

# In the Court of Appeal of Alberta

**Citation: Vermillion Networks Inc v Vermilion Energy Inc, 2024 ABCA 261**

**Date:** 20240809

**Docket:** 2401-0133AC

**Registry:** Calgary

**Between:**

**Vermillion Networks Inc, Vermillion Institute,  
Vermillion Communities Incorporated and Wade Ferguson**

Applicants

- and -

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

Respondents

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**Reasons for Decision of  
The Honourable Justice Alice Woolley**

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Application for Permission to Appeal

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## **Introduction**

[1] The applicant Wade Ferguson seeks permission to appeal a decision subjecting him and the corporate applicants to indefinite court access restrictions and designating them vexatious litigants: *Vermillion Networks Inc v Vermilion Energy Inc*, 2024 ABKB 222 [*Designation Decision*]. The *Designation Decision* was issued further to a prior decision which struck in part and summarily dismissed in part an action commenced by the corporate applicants against the respondents: *Vermillion Networks Inc v Vermilion Energy Inc*, 2022 ABQB 287 [*Preliminary Decision*]. The *Preliminary Decision* imposed interim court access restrictions on the applicants.

[2] In the *Preliminary Decision* the chambers judge found that Mr. Ferguson controlled and operated the corporate applicants, which the chambers judge called the Ferguson Entities. He called the respondents the Energy Entities. I adopt that nomenclature. The chambers judge also found that Mr. Ferguson and the Ferguson Entities had engaged in a “proven pattern of repeated, largely unsuccessful, persistent litigation failures, including repeated, persistent re-litigation of issues”. He found that the dismissed action against the Energy Entities was a collateral attack on matters previously decided by the Trademarks Opposition Board, and raised issues that were within the exclusive jurisdiction of the Federal Court. He found that Mr. Ferguson and the Ferguson Entities were engaged in forum shopping, and that the dismissed action was “an extension and expansion upon the existing pattern of bad litigation by Mr. Ferguson and the Ferguson Entities”: *Preliminary Decision* at para 132.

[3] The *Preliminary Decision* gave Mr. Ferguson and the Ferguson Entities the opportunity to make submissions as to why they should not be subject to indefinite court access restrictions: *Preliminary Decision* at para 134.

[4] The applicants filed an appeal of the *Preliminary Decision*, but only with respect to the vexatious litigant issue; they did not appeal the decision to strike out and summarily dismiss their action. Because the applicants only contest the aspects of the *Preliminary Decision* dealing with the vexatious litigant issue, the *Preliminary Decision* is effectively interlocutory to the *Designation Decision* and is considered here as part of the decision in respect of which permission to appeal is being sought: *Guillevin International Co v Barry*, 2022 ABCA 144 at para 15.

[5] For the reasons that follow, the application for permission to appeal is dismissed.

## Decisions Below

[6] The dispute between the Ferguson Entities and the Energy Entities originated in efforts by the Ferguson Entities to register a trademark for “Vermillion” in relation to a broad range of goods and services, in Canada and globally, and which included efforts to protect that trademark, including “lawsuits against the Energy Entities and other entities in the oil patch”: *Preliminary Decision* at paras 11-14.

[7] In 2012, the Energy Entities filed a statement of opposition to the trademark sought by the Ferguson Entities. The Ferguson Entities “continuously alleged that the Energy Entities were acting in bad faith and abusing the TMOB’s process”, allegations that the Ferguson Entities repeated in the dismissed action: *Preliminary Decision* at para 22.

[8] The Trademarks Opposition Board struck 11 of the goods and services from the Ferguson Entities’ trademark application. It did not make any findings of impropriety or abuse of process by the Energy Entities. The Ferguson Entities did not appeal that decision: *Vermilion Energy Inc v Vermillion Networks Inc*, 2017 TMOB 61; *Preliminary Decision* at para 23.

[9] The Ferguson Entities filed a claim against the Energy Entities in Alberta. In 2016 it filed a 126 page statement of claim which was never served. On February 7, 2018, the Ferguson Entities filed and served an 11-page amended statement of claim, which completely replaced the 2016 statement of claim: *Preliminary Decision* at paras 3-5.

[10] A significant portion of the 2018 amended statement of claim involved allegations of improper conduct by the Energy Entities in relation to trademarks. In striking this portion of the 2018 amended statement of claim, the chambers judge found that much of the claim was a collateral attack on a decision of the Trademarks Opposition Board: *Preliminary Decision* at paras 71, 73. He also found that much of it raised matters properly within the jurisdiction of the Federal Court: *Preliminary Decision* at paras 73-74.

