

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20230328**

**Docket: A-330-21**

**Citation: 2023 FCA 70**

**CORAM: GLEASON J.A.  
MACTAVISH J.A.  
MONAGHAN J.A.**

**BETWEEN:**

**IMS INCORPORATED, c.o.b. as RESTATS  
also known as REALITY and  
LEON Y. D'ANCONA**

**Appellants**

**and**

**THE TORONTO REGIONAL REAL ESTATE BOARD**

**Respondent**

Heard at Toronto, Ontario, on October 6, 2022.

Judgment delivered at Ottawa, Ontario, on March 28, 2023.

**REASONS FOR JUDGMENT BY:**

**GLEASON J.A.**

**CONCURRED IN BY:**

**MACTAVISH J.A.  
MONAGHAN J.A.**

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**REASONS FOR JUDGMENT**

**GLEASON J.A.**

[1] The appellants, IMS Inc. and Leon Y. d'Ancona (collectively, IMS), appeal from the order issued by Justice Pallotta of the Federal Court (the motion judge) in *Toronto Regional Real Estate Board v. IMS Incorporated*, 2021 FC 1239. In that order, the motion judge overturned a portion of an earlier unreported speaking order, issued on April 7, 2021 in T-900-20 by

Prothonotary Milczynski (whom I term the prothonotary, as that was the applicable title at the time the order in issue in this appeal was rendered). In her order, the prothonotary, who was acting as the case management judge, struck out the statement of claim of the respondent, Toronto Regional Real Estate Board (TRREB), with leave to amend certain claims that are not relevant to this appeal.

[2] For the reasons that follow, I would grant this appeal in part to correct a technical flaw in the motion judge's order but would uphold her determination setting aside the portion of the prothonotary's order striking TRREB's copyright claims without leave to amend. As I would find TRREB successful on the merits of this appeal, I would award it costs on the appeal.

I. Background

[3] The claim in the underlying action in this matter relates to the Multiple Listing Service online system operated by TRREB, which it terms the TRREB MLS® System in its statement of claim.

[4] In its claim, TRREB sought a declaration that it was "... the creator, author and custodian of a substantial curated online system operated as the TRREB MLS® for access by TRREB members, and TRREB's partner real estate boards' members..." (paragraph 1(a) of the statement of claim).

[5] TRREB further alleged in its statement of claim that the TREB MLS® System provides access to “... more than 100 on-line services, including access to active real estate sale listings, detailed unique property descriptions, archival information, unique photography, detailed neighbourhood descriptions listing schools and community features, and other curated information related to real property, including, but not limited to, purchase prices for properties located in the Greater Toronto Area ... and other parts of Ontario...” (paragraph 1(a) of the statement of claim).

[6] TRREB went on to state in the paragraph of its statement of claim seeking relief that it was the owner and/or exclusive licensee of the copyrights associated with the TRREB MLS® System and the materials displayed via the TRREB MLS® System (which it termed the TRREB MLS® Info). TRREB further alleged in paragraph 8 of its statement of claim that:

The unique collection of information compiled and organized by TRREB and maintained by TRREB as the TRREB MLS® System is a copyrightable work [...]. The manner of the compilation of all of the data is original and independently created and organized by TRREB, relying upon a great degree of skill, judgment and labour in its overall selection and arrangement [...]

[7] TRREB also alleged in its statement of claim that IMS obtained unauthorized and illegal access to the TRREB MLS® System and its proprietary contents through circumventing the protections put in place to protect the TRREB MLS® System in violation of section 41 of the *Copyright Act*, R.S.C. 1985, c. C-42 and used the information so obtained to market reports and otherwise monetize that information (paragraphs 22 to 25 of the statement of claim).

[8] TRREB claimed, among other things, the following relief:

- a declaration that it was the owner and/or exclusive licensee of the copyrights in the TRREB MLS® System and the TRREB MLS® Info;
- a declaration that IMS' "... unauthorized copying, data scraping, downloading, distribution, access, data collection, collation or exploitation..." of the TRREB MLS® Info was an infringement of TRREB's copyrights;
- a declaration that access to the TRREB MLS® System and the TRREB MLS® Info by using any means to bypass technological protection measures put in place to limit or deny access to the TRREB MLS® System and the TRREB MLS® Info was a breach of section 41 of the *Copyright Act*; and
- damages and injunctions for breach of its copyrights in the TRREB MLS® System and the TRREB MLS® Info.

