Federal Court  Cour fédérale

Date: 20241021

Docket: T-881-24

Citation: 2024 FC 1654

Vancouver, British Columbia, October 21. 2024

PRESENT: Case Management Judge Kathleen Ring

BETWEEN:

COLLEEN SCAMMELL

Plaintiff/
Defendant by Counterclaim

and

EQUITABLE BANK

Defendant/
Plaintiff by Counterclaim

ORDER AND REASONS

[1] The Defendant, Equitable Bank [EB], has brought a motion in writing, pursuant to Rules 75 and 369 of the *Federal Courts Rules* [*Rules*], for leave to serve and file an Amended Reply to Defence to Counterclaim in the form attached as Schedule "A" to their Notice of Motion.

[2] EB's proposed amendment asserts that Nevada and US federal laws govern an agreement by which the Plaintiff granted a licence regarding the subject patent to a third party, who in turn

granted a sub-licence to EB. EB asserts that neither the applicable foreign law, nor Canadian law, permit the rescission of the licence as pled by the Plaintiff.

[3] The Plaintiff, Colleen Scammell [Ms. Scammell], opposes the motion on the basis that EB's proposed pleading of foreign law does not allow her or the Court to appreciate the issues raised by the pleading, and does not provide sufficient particularity to be a sustainable pleading.

[4] EB submits that the degree of detail and precision required in pleading foreign law must be determined on a case-by-case basis. According to EB, the proposed amendment pleads sufficient facts, having regard for Ms. Scammell's understanding of the "applicable law" provision in the licence agreement. EB points to her reliance on this provision in a suit against her in New Jersey, which is set out in EB's supporting affidavit evidence.

[5] In my view, the three main issues for determination on this motion are:

a) Is EB's affidavit evidence admissible on this motion and, if so, to what extent?

b) Has EB pled sufficient material facts regarding the applicable foreign law to disclose a reasonable defence?

c) What is the appropriate remedy?

[6] Having considered the motion records filed on behalf of the parties, and for the reasons that follow, I conclude that EB's motion for leave to amend its Reply to Defence to Counterclaim should be allowed, but on the strict condition that EB must include further particulars of the foreign law in its amended pleading, in accordance with these Reasons.

I. **Facts**

A. ***The Litigation and the Pleadings***

[7] On April 19, 2024, Ms. Scammell commenced the underlying proceeding against EB for infringement of Canadian Patent No. 2,664,680 [the "680 Patent"]. The 680 Patent is directed to systems and methods of verifying the identity of consumers initiating electronic transactions to provide enhanced security for such transactions.

[8] EB's Statement of Defence and Counterclaim pleads multiple defences, including that Ms. Scammell lacks standing and that EB is sublicensed under the 680 Patent. Specifically, EB pleads that Ms. Scammell entered into a license with Verify Smart Corp. [Verify] on April 2, 2018 [the "License"], which granted Verify the (i) sole discretion to grant a sublicense and (ii) exclusive right to sue for infringement of the 680 Patent. EB asserts that the License has not been terminated, and that on May 3, 2023, Verify granted EB a sublicense to the 680 Patent, pursuant to the License.

[9] Ms. Scammell filed a Reply and Defence to Counterclaim which alleges, amongst other pleas, that any licence granted to Verify was rescinded on October 23, 2023, as a result of Verify failing to provide any consideration for the License. As such, Ms. Scammell asserts that she remains the owner of the 680 Patent and of the rights under that Patent.

[10] EB filed a Reply to Defence to Counterclaim on July 8, 2024. Amongst other pleas, EB denies that Ms. Scammell rescinded the License between herself and Verify, and asserts that Ms. Scammell was not permitted to rescind the License granted to Verify. It is this pleading that EB seeks to amend to plead the applicable law governing the License.

[11] Shortly after pleadings had closed, EB's counsel advised the Court, by letter dated July 31, 2024, that EB intends to move for summary trial on the basis that Ms. Scammell has no standing, and EB is sub-licensed under the 680 Patent.