[11] The chambers judge found that the rest of the claims advanced in the 2018 amended statement of claim, aside from the matters that were not within the court’s jurisdiction, were statute barred by operation of the *Limitations Act*, RSA 2000, c L-12: *Preliminary Decision* at para 106.

[12] In the *Preliminary Decision* the chambers judge also considered the application of the Energy Entities to declare Mr. Ferguson and the Ferguson Entities to be vexatious litigants. The chambers judge reviewed the requirements of ss. 23 and 23.1 of the *Judicature Act*, RSA 2000, c J-2 [*Judicature Act*] and, in particular, the indicia of conducting a proceeding in a vexatious manner set out in s. 23(2). He noted the ability to consider a “litigant’s entire public dispute history”, and indicators of vexatious litigation identified in *Chutskoff v Bonora*, 2014 ABQB 389 at paras 92, 93, permission to appeal denied, 2014 ABCA 444: *Preliminary Decision* at paras 116-

117. He suggested that whether a litigant intends to engage in future abuse of court processes is relevant to the consideration: *Preliminary Decision* at para 118.

[13] The chambers judge made a number of findings of fact:

1. Mr. Ferguson and the Ferguson Entities have initiated or been agents behind approximately 55 lawsuits since 2006, and Mr. Ferguson acknowledged there was a pattern underlying the litigation: *Preliminary Decision* at paras 111-112.
2. There was a substantive similarity and pattern between litigation commenced against the Energy Entities and a 2018 statement of claim filed against Cenovus: *Preliminary Decision* at paras 113, 114, 129.
3. The 2018 amended statement of claim appears to contain a “hopeless collection of vague allegations”: *Preliminary Decision* at para 121.
4. Mr. Ferguson is “extremely litigious” and has been the subject of a prior order restricting his access to the court: *Preliminary Decision* at para 122.
5. Mr. Ferguson submits copious materials, with “oddities in form and style” and “rambling prose”, but in this context will adjust in response to directions by the court: *Preliminary Decision* at paras 123-125.
6. The 2018 amended statement of claim shows that Mr. Ferguson “is intent on raising issues which have already been decided by a competent body”: *Preliminary Decision* at para 126.
7. The Ferguson Entities’ 2016 and 2018 statements of claim repeat the same allegations “over and over” and include allegations that other decision-makers have found to be unsubstantiated: *Preliminary Decision* at paras 127-128.
8. Mr. Ferguson has a stated intention to take “every opportunity to file evidence or argument as well as to seek reconsideration of decisions whenever ‘a faint hope suggested such steps might help’”: *Preliminary Decision* at para 131.

[14] The chambers judge summarized his findings of fact in the *Preliminary Decision* at para 132 as follows:

- a. Mr. Ferguson controls and operates the Ferguson Entities. Operationally, the Ferguson Entities are his puppets.
- b. Mr. Ferguson and the Ferguson Entities have a proven pattern of repeated, largely unsuccessful, persistent litigation failures, including repeated, persistent re-litigation of issues.
- c. The Action against the Energy Entities is a collateral attack on matters previously decided by the TMOB 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*.

d. 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

[15] The chambers judge held that these “findings of fact [were] a foundation on which [to] impose court access restrictions pursuant to sections 23 and 23.1 of the *Judicature Act*”, and imposed those restrictions on an interim basis. He gave Mr. Ferguson and the Ferguson Entities until May 24, 2022 to make submissions about why those restrictions ought not to be indefinite given his finding that “Mr. Ferguson and the Ferguson Entities have established a persistent pattern of bad litigation”: *Preliminary Decision* at para 134.

[16] In the *Designation Decision*, the chambers judge reviewed problematic conduct by Mr. Ferguson in submitting his materials for the further hearing, which included attempting to file materials late, in an improper manner and of excess length and scope. The chambers judge also summarized the law with respect to imposing court access restrictions, noting that the court must identify forms of abusive activity “itemized in *Judicature Act* s. 23(2) and detailed in case law”, that the abusive litigation conduct must be persistent, and that court access restrictions may only be imposed after other less intrusive approaches have failed or are found to be ineffective: *Designation Decision* at para 16.

