Federal Court Cour fédérale

Date: 20251126

Docket: T-2423-24

Ottawa, Ontario, November 26, 2025

PRESENT: Case management Judge Catharine Moore

BETWEEN:

THE CONSTRUCTION SPECIFICATIONS INSTITUTE, INC.

Plaintiff

and

BIBLIOTECH INC., JUSTE FANOU and TEMISAN FANOU

Defendants

ORDER

I. Overview

[1] The Defendants, Bibliotech Inc., Juste Fanou and Temisan Fanou, brought this motion to strike the Fresh as Amended Statement of Claim ("FASOC") of The Construction Specifications Institute, Inc., without leave to amend, pursuant to Rule 221(1)(a) of the *Federal Courts Rules*, SOR/98-106 [Rules]. The Defendants also sought an Order pursuant to Rule 181(2) for further and better particulars regarding the Plaintiff's FASOC. In the alternative, the Defendants sought an order pursuant to Rule 181(2) for other particulars.

[2] The Defendants argue that the claim fails to disclose a viable cause of action over which the Court has jurisdiction. They allege that the Plaintiff has failed to plead with sufficient particularity the material facts to establish its claim, especially by failing to identify any work in which copyright could subsist and by bringing a moral rights claim on behalf of a person incapable of having moral rights in a work. They further allege that the "Work" is not a trademark or subject matter for which depreciating goodwill would disclose a reasonable cause of action. They further allege that the common law tort of passing off alleged in the claim is outside the scope of the Federal Court's jurisdiction. They also argue that the allegations of trademark infringement in the FASOC are insufficiently detailed to enable the Defendants to defend themselves or the Court to be capable of regulating these allegations.

[3] The Plaintiff responds that the pleadings are sufficiently clear and identify how the Defendants are violating the copyright and trademark it possesses in MasterFormat and undermining the goodwill it possesses in the copyright. It argues that the Federal Court can consider the common-law tort of passing-off. It further argues that it should not be required to provide additional particulars on this motion.

[4] In the Plaintiff's Supplemental Submissions, it requests in the alternative that, if the Court requires further specificity, the Court should order particulars rather than striking the claim with leave to amend. In these supplemental submissions, it also states that it no longer opposes the Defendants' motion to strike without leave to amend the Plaintiff's claim to moral rights (previously laid out in paragraph 1(a)(x) of the Amended FASOC).

[5] For the reasons that follow, I conclude that the FASOC will be struck in its entirety with leave granted to the Plaintiff to amend.

II. Background

[6] The Plaintiff, the Construction Specifications Institute, Inc., is a not-for-profit association in the construction industry which develops standards for communicating construction information and provides education and certification to professionals on project delivery. The Plaintiff developed the "MasterFormat", which lists and categorizes construction products (such as sprinkler systems) and construction tasks (such as structure relocation) and associates each with a numerical code.

[7] According to the Plaintiff, MasterFormat was created for the Plaintiff by a panel of contracted, specialist volunteers in 1978 and updated by the Plaintiff's MasterFormat Maintenance Task Team periodically since then. The authors of each iteration of Masterformat were employees of or volunteers under contract with the Plaintiff at the time of creating each edition.

[8] The Plaintiff has registered copyright over MasterFormat with the United States Copyright Office under registration numbers TX0000740756 (Reg. Date March 14, 1979), TX0001538886 (Reg. Date March 25, 1985), TX0001538886 (Reg. Date April 8, 1997) and TX0009377235 (Reg. Date April 2, 2024). The copyright in MasterFormat is also registered with the Canadian Intellectual Property Office under Registration No. 1213241 (Reg. Date May 17, 2024).

[9] The Plaintiff is the owner of Canadian Trademark Registration No. TMA991107 for the MasterFormat Trademark, registered in association with the goods “Manuals in the field of construction project management”. The Plaintiff has used the MasterFormat Trademark in Canada since at least as early as 1979.

