

Federal Court



Cour fédérale

Date: 20260121

Docket: T-886-21

Citation: 2026 FC 94

Ottawa, Ontario, January 21, 2026

PRESENT: The Honourable Madam Justice Tsimberis

BETWEEN:

THE TORONTO-DOMINION BANK

Plaintiff

and

**THOMAS JOHN DYAS D/B/A TD BENEFITS
AND d/b/a TD BENEFIT SOLUTIONS**

Defendant

ORDER AND REASONS



I. Overview

[1] The trial of this trademark infringement action and other violations of the *Trademarks Act*, RSC 1985, c T-13 was adjourned on October 31, 2025 after the hearing of the Plaintiff's oral closing arguments [Closing] to allow the Plaintiff to file a motion under Rules 75 and 369 of the *Federal Courts Rules*, SOR/98-106 [Rules], which motion would be determined by the Court prior to hearing the Defendant's Closing. The Plaintiff's motion for leave to amend [Motion to

Amend] concerned the parties' Joint Statement of Issues [SOI], filed on October 27, 2025, as Trial Exhibit [TX] 80, the fifth day of trial.

[2] More specifically, the Plaintiff's Motion to Amend seeks to restore the Plaintiff's trademark Registration No. TMA 644,911 [TMA '911, filed as TX-12] for the TD Shield Design without a colour claim as one of three registrations for the TD trademarks at issue (allegedly infringed by the Defendant and relied upon by the Plaintiff), rather than its trademark Registration No. TMA 647,831 [TMA '831, filed as TX-13] for the TD Shield Design with a colour claim.

[3] TMA '831, like TMA '911, is a trademark registration for the TD Shield Design, registered with the same goods and services as TMA '911, except that it includes a colour claim where the letters TD are in white, and the background square element is green. The two registrations are otherwise virtually identical. The only substantive difference between TMA '831 and TMA '911 is the colour claim; while the registration date for each trademark is different, the underlying design, filing date, and goods and services are otherwise the same.

Trademark	Reg. No.	Filing Date	Reg. Date	Goods & Services
	TMA644911	May 13, 2004	Jul. 26, 2005	Credit cards; publications, namely brochures, print advertising, newsletters and reports; Banking; credit card; computerized data processing; <u>insurance</u> and securities <u>brokerage</u> .
 Colour claim: Colour is claimed as a feature of the trade-mark. The letters are white and the background is green.	TMA647831	May 13, 2004	Sept. 12, 2005	Credit cards; publications, namely brochures, print advertising, newsletters and reports; Banking; credit card; computerized data processing; <u>insurance</u> and securities <u>brokerage</u> .

A. *Plaintiff's Position*

[4] The Plaintiff argues that the proposed amendment accords with the real questions in controversy between the parties and serves the interests of justice. The Plaintiff submits the proposed amendment restoring TMA '911 to the October 27th Joint SOI accords with the Statement of Claim and the record before the Court at trial. The Plaintiff argues that the proposed amendment would ensure that the Court can consider the issues on their merits and do justice between the parties, rather than limit its consideration of the real issues in controversy because of an inadvertent typographical error. The Plaintiff argues that its removal of TMA '911 instead of TMA '831 from Schedule "A" is an obvious error as there is no logical reason for the Plaintiff to have removed a broader registration TMA '911 in place of the version of the TD Shield Design trademark containing the colour claim, namely TMA '831.

[5] The Plaintiff further argues the proposed amendment will not result in any injustice or prejudice to the Defendant. The Plaintiff submits that the Defendant has been aware of the Plaintiff's reliance on TMA '911 for over 4 years, prepared its fact witness' affidavits and expert evidence and submitted them to Court prior to the trial with the knowledge that TMA '911 was being asserted by the Plaintiff, and cannot seriously contend that it would have approached its case at trial differently by relying on the Plaintiff's alleged error. The Plaintiff argues that any prejudice can be cured by providing the Defendant with an opportunity to adjust its Memorandum of Fact and Law [Closing Argument] and Closing and, if warranted, by ordering costs.

