

Federal Court



Cour fédérale

Date: 20220815

Docket: T-219-22

Citation: 2022 FC 1197

Ottawa, Ontario, August 15, 2022

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

9107-7438 QUÉBEC INC.

Plaintiff

and

TRUST EXPRESS INC.

Defendant

ORDER AND REASONS

I. Overview

[1] The plaintiff/applicant, 9107-7438 Québec Inc., operates under the name “Les Aliments Akhavan / Akhavan Food” [Akhavan Food] and it packages, distributes and markets Middle Eastern / Mediterranean dried food products [Akhavan products] – mostly beans, lentils, nuts and spices – in various locations across Canada under the brand name “AKHAVAN” [AKHAVAN mark]. The underlying action, which was commenced on February 8, 2022, is for passing off and trademark infringement against the defendant/respondent, Trust Express Inc. [Trust Express].

Akhavan Food brings the present motion pursuant to sections 75 and 104 of the *Federal Courts Rules*, SOR/98-106 [FCR], for leave to amend, after defence and reply, its statement of claim so as to add Khooban Foods Inc. [Khooban] as a co-defendant as well to introduce additional allegations. The statement of claim seeks, amongst other things, a declaration that Trust Express, by its unauthorized use of the AKHAVAN mark, acted contrary to paragraphs 7(a), (b), (c) and subparagraph 7(d)(i) of the *Trademarks Act*, RSC 1985, c T-13 [Act]; the proposed amendments would also add Khooban as a target of such allegations.

[2] Trust Express opposes the proposed amendments to the statement of claim on the basis, amongst other things, that the amendments refer to two affidavits that it provided to Akhavan Food on a without prejudice basis in the context of settlement negotiations.

[3] For the following reasons, I am prepared to grant in part Akhavan Food's present motion.

II. Facts

[4] The present matter involves a family dispute.

[5] Akhavan Food, which also operates two food markets in the Montreal area through licensed sister companies, was originally run by four brothers: Verdi Ali Ajabi, Mohammad Ajabi, Hassan Ajabi as well as a fourth brother who does not seem to be involved in this matter. Trust Express, which I understand is unrelated to the Ajabi brothers, carries on business as a producer, distributor, wholesaler, importer and exporter of a variety of food items,

and between 2006 and 2021 (September 2021 to be precise), it sold and distributed Akhavan products in the Greater Toronto Area [GTA].

[6] In 2018, Mohammad Ajabi [Mohammad] left Akhavan Food and founded Khooban, which also operates a similar line of business in the GTA, selling and distributing, amongst other things, dried food products. Khooban acted as one of the distributors for Akhavan products from September 2019 to September 2020, which is around the same time that Hassan Ajabi [Hassan] left Akhavan Food following a falling out with his brother Verdi Ali Ajabi [Ali] and subsequently began working with his brother Mohammad at Khooban, selling and distributing dried food products. Ali is the only brother operating Akhavan Food at this time.

[7] Akhavan Food claims that counterfeit Akhavan products were discovered in two supermarkets within the GTA in October 2021, purportedly supplied by Trust Express, hence the initial action against Trust Express in February 2022 – evidence of the counterfeit products could purportedly be seen from the manner in which the bar code and product identification appeared on the face of the packaging. Following service of the statement of claim and the appointment of counsel by Trust Express, counsel for Akhavan Food sent the following message to counsel for Trust Express, on a without prejudice basis, on February 16, 2022:

Although I look forward to receiving your defence, I would honestly prefer that we settle this matter otherwise. If your client is willing to be more forthcoming in recognising its involvement in this matter and help us get to the ultimate culprit, I'm sure we can come to very reasonable settlement terms. The ball is in your client's court.

[Emphasis added.]

[8] Thereafter, and unsatisfied with the answers provided by Akhavan Food to its request for particulars, Trust Express undertook what it claimed to be its own internal investigation to determine whether there was any basis for the assertions in the statement of claim.

[9] On March 9, 2022, and purportedly in response to what Trust Express understood as being Akhavan Food's invitation on February 16, 2022, to negotiate a settlement, counsel for Trust Express sent counsel for Akhavan Food an email on a without prejudice basis containing two affidavits with information and evidence obtained as a result of its internal investigation. One affidavit was sworn by Hassan – who recounted his experience with Trust Express during the period in which he worked for Akhavan Food, in particular how Akhavan Food packaged its products in a way that was similar to the manner in which Akhavan Food was asserting to be the evidence of counterfeit products – and the other affidavit was sworn by an articling student employed by Trust Express's counsel, who retrieved screenshots of products advertised on Akhavan Food's website with packaging purportedly similar to the packaging on the alleged counterfeit products.

