Federal Court of Appeal | Cour d'appel fédérale

Date: 20250829

Docket: A-152-23

Citation: 2025 FCA 153

CORAM: **WOODS J.A.**
LASKIN J.A.
LOCKE J.A.

BETWEEN:

BELL CANADA and BELL ALIANT

Appellants
(Defendants/Plaintiffs by Counterclaim)

and

MILLENNIUM FUNDING, INC., OUTPOST PRODUCTIONS, INC., BODYGUARD PRODUCTIONS, INC., HUNTER KILLER PRODUCTIONS, INC., and RAMBO V PRODUCTIONS, INC.

Respondents
(Plaintiffs/Defendants by Counterclaim)

and

AIRD & BERLIS LLP

Respondent
(Defendant by Counterclaim)

Heard at Toronto, Ontario, on May 16, 2024.

Judgment delivered at Ottawa, Ontario, on August 29, 2025.

REASONS FOR JUDGMENT BY:	WOODS J.A.
CONCURRED IN BY:	LASKIN J.A. LOCKE J.A.

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REASONS FOR JUDGMENT

WOODS J.A.

Introduction

[1] The appellants, Bell Canada and Bell Aliant (collectively, Bell) appeal from the decision of the Federal Court (Decision) in *Millennium Funding, Inc. v. Bell Canada*, 2023 FC 764 (*per* Furlanetto J.). The respondents are a group of film studios (Millennium Producers) and their solicitors, Aird & Berlis LLP (AB) (collectively, respondents).

[2] This appeal concerns a motion brought by the respondents in the Federal Court to strike parts of Bell's pleadings in an action brought against Bell by the Millennium Producers. The motion sought to have impugned pleadings struck without leave to amend. A case management judge (CM judge) granted the motion in full (CM judge's order, FC docket T-1062-21, dated June 23, 2022).

[3] Bell moved to appeal the CM judge's order before a justice of the Federal Court. The Decision by Justice Furlanetto (FC judge) dismissed the appeal, and Bell has further appealed to this Court.

[4] In this Court, Bell submits that several of the impugned pleadings should not have been struck, and in any event leave to amend should have been granted. As explained below, I would allow this appeal, but only to permit Bell to amend its pleading.

Procedural background

[5] The Millennium Producers commenced an action against Bell in relation to copyright they assert in five films. They allege that Bell's internet services were used to infringe copyright by illegally distributing their films by the BitTorrent peer-to-peer network.

[6] In their amended statement of claim, the Millennium Producers allege that Bell, as the internet service provider (ISP), failed to comply with the requirement to deliver notices to potential defendants pursuant to sections 41.25 and 41.26 of the *Copyright Act*, R.S.C. 1985 c. C-42 [Act] (herein, notice and notice regime, or regime). The notice and notice regime is designed to deter copyright infringement by permitting a copyright owner to provide a "notice of claimed infringement" to an ISP. In turn, the ISP must forward the notice to the person associated with the IP address that is alleged to have infringed copyright (Decision at para. 4).

[7] The Millennium Producers seek the maximum amount of statutory damages against Bell, which they submit is $10,000 *per* failure to provide notice. They plead that Bell failed to satisfy its obligations with respect to 40,000 notices out of a total of 81,000 notices sent to Bell over a 28-month period. The aggregate amount at issue is approximately $400 million.

[8] Bell filed an amended statement of defence and counterclaim (ASODCC) in response. For clarity, the amended statement of defence relates to the action by the Millennium Producers, and the amended counterclaim is an action by Bell against all respondents.

[9] The respondents (Millennium Producers and AB) brought a motion to strike several of the pleadings in the ASODCC. However, the respondents did not seek to strike Bell's pleading that it reasonably complied with the notice and notice regime.

[10] The impugned pleadings allege that the respondents' copyright enforcement program (CEP) improperly used the notice and notice regime by, among other things, automatically generating large numbers of notices that were sent to ISPs. Bell alleges that the CEP was not used as a legitimate effort to protect copyright. Instead, the respondents' conduct had two main purposes: (1) to intimidate alleged infringers into settling claims for amounts much larger than the damages suffered; and (2) to claim exorbitant amounts from ISPs alleged to not be forwarding notices. Bell pleads that the respondents' use of the CEP constitutes the tort of misuse of copyright, and alleges that this is a viable defence to the Millennium Producers' action.