[9] TRREB also alleged that IMS had violated the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (PIPEDA), and other, unparticularized proprietary rights that TRREB claimed it possesses in respect of the TRREB MLS® System and the TRREB MLS® Info. TRREB also sought remedies in respect of these additional alleged violations.

[10] IMS brought a motion to strike TRREB's statement of claim in its entirety. It asserted that the claim fell outside the jurisdiction of the Federal Court, that the copyright claims disclosed no reasonable cause of action under rule 221(1)(a) of the *Federal Courts Rules*, S.O.R./98-106, or were otherwise an abuse of process within the meaning of rule 221(1)(f) of the Rules, and that the claims related to PIPEDA disclosed no reasonable cause of action.

[11] Its motion in respect of the copyright issues was premised on the assertion that this Court had finally decided in *Toronto Real Estate Board v. Canada (Commissioner of Competition)*, 2017 FCA 236, [2018] 3 F.C.R. 563 (*TREB v. Canada*) that the Toronto Real Estate Board possesses no copyright in its MLS system. In *obiter dicta* or a non-binding portion of the *TREB v. Canada* decision, this Court endorsed the conclusion of the Competition Tribunal that the components of the Toronto Real Estate Board's MLS system at issue in that case were not subject to copyright because they lacked originality.

## II. The Decisions of the Prothonotary and of the Motion Judge

[12] The prothonotary struck the copyright claims and the claims under PIPEDA, without leave to amend. She also struck the claims for breach of proprietary rights, but granted TRREB leave to amend what she characterized as TRREB's "vague claims of confidentiality and proprietary rights" that she could not conclusively determine fell outside the jurisdiction of the Federal Court.

[13] Insofar as concerns the copyright claims, the prothonotary stated that TRREB had failed to plead that it was the owner of the copyright or expressly how there had been a breach of copyright. She noted that these defects could be remedied with pleading amendments or particulars. However, she determined that the copyright claims suffered from a more fatal flaw because this Court found in *TREB v. Canada* "... that copyright does not exist in the content of the TRREB MLS system." The prothonotary accordingly struck the claims related to copyright, concluding that, "[e]ither there is copyright, or there is not." The prothonotary did not specify

whether she premised this conclusion on rule 221(1)(a) or rule 221(1)(f) of the *Federal Courts Rules* but noted that “[she was] satisfied that it [was] plain and obvious that neither the *Copyright Act* nor PIPEDA claims can succeed.”

[14] The prothonotary’s order provided as follows: “... the motion is granted, with costs to the Defendants, and the Statement of Claim is struck, with leave to amend.”

[15] TRREB appealed the order, submitting that the prothonotary had erred in striking its copyright claims without leave to amend. The motion judge granted TRREB’s appeal, overturned the prothonotary’s order in respect of the copyright claims, and granted TRREB leave to amend those claims.

[16] The motion judge concluded that the prothonotary had proceeded under rule 221(1)(f) of the *Federal Courts Rules* and committed a palpable and overriding error in relying on *TREB v. Canada* to conclude that TRREB was relitigating the same issue in its action. She also noted that she would have granted the appeal if the prothonotary had proceeded under rule 221(1)(a).

[17] The motion judge held that the issue of whether a work meets the originality threshold for copyright is a question of mixed fact and law. She stated that the prothonotary’s conclusion that the copyright issue had already been decided, “... and ‘[e]ither is there copyright, or there is not’, necessarily assumes that the works in question [*i.e.*, in this action and in *TREB v. Canada*] are the same” (paragraph 29). However, there was no evidence before the prothonotary on the point. The motion judge therefore concluded that the prothonotary made a palpable and overriding

error in assuming that the works were the same. She stated as follows at paragraph 36 of her reasons:

In my view, the [prothonotary] committed a palpable and overriding error by relying on the FCA's decision to find that TRREB is relitigating the same issue in this action. Whether a work meets the originality threshold is a finding of mixed fact and law and depends on the application of facts to a legal test. The FCA's determination in this regard was based on the Competition Tribunal's factual findings, which in turn were based on a specific evidentiary record before it. The proceeding before the Competition Tribunal related to "disputed data" from the MLS database, five years prior to this action. The record before the FCA was not before the [prothonotary] and there is no way to know if the evidentiary basis for the FCA's determination would be the same in this action.

