

Federal Court of Appeal



Cour d'appel fédérale

Date: 20260806

**Dockets: A-232-25 (Lead file)
A-278-25**

Citation: 2026 FCA 135

**CORAM: DE MONTIGNY C.J.
MONAGHAN J.A.
ROUSSEL J.A.**

BETWEEN:

THE LOUNGE MEDICAL SPA LTD. AND ROULA HAMDAN

Appellants

and

DERMASPARK PRODUCTS INC. AND POLLOGEN LTD.

Respondents

Heard at Edmonton, Alberta, on June 15, 2026.

Judgment delivered at Ottawa, Ontario, on August 6, 2026.

REASONS FOR JUDGMENT BY:

ROUSSEL J.A.

CONCURRED IN BY:

**DE MONTIGNY C.J.
MONAGHAN J.A.**

Federal Court of Appeal



Cour d'appel fédérale

Date: 20260806

Dockets: A-232-25 (Lead file)
A-278-25

Citation: 2026 FCA 135

CORAM: DE MONTIGNY C.J.
MONAGHAN J.A.
ROUSSEL J.A.

BETWEEN:

THE LOUNGE MEDICAL SPA LTD. AND ROULA HAMDAN

Appellants

and

DERMASPARK PRODUCTS INC. AND POLLOGEN LTD.

Respondents

REASONS FOR JUDGMENT

ROUSSEL J.A.

[1] This is a consolidated appeal of two unreported judgments of the Federal Court (Docket: T-1741-23).

[2] In the first judgment, dated May 12, 2025, the Federal Court granted the motion for summary trial brought by the respondents (plaintiffs in the Federal Court), DermaSpark Products

Inc. and Pollogen Ltd. The Federal Court concluded that the appellants (defendants in the Federal Court), The Lounge Medical Spa Ltd. and Roula Hamdan, had infringed the trademark rights of DermaSpark and Pollogen and damaged their goodwill, in a manner contrary to sections 19, 20 and 22 of the *Trademarks Act*, R.S.C. 1985, c. T-13. In addition to granting other relief, the Federal Court ordered as follows:

7. The Defendants shall pay to the Plaintiffs, jointly, nominal damages in the total amount of \$50,000.00 for the infringement, passing off, and dilution of goodwill of Pollogen's Trademarks.
8. The Defendants shall pay to the Plaintiffs, jointly, nominal damages in the total amount of \$50,000.00.

[3] In the second judgment, dated July 28, 2025, the Federal Court granted DermaSpark and Pollogen's motion for reconsideration under Rule 397(2) of the *Federal Courts Rules*, S.O.R./98-106. The motion sought a correction to paragraph 8 of the order portion of the May judgment. The Federal Court acknowledged that "a mistake/oversight" had been made in the preparation of the May judgment and ordered that paragraph 8 be amended to read:

8. The Defendants shall pay to the Plaintiffs, jointly, punitive and exemplary damages in the total amount of \$50,000.00.

[4] Before this Court, The Lounge and Ms. Hamdan raise several grounds of appeal in relation to both Federal Court judgments, all of which need not be addressed as I am satisfied, upon review of the record and consideration of the parties' submissions, that the appeals should be allowed.

[5] The standard of review in this consolidated appeal is that set out in *Housen v. Nikolaisen*, 2002 SCC 33: correctness for questions of law, and palpable and overriding error for questions of fact and questions of mixed fact and law.

[6] At the outset of these reasons, I wish to comment on the Federal Court's May judgment. With the exception of very minor alterations, the judgment is identical to the draft order that was included in DermaSpark and Pollogen's motion record for summary trial.

[7] While the Supreme Court of Canada accepted in *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30, that judges may incorporate large portions of a party's submissions or adopt a party's proposed draft orders, the reasonable person apprised of all the relevant facts should be able to conclude that the judge came to grips with the issues and decided them impartially and independently based on the evidence and the law (at paras. 1, 18, 36-37, 49-50).