[11] Secondarily, Bell pleads that the respondents' misuse of the notice and notice regime also constitutes (1) copyright misuse by AB and other AB clients, (2) an abuse of process, (3) a breach of the notice and notice regime, (4) champerty or maintenance, and (5) unlawful means conspiracy. Bell has not pursued an appeal with respect to the champerty or maintenance allegations and they will not be referred to further in these reasons.

[12] In its amended counterclaim, Bell seeks declaratory and injunctive relief against the respondents for all these allegations.

Federal Court Decision

[13] As mentioned, the CM judge granted the relief sought in the motion to strike. The impugned pleadings were struck in their entirety without leave to amend. On appeal, the FC judge applied the appellate standard of review, citing *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira*], and concluded that the CM judge did not err.

[14] With respect to the law concerning motions to strike, the FC judge concluded that the CM judge correctly identified the applicable legal principles. Pleadings should not be struck unless it is plain and obvious that the allegations have no reasonable prospect of success. The CM judge also emphasized this Court's decision in *Mancuso v. Canada (National Health and Welfare)*, 2015 FCA 227 [*Mancuso*] which stated that sufficient material facts had to be pleaded so that "the Court and opposing parties are not left to speculate as to how the facts might be variously arranged to support the allegations made" (CM judge's order, citing *Mancuso* at para. 16).

[15] The FC judge then turned to consider the impugned pleadings, starting with the misuse of copyright defence.

Misuse of copyright defence

[16] With respect to the defence of copyright misuse, the FC judge had to consider two issues: (1) Did the CM judge err when he concluded that the defence of misuse of copyright does not

extend to a section 41.26 action, and (2) Did the CM judge err when he determined that Bell had not pleaded sufficient material facts?

[17] On the first issue, the FC judge determined that the CM judge erred when he concluded that copyright misuse can never be a defence to a section 41.26 action. However, on the second issue the FC judge found that the CM judge did not err. Bell failed to plead sufficient material facts to support this defence. Accordingly, the FC judge concluded that "Bell has not established that the [CM judge] erred either in law or made a palpable and overriding error in finding that there were insufficient material facts to support a misuse of copyright defence" (Decision at paras. 46-48). This finding also tainted the pleading regarding declaratory and injunctive relief with respect to copyright misuse (Decision at para. 52).

Secondary allegations

[18] As mentioned earlier, Bell made additional allegations which were described as secondary. Bell also sought declarations and an injunction against all respondents with respect to these. The CM judge struck all these pleadings, and the FC judge found no error in doing so. The FC judge's reasons are briefly outlined below.

[19] The FC judge agreed with the CM judge that all pleadings in the counterclaim with respect to declaratory and injunctive relief should be struck because the declarations were simply statements of fact and Bell had not indicated what added value they would have (Decision at para. 53).

[20] As for allegations that the respondents had breached sections 41.25 and 41.26 of the Act, the CM judge concluded that this part of the defence and counterclaim should be struck because a statutory breach does not give rise to an independent cause of action. Bell submitted to the FC judge that these allegations were not intended as a separate cause of action, but only as a support for its misuse of copyright defence. The FC judge rejected this interpretation because it was not supported by the language in Bell's pleading (Decision at para. 54).

[21] Bell also alleged that the respondents' conduct constituted an abuse of process and unlawful means conspiracy. The CM judge struck these allegations because insufficient material facts were pleaded. The FC judge did not interfere with these findings, stating that Bell had not established the CM judge erred "in finding that there were no material facts alleged to establish the torts of abuse of process and unlawful means conspiracy" (Decision at para. 83).

[22] With respect to allegations against AB, Bell pleaded that AB's conduct was an abuse of the notice and notice regime and misused copyright (Decision at para. 55). The CM judge struck all allegations against AB. Although the CM judge acknowledged Bell's argument that AB had "induced and procured litigation which otherwise would not occur," he found the allegations to be vague and speculative and did not include sufficient material facts (Decision at para. 58).

[23] The FC judge refused to intervene with respect to this conclusion on the basis that there were insufficient material facts to provide a foundation to support a claim by a third party against solicitors. In particular, the judge concluded that there was insufficient detail to support Bell's assertion "that AB unreasonably, unfairly and/or disproportionately shared in any profits …, that

AB has fostered frivolous and improper litigation, or that AB induced such activities by the [Millennium Producers]" (Decision at para. 62). Accordingly, the FC judge concluded that Bell had not established that the CM judge erred in striking the allegations against AB (Decision at para. 65).