[10] Convinced that Akhavan Food's assertions were baseless, counsel for Trust Express stated the following in the March 9, 2022 email:

We had the chance to investigate your client's claim.

Please see attached two affidavits one by your client's brother who worked at the company and one from our student.

Your client still sell *[sic]* products on its website with the so called sticker barcode, so these so called products with sticker *[sic]* being fake is simply false. Unless he sells fake products himself.

You can also see his brother's affidavit about what has transpired in the past as well.

Here is our offer,

My client will agree to dismissal without cost by 5 pm on Friday March 11, 2022, this offer will be expired at that time.

If the offer is not accepted my instructions are to file a defence and bring a summary judgment motion. At that point we will seek cost of the entire proceedings from you [*sic*] client. If your client wants to do this the costly way that is fine with me.

[Emphasis added.]

[11] I should make clear that both affidavits were prepared with the style of cause of the present proceedings and included as a last paragraph: “I swear this Affidavit in support of this motion and for no other improper purpose.” On the face of things, it would seem as though the affidavits were prepared in contemplation of a motion, quite possibly the motion for summary judgment referred to by Trust Express’s counsel. In the context of what it understood as settlement negotiations, Trust Express only concedes that the affidavits were provided as a sample of what evidence Trust Express might choose to put forward on a summary judgment motion, should the litigation proceed. In any event, Akhavan Food did not accept Trust Express’s proposal, prompting the latter to file its statement of defence on March 15, 2022 – later amended on March 22, 2022, on consent, to correct a drafting error. Akhavan Food filed its reply on April 4, 2022.

[12] On May 2, 2022, and with the evidence set out in the two affidavits in hand, Akhavan Food informed Trust Express that on account of what it purported to be new information that had recently come to light – invoices allegedly demonstrating that it was Khooban which had sold purported counterfeit Akhavan products to at least one of the two supermarkets in question within the GTA – Akhavan Food intended to amend its statement of claim to include Khooban as

a co-defendant to the action and to add additional allegations against both defendants; the proposed amendments seem to further refine the manner in which Akhavan Food identified purported counterfeit products. In the statement of claim, Akhavan Food asserts that the counterfeit products can be identified, amongst other ways, by having a large product name and bar code sticker situated in the middle of the product packaging, rather than having a small sticker at the bottom of the packaging as it should be for legitimate products. In other words, stickers with the product name and bar code located in the middle of the packaging were evidence of counterfeit products. The affidavit of Hassan purported to provide evidence that, in fact, legitimate Akhavan products also had such stickers in the middle of the packaging. In its amended statement of claim, Akhavan Food refined the manner in which the purported counterfeit products could be identified by suggesting that it is not so much the existence of the product name and bar code sticker or its location in the middle of the packaging, but rather the width of those stickers, which are seemingly wider than the stickers identified in the Hassan affidavit, which are also placed in the middle of the product packaging.

[13] In any event, after reviewing the draft amended statement of claim, counsel for Trust Express advised Akhavan Food that Trust Express objected to some of the proposed amendments on account of the fact that the amendments were based upon information contained in the two affidavits that had been sent by Trust Express on March 9, 2022, which were, according to Trust Express, sent on a without prejudice basis and in the context of purported settlement discussions. Akhavan Food was unimpressed and on June 13, 2022, it filed the present motion for leave to amend its statement of claim, along with supporting material, including a draft amended statement of claim. Trust Express does not oppose the inclusion of Khooban as a co-defendant

and limits its objections to the proposed amendments at paragraphs 23.2, 23.3, 23.4, 23.5, 27, 28.1 and 30 of the amended statement of claim. Consequently, the only issue in the present motion is whether Akhavan Food should be granted leave to amend its statement of claim pursuant to section 75 of the FCR.

III. Analysis

[14] I have set out the relevant provisions of the FCR in the annex to my decision.

[15] Section 75 of the FCR provides that the Court may “allow a party to amend a document, on such terms as will protect the rights of all parties.” In *Canderel Ltd. v Canada*, [1994] 1 FC 3, 1993 CanLII 2990 (FCA), the Federal Court of Appeal set out the general rule regarding amendments:

. . . 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.