[18] In reaching this conclusion, the motion judge noted that it was inappropriate to use judicial notice to assume the works were the same. Relying on *R. v. Daley*, 2007 SCC 53, 288 D.L.R. (4th) 1 at para. 86; *Tsawwassen Indian Band v. Delta* (1997), 149 D.L.R. (4th) 672, 37 B.C.L.R. (3d) 276 at paras. 98–99; *R. v. Levkovic*, 2010 ONCA 830, 103 O.R. (3d) 1 at para. 48; *R. v. Perkins*, 2007 ONCA 585, 51 C.R. (6th) 116 at para. 38; and *R. v. Spence*, 2005 SCC 71, 259 D.L.R. (4th) 474, the motion judge held that facts that could reasonably be questioned cannot be the subject of judicial notice and that caution is warranted where the use of a prior judicial precedent would permit a party to substitute precedent for proof.

[19] The motion judge also noted that several court orders (including two from the Federal Court) had granted an interim injunction or default or consent judgment to TRREB in respect of its copyright claims in other actions. While holding that these orders were not determinative, the motion judge stated that "... they nevertheless form[ed] part of the overall circumstances that should be taken into account" (paragraph 37).



[20] The motion judge concluded on these points as follows at paragraph 38:

As the moving party on the motion to strike, IMS had the onus to prove that TRREB was relitigating the same issue. Relying on the determination in *TREB v [Canada]* without, at a minimum, evidence that the same works were at issue in both proceedings, permitted IMS to “substitute precedent for proof”.

[21] The motion judge continued by holding that, even if TRREB had been shown to have been relitigating the same issue, the prothonotary did not properly address whether relitigation of the same claims in the action as in *TREB v. Canada* would constitute an abuse of process. She noted that the bar against relitigation is a discretionary one, as the Supreme Court of Canada held in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, 232 D.L.R. (4th) 385 at para. 53. She stated as follows at paragraph 42 of her reasons:

The [prothonotary’s] order does not indicate that considerations such as whether relitigation would enhance the administration of justice or create an unfairness in this case were taken into account. These considerations might include differences in the nature of the proceedings, the fact that IMS was not a party to the prior proceeding, and that TRREB was defending allegations made against it. As noted above, the doctrine of abuse of process should only be invoked in the clearest cases: *Boily v. Canada*, 2019 FC 323, 311 A.C.W.S. (3d) 556] at para 70. In my view, the [prothonotary’s] order does not address whether the doctrine should be invoked in this case, and I am not persuaded that it should.

[22] By reason of the foregoing errors, the motion judge issued the following order:

1. This Rule 51 motion appealing the [prothonotary’s] April 7, 2021 order is allowed;
2. The April 7, 2021 order is set aside to the extent that it strikes out the copyright claims without leave to amend;

3. The April 7, 2021 order grants leave to amend TRREB's statement of claim in part, and that aspect of the order is undisturbed; in addition, TRREB is hereby granted leave to amend its statement of claim as it relates to the copyright claims; and
4. Costs remain to be determined.

### III. Issues

[23] IMS submits that the motion judge made several reviewable errors, any one of which would warrant setting her decision aside.

[24] IMS first submits that the motion judge erred by conducting what was in essence a *de novo* review, thereby failing to afford sufficient deference to the prothonotary. IMS points specifically to paragraph 42 of the motion judge's reasons as evidencing such improper overreach. IMS adds that, when the prothonotary's order is properly understood, it is clear that the prothonotary did consider whether relitigation was appropriate and concluded that it was not. IMS therefore submits that it was not open to the motion judge to replace the exercise of discretion undertaken by the prothonotary with the motion judge's own exercise of discretion.

[25] IMS secondly says that the motion judge misapprehended the nature of the prothonotary's decision. When properly read, contrary to what the motion judge determined, IMS says that the prothonotary did proceed under rule 221(1)(a) and not rule 221(1)(f) of the *Federal Courts Rules* because the prothonotary concluded that the copyright claims disclosed no reasonable cause of action. IMS submits that it was open to the prothonotary to have proceeded

under rule 221(1)(a) to strike the claims in light of the determinations made in *TREB v. Canada*. IMS likens the impact of that judgment to any other decision settling a point, which cannot be relitigated in a subsequent case.