[10] The Defendants are a corporation, Bibliotech Inc. (“Bibliotech”); Juste Fanou a director, the owner, and the operator of Bibliotech; and Temisan Fanou, a director of Bibliotech. Bibliotech has produced a Manufacturer Library and Knowledge Base, which it claims is Canada’s largest database of construction products and suppliers. It allows users to search for products or manufacturers by MasterFormat Divisions and labels the corporations in the Manufacturer library by MasterFormat Codes. It has not paid a licensing fee to use MasterFormat.

[11] The Plaintiff’s claim arises from the Defendants’ use of MasterFormat on their website and in the Manufacturer Library and Knowledge Base, including electronic forms produced by the Defendants which are available on their website.

[12] The action was commenced by way of Statement of Claim on September 18, 2024. The Defendants requested particulars of the allegations on October 17, 2024. In response, the Plaintiff served and filed the FASOC on December 30, 2024. The Defendants wrote to the Plaintiff on January 14, 2025, noting that the Plaintiff’s amendments to the FASOC and its “Response to Demand for Particulars” did not address the Defendants’ request for particulars.

The Plaintiff then provided a “Fresh as Amended Response to the Defendants’ Demand for Particulars of the FASOC” (“Amended Response”) on January 31, 2025.

[13] The specific nature of the work which is alleged to be subject of this claim is disputed. The Plaintiffs describe MasterFormat as “the specifications-writing standard for most of today’s construction and commercial building design projects in North America, including in Canada”. They also describe it as “an indexing system widely used by architects, engineers and builders to organize construction data under specific title divisions, such as electrical, mechanical, procurement and contracting requirements, HVAC and thermal protection”.

[14] In their motion, the Defendants highlighted the difference between an indexing system and a specifications-writing standard and their requests for particularity about the nature of the work. In their reply on January 31, 2025, the Plaintiff stated that “The Work is further described but not limited by a document entitled ‘MasterFormat: 2020 Edition, Master List of Numbers and Titles for the Construction Industry’”.

[15] The motion to strike and for particulars was heard on September 25, 2025. At the end of the Motion, I requested additional submissions in writing on two recent Federal Court of Appeal decisions on motions to strike, *Bell Canada v Millennium Funding, Inc.*, 2025 FCA 153 [*Bell*] and *Michel v Canada (Attorney General)*, 2025 FCA 58 [*Michel*]. Submissions from the parties (“Plaintiffs Supplemental Submissions” and “Defendants’ Supplemental Submissions”) were received by the Court and were considered in these reasons.

III. Issues

[16] This matter raises the following issues:

1. Does the Court have jurisdiction to consider passing off?
2. Should the FASOC be struck, per Rule 221(1)(a) of the *Rules*?
3. If the FASOC is struck, should leave be granted to amend?

A. Does the Court have jurisdiction to consider passing off?

[17] The Defendants allege that the Federal Court, as a statutory court, lacks jurisdiction to consider the common law tort of passing off, and therefore it should exercise its discretion to strike pleadings on the common law tort of passing off.

[18] It is true that as a statutory Court, the Court lacks jurisdiction to consider common law causes of action. However, the court may adjudicate matters under the *Trademarks Act*, RSC 1985, c T-13 [*Trademarks Act*] and subsection 7(b) of the *Trademarks Act* codifies the common law tort of passing off (*Kirkby v Ritvik Holdings Inc.*, 2005 SCC 65, para 23). The sole distinction between the statutory expression in subsection 7(b) and the common law equivalent of the tort of passing off is that in order to resort to that provision, the Plaintiff must prove possession of a valid and enforceable trademark *(Diageo Canada Inc v Heaven Hill Distilleries, Inc.*, 2017 FC 571 at para 68).

[19] In the FASOC, the Plaintiff pleaded that the Defendants' actions were contrary to section 7(b) and (c) of the *Trademarks Act*. Taking all of this into account, I conclude that this Court has jurisdiction to consider the Plaintiff's arguments pursuant to the statutory expression of passing off.