[16] The Federal Court of Appeal set out two independent criteria that must be met so as to allow an amendment: (1) any injustice to the other party is capable of being compensated by an award of costs; and (2) the interests of justice would be served (*Janssen Inc. v Abbvie Corporation*, 2014 FCA 242 at para 9 [*Janssen*]; *Sanofi-Aventis Canada Inc. v Teva Canada Limited*, 2014 FCA 65, [2014] FCJ No 254 at para 15).

[17] In *Janssen*, the Federal Court of Appeal adopted the following statement of principle as regards the applicable test on a motion to amend:

On a motion to amend, the applicable test is that taught by the case of *Continental Bank Leasing Corp. v. R.*, [1993] T.C.J. No. 18, (1993) 93 DTC 298 at page 302, [*Continental*], cited by our Court in *Merck & Co. Inc. v. Apotex Inc.*, 2003 FCA 488, [2004] 2 F.C.R. 459 leave to appeal to S.C.C. refused, 30193 (May 6, 2004) (see Judge’s reasons in A-380-13 at paragraph 10):

[...] I prefer to put the matter on a broader basis: whether it is more consonant with the interests of justice that the withdrawal or amendment be permitted or that it be denied. The tests mentioned in cases in other courts are of course helpful but other factors should also be emphasized, including the timeliness of the motion to amend or withdraw, the extent to which the proposed amendments would delay the expeditious trial of the matter, 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 predominates nor is its presence or absence necessarily determinative. All must be assigned their proper weight in the context of the particular case. Ultimately, it boils down to a consideration of simple fairness, common sense and the interest that the courts have that justice be done.

[Emphasis in original.]

[18] Furthermore, in the context of a motion to amend pleadings, this Court must consider whether the grounds pleaded in the amendment have a “reasonable prospect of success” (*Teva Canada Limited v Gilead Sciences Inc.*, 2016 FCA 176 at paras 28-31 [*Teva*]) or, put another way, whether the amendment would be a plea capable of being struck pursuant to section 221 of the FCR (*Enercorp Sand Solutions Inc. v Specialized Desanders Inc.*, 2018 FCA 215 at para 22

[*Enercorp*]; *Bauer Hockey Corp. v Sport Masko Inc. (Reebok-CCM Hockey)*, 2014 FCA 158 at para 16 [*Bauer*]). Normally, only once this threshold is crossed will a court consider the issues of any prejudice to the opposing party and the interests of justice (*Teva* at para 31).

[19] As stated, Trust Express limits its objections to the following proposed amendments (underlined) in the amended statement of claim:

23.2. Trust Express denies having dealt in Counterfeit Goods and, in an attempt to convince Akhavan Food and its counsel of this, had an affidavit prepared and sworn under oath by Hassan Ajabi wherein the latter affirms that the Counterfeit Goods are authentic and correspond to the labelling of AKHAVAN Goods he had sold to Trust Express in 2017 (while Hassan Ajabi was working for Akhavan Food).

23.3. To support his affirmation, Hassan Ajabi provides the following photograph:

...

23.4. Although those photographs are not clear enough to identify the nature of the AKHAVAN Goods in question, we clearly see that the label stickers do not span the entire width of the tricolour white-red-green contour of the packaging, which was indeed how AKHAVAN Goods were packaged at the time.

23.5. Hassan Ajabi clearly knows that Khooban Food packaged Counterfeit Goods yet assists Trust Express to try to hide the fact by preparing a statement under oath he knows to be false.

...

27. Trust Express denies having dealt in Counterfeit Goods, but its denial is not credible and replete with contradictions and it now appears that it conspired with Hassan Ajabi and Khooban Foods to hide the fact, albeit clumsily by failing to take into account the width of the labels on the Counterfeit Goods.

28.1. Since Akhavan Food has taken action against Trust Express, it appears that no new Counterfeit Goods have been found in the market, which further supports the fact that Trust Express was

involved with Khooban Foods to distribute and sell Counterfeit Goods.

...

30. Furthermore, in view of Trust Express' and Khooban Foods' blatant disregard of Akhavan Food's clear rights and their clumsy attempt to deny it by way of a sworn statement containing false information, including the allegation that Hassan Ajabi is a shareholder of Akhavan Food, which he never was, punitive and exemplary damages in the amount of \$[...]100,000.00 are exceptionally warranted.