[17] The chambers judge reiterated his previous findings of fact but noted additionally that the materials filed by Mr. Ferguson subsequent to the *Preliminary Decision* were improper, containing “hearsay, potential breaches of settlement privilege on behalf of a third party, purported legal analysis from Wade Ferguson...[and] unsupported claims, and assumptions or predictions”. The chambers judge found Mr. Ferguson’s filed materials amounted to a rejection of the chambers judge’s characterization of Mr. Ferguson’s litigation history in the *Preliminary Decision: Designation Decision* at paras 22. He characterized Mr. Ferguson’s recent conduct as “continuing litigation misconduct” and as an extension of his well-established pattern of “repeated, persistent litigation misconduct”: *Designation Decision* at para 23, 31. He noted that Mr. Ferguson had submitted extraneous materials: *Designation Decision* at para 27.

[18] The chambers judge rejected Mr. Ferguson’s claim that his difficulties in litigation arose from an autism diagnosis. The chambers judge observed that Mr. Ferguson has previously worked at a law firm, and a lawyer at that firm had attested to Mr. Ferguson’s legal competence. The trial judge found that this evidence “contradicts the assertion by Wade Ferguson that he has a need for accommodation”: *Designation Decision* at para 29. The chambers judge found the claims of discrimination were not supported, and in fact that they “align with his history of broadly pleading other serious allegations such as abuse of process and bad faith”, which further evidenced his pattern of persistent litigation misconduct: *Designation Decision* at para 30.

[19] The chambers judge emphasized Mr. Ferguson’s failure to acknowledge the problems arising from the “sheer amount of litigation” engaged in by him and the Ferguson Entities, and

that Mr. Ferguson “continues to flog his failures as successes”: *Designation Decision* at paras 32-33.

[20] As a result, the chambers judge concluded that Mr. Ferguson had not demonstrated any credible reason to lift the interim court access restrictions: *Designation Decision* at para 34.

[21] He rejected the suggestion that case management or a sanctions regime would be sufficient to manage the issues with Mr. Ferguson’s litigation misconduct. He found Mr. Ferguson does not follow court instructions or rules, but rather takes the steps he thinks appropriate as “a means to his end”: *Designation Decision* at para 38.

[22] Based on his assessment that Mr. Ferguson uses the Ferguson Entities as “corporate puppets as his means to conduct litigation”, the chambers judge concluded that they too should be subject to the access restriction: *Designation Decision* at para 40. In particular, he found that the corporate entities were associated with the litigation misconduct in a way that related to and furthered the abusive conduct of Mr. Ferguson: *Designation Decision* at para 40; *Docken v Anderson*, 2023 ABKB 515 at paras 16-22; *Judicature Act*, s. 23.1(4).

### **Standard for Leave to Appeal**

[23] Whether leave to appeal ought to be granted pursuant to Rule 14.5(1)(j) of the *Alberta Rules of Court*, Alta Reg 124/2010 depends on the answer to the following questions:

1. Is there an important question of law or precedent?
2. Is there a reasonable chance of success on appeal? and
3. Will the delay unduly hinder the progress of the action or cause undue prejudice?

*Joshi v Canadian Imperial Bank of Commerce*, 2022 ABCA 137 at para 22 [*Joshi*]; *Rana v Rana*, 2022 ABCA 106 at para 13; *Thompson v Procrane Inc (Sterling Crane)*, 2016 ABCA 71 at para 7.

[24] Other considerations include “whether there is a possible error of law; whether a discretion has been unreasonably exercised; whether the chambers judge misapprehended important facts; whether there are conflicting decisions on the point; the standard of review that would be applied on the appeal; and whether there are other good reasons why a full panel of the Court should review the order under appeal”: *Ubah v Ubah*, 2023 ABCA 15 at para 14; *Wong v Giannacopoulos*, 2011 ABCA 277 at para 4.

[25] This Court reviews discretionary decisions deferentially; the decision to declare a party a vexatious litigant is a discretionary one. That deferential standard of review must be factored into the assessment of whether the applicants have a reasonable chance of success on appeal: *Joshi* at para 25.

### **Position of the Applicants**

[26] The applicants submit that the chambers judge erred with respect to an important question of law by using his inherent jurisdiction to expand upon the indicia of vexatious litigation enumerated in s. 23(2) of the *Judicature Act*. They argue the chambers judge erred in considering irrelevant factors, including the “amount of litigation” commenced by the Ferguson Entities and the “significant overlap” between a prior action and the action at issue in the *Preliminary Decision*, as neither of those are relevant factors under s. 23(2). They submit simply being active litigants does not make them vexatious.