[12] By Order dated August 8, 2024, the Court set down the hearing of EB's motion for summary trial for March 12 and 13, 2025. The scheduling Order requires EB to file its motion record by October 30, 2024, and for Ms. Scammell to file her motion record by December 23, 2024. On consent of the parties, the Court Order also provides that the parties are dispensed from taking further steps relating to document discovery and oral examinations for discovery pending the disposition of EB's summary trial motion.

B. ***The Proposed Amendment and the Current Motion***

[13] EB's proposed amendments to its Reply to Defence to Counterclaim consist of including a plea as to the governing law of the Licence in two sentences in paragraph 4 of the proposed pleading. EB's proposed amendments are underlined below:

> 4. Regarding paragraphs 4 and 11 of the Reply, EB denies that the Plaintiff rescinded the April 2, 2018 license between the Plaintiff and Verify Smart Corp. ("Verify") (the "License") and in any event the Plaintiff has not pleaded any facts that support rescission, <u>which taking into account the governing law for the License, would be governed by the laws of the State of Nevada and the federal laws of the United States applicable therein</u>. The Plaintiff was and is not permitted to rescind the License, <u>whether pursuant to the laws of the State of Nevada, the federal laws of the United States applicable therein, or the laws of Canada.</u>
>
> [the "Disputed Amendments"]

[14] EB sought Ms. Scammell's consent to the Disputed Amendments. Ms. Scammell declined to consent, stating that pleadings had closed and that there was "no need to re-open them on the eve" of EB's intended summary trial motion. Thus, EB brought this motion seeking leave of the Court to amend its Reply to Defence to Counterclaim.

II. **Legal Principles Governing Amendment of Pleadings**

[15] Rule 75 of the *Rules* provides that the Court may, at any time, allow a party to amend a document on such terms as will protect the rights of all parties. The onus lies on the amending party to show the amendments should be allowed: *Merck & Co., Inc. v Apotex Inc. (F.C.A.)*, 2003 FCA 488 at paras 35 and 36.

[16] The general rule is that "an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice": *Enercorp Sand Solutions Inc. v Specialized Desanders Inc.*, 2018 FCA 215 at para 19 [*Enercorp FCA*], quoting *Canderel Ltd. v. Canada (C.A.)*, 1993 CanLII 2990 (FCA), [1994] 1 FC 3 (CA) at pg. 10 [*Canderel*].

[17] There is also a threshold requirement on a motion to amend pleadings that the proposed amendment must have a reasonable prospect of success: *Teva Canada Limited v. Gilead Sciences Inc.*, 2016 FCA 176 at paras 29-32 [*Teva*].

[18] Once it has been established that the proposed amendment has a reasonable prospect of success, the other factors set out in *Canderel* must be considered. There are at least two

independent criteria that must be met by the moving party to allow an amendment: (a) any injustice to the other party is capable of being compensated by an award of costs, and (b) the interests of justice would be served. Failure to meet one or the other of these criteria may result in the amendment being refused: *Sanofi-Aventis Canada Inc. v. Teva Canada Limited*, 2014 FCA 65 at para 15 [*Sanofi*].

[19] The criterion focused on the interests of justice allows a Court to consider factors such as the timeliness of the motion to amend, the extent to which the proposed amendment would delay the proceedings, the extent to which a position taken originally by one party has led another party to follow a course of action in the litigation which it would be difficult or impossible to alter, and whether the amendments sought will facilitate the Court's consideration of the true substance of the dispute on its merits. No single factor is determinative, and the list of factors to be considered is not exhaustive. *Canderel* at para 12; *Sanofi* at para 17; *Janssen Inc. v. Abbvie Corporation*, 2014 FCA 242 at para 3.

III. **Is EB's Affidavit Evidence Admissible on this Motion and, if so, to What Extent?**

[20] This Court has held that no evidence is admissible on a motion to amend pleadings when the Court considers whether the proposed amendment would be subject to a successful motion to strike under Rule 221(1)(a) of the *Rules*. Otherwise stated, the Court should not generally accept any evidence in support of a motion for leave to amend pleadings on the "threshold issue" (i.e. whether the Disputed Amendments disclose a reasonable defence), unless evidence is required in order to clarify the nature of the proposed amendments: *Specialized Desanders Inc. v. Enercorp Sand Solutions Inc.*, 2018 FC 689 at para 38 [*Enercorp FC*]; *Visx Inc. v Nidek Co.*, 1996 CanLII (1996) 209 NR 342, 69 ACWS (3d) 59, 72 CPR (3d) 19 (FCA) at para 16 [*Visx Inc.*].