[8] The error that occurred in paragraph 8 originates from the draft order prepared by DermaSpark and Pollogen. While I accept that in the July reconsideration judgment the Federal Court acknowledged that a "mistake/oversight was made in the preparation" of the May judgment, the wholesale adoption of the draft order, including its errors, could cause a reasonable person to be concerned that the Federal Court did not direct its mind to all the issues and evidence before it.

[9] Against this backdrop, I find that the Federal Court erred in law by providing inadequate reasons for its conclusions.

[10] Reasons need not be a model of perfection, nor do they need to be extensive or exhaustive. Rather, they must be read as a whole and in their overall context, including the evidentiary record before the court, the submissions of counsel, and the live issues, and must adequately explain why the court decided in a particular way, hence permitting meaningful appellate review (*R. v. Sheppard*, 2002 SCC 26 at paras. 28, 46, 50; *R. v. R.E.M.*, 2008 SCC 51 at paras. 16-17, 37, 53; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para. 101; *R. v. G.F.*, 2021 SCC 20 at paras. 69-70; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 233; *Canada v. Brokenhead First Nation*, 2011 FCA 148 at paras. 31-33; *SRI Homes Inc. v. Canada*, 2012 FCA 208 at paras. 13-17; *Canada v. Long Plain First Nation*, 2015 FCA 177 at para. 143; *Canada v. Greenwood*, 2021 FCA 186 at para. 101, leave to appeal to SCC denied, 39885 (March 17, 2022); *Manitoba Métis Federation Inc. v. Canada (Energy Regulator)*, 2023 FCA 24 at paras. 197-198).

[11] Adopting a functional and contextual approach to the Federal Court's reasons, I find that they do not adequately explain the basis for the conclusions (the "why"), thus precluding meaningful appellate review.

[12] My first concern relates to the award of nominal damages for passing off. In their statement of claim, DermaSpark and Pollogen sought declarations of passing off contrary to subsections 7(b) and 7(c) of the *Trademarks Act*. However, their notice of motion for summary

trial and supporting memorandum of fact and law failed to advance any argument on that issue. Indeed, neither document referred to either provision or to the legal test for establishing a claim of passing off.

[13] In response, DermaSpark and Pollogen submit that their supporting memorandum of fact and law referred to cases that engaged with the test for passing off (including as it applied to their trademarks but involving different parties) and rely on this Court's decision in *Mud Engineering Inc. v. Secure Energy Services Inc.*, 2024 FCA 131.

[14] In *Mud Engineering*, at paragraph 36, this Court noted that the Federal Court had not explicitly set out the test for settlement privilege in its order striking significant portions of the affidavit filed by the appellants. Despite this omission, this Court held that the reasons met the legal standard of sufficiency. It explained that the Federal Court had stated in its reasons that it drew upon the respondents' written submissions, which cited a leading Supreme Court authority that set out the relevant principles on settlement privilege. This Court found that when the reasons were read holistically in light of the record before the Court, including the submissions and authorities put to the Court, it could discern the basis upon which the Federal Court had decided the issue of settlement privilege.

[15] In this case, no explicit arguments on passing off were made in DermaSpark and Pollogen's written submissions, and the cases that they cited were not used to support that specific point. The Federal Court could not draw from DermaSpark and Pollogen's submissions to make findings on passing off as there were none.

[16] In the absence of submissions on the issue and of any analysis explaining why it made a finding of liability on this basis, I fail to understand how the Federal Court could include “passing off” in its award of damages.

[17] At the hearing, DermaSpark and Pollogen’s counsel stated that the passing off argument was strategically omitted from the motion as it would not make a difference since they were seeking nominal damages.

[18] I am not persuaded by this argument. It seems to me that in assessing the quantum of damages to award—either at the lower or higher end of the range for such damages—the nature and degree of infringement would be a relevant consideration. Further, regardless of the rationale for omitting the passing off argument, the insufficiency of reasons with respect to passing off remains.

[19] My second concern relates to the registered trademarks deemed to have been infringed. They are a moving target.