[20] Trust Express asserts that the proposed amendments to all the paragraphs other than paragraph 28.1 refer to evidence, contrary to section 174 of the FCR, and that they are redundant, frivolous and/or vexatious, and may prejudice or delay the fair trial of the action, the whole contrary to paragraphs 221(1)(b),(c) and (d) of the FCR. In addition, Trust Express claims that those amendments refer to material that was provided as part of "without prejudice" settlement negotiations and should be struck on that basis as well.

[21] Pursuant to section 174 of the FCR, although pleadings must contain a concise statement of the material facts on which the party relies, they shall not include the evidence by which those facts are to be proved. The Federal Court of Appeal stated the following in *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 18:

[18] There is no bright line between material facts and bald allegations, nor between pleadings of material facts and the prohibition on pleading of evidence. They are points on a continuum, and it is the responsibility of a motions judge, looking at the pleadings as a whole, to ensure that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair.

[22] Indeed, one must not confuse material facts, which must be pleaded, and the evidence by which those facts may be proven; however, an allegation made without any evidentiary foundation would be considered an abuse of process (*AstraZeneca Canada Inc. v Novopharm Limited*, 2010 FCA 112 at para 5 [*AstraZeneca*]).

[23] Trust Express asserts that the affidavits themselves constitute evidence to which Akhavan Food is pointing in order to establish the assertions being made in the various proposed amendments and accordingly are not to be included in the pleadings under section 174 of the FCR. For the most part, I must agree with Trust Express. I will deal with each paragraph individually.

[24] Paragraph 23.2 – I see no difficulty with this paragraph. The reference to the affidavit of Hassan is simply part of the concise statement of material facts and not meant to be the evidence in support any particular assertion made in the pleadings. Nor am I convinced that the paragraph risks being struck pursuant to section 221 of the FCR. This paragraph shall remain.

[25] Paragraph 23.3 – This amendment will not be allowed as it simply identifies evidence – a photograph showing what is the supposed width of a legitimate middle-packaging sticker – in support of the assertions of Hassan referred to in paragraph 23.2; such is contrary to section 174 of the FCR.

[26] Paragraph 23.4 – As drafted, this amendment will not be allowed. I would have no difficulty with the paragraph had it simply asserted the purported discrepancy in the width of the

stickers in the alleged counterfeit products; however, the paragraph goes further and makes reference to the evidence in support of such an assertion, which I have not allowed under paragraph 23.3 and which is thus contrary to section 174 of the FCR. I am also not going to get involved with wordsmithing the paragraph to bring it in line with what may be acceptable; as drafted, it is not acceptable. I should mention that Trust Express does not claim that this amendment is a departure from a previous pleading and thus may not survive a challenge under paragraph 221(1)(e). In any event, I need not deal with that issue as I have already refused to accept this amendment.

[27] Paragraph 23.5 – This amendment is also not allowed. Hassan is not a party to the action, and what he may have known or not known is of little value at this stage of the proceedings. As the allegation seems to me to be immaterial, I will not allow it as it would in any event be subject to being struck under paragraph 221(1)(b) of the FCR. I also find that the pleadings do not include the evidentiary support for Akhavan Food’s claim that Hassan “clearly knows that Khooban Food packaged Counterfeit Goods” and thus the amendment constitutes an abuse of process (*AstraZeneca* at para 5). Also, allowing this amendment would not advance the determination of the “real questions in controversy between the parties” (*Teva* at para 26).

[28] Paragraph 27 – The proposed amendment to this paragraph is not permitted. Akhavan Food pleads the evidence it claims establishes its allegation that, purportedly, Hassan and Khooban conspired with Trust Express in passing off counterfeit products by “clumsily” failing to consider the width of the alleged counterfeit stickers; the amendment thus runs afoul of section 174 of the FCR. On the other hand, it may well have been Akhavan Food that failed to

consider that aspect of the relevant stickers in its original statement of claim and only tweaked to the distinction with the affidavit of Hassan. In any event, I leave that issue to the judge hearing the matter on the merits.

[29] Paragraph 30 – As drafted, the amendment to this paragraph is not allowed. Again, as matters stand, the status of Hassan with Akhavan Food is in no way material to the claim being advanced by Akhavan Food in relation to Trust Express or Khooban; reference to it is simply immaterial and thus subject to being struck under paragraph 221(1)(b).