[21] However, apart from the Court's consideration of the effect of Rule 221(1)(a), evidence can be received on a motion to amend pleadings for other purposes, such as considering the factors prescribed by *Canderel*, or in considering whether the proposed pleading would survive a motion to strike on the basis of the other grounds set out in Rule 221(1): *Enercorp FC* at para 38.

[22] In this case, EB's motion record includes an affidavit of a legal assistant [the "Araus Affidavit"] which attaches a copy of the License dated April 2, 2018 between Verify (as Licensee) and Assured Mobile Technologies and Ms. Scammell (as the Licensor). The License states that Verify is a Nevada corporation, Assured Mobile Technologies is a Nevada limited liability corporation, and Ms. Scammell resides in British Columbia. The Licence includes the following provision [the "Applicable Law Provision"]:

> 1.7 Applicable Law. This License and Assignment Agreement will be construed, interpreted and enforced in accordance with, and the respective rights and obligations of the parties will be governed by, the laws of the State of Nevada and the federal laws of United States applicable therein, and each party irrevocably and unconditionally submits to the jurisdiction of the courts of State of Nevada competent to hear appeals there from and waives, so far as is legally possible, its right to have any legal action relating to this License Assignment Agreement tried by a jury.

[23] The Araus Affidavit also includes several court documents relating to a lawsuit commenced by Verify against Ms. Scammell for the breach of the License in the Superior Court of New Jersey, Bergen County, Docket No. BER-L-003483-24 [the "New Jersey Action"]. These documents indicate that Ms. Scammell brought a motion to dismiss the New Jersey Action on the grounds, *inter alia*, that the New Jersey court lacked subject matter jurisdiction due to the Applicable Law Provision of the Licence. Verify voluntarily dismissed the New Jersey action on August 9, 2024.

[24] Although Ms. Scammell has not objected to EB's affidavit evidence, the Court must nevertheless apply the jurisprudence of this Court in determining the admissibility of that evidence on this motion. I find that EB's evidence is not admissible on the threshold issue. EB's evidence is not being tendered to clarify the nature of the Disputed Amendments. The nature of those amendments is self-evident: EB seeks to plead that foreign law governs the License. EB's evidence is being adduced to prove that the Disputed Amendments are legally sufficient. In the result, I have only considered EB's evidence for the limited purposes permitted in *Enercorp FC*.

IV. **Should EB be Allowed to Make the Disputed Amendments?**

A. ***There is no Dispute on the Canderel Factors***

[25] EB submits that the Disputed Amendments would not give rise to an injustice to Ms. Scammell that could not be compensated by costs, and the interests of justice would be served by permitting the proposed amendments.

[26] In her responding materials, Ms. Scammell does not argue that the Disputed Amendments will cause any delay or prejudice, or that the amendments would not serve the interests of justice. Rather, her objection to the Disputed Amendments is that EB has not satisfied the threshold issue because the amendments lack the requisite specificity required in pleading foreign law.

[27] Assuming that it is even necessary for the Court to consider the factors set out in *Canderel* in these circumstances, I conclude that these factors are met. Based on the material before the Court, I am satisfied that the Disputed Amendments are not likely to result in an injustice to Ms.

Scammell that cannot be compensated by costs. The amendments do not represent a dramatic change of the course of the litigation.

[28] As well, I am satisfied that it would be in the interests of justice to permit the proposed amendments. EB brought the motion for leave to amend in a timely manner, and moved quickly throughout the process. Additionally, the motion was brought six months ahead of the date of the summary trial and three months ahead of the deadline for Ms. Scammell's summary trial record. Whether the License has, in fact, been rescinded is clearly at issue between the parties. The License states that the applicable law is that of the State of Nevada and the applicable federal laws. Pleading the applicable law will facilitate the Court's consideration of the true substance of the dispute on its merits.