Leave to amend

[24] The CM judge denied leave to amend the ASODCC, stating that he was "not persuaded that the bald and vague allegations … can be cured by amendment." The FC judge concluded that, by itself, the fact that allegations are bald and vague does not provide a sufficient reason to deny leave to amend (Decision at para. 94).

[25] However, the FC judge concluded that the CM judge's decision to deny leave was justified based on the record before him. The FC judge noted that Bell had previously amended its pleading but had failed to rectify defects raised by the Millennium Producers. Further, Bell did not indicate how it would cure these deficiencies. The FC judge concluded that the CM judge did not err because "there is no basis to suggest that further amendment would cure the defects" (Decision at paras. 96-97).

Issues

[26] The main issue in this appeal concerns whether Bell pleaded sufficient material facts with respect to the copyright misuse defence. Bell submits that its pleading is not deficient in this regard and in any event leave to amend should have been granted.

[27] Bell also appeals with respect to some of the secondary allegations. This part of the appeal primarily concerns whether the declarations are appropriate, and whether the pleaded material facts were sufficient to support allegations against AB, and allegations of abuse of process and unlawful means conspiracy.

Relevant legal principles

[28] The appellate standard of review applies to this appeal (*Hospira* at para. 83). The question to be asked is whether the FC judge erred in law or made a palpable and overriding error of fact or of mixed fact and law in refusing to interfere with the CM judge's decision (*Hospira* at para. 84; *Sport Maska Inc. v. Bauer Hockey Ltd.*, 2019 FCA 204 at para. 20).

[29] As for the law on motions to strike, this motion was brought pursuant to s. 221(1)(a) of the *Federal Courts Rules*, SOR/98-106 (Rules). The impugned provisions may be struck only if it is plain and obvious, assuming the facts pleaded to be true, that no reasonable cause of action, or defence is disclosed: *Adelberg v. Canada*, 2024 FCA 106 at para. 40 [*Adelberg*]; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17.

[30] With respect to general principles on leave to amend, leave may be denied only if it is plain and obvious that the defect cannot be cured by amendment (*Simon v. Canada*, 2011 FCA 6 at paras. 8, 15 [*Simon*]).

Analysis

Issue 1: Did the FC judge err in not interfering with the CM judge's decision to strike the copyright misuse pleadings?

[31] Bell asserts that the CEP is a misuse and abuse of the notice and notice regime, and this constitutes copyright misuse by the respondents. Bell specifically alleges that the respondents used the notice and notice regime for improper purposes, namely, to harass and intimidate alleged infringers, and to make exorbitant claims against ISPs. Bell pleads that it should not be liable for statutory damages in these circumstances.

[32] The FC judge commented that the defence of copyright misuse has not yet been adjudicated under Canadian law, and is developing in the United States. The misuse is said to occur "when a copyright holder attempts to extend his copyright beyond the scope of his exclusive rights in a manner that violates antitrust law or the public policy embodied in copyright law" (Decision at paras. 30-31, referring to *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37 at para. 98).

[33] As mentioned above, the FC judge disagreed with the CM judge as to whether copyright misuse could ever be pleaded as a defence to a section 41.26 action. The FC judge concluded that it could. However, the FC judge also concluded that the CM judge did not err in law or make a palpable and overriding error in striking the copyright misuse pleadings on the ground that insufficient material facts were pleaded. The FC judge explained that "[t]he pleading does not

provide sufficient foundation for what constitutes the alleged improper behavior" (Decision at paras. 47-48).

[34] As mentioned, this Court can interfere with this finding only if the FC judge made an error of law or a palpable and overriding error in refusing to interfere with the CM judge's order.

[35] It would be an error of law if the FC judge had applied the incorrect legal test. However, whether the pleading contains adequate material facts is subject to the deferential palpable and overriding error standard of review: *Adelberg* at para. 39, citing *Jensen v. Samsung Electronics Co. Ltd.*, 2023 FCA 89 at para. 38.

[36] The FC judge determined that Bell's pleading does not provide sufficient material facts with respect to copyright misuse. In particular, the pleading does not "set out 'what' the misuse is and 'how' the conduct complained of is contrary to public policy under the Act" (Decision at para. 46). The FC judge further explained (at para. 47) that the pleaded facts are deficient with respect to:

- how the CEP is set up to intimidate and harass alleged infringers and in turn to claim exorbitant amounts from ISPs (such as Bell);
- how the CEP is used to generate notices to members of the public who do not infringe or who are wrongfully accused of infringing; and
- the basis for asserting that the notices are unreliable and unlawful and what proportion of the notices the allegation relates to.