[30] In addition, Trust Express objects to the amendments sought at paragraphs 23.2, 23.3, 23.4, 23.5, 27 and 30 of the amended statement of claim because they refer to the affidavits that were provided to Akhavan Food for the purposes of settlement negotiations and as a sample of what evidence Trust Express might choose to put forward on a summary judgment motion.

[31] Pleadings that contain privileged settlement negotiation information are considered scandalous, frivolous, or vexatious and must be struck out (*Buck v Canada (Attorney General)*, 2022 CanLII 19523 at paras 13-15 [*Buck*]; *Fono v Canada Mortgage and Housing Corporation*, 2021 FCA 125 at para 7). Settlement privilege is a class privilege that protects from disclosure at trial documents and communications prepared for the purposes of settling a dispute (*Buck* at para 16; *Globe and Mail v Canada (Attorney General)*, 2010 SCC 41 at para 80; *Bertram v Canada*, [1996] 1 FC 756 (FCA) at 763). The purpose of settlement privilege is to promote the settlement of disputes and to wrap “a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are

inadmissible” (*Buck* at para 17, citing *Sable Offshore Energy Inc. v Ameron International Corp.*, 2013 SCC 37 at para 2 [*Sable Offshore Energy*]).

[32] That said, just because information is exchanged in the context of settlement discussions does not automatically protect it under the veil of confidentiality. In addition, merely marking a letter “without prejudice” does not make it privileged unless the contents are actually privileged (*Renzone v Onyx Homes Inc.*, 2020 ONSC 7722 (CanLII) at para 18). The necessary conditions for settlement privilege were set out in *Mohawks of the Bay of Quinte v Canada (Indian Affairs and Northern Development)*, 2013 FC 669 at para 34, citing Sopinka et al, *The Law of Evidence in Canada*, 3rd ed. (Markham, ON: LexisNexis Canada Inc., 2009):

- (1) A litigious dispute must be in existence or within contemplation;
- (2) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed;
- (3) The purpose of the communication must be to attempt to effect a settlement.

[Emphasis added.]

[33] Trust Express argues that the affidavit sworn by Hassan satisfies this test as the email correspondence to which the affidavit was attached was clearly sent for the purposes of settlement negotiations: (1) the email was sent in response to the statement of claim, in the course of a litigation dispute; (2) the email was marked with “without prejudice” at the top of the correspondence; (3) the email contained an offer to settle with the rationale supporting that offer included in the content of the affidavit.

[34] As regards the second condition, the Supreme Court of Canada has stated that “although the privilege is often referred to as the rule about ‘without prejudice’ communications, those precise words are not required to invoke the privilege. What matters instead is the intent of the parties to settle the action” (*Sable Offshore Energy* at para 14). Moreover, the use of the phrase “without prejudice” may imply an intention that the communication would not be disclosed to the court in the event that the negotiations failed. However, it does not automatically make the correspondence privileged:

Although the use of this phrase is not conclusive of the intention, it may constitute some, if not *prima facie*, evidence of it and thus its use is of value. Moreover, in the course of negotiations, if a letter has been written by one party “without prejudice”, then an intention to maintain the privilege with respect to the whole of the correspondence of which the letter forms a part may be inferred.

(Sidney N. Lederman, Michelle K. Fuerst & Hamish C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed (Toronto: LexisNexis Canada, 2022) at § 14.382)

[35] In this case, although the March 9, 2022, email contains the phrase “without prejudice” at the top of the correspondence, I cannot conclude that there was an implied intention that the documents attached to the email would not be disclosed to the court in the event that the negotiations failed. In fact, the opposite is true. On February 16, 2022, counsel for Akhavan Food sent an email using the phrase “without prejudice”, inviting Trust Express to negotiate a settlement and to help Akhavan Food “get to the ultimate culprit.” On March 9, 2022, counsel for Trust Express sent an email also using the phrase “without prejudice”, offering to agree to the dismissal of the action without costs. In the same email, counsel for Trust Express warned Akhavan Food that if the proposal was not accepted, his instructions were to file a statement of defence and bring a motion for summary judgment. Attached to that email were two sworn

affidavits in which the affiants expressly stated the following: “I swear this Affidavit in support of this motion and for no other improper purpose.”