B. ***On the Threshold Issue, the Disputed Amendments do not Yield a Sustainable Pleading***

[29] Ms. Scammell's central objection to the Disputed Amendments is that the foreign law has not been pled with sufficient particularity, and therefore EB has not satisfied the threshold issue on this motion. Ms. Scammell submits that the Disputed Amendments are doomed to fail because they do not disclose the "tenor or substance" of the Nevada law on rescission of a license. She also argues that the pleading is "indiscriminate" because it pleads multiple legal jurisdictions.

[30] EB submits that the Disputed Amendments plead the foreign law with sufficient particularity, and therefore it has discharged its burden on the threshold issue. According to EB, the Disputed Amendments plead facts which "embody the essence of the law". As the evidence reveals that Ms. Scammell is familiar with the License agreement, and has previously relied on it in the New Jersey Action, EB posits that Ms. Scammell is aware of the substance of the foreign

law and that no further specificity is required. EB also argues that the Disputed Amendments are not indiscriminate.

[31] The "threshold issue" has been described as the requirement that an amendment must yield a sustainable pleading: *GE Renewable Energy Canada Inc. v. Canmec Industrial Inc.*, 2024 FC 187 at para 10 [*GRECI*]. Another way to put this is that a proposed amendment will be refused if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action or defence: *McCain Foods Limited v. J.R. Simplot Company*, 2021 FCA 4 at para 20 [*McCain*].

[32] In determining whether an amendment should be allowed, it is helpful for the Court to ask itself whether the amendment, if it were already part of the proposed pleadings, would be a plea capable of being struck out. If yes, the amendment should not be allowed: *VISX Inc*. at para. 16; *McCain* at para 22.

[33] As with pleadings that are subject to being struck under Rule 221 for failure to comply with the requirement in Rule 174, if proposed amendments are inadequately particularized to allow the opposing party to plead in response, such amendments may similarly be refused on this ground: *GRECI* at para 11.

[34] The Federal Court of Appeal teaches that, in deciding whether an amendment has a reasonable prospect of success, the Court must examine its chances of success in the context of the law and the litigation process, and a realistic view must be taken: *McCain* at para 21.

[35] Here, the "context of the law" necessarily includes a consideration of the legal principles with respect to the pleading of foreign law. It is well settled that the Court cannot take judicial

notice of foreign law. It is a question of fact which must be specifically pleaded and proved to the satisfaction of the Court: *Backman v. Canada* (*C.A.), 1999 CanLII 9371 (FCA)* [2000] 1 FC 555 (FCA) at para 38, aff'd [2001] 1 S.C.R. 367; *JPMorgan Chase Bank v. Lanner (The)*, 2008 FCA 399 at para 18.

[36] The only decision of this Court cited by the parties that squarely addresses the particularity with which foreign law must be pleaded is *Vardy v. R.*, (1977) CarswellNat 5, 5 C.P.C. 90, [1977] F.C.J. No. 909 [*Vardy*]. There, the defendants moved for an order for particulars of a statement of claim which alleged that members of the Royal Canadian Mounted Police acted illegally, unlawfully, and with malice, that they entered into a conspiracy with the authorities in Panama, and that the Panamanian authorities were acting under their direction and instructions "in contravention of Panamanian law and the Extradition Treaty of that country with Canada" (para 5). In the statement of claim, the plaintiff referred in a general manner to the "Domestic Law of the Republic of Panama" and "United States Domestic Law" without specifying to what laws he referred (para 5).

[37] Justice Walsh concluded that the plaintiff's pleading was defective, and that particulars must be given of, *inter alia*, "what domestic laws of Panama and Canada are being referred to and what are the rights of which plaintiff is allegedly being deprived under the laws of Canada and Panama" (para 21). In arriving at this conclusion, the Court relied upon a body of jurisprudence from the Ontario Courts on pleading a foreign law: *Hands v. Stampede International Resources Ltd. et al.*, [1971] 3 O.R. 44; *Bryant Press Ltd. v. Acme Fast Freight Inc.*, [1951] O.W.N. 665 [*Bryant*]; *Beelby v. Beelby*, [1953] O.W.N. 561.