[6] The Plaintiff argues that it brought its Motion to Amend at the earliest opportunity. The Plaintiff's proposed amendment will not delay the trial of this action beyond any accommodation the Court may grant to the Defendant to adjust and prepare for its [Closing Argument] and Closing.

B. *Defendant's Position*

[7] The Defendant has objected to the Plaintiff's Motion to Amend to assert the alternate TMA '911 to Schedule "A" and consequently, for the Court to analyse the Plaintiff's trademark claims in relation to TMA '911.

[8] The Defendant submits that the Plaintiff narrowed its claim when it shared its draft Joint SOI dated October 18, 2025, where for the first time TMA '911 was not included in the list of the Plaintiff's registered TD trademarks at issue (as shown in Schedule "A") that were allegedly infringed by the Defendant. The Defendant notes that the list of the Plaintiff's registered TD trademarks at issue remained the same in the Plaintiff's Revised SOI [TX-1] filed with the Court on October 20, 2025, the first day of trial.

[9] The Defendant argues that allowing the Plaintiff to make the amendment would be prejudicial as it relied on the Plaintiff's narrowing of the issues during the trial. The Defendant states that prejudice must be presumed in this case due to its inability to retroactively change its litigation strategy and argues the Plaintiff has not met its onus to rebut the presumption of prejudice. The Defendant submits that allowing the amendment would require the Defendant to change its litigation strategy after the evidentiary phase of the trial has already closed and would

amount to prejudice that is non-compensable by costs. As such, allowing the Plaintiff's Motion to Amend would not be in the interests of justice.

[10] In the alternative, the Defendant submits that should the Court grant the Plaintiff's Motion to Amend the Joint SOI to include TMA '911, the Court must then order a new trial before a new trier of fact for which the Plaintiff would be responsible for the costs. The Defendant relies on Rule 75(2) stating that no amendment shall be allowed under Rule 75(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 party is given an opportunity for any preparation necessary to meet any new or amended allegations. The Defendant argues that granting leave to amend pursuant to Rule 75(2)(a) is illogical as the document for which the amendment is sought framed the issues at trial, and as such, any amendment to the Joint SOI would have the effect of varying the issues at trial. The Defendant argues that granting leave pursuant to Rule 75(2)(c) by providing the Defendant with the opportunity to amend the Defendant's Memorandum of Fact and Law is wholly insufficient and prejudicial as the evidence phase of the trial has already been completed. As such, the Defendant argues that this Court would be required to order a "new hearing" as per Rule 75(2)(b). However, the Defendant recognizes that it is unclear if this Court has the power to order a new trial under Rule 75(2)(b).

C. *Plaintiff's Reply*

[11] In its Written Representations in Reply, the Plaintiff argues that prejudice ought not to be presumed in this case because the Defendant has failed to demonstrate how it would be

prejudiced if the Motion to Amend is granted and that it would be in the interests of justice to grant the Motion to Amend.

[12] Regarding the Defendant's request for a new trial if the proposed amendment is allowed, the Plaintiff argues that a new trial should not be ordered in this case as the Defendant does not cite any jurisprudence that has ever ordered a new trial as a result of an amendment, even though such amendments have been ordered after a trial was conducted: *Treirs v Kmith*, 2023 ONCA 751 at paras 4-7; *Garcia v Normore*, 2008 CanLII 14796 (ON SC) at para 7. The Plaintiff also argues that the Defendant has not identified anything it would have done differently had the alleged inadvertent error not occurred. The Plaintiff thereby relies on *Extreme Ventures Partners Fund I LP v Varma*, 2021 ONCA 853 at paras 60-62 where a request for a new trial was denied despite the Court allowing an amendment to include a claim of disgorgement after trial on the basis that the Defendant had not identified any new evidence they might call or what they would have done differently at a new trial. The Plaintiff lastly submits a new trial is not justified considering the costs, delay and drain on judicial resources associated with conducting a new trial in these circumstances.