[36] In short, by using the medium of affidavits drafted as they were, Trust Express has not convinced me that the affidavits were sent to counsel for Akhavan Food with the “express or implied intention that [they] would not be disclosed to the court in the event negotiations failed”. I accept, as stated by Justice Quigg in *Brandt Tractor Ltd. v Kitchen*, 2021 NBCA 54 (CanLII) at paragraph 15, that there is a contextual element to determining whether settlement privilege will extend to any particular part of an exchange of correspondence; however, in this case, the context included a direct assertion from Trust Express that if its proposal was not accepted, a motion for summary judgment would follow, and with the contested information being conveyed as it was, I am not convinced that it was intended that settlement privilege should attach to the affidavits in this particular case.

[37] During the hearing, I asked the parties whether it would have made a difference if the information contained in the affidavits had instead been set out by Trust Express in a simple letter from counsel sharing the results of its investigation. They disagreed with each other, however, for my part, I find that it may have made a difference. The fact that Trust Express chose to convey the findings of its investigation through affidavits seemingly drafted in a manner which objectively displayed an intention to use those affidavits in court actually implies that Trust Express intended to disclose the affidavits to the Court. I accept that when it came time for Trust Express to actually serve and file any motion for summary judgment, it was not necessarily obliged to file the two affidavits in question in support thereof; however, in proceeding the way

it did, it cannot be said, without any other clear language, that there was an express or implied intention that the affidavits would not be disclosed to the court in the event negotiations failed; the implication was to the contrary, *to wit*, that Trust Express did not intend to treat the information in the affidavits as confidential.

[38] As for paragraph 28.1, Trust Express opposes the proposed amendment on the grounds of improper pleadings as it amounts to pleading a point of law without the requisite supporting facts, is an inconsistent pleading, constitutes a departure from a previous pleading and is an abuse of process, the whole contrary to sections 174, 175, 180, and paragraphs 221(1)(e) and (f) of the FCR. Trust Express asserts that pursuant to section 175, although a party may raise any point of law in a pleading, section 175 nonetheless does not relieve the party of the obligation to comply with section 174, and a party must plead the material facts on which a conclusion of law is based (*Enercorp* at para 34).

[39] Paragraph 28.1 must be contrasted with the proposed amendment at paragraph 28.2, which is not being challenged by Trust Express and which reads:

28.2. However, in April 2022, Akhavan Food learned that Counterfeit Goods (white kidney beans) were advertised on the website of another Middle Eastern grocery in the GTA, namely SuperToranj, as shown in the screenshot below:

White kidney beans

Manufacturer: **Akhavan**



SKU: 807785020052

Vendor: **Super Toranj**

Share:    

[40] I do not agree with Trust Express that paragraphs 28.1 and 28.2 are necessarily contradictory and at odds with each other. Although admittedly somewhat of a stretch, paragraph 28.1 speaks of alleged counterfeit products being found in the market, while paragraph 28.2 speaks of an advertisement on a grocery store's website. It may be splitting hairs, and although Akhavan Food may wish to clarify its position, I am not prepared to say that the two paragraphs are in direct contradiction with each other, as asserted by Trust Express. I also therefore cannot agree with Trust Express's claim that Akhavan Food is purporting to arrive at a legal conclusion as to the liability of the parties based on facts that it subsequently alleges are no longer true. I will not disallow this paragraph.

[41] Consequently, the proposed amendments in paragraphs 23.3, 23.4, 23.5, 27 and 30 will not be permitted and are to be removed prior to the filing of the amended statement of claim.

IV. Conclusion

[42] I would grant the motion in part. Although Akhavan Food will be permitted to file its amended statement of claim without the amendments to paragraphs 23.3, 23.4, 23.5, 27 and 30, I appreciate that it may choose to further revise its amended statement of claim given my findings on the present motion. I leave it to the parties, on the basis of the present Order, to agree upon any amendments to be made by Akhavan Food to its statement of claim.

[43] As for costs, under section 410 of the FCR, “[u]nless the Court orders otherwise, the costs occasioned by an amendment to a pleading made without leave shall be borne by the party making the amendment.” In *Apotex Inc. v Wellcome Foundation Limited*, 2009 FC 117 at paragraph 55, then Prothonotary Lafrenière (now Justice Lafrenière) found that “[a]s a general rule, a party seeking an amendment should bear the costs, particularly when the amendments are required due to inadvertence”; however, Prothonotary Lafrenière granted no costs because the respondents resisted the motion on the merits, not just as to terms, and were unsuccessful.