[38] In *Bryant*, which Justice Walsh discussed at some length, the Ontario High Court of Justice ruled on the proper method of pleading a statute of a foreign country. Relying on American authorities, Senior Master Marriot found that there are three methods of pleading a foreign statute: first, by merely citing the statute and section; second, by also summarizing its effect; and third, by setting out the statute verbatim. The Senior Master concluded that the second method was the method that would most likely be approved by the Ontario Courts, and "if practicable should be the one to be used as it will give the defendant sufficient information as to the law relied upon to enable it to answer and at the same time it will be a concise statement of a material fact" (para 5).

[39] Several years later, in *Ontario Stone Corporation v. R.E. Law Crushed Stone Ltd.*, [1964] 1 OR 303, 1964 CanLII 266 (ON SC) [*Ontario Stone*], Senior Master Marriot addressed the proper way to plead non-statutory foreign law. The statement of defence in that case alleged that a provision of the contract for the payment of $250,000 was unenforceable "by the laws of the State of Ohio". The Senior Master concluded that, after referring to the fact that the contract was to be construed according to the law of Ohio, the defendant should have also set out affirmatively, and in summary form, a statement of the non-statutory foreign law (i.e. an epitome or embodiment of the law), without citations or references to particular authorities, followed by a recital of the related facts. Accordingly, the Court struck out the impugned pleading with leave to amend.

[40] More recently, the Ontario Superior Court of Justice undertook a comprehensive review of the jurisprudence on pleading foreign law in *Yordanes v. Bank of Nova Scotia* (2006), 78 OR (3d) 590, 2006 CanLII 1777 (ON SC) [*Yordanes*]. At the outset, Justice Cullity stated that provisions of foreign law must be pleaded with sufficient certainty to enable the opposing party,

and the court at trial, to identify the issues to be decided. The degree of detail and precision required is to be determined on a case-by-case basis: *Yordanes* at para 11.

[41] As regards pleadings of non-statutory foreign law, Justice Cullity observed that, although there were some cases which suggested that a reference to the foreign "legal authorities" was required, he preferred the approach in *Ontario Stone* which, in effect, would regard the actual decisions of courts as matters of evidence that are not to be pleaded. However, Justice Cullity held that where material reliance is to be placed on jurisprudence that is alleged to establish a specific non-statutory rule or principle – as distinct from decisions that reflect only a straightforward application of statutory provisions – its tenor and effect should be pleaded: *Yordanes* at para 37.

[42] As for pleadings of statutory foreign law, Justice Cullity was asked to determine whether it was sufficient to plead the name of the foreign statute and the section numbers relied upon, or whether the text of the foreign statute must also be pled. The Court held that the text of foreign laws will be required when this is necessary to achieve an adequate degree of certainty to enable the opposing party to plead: *Yordanes* at paras 44 and 45.

[43] In *Yordanes*, the plaintiffs referred in different parts of their pleading to the laws of England, the Bahamas and New York without further detail or elaboration. Justice Cullity held that it is not permissible for a party to plead reliance on the laws of particular jurisdictions without identifying particular laws or legal propositions: *Yordanes* at paras 47 and 48. Indeed, on the facts of that case, Justice Cullity required that a translation of the text of the provisions of all statutes and other written laws, decrees and resolutions on which the plaintiffs intended to rely be pleaded,

and preferably incorporated by reference, rather than inserted in the statement of claim: *Yordanes* at para 46.

[44] Although the jurisprudence of the Ontario courts discussed above is not binding on this Court, I find it to be persuasive on the question of the particularity with which foreign law must be pleaded.