[13] For the reasons that follow, the Plaintiff has not met its onus to show the requested amendment should be allowed. The Plaintiff's Motion to Amend came at a very late stage in the litigation, after the Plaintiff completed its Closing, but before the Defendant. It would not be in the interests of justice, nor would it be fair to the Defendant, to allow the Plaintiff to amend a document in a way that would broaden its claim. The Defendant relied on the SOI filed by the

Plaintiff on the first day of trial to conduct its cross-examinations, plan its litigation strategy and prepare its Closing Argument. Therefore, the Plaintiff's Motion to Amend is denied.





II. Factual Background

A. *Statements of Issues*

[14] Although ordered to do so, the parties were unable to agree on a Joint SOI in advance of the start of the trial on October 20, 2025.

[15] On August 29, 2025, the Plaintiff delivered the first draft of the Joint SOI to the Defendant for consideration [Defendant's Responding Motion Record at 975, Affidavit of Mr. Gill at para 2]. Schedule "A" of the Plaintiff's first draft Joint SOI [Defendant's Responding Motion Record at 976, Affidavit of Mr. Gill at para 2] listed the six (6) registrations (depicted below) allegedly infringed by the Defendant, which registrations included TMA '911 and TMA '831 as the 2nd and 3rd marks listed therein:

Schedule "A" – Plaintiff's Registered TD Trademark

Trademarks	Reg. No.
TD	TMA396097
	TMA644911
	TMA647831
	TMA170771
	TMA251349
TD INSURANCE	TMA516808

[16] The Schedule “A” chart of the six (6) Plaintiff’s Registered TD Trademarks depicted above appeared in black and white without any textual reference to any colour claim. This contrasts with Schedule “B” of the Plaintiff’s first draft Joint SOI, depicted below, which was a chart of the seven (7) TD Benefits impugned trademarks that were alleged to be infringed that appeared in colour [Defendant’s Responding Motion Record at 977, Affidavit of Mr. Gill at para 2]:

Schedule “B” – Defendant’s TD Benefits Marks

Mark
TD BENEFITS




<p> tdbenefits.ca https://www.tdbenefits.ca ;</p> <p>TD Benefits Serving the Okanagan for over 20 years Insurance and employee benefit specialists who protect the lives of individuals and their families by providing valuable insurance solutions delivered with ...</p>


[17] This first draft Joint SOI was accompanied by a cover email from the Plaintiff's counsel dated August 29, 2025, which included the following disclaimer [Plaintiff's Motion Record at 211, Exhibit K of the Affidavit of Ms. Panaroni]:

We circulate these drafts strictly on a confidential and without prejudice basis for the sole purpose of progressing dialogue as to the potential areas of factual agreement and the issues to be determined by the Court.



For the avoidance of doubt, the exchange of the enclosed drafts:

- Does not constitute, and shall not be construed as constituting, any admission, concession, representation, or agreement by our client (whether express or implied) in relation to the accuracy, completeness, relevance, materiality, admissibility, or legal effect of any fact, matter, allegation, or contention set out or referred to herein; and
- Shall not be tendered in evidence, referred to in open court, or otherwise relied upon by either party unless and until a final, mutually executed version is formally agreed and filed, or the Court otherwise orders.

[18] In view of the above disclaimer, the Plaintiff noted that it did not include in support of its Motion Record any drafts of the Joint SOI provided to the Defendant and exchanged between the parties because its position is that they were exchanged expressly on a without prejudice basis and were not final.

[19] Between August 29, 2025 and September 24, 2025, the parties exchanged draft proposed Joint SOI, each of which included the same six (6) registered trademarks, including TMA '911 for the TD Shield Design mark and TMA '831 for the TD Shield Design mark, reproduced above. There was no reference to the colour claim for TMA '831 for the TD Shield Design trademark and the TD Shield Design was not shown using the colours green and white.