[20] Notably, the May judgment lists TMA1032**940** as one of the infringed trademarks. While this particular trademark was included in the notice of motion for summary trial, memorandum of fact and law and draft order, it was not included in the statement of claim or as one of the several trademarks listed in the request to admit served on The Lounge and Ms. Hamdan. Further, while the trademark is mentioned in the affidavit of DermaSpark’s director, it is not included in the printouts of the CIPO database attached as exhibit MB-3 nor is it listed in the

document attached as exhibit MB-4. This document, entitled “Authorization for the Use of Registered Designs and Power of Attorney”, identifies a number of Pollogen’s trademarks for which DermaSpark is the sole and exclusive licensee within Canada and over which DermaSpark may take any action it deems necessary to enforce the Pollogen trademarks against third parties. There is nothing in the record that explains why this particular trademark was not included in the statement of claim, the request to admit, or exhibits MB-3 and MB-4 but then included in the motion for summary trial and, subsequently, in the May judgment.

[21] Further, while it is not one of the trademarks identified in the May judgment as having been infringed, I note that TMA1192569 was included in the statement of claim. It is also one of the trademarks included in the printouts of the CIPO database attached as exhibit MB-3 to the affidavit of DermaSpark’s director. There is no explanation in the record as to why it was dropped in subsequent pleadings, including the request to admit, and later in the May judgment but included in the evidence.

[22] Likewise, TMA 1184661—which is one of the registered trademarks included in the pleadings and found in the May judgment—is not listed in the Authorization for Use. While I understand that there is evidence that the trademark is registered to Pollogen and that it was registered as a trademark on June 14, 2023, after the Authorization for Use was signed, the evidence included in support of the affidavit of DermaSpark’s director does not clearly demonstrate that DermaSpark has been granted exclusive authorized use of this registered trademark.

[23] Given the inconsistencies in the registered trademarks alleged or deemed to have been infringed and in the evidence regarding their ownership and exclusive authorized use, I am not persuaded that the Federal Court could conclude as it did regarding the infringement of TMA1032**940** and TMA1184**661** without further justification. Moreover, upon review of the examples of infringement provided by DermaSpark’s director, it is unclear to me how the Federal Court could reach the conclusion that all the registered trademarks listed in the May judgment were indeed infringed.

[24] My third concern relates to the Federal Court’s failure to address the conflicts in the evidence on a key issue (*Hill* at para. 101; *Brokenhead First Nation* at paras. 41, 50).

[25] Rule 256 of the *Federal Courts Rules* provides that where a party fails to serve a response in Form 256, they are deemed to have admitted a fact or the authenticity of a document set out in the request to admit.

[26] When the Federal Court concluded that The Lounge and Ms. Hamdan were deemed to have admitted to the entirety of the facts and documents contained in DermaSpark and Pollogen’s request to admit, it accepted the allegation that the “Oxygeneo cosmetic apparatus” used by The Lounge and Ms. Hamdan was counterfeit (Amended Appeal Book filed on December 12, 2025 (AAB) at p. 51, Request to admit at para. 7).

[27] I acknowledge that The Lounge and Ms. Hamdan failed to serve a response to the request to admit using Form 256. However, there was evidence in the motion record that suggested that the apparatus used was not counterfeit.

[28] In what appears to be an attempt to respond to the request to admit, Ms. Hamdan sent an email to counsel for DermaSpark and Pollogen within the prescribed period for response. In the email, dated July 23, 2024, Ms. Hamdan states that she will be defending herself in court and has attached “documents and proofs” that she has the “real machine”. She provides the machine’s serial number and mentions that she has a purchase agreement and four witnesses. Later in the email, she repeats that she “purchased a legitimate machine which ought to have entitled her to use the name of the serial number OxyGeneo (S/N GP001705022)” and that “proof is in [the] attachment”. She also states that her “business purchased and used legitimate products directly from Dermaspark” and that she paid \$12,000 for the machine (AAB at p. 150).