[45] In light of this Court's decision in *Vardy*, and the above-noted Ontario jurisprudence, I conclude that EB's proposed Amended Reply to Defence to Counterclaim is not a sustainable pleading as it stands. It is not permissible for EB to plead reliance on the laws of particular jurisdictions – namely, "the laws of the State of Nevada and the federal laws of the United States applicable therein" – without identifying the particular statutory provisions or legal propositions being relied upon. This Court must treat the contents of the foreign law, as pled, as the material facts relied on by EB for the purpose of determining whether a reasonable defence has been pled by EB (i.e. the "threshold issue" on this motion). Here, the foreign law has not been pled with sufficient certainty to enable this Court or Ms. Scammell to assess whether a reasonable defence is disclosed under the foreign law, when that law is applied to the other facts pleaded.

[46] EB argues that it is disingenuous for Ms. Scammell to allege that the Disputed Amendments fail to plead the tenor or substance of the foreign law, as they mirror the Applicable Law Provision of the License between Ms. Scammell the Plaintiff and Verify, which she herself signed.

[47] I reject EB's argument as lacking merit for several reasons. First, EB's argument relies on a provision in the License Agreement which is exhibited to the Araus Affidavit. For the reasons

stated earlier, this evidence is not admissible in determining the threshold issue. The foreign law must be articulated such that "on a motion to strike, the court will, without further evidence, be able to properly assess the claim or defence" made under the foreign law [my emphasis]: Stephen G.A. Pitel & Nicholas S. Rafferty, *Conflict of Laws,* (Toronto: Irwin Books, 2016) at 251 [Pitel & Rafferty].

[48] Second, even if the License is admissible evidence on the threshold question, the Applicable Laws Provision of the License only informs Ms. Scammell and the Court that the laws of particular jurisdictions, namely "the State of Nevada and the federal laws of the United States applicable therein" apply. It does nothing to identify particular laws or legal propositions being relied upon by EB in alleging that no rescission of the License has occurred.

[49] EB argues that Ms. Scammell further demonstrated an understanding of the License's governing law when she relied on the same Applicable Law Provision in moving to dismiss the New Jersey Action.

[50] I find this argument to be equally ill-founded. EB again relies on evidence regarding the New Jersey Action contained in the Araus Affidavit, and that evidence is inadmissible in determining the threshold question.

[51] Second, even if the evidence regarding the New Jersey Action is admissible evidence on the threshold question, I am not persuaded by that evidence that Ms. Scammell thereby appreciated the particular statutory foreign law or legal propositions being relied upon by EB in alleging that there has been no rescission of the License. The evidence regarding the New Jersey Action indicates that Ms. Scammell applied to the Superior Court of New Jersey for an order dismissing

Verify's complaint for lack of personal jurisdiction over her, and for lack of subject matter jurisdiction based on the Applicable Laws Provision of the License. Although such evidence indicates that Ms. Scammell was aware of the Applicable Laws Provision, it does not signify her awareness of the particular foreign statutory law or legal propositions being relied upon by EB in alleging that there has been no rescission of the License.

[52] According to EB, Ms. Scammell "without authority assumes that the Nevada law of rescission is statutory. Yet, if Nevada contractual interpretation and rescission law is akin to Canada, such laws are non-statutory" [my emphasis]: Reply Written Representations at para 2. Rather than providing any clarity as the nature of the foreign law upon which it relies, EB's submission muddies the water by suggesting that the applicable foreign law *may* be non-statutory in nature.

[53] In any event, I disagree with EB that Ms. Scammell is relying on case law that is "entirely distinguishable". Ms. Scammell has cited case law on pleading foreign statutes and case law on pleading foreign non-statutory law because the nature of the foreign law being alleged by EB is unclear from the Disputed Amendments. While EB is correct to say that the Court in *Ontario Stone* did not require the pleader to cite specific case law in detail when pleading non-statutory foreign law, EB neglects to point out that the Court held in that case that the proper way to plead such law is to set out a statement (or epitome) of that law, followed by a recital of the related facts.

[54] I firmly reject EB's argument that it has pleaded facts that "embody the essence of the law". While the degree of detail or precision required in a pleading is to be established on a case-by-case basis, there are *no* details provided in the Disputed Amendments as to which foreign statutory law or non-statutory legal propositions are being relied upon by EB in asserting that

rescission of the License has not occurred. Assuming that EB may be relying on non-statutory foreign law, the Disputed Amendments do not set out an epitome of the relevant non-statutory law. It is noteworthy that EB has not cited any case law where a plea of foreign law comparable to the Disputed Amendments was found to constitute a sufficiently particularized pleading.