[20] As the parties could not agree on a Joint SOI by the August 29, 2025 Court deadline, the Defendant filed its own version of the SOI on September 24, 2025. This SOI listed as “Issue 2: Has the Defendant infringed one or more of the Plaintiff’s registered TD Trademarks (as shown in Schedule “A”) contrary to s. 20 of the *Trademarks Act* by using the TD Benefits Marks (as shown in Schedule “B”)?” As reproduced below, the Plaintiff’s registered TD Trademarks in Schedule “A” again listed the same six (6) registered trademarks, including the TD Shield Design mark TMA ‘911 and the TD Shield Design mark TMA ‘831. There was no reference to the colour claim for the TD Shield Design mark TMA ‘831 and the mark was not indicated using the colours green and white [Plaintiff’s Motion Record at 229, Exhibit N of the Affidavit of Ms. Panaroni]:

	TMA644911	<p>Goods:</p> <p>(1) Credit cards; publications, namely brochures, print advertising, newsletters and reports.</p> <p>Services:</p> <p>(1) Banking; credit card; computerized data processing; insurance and securities brokerage.</p>
	TMA647831	<p>Goods:</p> <p>(1) Credit cards; publications, namely brochures, print advertising, newsletters and reports.</p> <p>Services:</p> <p>(1) Banking; credit card; computerized data processing; insurance and securities brokerage.</p>

[21] On October 8, 2025, the Court issued a Scheduling Order providing that “[s]hould the parties be unable to reach an agreement on a joint statement of issues, the plaintiff will file its statement of issues by no later than October 8, 2025, with the defendant relying on its Statement

of Issues filed on September 24, 2025.” [Plaintiff’s Motion Record at 358, Exhibit P of the Affidavit of Ms. Panaroni (Scheduling Order dated October 8, 2025 at para 3)].


[22] The Plaintiff’s SOI filed October 8, 2025 had similar language for Issue 2: “Has the Defendant infringed one or more of the Plaintiff’s registered TD Trademarks (as shown in Schedule “A”) contrary to sections 19 and 20 of the Trademarks Act as a result of its activities in association with the TD Benefits Marks (as shown in Schedule “B”)?” The Plaintiff’s registered TD Trademarks in Schedule “A” included the same six (6) registered trademarks, including the TD Shield Design mark TMA ‘911 and the TD Shield Design mark TMA ‘831 reproduced below. There was no reference to the colour claim for the TD Shield Design mark TMA ‘831 and the mark was not indicated using the colours green and white [Plaintiff’s Motion Record at 369, Exhibit Q of the Affidavit of Ms. Panaroni]:

Schedule “A” – Plaintiff’s Registered TD Trademarks

<u>Trademarks</u>	<u>Reg. No.</u>
TD	TMA396097
	TMA644911
	TMA647831
	TMA170771
	TMA251349
TD INSURANCE	TMA516808

[23] At a Trial Management Conference held on October 16, 2025, the Court again encouraged the parties to come to an agreement on the outstanding Joint SOI.

[24] On October 16, 2025, counsel for the Plaintiff narrowed the asserted trademark registrations in Schedule “A” from six (6) to three (3) in the draft Joint SOI it was working on. The Plaintiff asserts that its decision to narrow was an effort to streamline the issues for trial and ultimately simplify the mark-by-mark trademark confusion analyses the Court would be required to perform. As a result, counsel for the Plaintiff removed three (3) registrations from Schedule “A”, which resulted in TMA ‘911 being removed [Defendant’s Responding Motion Record at 978-979, Affidavit of Mr. Gill at paras 4-6]. As indicated in the Affidavit of Mr. Gill at para 5, the Schedule “A” chart appeared as follows:

<u>Trademarks</u>	<u>Reg. No.</u>
TD	TMA396097
TD INSURANCE	TMA516808
	TMA647831

[25] On Saturday, October 18, 2025, the Plaintiff provided this revised version of the draft Joint SOI to the Defendant [Defendant’s Responding Motion Record at 979, Affidavit of Mr. Gill at para 7].