[29] The record also contained an informational video (exhibit MB-22 to the affidavit of DermaSpark’s director) demonstrating the differences between legitimate and counterfeit machines. One of the differences identified is the existence of a label at the back of a legitimate machine that provides the name, the serial number, and the date of the machine. In the video in question, the legitimate machine’s serial number is GP002205849 and it is dated March 2022 (time stamp 1:41). I note the similarity between this serial number and the one mentioned by Ms. Hamdan in her July 23rd email: both have the same number of letters and numbers, and both start with “GP00”. This evidence could be construed as supporting Ms. Hamdan’s claim that the machine was not a counterfeit.

[30] In their motion for summary trial, DermaSpark and Pollogen alleged that “[w]hen examined as a whole, the evidence is absent any controversial nature and dissociated from any concerns of credibility” (AAB at p. 104). Given The Lounge and Ms. Hamdan’s statement of defence specifically denying the counterfeit allegations and the above evidence in the record, I am not satisfied that the Federal Court could accept such an assertion without further inquiry or justification. The Federal Court’s reasons do not mention this conflicting evidence, nor any contextual evidence that would indicate that it was considered.

[31] Incidentally, I note that Ms. Hamdan’s July 23rd email appears twice in the amended appeal book. It first appears in Tab O as a standalone email with attachments (AAB at pp. 66-90) and then in a chain of emails which are part of exhibit MC-2 to the affidavit of counsel for DermaSpark and Pollogen (AAB at pp. 144-158). In contrast with the email in Tab O, the email in exhibit MC-2 neither displays the attachments in the header nor includes the attachments themselves.

[32] Interestingly, the attachments in Tab O include a sales agreement dated March 23, 2022, between Diana Kadir and Ms. Hamdan for the sale of an “Oxegeneo” machine on May 22, 2022, with a purchase price of \$12,000.00 (AAB at p. 78). The serial number indicated on the agreement is the same as the one mentioned in the July 23rd email: GP001705022. There is also an invoice dated February 12, 2019, from DermaSpark to Diana Kadir, showing the purchase of an OxyGeneo machine bearing the same serial number (AAB at p. 77). There is a further invoice from DermaSpark to Ms. Kadir dated December 5, 2017, which demonstrates the purchase of an “OxyGeneo System” and other equipment (AAB at p. 75). In both the chain of emails in Tab O

and at exhibit MC-2, there is an email dated May 11, 2023, in which Ms. Hamdan alleges that “Diana el Kadri” is one of her employees (AAB at pp. 70 and 154, respectively).

[33] It is unclear to me whether these attachments were before the Federal Court. The Lounge and Ms. Hamdan ceased to be represented by counsel after filing their statement of defence and prior to being served with the request to admit. Counsel appearing on their behalf in the appeal was retained after the issuance of the May judgment but before the determination of the reconsideration motion and thus made no submissions in response to the motion for summary trial.

[34] If the attachments were part of the record before the Federal Court, it reinforces my conclusion that the Federal Court’s reasons fail to adequately address conflicting evidence on the record. If, on the other hand, they were not before the Federal Court, these documents are not properly before this Court given the absence of a motion to adduce fresh evidence. It thus becomes unclear to me why counsel for DermaSpark and Pollogen would agree to their inclusion in the appeal book. Regardless, I find that the reference to the attachments mentioned in the July 23rd email should have alerted the Federal Court to the fact that the evidence may not have been as uncontroversial as claimed by DermaSpark and Pollogen and warranted clarification.

[35] The next concern upon which I will comment relates to the award of damages.

[36] Given that the range of nominal damages awarded in similar cases is typically between \$15,000 and \$25,000, it was incumbent upon the Federal Court to explain why it was of the view