B. Should the FASOC be struck, per Rule 221(1)(a) of the *Rules*?

(1) *Motion to Strike*

[20] The Court may strike a pleading under Rule 221(1)(a) if it is "plain and obvious" that the pleading does not disclose a reasonable cause of action: *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17 [*Imperial Tobacco*]. The Court is to read the pleadings as generously as possible and make allowances for drafting deficiencies: *Operation Dismantle v The Queen*, 1985 CanLII 74 (SCC), [1985] 1 SCR 441 at p 451 [*Operation Dismantle*]. The moving party has the burden of establishing that a claim does not have a reasonable prospect of success: *Imperial Tobacco* at para 17.

[21] To survive a motion to strike under Rule 221(1)(a), the pleadings must allege a recognized cause of action and sufficient material facts to establish all the elements of that cause of action: *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 18. The material facts pled are taken to be true, unless they are manifestly false, incapable of being proven, assumptions, or speculations: *Operation Dismantle* at p 455. Particulars provided in response to a request for particulars are assessed as part of the pleadings: *El-Nakady v Canada*, 2024 FC 254 at para 17 [*El-Nakady*].

[22] The claim should not be struck merely because it is novel, as stated by the Supreme Court of Canada in *Imperial Tobacco* at para 21. The Supreme Court recently reiterated this in *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19, finding at para 19 that it is not determinative on a motion to strike that the law has not yet recognized the particular claim.

(2) *Required Particulars*

[23] According to *Oleynik v Canada (Attorney General)*, 2014 FC 896 at para 5, citing the decision in *Bérubé v Canada* (2009), 2009 FC 43 at paragraph 24, in order to disclose a reasonable cause of action, a claim must show the following three elements:

i. allege facts that are capable of giving rise to a cause of action;

ii. disclose the nature of the action which is to be founded on those facts; and

iii. indicate the relief sought, which must be of a type that the action could produce and that the Court has jurisdiction to grant.

[24] The Plaintiff submits that the particulars provided are sufficient to meet the above standard, and in response to the Defendants' request for further particulars in this motion, it requests the Court apply the test and procedure as set out in *Rovi Guides, Inc v Videotron Ltd.*, 2022 FC 981 paras 78, 85. In that case, the Court upheld the following test:

> When faced with a motion for particulars, the Court asks two questions (*Throttle Control* at para 10):
>
> 1) Are the alleged particulars requested material facts or are they evidence? The former may be ordered whereas the latter should not.
>
> 2) Are the particulars requested necessary for the purpose of being able to respond to the pleading?
>
> It should also be noted that material facts sought by way of a particulars motion should not be within the knowledge of the requesting party. To the extent they are not, an affidavit should be provided setting out why the particulars are required. A failure to provide an affidavit, however, is not necessarily fatal to a motion for particulars [Citations omitted].

[25] In light of this, the Plaintiff requested that the Defendants provide an affidavit explaining why the additional particulars are required.

[26] In the interests of streamlining the proceeding, and because the Defendant provided the reasons it sought additional particulars in its motion materials, I allowed the motion to proceed without requiring this affidavit.

(3) *Nature of the Work and Copyright Act subsection 34.1(1)*

[27] In order to establish a cause of action for copyright infringement, a Plaintiff must identify a "work" in which copyright subsists, as set out in the *Copyright Act*, RSC 1985, c C-42, 17 [*Copyright Act*] sections 3 and 27.

[28] Where a copyright has been registered, there is a presumption in section 34.1(1) that there is a copyright in the work.

[29] The Plaintiff stated in oral submissions that the subject of this dispute is the MasterFormat literary work, the 600+ page document attached as Schedule A to the Plaintiff's Ammended Response, pages 115 to 772 of the Moving Parties' Motion Record ("Masterformat 600+ Page Document"). They plead that this document is the subject of registered copyright #1213241.

[30] As the Masterformat 600+ Page Document is the subject of a registered copyright, per subsection 34.1(1) of the *Copyright Act*, the Plaintiff is presumed to possess a valid copyright in

that work. Assuming this work is the subject of the dispute in this case, the Defendants would bear the burden of rebutting this copyright, as discussed in *Proline Pipe Equipment Inc v Provincial Rentals Ltd.*, 2019 ABQB 983 [*Proline*].