[37] The requirement for material facts was considered in depth by this Court in *Mancuso*. Justice Rennie, writing for the Court, described that "the pleading must tell the defendant who, when, where, how and what gave rise to its liability" (*Mancuso* at para. 19). This is the test that was applied by the FC judge.

[38] Bell submits that the FC judge made a legal error by effectively requiring evidence to be pleaded. I disagree. In general, the pleadings must "define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair" (*Mancuso* at para. 18). The FC judge found that the pleading did not provide a sufficient foundation for the allegations of improper conduct. Bell was required to succinctly plead what the improper conduct consisted of, and how this was contrary to the public policy in the Act. Bell was not required to plead evidence showing how this foundation would be proved.

[39] In my view, the FC judge made no legal error in identifying the proper test.

[40] The next question is whether the FC judge made a palpable and overriding error in not interfering with the decision of the CM judge that there was a lack of material facts pleaded. The palpable and overriding error standard is a high threshold – the error must be obvious or plain to see, and it must be capable of affecting the outcome.

[41] The high threshold to intervene is accentuated in this case by the fact that the test for adequacy of material facts is not black and white. As stated in *Mancuso*, "[t]here is no bright line

between material facts and bald allegations, nor between pleadings of material facts and the prohibition on pleading of evidence" (at para. 18).

[42] I conclude that the FC judge did not make a palpable and overriding error in not interfering with the CM judge's decision on this issue. Bell pleads that the CEP "is used for the purpose of extracting disproportionate and unjustified settlements from innocent parties." It was not a palpable error for the FC judge to require more justification for this assertion. It was open to the FC judge to conclude that this was necessary in order to make the proceedings manageable and fair.

[43] Bell also submits that the sufficiency of material facts can depend on the relative knowledge of the parties, citing *Enercorp Sand Solutions Inc. v. Specialized Desanders Inc.*, 2018 FCA 215 at para. 36. While this principle may have a bearing on the extent of additional material facts that are required, it is not a sufficient basis to overcome the FC judge's concern with the existing pleading.

Issue 2: Did the FC judge err in not interfering with the CM judge's decision to deny leave to amend?

[44] In the alternative, Bell submits that it should have been granted leave to amend the pleading. As mentioned earlier, the appropriate standard of review is whether the FC judge erred in law or made a palpable and overriding error of fact or of mixed fact and law in refusing to interfere with the CM judge's decision.

[45] The appropriate legal test with respect to leave to amend is well established and was described by Justice Dawson in *Simon* at paragraphs 8, 15. Leave to amend may be denied only if it is plain and obvious that the defect cannot be cured by amendment.

[46] The FC judge concluded that the CM judge's decision to deny leave to amend was justified on the record before him. In particular, the FC judge referred to the fact that when Bell amended its pleading prior to the CM judge's order, it had not cured deficiencies raised by the Millennium Producers. The judge concluded that "in such circumstances … there is no basis to suggest that further amendment would cure the defects" (Decision at paras. 95-96).

[47] The legal test to deny leave requires 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, a recent decision of this Court written by Justice Gleason 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…" (*Michel v. Canada (Attorney General)*, 2025 FCA 58 at para. 79).

[48] In this case, the FC judge did not apply these principles. Instead, leave to amend was denied because Bell had not addressed deficiencies identified by the respondents. The FC judge stated that "in these circumstances … there is no basis to suggest that further amendment would cure the defects." These reasons appear to put the onus on Bell. However, this misplaces the

onus. The judge must consider the circumstances as a whole and determine whether the defects could possibly be cured. The FC judge's failure to do this was an error of law.

[49] An examination of Bell's pleading shows that Bell raises a viable defence of copyright misuse based on allegations of using the notice and notice regime for improper purposes. The FC judge determined that the pleading does not provide sufficient detail to support these allegations, but it is not plain and obvious that these defects cannot be cured.

[50] I conclude that this part of the FC judge's decision should be set aside, and Bell should be granted leave to amend the pleading relating the copyright misuse.

[51] In light of this conclusion, it is not necessary to discuss suggested revisions to the ASODCC that Bell attached to its notice of appeal in this Court. It is also not necessary to discuss supplementary submissions received by the Court concerning the recent decision of this Court in *Voltage Pictures, LLC v. Salna*, 2025 FCA 131.