that both DermaSpark and Pollogen were entitled to damages at the higher end of the range. With the exception of an award given in default proceedings where the Federal Court awarded nominal damages of \$35,000 to each DermaSpark and Pollogen for a total amount of \$70,000 and for which there is very little information regarding the nature and scope of the infringement, the nominal damages awarded in similar cases have generally been much lower (see for example, *Dermaspark Products Inc. v. Ipince (Dreamlook Beauty)*, 2025 FC 946 - \$10,000; *Dermaspark Products Inc. v. Aveena Cosmetic Clinic Inc.*, 2025 FC 1350 (*Aveena (1350)*) - \$15,000; *Dermaspark Products Inc. v. Patel*, 2023 FC 388 - \$20,000; *Dermaspark Products Inc. c. Étienne*, 2023 QCCS 1268 - \$20,000 per plaintiff; and most recently *Dermaspark Products Inc. v. Ottamann (Admire beauty and Medispa)*, 2026 FC 23 - \$25,000). Likewise, unlike in other cases involving both DermaSpark and Pollogen, Pollogen did not file any affidavit evidence to support a claim of separate damages (*Ipince* at para. 23; *Aveena (1350)* at para. 6; *Dermaspark Products Inc. v. Aveena Cosmetic Clinic Inc.*, 2025 FC 979 at para. 18; *Patel* at Annex A).

[37] As for the punitive and exemplary damages awarded as a result of the amendment made pursuant to the July reconsideration judgment, the reasons in either judgment do not demonstrate that the Federal Court engaged with the factors set out in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18. For example, there is no engagement with the principle that punitive damages are generally only given where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation, or that punitive damages are only awarded where compensatory damages are insufficient to accomplish these objectives. I similarly note that there is no explicit engagement

with the fact that punitive damages are imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct (*Whiten* at para. 94).

[38] Finally, I accept that cost awards are discretionary and that the Federal Court did not have to address all relevant factors when assessing what constituted an appropriate cost award (*Red Pheasant First Nation v. Whitford*, 2023 FCA 29 at para. 74). However, the Federal Court found that DermaSpark and Pollogen were entitled to costs under Column V of Tariff B of the *Federal Courts Rules* without providing justification for deviating from the general rule for costs, which is to award them in accordance with Column III of Tariff B. Particularly given the limited complexity of the issues, the diminished amount of work required of DermaSpark and Pollogen to obtain judgment given their reliance on materials used in other infringement cases, and The Lounge and Ms. Hamdan's failure to respond to the request to admit using Form 256 and to defend the motion for summary trial, the Federal Court's reasons do not explain why the enhanced award was justified in this case.

[39] While this Court may, pursuant to subparagraph 52(b)(i) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, give the judgment that the Federal Court should have given, I am of the view that it would be inappropriate to do so in this case given the deficiencies in the reasons, the ambiguity in the pleadings, and the conflicting evidence regarding which trademarks were infringed and the authenticity of the machine at issue. It is better left to the Federal Court to determine whether this matter is indeed suitable for summary trial in light of these considerations, or whether the matter should proceed to trial. In either case, the Federal Court should provide reasons that sufficiently explain its reasoning for the chosen course of action.

[40] Accordingly, for the foregoing reasons, I would allow the appeals, set aside the judgment of the Federal Court dated May 12, 2025, as amended by the reconsideration judgment dated July 28, 2025, and remit the summary trial motion to the Federal Court for re-determination in accordance with these reasons. Of necessity, I would also set aside the July 28, 2025 reconsideration judgment.

[41] I would not award costs to The Lounge or Ms. Hamdan in this appeal as they are in part responsible for this unfortunate situation. Had they formally responded to the request to admit or the motion for summary trial, they could have clarified the issues for the Federal Court.

"Sylvie E. Roussel"

J.A.

"I agree.
Yves de Montigny C.J."

"I agree.
K.A. Siobhan Monaghan J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-232-25 (LEAD FILE) A-278-25
STYLE OF CAUSE:	THE LOUNGE MEDICAL SPA LTD. AND ROULA HAMDAN v. DERMASPARK PRODUCTS INC. AND POLLOGEN LTD.
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	JUNE 15, 2026
REASONS FOR JUDGMENT BY:	ROUSSEL J.A.
CONCURRED IN BY:	DE MONTIGNY C.J. MONAGHAN J.A.
DATED:	AUGUST 6, 2026

APPEARANCES:

Adam Ferland	FOR THE APPELLANTS
Michael Chevalier	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Prowse Barrette LLP Edmonton, Alberta	FOR THE APPELLANTS
Pinto Legal Westmount, Quebec	FOR THE RESPONDENTS