[26] IMS thirdly contends that the ruling in *TREB v. Canada* finally disposed of the issue of whether TRREB possesses copyright in the TRREB MLS® system, that the prothonotary correctly so found, and that the motion judge erred in concluding otherwise. It also asserts that it was incumbent on TRREB to have demonstrated that the TRREB MLS® system was not the same work as the one at issue in *TREB v. Canada*, which it failed to do. It therefore contends that the prothonotary's order striking TRREB's copyright claims without leave to amend contained no error.

[27] IMS fourthly submits that the motion judge erred in her understanding of the doctrine of judicial notice and violated its rights to procedural fairness in invoking the inapplicability of judicial notice, when neither party had made such an argument nor referred to the cases the motion judge relied on.

[28] IMS further says that the motion judge erred in making reference in her reasons to the interim injunctions and consent and default judgments in which TRREB's copyright claims were recognized, noting that several of these rulings have been overturned.

[29] IMS finally contends that the motion judge's order contains a logical flaw in that she set aside the prothonotary's order striking the copyright claims without leave to amend but then ordered that TRREB was granted leave to amend the copyright claims.

[30] The issues raised by IMS overlap to a certain degree. They can be usefully restated as follows:

1. Did the motion judge err in concluding that a necessary part of the prothonotary's reasoning involved the determination that the works at issue in the action were the same as those at issue in *TREB v. Canada*?
2. Did the motion judge err in concluding that the prothonotary made a palpable and overriding error in finding the works at issue in the action were the same as those at issue in *TREB v. Canada*?
3. Did the motion judge err in concluding that the prothonotary had proceeded under rule 221(1)(f) as opposed to rule 221(1)(a) of the *Federal Courts Rules*?
4. Did the motion judge err or violate IMS' procedural fairness rights in referring to the notion of judicial notice and relying on the case law she cited regarding that notion?
5. Did the motion judge err by applying the incorrect standard of review and improperly substituting her opinion for that of the prothonotary in paragraph 42 of her reasons?

6. Did the motion judge err in making reference in her reasons to the interim injunctions and consent and default judgments in which TRREB's copyright claims were recognized?
7. Did the motion judge err in the way she formulated her order?

[31] As will become apparent, the first two of the foregoing issues are largely dispositive of this appeal. I will accordingly fully address them and comment only briefly on the remaining issues.

#### IV. Analysis

##### A. *Standard of review*

[32] In examining these issues, it is useful to commence by outlining the standard of review the motion judge was required to apply and that which this Court is to apply to her order.

[33] As concerns the standard that the motion judge was to apply, she correctly identified that standard in paragraph 11 of her reasons, citing *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, 402 D.L.R. (4th) 497 at paras. 64, 66 [*Hospira*]. As for this Court, we are to apply a similar standard: legal determinations made by the motion judge are reviewable for correctness, whereas findings of fact, of mixed fact and law, from which a legal issue cannot be extricated, and exercises of discretion are reviewable only if they disclose a palpable and overriding error: *Hospira* at paras. 83–84; *NOV Downhole Eurasia Limited v. TLL*

*Oilfield Consulting Ltd.*, 2017 FCA 32, 275 A.C.W.S. (3d) 521 at para.7; *Marshall v. Canada (Attorney General)*, 2019 FCA 31, 301 A.C.W.S. (3d) 683 at para 6.

B. *Did the motion judge err in concluding that a necessary part of the prothonotary's reasoning involved the determination that the works at issue in the action were the same as those at issue in TREB v. Canada?*

[34] The motion judge's reasoning centred on the determination that the prothonotary's order was premised on the conclusion that the works to which TRREB's statement of claim applied were the same as those considered in *TREB v. Canada*. This determination implicitly involves several legal conclusions, namely that: (1) copyright pertains to works because it protects expression and not ideas; (2) copyright may extend to a compilation of materials drawn from other sources if it is sufficiently original; and (3) the assessment of whether a particular work meets the test for originality must be conducted with reference to the particular work in question. I see no error in any of the foregoing conclusions, which are all so well established as to be axiomatic.