[31] However, the Defendants allege that in the pleadings in the FASOC and the Amended Response, the "work", which is the subject of the Plaintiff's claim, is unclearly particularized (and is not clearly referring to the Masterformat 600+ Page Document). In particular, the Defendants point to the following definitions of the "work" in the Plaintiff's submissions, which they submit are ambiguous:

i. The Work is further described <u>but not limited by</u> [the Masterformat 600+ page Document] attached as Schedule "A"

ii. copyright subsists in the MasterFormat standards (the "Work") as further described herein and <u>including</u> Registration No. 1213241;

iii. One of the Plaintiff's most popular and well-known standards is the Work, first released in 1979 and updated continuously by the Plaintiff since that time. The Work is the specifications-writing standard for most of today's construction and commercial building design projects in North America, including in Canada.

iv. The Work is a creative indexing system

[32] Per *Proline*, para 21, when the subject matter of the claim is not capable of being the subject of copyright, there can be no presumption of copyright under section 34.1. Systems are not works which can be subject to copyright, as set out in *Delrina Corp v Triolet Systems Inc*, 2002 CanLII 11389 (ON CA) [*Delrina*] at paras 35-36. Therefore, if the "work" is a "system" as alleged by the Defendants, the Plaintiff does not benefit from the presumption of copyright.

[33] This interpretation is contrary to the oral submissions of the Plaintiff, which were that the "work" is the Masterformat 600+ Page Document. However, this oral submission is itself contrary to the varied written articulations of the Work as pled in the FASOC and Amended Response. Pursuant to Rule 180 of the *Rules*, a party may plead an allegation of fact or raise a new ground of claim in a pleading that is inconsistent with a previous pleading only if the party amends the previous pleading accordingly.

[34] Ambiguity in the "works" under dispute was discussed in *Fox Restaurant Concepts LLC v 43 North Restaurant Group Inc*., 2022 FC 1149. In that case the Court stated at para 23 that a Plaintiff must provide a closed and specific list of the works they claim are copyrighted in order to adequately frame the issues for discovery and trial.

[35] The nature of the work must be unambiguously articulated by the Plaintiff (per *Fox Restaurant*). In this case the existing definitions of the work are ambiguous, and per Rule 180, such ambiguity can only be resolved by amendment to the pleadings.

(4) *Copyright in Compilations and Taxonomies*

[36] As stated above, the lack of precision in the nature of the "work" at issue in this case means that the pleadings in the FASOC have failed to establish a cause of action for copyright infringement. However, I will also address whether copyright could exist in an indexing system or taxonomy, since some of the Plaintiffs' pleadings have indicated Masterformat is an indexing system, and the parties provided submissions on this issue as stated in *U & R Tax Services Ltd v H & R Block Canada Inc.,* 1995 CanLII 19292 (FC); [1995] FCJ No 962 at page 265, "The

general rule of law is that the use of information generally available, even assembled in a form used by others, still possesses copyright if it is the result of labour, skill or judgment, and not copied from others, even though it may be open to others to make their own composition or compilation from the same source material." In this case, "assembled in a form used by others" refers to the fact that copyright may exist in a particular map or form, even if other parties make use of the same publicly available information to make other works of the same type.

[37] The Plaintiff raised several cases where copyright was found in a form, including *BC Jockey Club v Standen (Winbar Publications)*, 1985 CanLII 591 (BC CA); *Patterned Concrete Mississauga Inc v Bomanite Toronto Ltd*, 2021 FC 314. However, these cases are of limited assistance to the Court, because while the Plaintiff does plead that a form constitutes part of the Defendants' violation of their copyright, the "work" at issue in this case is not pleaded to be a form. A specific presentation of objectively determinable facts (such as tax equations or the relative size of landmasses) is a different type of work than a taxonomy, which creates a system of categories to set out relationships between products, so such cases are not relevant to findings concerning copyright infringement of the indexing system in the Masterformat work.