[27] In addition, the applicants argue the chambers judge lowered the standard necessary to find their conduct was “persistent”, relying on errors better characterized as intermittent, and placing improper emphasis on “far-past problematic conduct”. They submit the chambers judge further erred by not recognizing and accommodating the specific challenges arising from Mr. Ferguson’s diagnosis as a person with high functioning autism. Finally, they submit the chambers judge erred by imposing a court access restriction order when that measure was not necessary to address any issues arising from Mr. Ferguson’s conduct.

[28] The applicants argue that no prejudice from delay would arise to the respondents from granting this application, because the underlying action no longer exists.

### **Position of the Respondents**

[29] The respondents submit that the issues raised by the applicants are questions of fact or relate to matters previously settled by this Court. The chambers judge relied on the indicia in the *Judicature Act*, any of which is sufficient to justify a finding of vexatiousness and, in any event, the list of indicia is non-exhaustive. The chambers judge’s decisions that the applicants are vexatious and that only a court access restriction would be effective have a sufficient evidentiary basis and are entitled to deference on appeal.

[30] The respondents also submit they would be significantly prejudiced by the appeal, being required to incur significant further expense and being subject to further abuse from the applicants. They noted that the vexatious litigant application took six years to be decided largely due to the conduct of the applicants, and has resulted in significant expense being incurred.

### **Analysis**

[31] None of the issues identified by the applicants merit consideration by a panel of this Court. This Court explained the proper approach to s. 23(2) of the *Judicature Act* in *Jonsson v Lymer*, 2020 ABCA 167 at paras 20-22, where it noted that s. 23(2) addresses persistent past conduct by a litigant and also that “the definition of vexatious conduct in s. 23(2) of the *Judicature Act* [is] inclusive, not closed”.

[32] Moreover, the chambers judge focussed on matters relevant to the question of whether the applicants' conduct was vexatious. The chambers judge found the applicants not only pursued a high amount of litigation, and litigation with "significant overlap", but he also concluded many of the issues raised by the applicants had "already been decided by a competent body", the 2018 amended claim was "hopeless", the applicant was "extremely litigious" and had a "proven pattern of repeated, largely unsuccessful, persistent litigation failures, including repeated, persistent re-litigation of issues". These related findings go to whether a litigant is persistently "bringing proceedings that cannot succeed", "bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction", and "using previously raised grounds and issues in subsequent proceedings inappropriately": *Judicature Act*, ss. 23(2)(a), (b) and (d). They are entitled deference.

[33] The applicants have not identified any error in the law relied upon by the chambers judge in the *Designation Decision*.

[34] The chambers judge found that Mr. Ferguson's conduct indicated vexatiousness and was persistent, relying in particular on Mr. Ferguson's bringing proceedings involving issues previously decided by other courts and tribunals and engaging in improper litigation behaviour. His findings in these regards are factual and entitled to significant deference; they do not merit further consideration by this Court.

[35] With respect to Mr. Ferguson's autism, the chambers judge found that Mr. Ferguson was not impaired in his ability to navigate and access the court system. In his view, Mr. Ferguson's claim of discrimination was not supported and was in fact part of the pattern of Mr. Ferguson "broadly pleading other serious allegations such as abuse of process and bad faith": *Designation Decision* at para 30. That finding was based upon evidence before the chambers judge about Mr. Ferguson's history in legal practice and is entitled to deference. It does not merit further consideration by this Court.

[36] The decision by the chambers judge that a restriction on court access was the only way to manage the issues with Mr. Ferguson's conduct is discretionary, and also entitled to deference by this Court; it does not warrant granting permission to appeal.

[37] In short, none of the errors alleged by the applicants constitute an important question of law or precedent that has a reasonable chance of success on appeal. The chambers judge's factual findings which the applicants seek to challenge are entitled to deference and do not warrant appellate intervention.

[38] Finally, I am satisfied that granting leave in this case would cause significant prejudice to the respondents, who have been engaged in years of litigation across multiple jurisdictions as a result of little more than the unfortunate accident of the applicants' choice of corporate name and

their overbroad assertion of their trademark. The time and expense of further litigation on questions with no broader legal significance ought not to be imposed upon them.

[39] The application for permission to appeal is dismissed.

Application heard on July 25, 2024

Reasons filed at Calgary, Alberta  
this 9th day of August, 2024

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Woolley J.A.

**Appearances:**

G.S. Panunto  
for the Applicants

B. LaTorre  
for the Respondents