[35] In this regard, it is incontrovertible that copyright protects the expression used by an author or creator as opposed to facts or ideas. Copyright thus pertains to works and not to information: John S. McKeown, *Fox on Canadian Law of Canadian and Industrial Designs*, 4th ed. (Toronto: Thomson Reuters Canada, 2023) at §§ 1:1, 4:2 (Proview); *Deeks v. Wells* (1932), [1933], 1 D.L.R. 353 at 358, 1932 CarswellOnt 119 (Ont. P.C.) (WL Can); *British Columbia Jockey Club v. Standen* (1985), 22 D.L.R. (4th) 467 at 469, 8 C.P.R. (3d) 283 (BCCA); *Nautical Data International Inc. v. C-Map USA Inc.*, 2013 FCA 63, 110 C.P.R. (4th) 317 at paras. 11, 14,

leave to appeal refused 2013 CarswellNat 2948, 464 N.R. 400 (note) (WL Can); *Pyrrha Design Inc. v. Plum and Posey Inc.*, 2022 FCA 7, 190 C.P.R. (4th) 307 at para. 10.

[36] Under the *Copyright Act*, copyright subsists in works if they are original and if their authors or creators, at the time the works were created, were ordinarily resident in Canada or another country to which rights under the Act extend (*Copyright Act*, s. 5).

[37] In addition, it is indisputable that copyright may exist in compilations as contemplated by subsection 2.1(2) of the *Copyright Act*, which provides that:

The mere fact that a work is included in a compilation does not increase, decrease or otherwise affect the protection conferred by this Act in respect of the copyright in the work or the moral rights in respect of the work.

L'incorporation d'une œuvre dans une compilation ne modifie pas la protection conférée par la présente loi à l'œuvre au titre du droit d'auteur ou des droits moraux.

[38] Moreover, it is clear that compilations include works resulting from the arrangement or selection of data, as provided by the definition of “compilation” set out in section 2 of the *Copyright Act*, which states:

**compilation** means

(a) a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or

**compilation** Les œuvres résultant du choix ou de l'arrangement de tout ou partie d'œuvres littéraires, dramatiques, musicales ou artistiques ou de données. (*compilation*)

(b) a work resulting from the selection or arrangement of data; (*compilation*)

[39] In *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, 236 D.L.R. (4th) 395 [*CCH*], the Supreme Court of Canada held that the headnotes, case summaries, topical index and compilations of reported judicial decisions were all original works in which copyright subsists. The Supreme Court described the test for originality in paragraph 25 of *CCH* as follows:

[...] an “original” work under the *Copyright Act* is one that originates from an author and is not copied from another work. That alone, however, is not sufficient to find that something is original. In addition, an original work must be the product of an author’s exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. While creative works will by definition be “original” and covered by copyright, creativity is not required to make a work “original”.

[40] In assessing the originality of the reported judicial decisions at issue in that case, the Supreme Court of Canada in *CCH* stated as follows at paragraphs 33 to 35:

The reported judicial decisions, when properly understood as a compilation of the headnote and the accompanying edited judicial reasons, are “original” works covered by copyright. Copyright protects originality of form or expression. A compilation takes existing material and casts it in a different form. The arranger does not have copyright in the individual components. However, the arranger may have copyright in the form represented by the compilation. “It is not the several components that are the subject of the copyright, but the over-all arrangement of them which the plaintiff through his industry has produced”: *Slumber-Magic Adjustable Bed Co. v. Sleep-King Adjustable Bed Co.* (1984), 1984 CanLII 54 (BC SC), 3 C.P.R. (3d) 81 (B.C.S.C.), at p. 84; see also *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, [1964] 1 All E.R. 465 (H.L.), at p. 469.



The reported judicial decisions here at issue meet the test for originality. The authors have arranged the case summary, catchlines, case title, case information (the headnotes) and the judicial reasons in a specific manner. The arrangement of these different components requires the exercise of skill and judgment. The compilation, viewed globally, attracts copyright protection.

This said, the judicial reasons in and of themselves, without the headnotes, are not original works in which the publishers could claim copyright. The changes made to judicial reasons are relatively trivial; the publishers add only basic factual information about the date of the judgment, the court and the panel hearing the case, counsel for each party, lists of cases, statutes and parallel citations. The publishers also correct minor grammatical errors and spelling mistakes. Any skill and judgment that might be involved in making these minor changes and additions to the judicial reasons are too trivial to warrant copyright protection. The changes and additions are more properly characterized as a mere mechanical exercise. As such, the reported reasons, when disentangled from the rest of the compilation — namely the headnote — are not covered by copyright. It would not be copyright infringement for someone to reproduce only the judicial reasons.