[38] The distinction between these types of work was noted in *ADA v Delta Dental Plans Ass'n*, 126 F.3d 977, 1997 US App LEXIS 26957 [*Delta Dental*]. This case was raised by the Plaintiff, which noted a lack of Canadian precedent on copyright of taxonomies. As the Court said in that case at page 980, "It could be a compilation only if its elements existed independently and the ADA merely put them in order. A taxonomy is a way of *describing* items

in a body of knowledge or practice; it is not a collection or compilation *of* bits and pieces of 'reality.'"

[39] The Plaintiff's authorities included *Divine Hardwood Flooring Ltd v D Nine Flooring Ltd*, 2018 FC 500, which referenced *Tele-Direct (Publications) Inc v American Business Information, Inc (CA)*, 1997 CanLII 6378 (FCA), [1998] 2 FC 22, a Canadian precedent which does address the possibility of copyright of ways to organize information, though not of a taxonomy specifically. In this case, the Court of Appeal considered whether there could be copyright in the arrangement of the information from businesses, including the name, address, and telephone number, and the organization of these businesses themselves in the classified sections of the Yellow Pages telephone directory. It clarified that that analysis should be separate from whether there was copyright in the work overall (pages 34-35).

[40] The Court found that copyright in a compilation of data has, since 1993, required originality, which means it must "be a work that was independently created by the author and which displays at least a minimal degree of skill, judgment and labour in its overall selection or arrangement. The threshold is low, but it does exist" (page 36). The Court found similarity in matters of compilation of data between American and Canadian copyright law. It cites an American authority on whether arrangements are original, wherein the Court found that alphabetical, chronological and sequential listings of data lack the minimum degree of originality to attract copyright.

[41] In *Delta Dental*, the US Court found that copyright existed in a taxonomy of dental procedures where each procedure was represented by a five-digit code. The Court found at page 979, "Facts do not supply their own principles of organization. Classification is a creative endeavor. Butterflies may be grouped by their color, or the shape of their wings, or their feeding or breeding habits, or their habitats, or the attributes of their caterpillars, or the sequence of their DNA; each scheme of classification could be expressed in multiple ways."

[42] This finding of creative work and copyright in taxonomies has not been upheld consistently in subsequent American appellate jurisprudence. In *Southco Inc. v Kanebridge Corp*, 258 F3d 148, 2001 US App LEXIS 16245, *Aftermarket Tech Corp. v Whatever It Takes Transmissions*, 2003 US Dist LEXIS 27933 (Western Dist Ky August 12, 2003), and *UIRC-GSA Holdings, LLC v William Blair & Co., LLC,* 90 F4th 908, 2024 US App LEXIS 865, the Courts distinguished *Delta Dental*, finding in those cases that the specific taxonomies were insufficiently creative to attract copyright.

[43] In *ATC Distrib Group Inc. v Whatever It Takes Transmissions & Parts, Inc,* 402 F3d 700, 2005 US App LEXIS 5059, the Court found at pages 707-709 that all the creative elements of the taxonomy were non-protectable ideas. It found that the expression of the categories was merged with the ideas of categories and therefore not copyrightable (applying the merger doctrine), making only the specific numbers copyrightable. However, it found that the specific numbers lacked copyright because they were not creatively assigned to the categories.

[44] Despite some historic dispute (ex: *Apple Computer Inc v Mackintosh Computers Ltd.*, 1986 CanLII 6820 (FC), [1987] 1 FC 173 at page 186), recent Canadian and Federal Court jurisprudence accepted the merger doctrine as the "natural corollary of the idea/expression distinction"(*Delrina* at para 52, *Red Label Vacations Inc. (redtag.ca) v 411 Travel Buys Ltd. (411travelbuys.ca)*, 2015 FC 18, *Toronto Real Estate Board v Canada (Commissioner of Competition)*, 2017 FCA 236).