[44] In this case, the results were mixed, and I have not agreed with Trust Express’s main argument regarding the purported confidentiality of the two affidavits in question. As a result, there will be no costs on this motion.

ORDER in T-219-22

THIS COURT ORDERS that:

1. The motion is granted in part;
2. The plaintiff/applicant is permitted to serve and file its proposed amended statement of claim attached as Annex A to its notice of motion, save for the amendments to paragraphs 23.3, 23.4, 23.5, 27 and 30, within 20 days of the present Order. Otherwise, it may file, within the same time period, a further revised amended statement of claim with the consent of the defendant/respondent;
3. There shall be no costs.

“Peter G. Pamel”

Judge

ANNEX*Federal Courts Rules, SOR/98-106***Amendments with leave**

75(1) Subject to subsection (2) and rule 76, the Court may, on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties.

Limitation

(2) No amendment shall be allowed under subsection (1) during or after a hearing unless

(a) the purpose is to make the document accord with the issues at the hearing;

(b) a new hearing is ordered; or

(c) the other parties are given an opportunity for any preparation necessary to meet any new or amended allegations.

...

Material facts

174 Every pleading shall contain a concise statement of the material facts on which the party relies, but shall not

Modifications avec autorisation

75 (1) Sous réserve du paragraphe (2) et de la règle 76, la Cour peut à tout moment, sur requête, autoriser une partie à modifier un document, aux conditions qui permettent de protéger les droits de toutes les parties.

Conditions

(2) L'autorisation visée au paragraphe (1) ne peut être accordée pendant ou après une audience que si, selon le cas :

a) l'objet de la modification est de faire concorder le document avec les questions en litige à l'audience;

b) une nouvelle audience est ordonnée;

c) les autres parties se voient accorder l'occasion de prendre les mesures préparatoires nécessaires pour donner suite aux prétentions nouvelles ou révisées.

[...]

Exposé des faits

174 Tout acte de procédure contient un exposé concis des faits substantiels sur lesquels la partie se fonde; il ne

include evidence by which those facts are to be proved.

comprend pas les moyens de preuve à l'appui de ces faits.

Pleading law

Points de droit

175 A party may raise any point of law in a pleading.

175 Une partie peut, dans un acte de procédure, soulever des points de droit.

...

[...]

Documents or conversations

Documents ou conversations

177 A pleading shall briefly describe any document or conversation referred to in the pleading, but need not set out the exact words of the document or conversation unless the words are themselves material.

177 L'acte de procédure qui fait mention d'un document ou d'une conversation énonce succinctement le contenu du document ou l'objet de la conversation. Il n'est pas nécessaire d'y rapporter textuellement le document ou la conversation, à moins que les termes employés ne soient essentiels.

...

[...]

Inconsistent pleading

Incompatibilité

180 A party may plead an allegation of fact, or raise a new ground of claim in a pleading, that is inconsistent with a previous pleading only if the party amends the previous pleading accordingly.

180 Une partie ne peut, dans un acte de procédure, faire des allégations de fait ou soulever de nouveaux motifs qui sont incompatibles avec ceux figurant dans un acte de procédure antérieur que si elle modifie ce dernier en conséquence.

...

[...]

Motion to strike

Requête en radiation

221(1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck

221(1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans

out, with or without leave to amend, on the ground that it	autorisation de le modifier, au motif, selon le cas :
(a) discloses no reasonable cause of action or defence, as the case may be,	a) qu'il ne révèle aucune cause d'action ou de défense valable;
(b) is immaterial or redundant,	b) qu'il n'est pas pertinent ou qu'il est redondant;
(c) is scandalous, frivolous or vexatious,	c) qu'il est scandaleux, frivole ou vexatoire;
(d) may prejudice or delay the fair trial of the action,	d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
(e) constitutes a departure from a previous pleading, or	e) qu'il diverge d'un acte de procédure antérieur;
(f) is otherwise an abuse of the process of the Court,	f) qu'il constitue autrement un abus de procédure.
and may order the action be dismissed or judgment entered accordingly.	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.
...	[...]

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-219-22

STYLE OF CAUSE: 9107-7438 QUÉBEC INC. v TRUST EXPRESS INC.

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: JUNE 28, 2022

ORDER AND REASONS: PAMEL J

DATED: AUGUST 15, 2022

APPEARANCES:

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