[41] From the foregoing, it is apparent that the requisite assessment involves consideration of the particular work in question and that originality can only be determined on a case-by-case basis. As this Court noted at paragraph 185 of *TREB v. Canada*, the determination of whether a work is sufficiently original to be copyrightable is “... a highly contextual and factual determination.”

[42] I therefore conclude that the motion judge did not err in holding that the portion of the prothonotary’s order at issue in this appeal was premised on the determination that the works at issue in this action were the same as the works at issue in *TREB v. Canada*.

C. *Did the motion judge err in concluding that the prothonotary made a palpable and overriding error in finding the works at issue in the action were the same as those at issue in TREB v. Canada?*

[43] I turn next to the motion judge's assessment of the error made by the prothonotary. I agree with the motion judge that the prothonotary made a palpable and overriding error in finding that the works at issue in the case at bar were the same as those at issue in *TREB v. Canada*, but not precisely for the reasons given by the motion judge.

[44] Contrary to what the motion judge indicated in her reasons, a party may move to strike a pleading that it alleges raises an issue that has been finally determined in an earlier proceeding under either rule 221(1)(a) or rule 221(1)(f) of the *Federal Courts Rules* (see, e.g., *Apotex Inc v. Pfizer Ireland Pharmaceuticals*, 2011 FCA 77, 93 C.P.R. (4th) 42; and *Apotex Inc. v. Laboratoires Servier*, 2007 FCA 350, 286 D.L.R. (4th) 1).

[45] Rule 221(1)(a) permits the Court to strike a pleading where it discloses no reasonable cause of action, and rule 221(1)(f) permits the Court to strike a pleading where it is an abuse of process — both either with or without leave to amend. If the party proceeds under rule 221(1)(a), by virtue of rule 221(2), no evidence is admissible, but evidence is admissible in a motion to strike a pleading brought under rule 221(1)(f).

[46] Where, as in the case at bar, there is no evidence before the Court, the Court must assess whether the same issues were determined in the earlier case by comparing what was decided in the earlier case with what is pleaded in the statement of claim. This will sometimes require an

assessment of what the facts were in the prior case. This is not so much an act of taking judicial notice of a fact, but rather an assessment of what was decided in a previous proceeding and whether issue estoppel applies (*Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161, 400 D.L.R. (4th) 723 at paras. 79-80 (citing to *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, 201 D.L.R. (4th) 193)).

[47] In the case of copyright infringement, the requisite assessment of a prior finding on originality necessarily requires a determination of whether the works at issue in the previous case were the same and thus whether what is being attempted is to reargue a decided matter.

[48] A careful review of the Competition Tribunal's reasons in *Commissioner of Competition v. Toronto Real Estate Board*, 2016 Comp. Trib. 7 (*Commissioner of Competition v. TREB*) and those of this Court in *TREB v. Canada* indicates that the works at issue in that case were not entirely the same as those described by TRREB in its statement of claim in the case at bar.

[49] In this regard, the portion of the TRREB MLS system that was at issue in *Commissioner of Competition v. TREB* and *TREB v. Canada* was described by this Court at paragraph 5 of *TREB v. Canada* as being: "... a database ... of information on properties, including, *inter alia*: addresses, list prices, interior and exterior photographs, length of time for sale, whether the listing was withdrawn or expired, etc." A similar description figures in the reasons of the Competition Tribunal at paragraphs 72 and 75 to 78 of *Commissioner of Competition v. TREB*.

[50] Conversely, the TRREB MLS® System described in TRREB’s statement of claim in the instant case includes additional elements, such as what TRREB alleges are “detailed unique property descriptions”, and “detailed neighbourhood descriptions listing schools and community features”. In addition, several years have elapsed since the *TREB v. Canada* decision was rendered. There is accordingly no basis for concluding that the works at issue in *TREB v. Canada* are the same as those referred to in TRREB’s statement of claim.