[45] Teledirect, along with the taxonomy precedents above provides some indication of what is necessary for copyright to subsist in a taxonomy: it must be a way to organize information creatively (not simply alphabetically or chronologically), which is not the only way to represent the idea of that organization, and the copyright of the organization must be analyzed distinctly from the copyright to the work as a whole. The lack of Canadian precedent on taxonomy copyright and minimal precedent on information organization copyright demonstrate the novelty of the Plaintiff's case. However, while a claim cannot be struck because it is novel, the mere novelty of a claim cannot save pleadings which do not otherwise disclose a reasonable cause of action.

(5) *Depreciation of Goodwill*

[46] Section 22 of the *Trademarks Act*, creates an action for depreciating the goodwill in a registered trademark. It states that:

> **Depreciation of goodwill**
>
> **22 (1)** No person shall use a trademark registered by another person in a manner that is likely to have the effect of depreciating the value of the goodwill attaching thereto.

[47] Although goodwill is not defined in the *Trademarks Act*, the Supreme Court of Canada has described the goodwill associated with a trademark as being "the positive association that attracts customers towards its owner's wares or services rather than those of its competitors" (*Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23 at para 50).

[48] As set out by this Court in *Sadhu Singh Hamdard Trust v Navsun Holdings Ltd*, 2018 FC 1039 [*Hamdard Trust*], citing *Kirkbi*, "the existence of goodwill is tested by determining whether the party has established that its goods are known in the market by reason of their distinctive features" (para 30). In making this assessment for the purposes of passing off, the Court may consider the *Veuve Clicquot* factors (*Hamdard Trust* at paras 41-50).

[49] The Plaintiff alleges that it has created substantial goodwill in the MasterFormat Work and in the registered trademarks associated with the MasterFormat Work through continuous use and promotion and its corresponding widespread acceptance in the construction, design and specification community. It submits that the Defendants' infringement damages this goodwill.

[50] The Plaintiff cites *Oakley, Inc v Doe*, 2000 CanLII 15963 (FC), for the principle that the Court may award damages for loss of goodwill without proof of actual damage and without an allegation of passing off (para 8). The Court found that damage may consist of lost sales, but records of these are often too difficult to find, and "It is more likely that the intellectual property holder's goodwill will be damaged by the presence of inferior quality goods bearing its marks or copyrighted material."

[51] The Defendants rely on their argument that the subject of dispute in this case is not the MasterFormat Trademark or the associated MasterFormat 600+ Page Document. They allege that since the subject of dispute is not a registered trademark, it cannot attract goodwill, and therefore they should not be held liable for depreciation of goodwill.

> In order to make out a claim under Section 22 of the *Trademarks Act*, the subject of the dispute must be a registered trademark. While it is undisputed that the Plaintiffs have registered trademarks to Masterformat, as I have found, it is unclear whether that registered trademark is the subject of this dispute. As such these pleadings do not disclose a reasonable cause of action and therefore must be struck.

[52] Moral rights are set out in the *Copyright Act* at section 14.1, which states that:

> **14.1(1)** The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.
>
> **No assignment of moral rights**
>
> **(2)** Moral rights may not be assigned but may be waived in whole or in part.

[53] The binding precedent on this matter is *Théberge v Galerie d'Art du Petit Champlain inc*, 2002 SCC 34 (CanLII). As the Supreme Court of Canada says at paragraph 15:

> Moral rights, by contrast, descend from the civil law tradition. They adopt a more elevated and less dollars and cents view of the relationship between an artist and his or her work. They treat the artist's *œuvre* as an extension of his or her personality, possessing a dignity which is deserving of protection. They focus on the artist's right (which by s. 14.1(2) is not assignable, though it may be waived) to protect throughout the duration of the economic rights (even where these have been assigned elsewhere) both the integrity of the work and his or her authorship of it (or anonymity, as the author wishes).

[54] This is consistent with the plain language reading of section 14.1.

