claims. As a second step, the Court can, after granting leave, consider case management, procedural orders, and a "sanction regime". In my view, this sequence is an important protective mechanism because the second step alone does not offer sufficient protection to other litigants or court resources.

[40] I previously concluded that the Ferguson Entities are Wade Ferguson's litigation "puppets". In his litigation against the Energy Entities, and in many other contexts, Wade Fergusion uses these corporate puppets as his means to conduct litigation. I therefore decide that pursuant to section 23.1(4) of the *Judicature Act*, the Ferguson Entities also should be subject to the same court access restrictions as Wade Ferguson. Applying the ***Docken*** analysis, I conclude as follows. First, the Ferguson Entities are "associated" with the litigation misconduct by Wade Ferguson. Second, that "association" relates to and furthers the abusive conduct of Wade Ferguson which has led to the *Judicature Act* ss 23-23.1 court access restrictions. On that basis, I conclude that the Ferguson Entities must also be subject to the same indefinite court access restrictions as Wade Ferguson.

VI. Conclusions

[41] Based on my review of the evidence and consideration of the law, I find that Wade Ferguson and the Ferguson Entities are to be subject to court access restrictions and a formal "vexatious litigant" designation. Further, I direct that the interim court access restrictions imposed on Wade Ferguson and the Ferguson Entities be indefinite. I make this determination because I am of the view that "court access restrictions" are the only fair and viable option to protect other parties and the court system from wasting significant time and resources on the persistent, repeated frivolous and improper claims by Wade Ferguson and the Ferguson Entities.

[42] I emphasize that neither the court access restrictions nor a vexatious litigant finding will prevent all access to the courts. Access will be granted by leave of the Court in appropriate circumstances. As former Chief Justice Beverly McLachlin explained, these mechanisms are simply a constitutionally valid screening tool that can be used to increase efficiency and overall access to justice: see ***Lymer*** at para 15, citing ***Trial Lawyers Assn. of BC v BC (Attorney General)***, 2014 SCC 59 at para 47 They are necessary and appropriate in this case.

[43] I direct Counsel for the Energy Entities to prepare the court order giving effect to this decision. Wade Ferguson's approval of that order is dispensed with pursuant to *Rule* 9.4(2)(c). This decision and the corresponding order shall be served on Wade Ferguson by email.

VII. Costs

[44] The parties can make submissions on Costs if they cannot otherwise agree.

Heard on the 29th day of June 2023.
Dated at the City of Calgary, Alberta this 16th day of April 2024.

D.B. Nixon
A.C.J.C.K.B.A.

Appearances:

Wade Ferguson
for the Plaintiffs

Chase Holthe and Brittany LaTorre
for the Defendants