[55] Finally, I agree with Ms. Scammell that the Disputed Amendments suffer from another defect. EB's proposed pleading indiscriminately pleads that Ms. Scammell was not permitted to rescind the License, "whether pursuant to the laws of the State of Nevada, the federal laws of the United States applicable therein, or the laws of Canada", without taking a position on which law applies, or pleading the various laws in the alternative.

[56] The Ontario Superior Court of Justice held in *Yordanes* that a pleader must plead that the laws of a particular jurisdiction apply, either without more, or in the alternative to those of other identified jurisdictions, as well as the factual basis for each such plea, or rely specifically on the presumption of similarity (para 51). In this Court, Rule 178 of the *Rules* permits a party to plead alternative defences, but only if they are pled "in the alternative". The Disputed Amendments do not satisfy this requirement.

[57] In conclusion, the Disputed Amendments do not plead foreign law with sufficient certainty to enable Ms. Scammel or this Court to assess whether they disclose a reasonable defence. Further, because the foreign law has not been specifically pleaded, it is difficult to assess which material facts in the pleadings support EB's defence. EB has also not pled that the laws of a particular jurisdiction apply, either without more, or in the alternative to those of other identified jurisdictions. Accordingly, the Disputed Amendments do not meet the threshold question on this

motion to amend, as they have not been particularized with sufficient certainty to yield a sustainable pleading.

[58] As the Disputed Amendments are defective in their present form, EB will be required to provide further particulars of the foreign law as a condition of granting it leave to file an amended pleading. Specifically, EB must indicate, by its pleading, whether the foreign law being relied upon is statutory or case law. If EB is relying on foreign statutory law, it must, at a minimum, cite the statute and the applicable sections, as well as the tenor and effect of that law. If EB is relying on non-statutory law, it must, at a minimum, plead a statement of the non-statutory foreign law, followed by a recital of the related facts. Further, EB's pleading must be amended to adhere to Rule 178.

[59] It is not for this Court to speculate whether the minimum additional particulars described above will add up to the proper plea of foreign law by EB, or whether further particulars could properly be sought by Ms. Scammell. It is enough for me to find that the Disputed Amendments do not contain sufficient particulars to grant leave to include these amendments in their present form, and to provide some guidance as to EB as to the minimal additional particulars required that may result in a sustainable pleading of foreign law.

V. **What is the Appropriate Remedy?**

[60] As I have concluded that the Disputed Amendments cannot stand as drafted, the remaining issue is to determine the appropriate remedy. EB proposes that the Court should grant leave to EB to file a pleading with greater particularity, in accordance with the Court's reasons. Ms. Scammell requests an Order simply disallowing the Disputed Amendments.

[61] The nature of the defect with the Disputed Amendments – inadequate particularization of the foreign law – is not one which is incurable by further amendment. A legally sufficient amendment by EB may be possible. As earlier noted, the *Canderel* factors are not at play on this motion. In these circumstances, and having regard to the long-held policy of the law that meritorious claims should not be defeated on the basis of inadequate pleadings, I decline to simply disallow the Disputed Amendments: *Enercorp FCA* at paras 26 to 30 and 47 to 48.

[62] In *GRECI* (at para 11), this Court observed that, where appropriate, a lack of particulars in a proposed amendment may be addressed by granting leave to reapply, or by imposing an obligation of particulars as a condition of the amendment, citing *Enercorp FCA* at paras 26 to 30 and 34 to 38, and *Atlantic* at para 15.

[63] My concern with granting leave to EB to re-apply is that the resulting process which is likely to unfold could jeopardize the hearing date for EB's summary trial motion (March 12 and 13, 2025). If I grant leave to EB to re-apply, EB would be free to file a fresh notice of motion seeking leave, once again, to amend its Reply to Defence to Counterclaim. Ms. Scammell would then be free to once again meet that new motion with arguments challenging the sufficiency of the particulars provided, raising the prospect of further protracted interlocutory proceedings.