[51] Moreover, this Court’s comments in *TREB v. Canada* were made in *obiter* and thus do not conclusively determine the copyright issue so as to prevent relitigation (see Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 5th ed. (Toronto: LexisNexis Canada, 2021) at 98).

[52] For these reasons, I conclude that the motion judge did not err in finding that the prothonotary made a palpable and overriding error in her assessment that the works at issue in the case at bar were the same as in *TREB v. Canada*. As this determination was the central point in the motion judge’s reasoning, it follows that I would uphold the motion judge’s order.

D. *Issues 3 to 6*

[53] In light of the foregoing, it is not necessary to comment on issues 3 to 6, set out above, but I will briefly do so for sake of completeness.

[54] Insofar as concerns the motion judge’s assessment of the basis for the prothonotary’s order, I agree with IMS that there is no reason for the motion judge to have assumed that the

prothonotary had proceeded under rule 221(1)(f), but nothing turns on this point. For the reasons noted, it was possible to decide the motion under either rule 221(1)(a) or 221(1)(f) in the case at bar.

[55] As concerns the motion judge's invocation of the limits of the doctrine of judicial notice, likewise, nothing turns on this point since the motion judge's discussion of the doctrine was not, strictly speaking, necessary to the result. Had it been so, though, the motion judge might well have violated the parties' rights to procedural fairness. A court cannot raise a new legal issue in its decision that was not raised by either party or by necessary implication without first raising the issue with the parties and giving them the right to make submissions: *R. v. Mian*, 2014 SCC 54, 377 D.L.R. (4th) 385 at paras. 41, 54; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, 384 D.L.R. (4th) 1 at para. 26; and *Adamson v. Canada (Human Rights Commission)*, 2015 FCA 153, 255 A.C.W.S. (3d) 956 at para. 89. That said, a court is entitled to raise and rely on cases that have not been cited by the parties that relate to the issues raised by the parties, if it considers them relevant, as this Court noted in *Heron Bay Investments Ltd. v. Canada*, 2010 FCA 203, 2010 D.T.C. 5126 at para. 22.

[56] It follows that the Federal Court did not err in mentioning the fact that there were interim orders for injunctions, as well as default and consent judgments, issued in which TRREB's copyright in the TRREB MLS system was recognized. Moreover, contrary to what IMS asserts, not all these cases have been overturned to the extent that the issue of whether TRREB possesses copyright in the TRREB MLS system can be said to no longer be a live one in those cases. For example, copyright is still undecided in the T-898-20 matter before the Federal Court (*Toronto*

*Regional Real Estate Board v. R E Stats Inc. (Redatum)*, 2021 FC 735, 186 C.P.R. (4th) 462 at para. 13, rev'd only on default judgment, 2021 FC 1193, 187 C.P.R. (4th) 237 at para 46;  
*Toronto Regional Real Estate Board v. RE Stats Inc. (Redatum)*, 2021 FC 30, 185 C.P.R. (4th) 106).

E. *Did the motion judge err in the remedy she awarded?*

[57] I turn finally to the alleged error in the motion judge's order. I agree with IMS that it contains an inconsistency.

[58] Having set aside the prothonotary's order to the extent it struck out TRREB's copyright claim without leave to amend, there was no need for the motion judge to issue an order granting TRREB leave to amend its copyright claim. TRREB was and is entitled to amend such claim, without leave, until IMS files a statement of defence by virtue of rule 200 of the *Federal Courts Rules*. Paragraph 3 of the motion judge's order is therefore unnecessary and confusing. I would thus allow this appeal but only to the extent of deleting paragraph 3 of the motion judge's order.

V. Proposed Disposition

[59] I would accordingly allow this appeal to the extent of deleting paragraph 3 of the motion judge's order. As I would find TRREB to have been largely successful, I would award it its costs of the appeal.

"Mary J.L. Gleason"

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J.A.

“I agree.  
Anne L. Mactavish”

“I agree.  
K. A. Siobhan Monaghan”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-330-21

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RESTATS also known as  
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D'ANCONA v. THE TORONTO  
REGIONAL REAL ESTATE  
BOARD

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** OCTOBER 6, 2022

**REASONS FOR JUDGMENT BY:** GLEASON J.A.

**CONCURRED IN BY:** MACTAVISH J.A.  
MONAGHAN J.A.

**DATED:** MARCH 28, 2023

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