[26] The Defendant alleges that the October 18, 2025 draft Joint SOI was the first time it became aware that the Plaintiff had made the decision to narrow its asserted TD trademarks to

rely on the TMA '831 TD Shield Design colour mark and not the TMA '911 TD Shield Design mark without any colour claim.

[27] The Plaintiff alleges that TMA '911 was mistakenly removed from Schedule "A" of its revised version of the draft Joint SOI due to an inadvertent clerical error, with the row containing TMA '911 being mistakenly deleted instead of the row for TMA '831. The alleged mistake resulted from the rows in Schedule "A" for TMA '831 and TMA '911 being immediately adjacent to one another, and neither mark in Schedule "A" being shown in colour [Defendant's Responding Motion Record at 978, Affidavit of Mr. Gill at para 5]. The Plaintiff now alleges that its intention was to remove TMA '831 instead of TMA '911, given that the rights associated with TMA '911 are broader as they are not limited to any particular colour combinations as with TMA '831.

[28] The Plaintiff indicated that this alleged error was carried over to subsequent drafts of the Joint SOI exchanged between the parties throughout the trial. The Plaintiff indicated that the incorrect revised version of the Schedule "A" chart incorporating the alleged error was also filed with the Court on the first day of trial as part of the Plaintiff's Revised SOI dated October 20, 2025 [TX-1] and as part of the Plaintiff's infringement analysis chart filed as TX-4 at Tab 25 during the Plaintiff's opening arguments [Opening]. Counsel for the Plaintiff indicates that the fact that the Plaintiff's registrations were never depicted in colour or with any textual reference to any colour claim in these documents, whereas the Defendant's impugned marks were depicted in colour where appropriate, is consistent with his intention and belief that he was presenting the

case based on the TD Shield Design registration TMA '911 without a colour claim [Defendant's Responding Motion Record at 979, Affidavit of Mr. Gill at para 8].

[29] On October 20, 2025, when the trial of this action commenced, the parties advised the Court that they had not come to any agreement on a Joint SOI.

[30] At the outset of its Opening, the Plaintiff advised the Court that it had instead prepared a revised version of the Plaintiff's SOI and asked that it be marked as TX-1. Schedule "A" of the Plaintiff's Revised SOI dated October 20, 2025 referenced TMA '831 instead of TMA '911. TMA '831 was not shown in colour and did not reference any colour claim. On the other hand, the Defendant's impugned marks included in the document at Schedule "B" were shown in colour.

[31] During the Plaintiff's Opening, the Plaintiff drew the Court's attention to its infringement analysis chart [Exhibit 2 of the Affidavit of Mr. Gill (Plaintiff's Opening Argument Compendium, TX-4 at Tab 25)] to show which marks were at issue and to identify the Plaintiff's registrations that should form the analysis for infringement. The Plaintiff's infringement analysis chart also referenced TMA '831 instead of TMA '911. The infringement analysis chart did not depict the TD Shield Design in colour or reference any colour claim. Again, TMA '831 was not shown in colour, but the Defendant's marks included in the chart were shown in colour.

[32] The Plaintiff's Opening contained no reference to a colour claim in TMA '831, or to either party's use (or lack of use) of the colour green in its trademarks or branding. The Plaintiff

alleges that the colour green was not an issue for trial and was not intended to be an issue for trial given the Plaintiff's longstanding intention to advance its infringement claim with respect to the TD Shield Design trademark registered as TMA '911 that does not claim any colour combination, as demonstrated in its pleadings and during discovery. In its May 11, 2023 answer to undertaking, the Plaintiff confirming that TMA '911 was one of six (6) trademark registrations infringed by the Defendant's conduct that it was asserting [Plaintiff's Motion Record at 197, Exhibit I of the Affidavit of Ms. Panaroni].