Issue 3: Did the FC judge err in not interfering with the CM judge's decision with respect to secondary issues?

[52] With respect to the secondary issues, Bell submits that the FC judge erred in not interfering with the CM judge's decision to strike: (1) allegations against AB, (2) allegations of abuse of process and unlawful means conspiracy, and (3) requests for declarations.

[53] With respect to the allegations against AB, the CM judge struck all these claims, whether pleaded in the defence or counterclaim, on the basis that they were vague and speculative.

[54] The FC judge concluded that Bell had not established that the CM judge made an error in striking the allegations against AB. In the judge's view, there were insufficient material facts pleaded to support Bell's allegation that AB engaged in improper conduct in connection with the notice and notice regime (Decision at paras. 62, 65). I conclude that the FC judge made no error in this respect.

[55] As for allegations of abuse of process and unlawful means conspiracy, the CM judge struck these allegations on the basis that "[t]here must be something more than a law firm acting for a client to enforce the clients' rights" and there are no material facts in this regard.

[56] The FC judge determined that the CM judge did not err because Bell had not pleaded "how in advancing a statutory right under subsection 41.26 of the Act on behalf of the Millennium Producers, this action advances an illegal purpose." The judge also noted that, although the tort of unlawful means conspiracy requires actual damage to result from the conduct, Bell does not claim that it has suffered any damage (Decision at paras. 77, 81).

[57] There is no good reason to interfere with these findings of the FC judge. As for the failure to plead how the conduct advances an illegal purpose, the FC judge's reasons are supported by *Mancuso*, just as they were with respect to the allegations of copyright misuse. As for the failure to plead actual damage, Bell mainly relies on the administrative burden imposed on it by the

large number of notices it received. The FC judge did not make a palpable and overriding error in concluding that Bell had not claimed actual damage.

[58] With respect to declaratory relief, Bell first submits that the FC judge should have interfered with the CM judge's decision to strike all declaratory relief. The CM judge noted that declarations need to have practical utility, citing *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at paras. 104-106. The judge found that in this case the declarations lacked usefulness because they were actually declarations of pleaded facts and not declarations of rights.

[59] The FC judge agreed that the declarations were simply statements of fact, and found that "Bell has not indicated what added value they would serve" (Decision at para. 53).

[60] In this Court, Bell submits that the declarations are necessary to provide certainty going forward and suggests that it was an error of law to decide this issue on a pleadings motion. Neither of these submissions is persuasive. As for needing certainty, Bell's submission does not explain what added certainty, beyond the FC judge's reasons, the declarations would have. As for whether it was an error of law to decide this issue on a motion to strike, according to *GCT Canada Limited Partnership v. Vancouver Fraser Port Authority*, 2020 FC 348, which is the authority relied on by Bell, this principle only applies to issues that are debatable. The issue in the present case is not in this category. I conclude that the FC judge did not make an error of law or a palpable and overriding error in striking the pleadings relating to declarations. The same reasoning would also apply to the request for injunctive relief.

[61] Bell further submits that an error was made in striking the request for a declaration that the notice and notice provisions had been breached. The CM judge found that a breach of a statutory provision does not give rise to an independent cause of action, relying on *Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at pp. 225-228.

[62] Bell submits that this declaration should not have been struck because it is not intended as a separate cause of action. It is only intended as a support for its allegations of improper conduct. The FC judge rejected this submission, stating that the pleading is not drafted this way (Decision at para. 54). The FC judge did not make an error in finding that this pleading was properly struck.

[63] Finally, the conclusion above with respect to leave to amend also applies to the secondary issues. Leave to amend should have been granted.

Conclusion

[64] I conclude that the FC judge made no error except as it relates to denying leave to amend. I would grant Bell leave to amend the ASODCC to rectify the defects noted in these reasons.

[65] Since success was divided, I conclude that the parties should bear their own costs of this appeal and of the two Federal Court motions.

Proposed disposition

[66] I would allow the appeal in part without costs. I would set aside the Decision as it relates to leave to amend, and would grant Bell leave to amend the ASODCC in accordance with these reasons.

[67] I would also set aside the costs awards in the two Federal Court motions, and order that the parties bear their own costs of those motions.

"Judith Woods"
J.A.

"I agree.
John B. Laskin J.A."

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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