[55] As moral rights cannot be assigned to the Plainttiff by the authors of the work, and as it is not the author of the MasterFormat, the Plaintiff is thus incapable of possessing moral rights in the work.

[56] Following the oral hearing, the Plaintiffs included in their Supplemental Submissions that they no longer oppose the Defendants' motion to strike their claim to moral rights.

C. If the FASOC is struck, should leave to amend be granted?

[57] The Court also has discretion under Rule 221(1)(a) to grant leave to amend pleadings which have been struck. For leave to amend to be granted, the defect in the struck pleading must be curable by amendment: *Simon v Canada*, 2011 FCA 6 at para 8. However, the Plaintiff cannot rely on the possibility of providing further particulars to save an insufficient pleading: *El-Nakady* at para 17.

[58] The above-mentioned Federal Court of Appeal cases, *Michel* and *Bell*, address whether leave should be granted to amend after a pleading is struck. The test for whether leave should be granted is stated at para 47 of *Bell*, requiring:

> that the judge conclude that the defects are not curable. This high bar highlights that denying leave is a very serious consequence for the party whose claim is dismissed and is a step that should not be taken lightly. Importantly, if the defect involves the insufficiency of material facts [*Michel*, at para 79] stressed that leave to amend should be granted 'unless they have already been granted so many chances to amend that the court concludes they are unable to plead the required facts'.

[59] As stated, I requested supplemental written submissions from the parties on this issue.

[60] The Defendants argue that *Bell* supports their position that the impugned pleadings should be struck without leave to amend because it requires a Judge to examine the pleadings and consider the circumstances as a whole in determining whether the defects could possibly be cured (para 48). They allege that the circumstances as a whole in the present case do not support the impugned pleadings and amendments are incapable of correcting them.

[61] The Defendants also argue that the requirement in *Bell* that pleadings must define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair (and that a failure to do so justifies striking pleadings) is consistent with their motion to strike.

[62] The Defendants raise para 79 of *Michel*, which states that a party should be granted leave to amend if a pleading is struck for want of material facts unless they have already been granted so many chances to amend that the court concludes they are unable to plead the required material facts. They argue that the Plaintiffs have been modifying their pleadings for a year and therefore have been granted so many chances to amend that the above standard has been met.

[63] The Plaintiff maintains that its present pleadings are sufficient. However, in the alternative, they argue that if the Court decides to strike portions of the FASOC, leave to amend should be granted, as there has been no decision to amend its claim (in contrast to *Michel*, where

the Federal Court of Appeal found it appropriate to grant leave three times). They argue that the defence did not, in its motion, allege that there are insufficient material facts.

[64] For the foregoing reasons, and specifically including comments made in oral submissions and post-hearing submissions, I am striking the claim in its entirety with leave to amend. In so doing, I adopt the reasoning of Associate Judge Horne in *Toyota v Marrand Auto Inc.*, 2024 FC 1776:

> [35] As currently drafted, the Claim does not set out material facts alleging that the TOYOTA products sold by the defendant were damaged in shipment and unsafe. While I have the discretion to order that particulars be provided, there is a benefit to having all of the plaintiffs' allegations and material facts in a single document. The most efficient way to move the matter forward is to strike the Claim in its entirety, but with leave to amend in this respect.

D. Costs:

[65] In my view, each side has had a measure of success; however, the Defendants have obtained much of the relief they were seeking. Further, I note the comments of the Defendants to the effect that the motion may not have been necessary if the clear description of the Work articulated during the hearing of the motion had been provided in the pleadings. I also note that the Plaintiff offered to amend the claim at several points during the argument. Accordingly, in my discretion, I award costs to the Defendant.

Order in T-2423-24

THIS COURT ORDERS that:

1. The Fresh as Amended Statement of Claim is struck out in its entirety. The Plaintiff is granted leave to amend and serve and file an Amended Fresh as Amended Statement of Claim within sixty (60) days of the date of this Order.

2. The Defendants are awarded their costs of the motion in any event of the cause, assessed in accordance with Column III of Tariff B.

"Catharine Moore"
Case management Judge