[64] To avoid such a scenario, I conclude that the most appropriate remedy on this motion is to impose an obligation on EB that adequate particulars be provided, in accordance with these Reasons, as a condition of allowing EB to amend its Reply to Defence to Counterclaim. I find that the circumstances of this case are amenable to such a remedy, as the nature of the particularization of the foreign law required by EB to at least satisfy the minimum requirements articulated in these

Reasons is relatively straight-forward, and it will facilitate the Court's consideration of the substance of the dispute between the parties.

[65] Such an Order was made by Prothonotary Tabib (as she then was) in *Atlantic Container Lines AB v. Cerescorp Company*, 2017 FC 465 at para 15. Likewise, the Federal Court of Appeal upheld a comparable procedure established by Prothonotary Tabib to streamline the process for providing particularized amendments to pleadings in *J2 Global Communications Inc. v. Protus IP Solutions Inc.*, 2009 FCA 41 at paras 13 to 19. In that regard, Evan, J.A. observed that prothonotaries (now called associate judges) and trial judges are to be afforded ample scope in the exercise of their discretion when managing cases because of their intimate knowledge of the litigation and its dynamics, and having regard to Rule 385 of the *Rules*.

VI. **Conclusion**

[66] For the foregoing reasons, I conclude that the Disputed Amendments do not plead foreign law with sufficient particularity to yield a sustainable pleading as drafted, and therefore the threshold issue on this motion to amend has not been met.

[67] In these particular circumstances, the Court will grant leave to EB to file an Amended Reply to Defence to Counterclaim to plead foreign law, but on the strict condition that EB must include further particulars of the foreign law in its amended pleading, in accordance with these Reasons. EB shall serve and file the document no later than October 29, 2024, one day before EB's deadline to file its motion record on its summary trial motion. By October 29, 2024, EB will or ought to know its case with sufficient clarity to properly plead the applicable foreign law.

[68] Both parties seek costs of this motion. Pursuant to Rule 400(1) of the *Rules*, costs lie wholly in the discretion of the Court. While the Court is granting leave to EB to amend its Reply to Defence to Counterclaim, EB can hardly claim to be the "successful" party on this motion. My Order is made on the strict condition that EB must include further particulars of the foreign law in its amended pleading, to address the objections raised by Ms. Scammell, which I have determined to be well-founded. Accordingly, in the exercise of my discretion, I have determined that costs of this motion shall be awarded to Ms. Scammell in any event of the cause.

ORDER in T-881-24

THIS COURT ORDERS that:

1. The Defendant, Equitable Bank, is granted leave to serve and file, by no later than October 29, 2024, an Amended Reply to Defence to Counterclaim which includes a plea of foreign law, but on the strict condition that the Defendant shall include further particulars of the foreign law in its amended pleading, in accordance with these Reasons.

2. This Order is made without prejudice to any motion that may be brought by the Plaintiff, Ms. Scammell, as a result of the Defendant filing an amended pleading in accordance with paragraph one of this Order.

3. Costs of this motion shall be awarded to Ms. Scammell in any event of the cause.

"Kathleen Ring"

Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-881-24
STYLE OF CAUSE:	COLLEEN SCAMMELL v EQUITABLE BANK

MOTION IN WRITING CONSIDERED AT VANCOUVER, BRITISH COLUMBIA, PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	RING A. J.
DATED:	OCTOBER 21, 2024

APPEARANCES:

Paul Smith	FOR THE PLAINTIFF/DEFENDANT BY COUNTERCLAIM
Benjamin Reingold	FOR DEFENDANT/PLAINTIFF BY COUNTERCLAIM

SOLICITORS OF RECORD:

OWEN WIGGS GREEN & MUTALA LLP Vancouver, British Columbia	FOR THE PLAINTIFF/DEFENDANT BY COUNTERCLAIM
BENNETT JONES LLP Toronto, Ontario	FOR DEFENDANT/PLAINTIFF BY COUNTERCLAIM