[33] On the afternoon of October 20, 2025, during the Defendant's Opening on the allegations of trademark infringement, the Defendant asked the Court to mark the Defendant's "Revised TD Benefits Statement of Issues" as TX-7, and advised the Court that it had revised it "on the understanding that our friends were asserting 3 registered marks ending in 087, 831, and 808". I note that the Defendant's TX-7 "Revised TD Benefits Statement of Issues" is titled "Defendant's Statement of Issues (Filed September 24, 2025)", comprises a cropped Schedule "A" from the draft Joint SOI provided by the Plaintiff on October 18, 2025 [Written Representations of the Defendant on the Motion to Amend, at para 51].

[34] During its Opening, the Defendant referred to TMA '831 but did not refer to the colour claim in TMA '831, nor to the Plaintiff's use of green in its TD branding or the Defendant's non-use of the colour green. The Defendant did not raise or suggest that the colour of any of the parties' marks was relevant to any of the factual or legal issues at trial.

[35] On October 27, 2025, the parties filed their Joint SOI that is the subject of this motion and marked it as TX-80. This Joint SOI included the same Schedule “A” as the Plaintiff’s Revised SOI dated October 20, 2025. This Schedule “A” includes the same trademarks and registration numbers as those in the Plaintiff’s Draft Joint SOI dated October 18, 2025, the Plaintiff’s Revised SOI filed on October 20, 2025 [TX-1], and the Defendant’s Revised SOI filed October 20, 2025 [TX-7], albeit appearing in a different order in the latter.

[36] This Joint SOI was filed on the morning of October 27, 2025, the fifth day of trial. By this time, the parties had made their respective Openings and the Plaintiff’s corporate fact witnesses and expert witnesses had testified, and their affidavits were tendered to the Court as TX. More importantly, the Defendant’s cross-examination of all the Plaintiff’s witnesses had occurred, except for the Plaintiff’s third-party consumer fact witness. While most of the Defendant’s witnesses testified prior to filing the Joint SOI, four witnesses testified after it was filed, namely Lyndon Dyas, Craig White, Larissa Ann Rose Macarthur and Kathy Finley.

B. *Written Closing Arguments*

[37] On the afternoon of October 28, 2025, the Plaintiff served and filed its Closing Argument [TX-102]. References to TMA ‘831 are found at paragraph 24 reproduced below, paragraph 114 and Appendix “A” that includes the Plaintiff’s thirty-eight (38) TD and TD-formative trademarks registrations. The only reference to TMA ‘911 is in Appendix “A” of the TD-formative registered trademarks owned by the Plaintiff, with the Plaintiff arguing that TMA ‘911 is one of its family of TD-formative marks relevant to the confusion analysis.

The Plaintiff's Closing Argument includes no submissions with respect to the colour claim in TMA '831, or either party's use (or lack of use) of the colour green in its trademarks or branding. The Plaintiff now alleges that it was its intention throughout the trial to rely on its registered rights in TMA '911 that are not limited by colour.

[38] On the morning of October 29, 2025, while the Plaintiff's counsel was preparing for its Closing and prior to receiving the Defendant's Closing Argument, the Plaintiff's counsel alleges that he identified two errors in the Plaintiff's materials: (i) an error in the stated registration date for the TD Shield Design without colour claim trademark registration and (ii) that there was reference to the wrong trademark registration – TMA '831 instead of TMA '911 [Defendant's Responding Motion Record at 983, Affidavit of Mr. Gill at para 16].

[39] On the morning of October 29, 2025, the Defendant served and filed its Closing Argument. References to TMA '831 (or the "TD Shield") are found at paragraphs 60 to 61, 101 to 104, and 120 to 121. The only substantive argument made by the Defendant with respect to the colour claim in TMA '831 is found at paragraph 120 of the Defendant's Closing Argument dealing with the degree of resemblance factor under section 6(5)(e) of the *Trademarks Act*:

120. The Plaintiff's TD SHIELD's colour claim claims white letters on a green background. The caselaw is sparse on the legal effect and scope of colour claims in Canada, but this Court found senior mark (with a more complex colour claim than the TD Shield) was infringed by another mark that did not identically mirror the senior mark's colour scheme. In addition to the other factors militating away from resemblance, none of the TD BENEFITS Marks use the colour green and/or white lettering. The resemblance therefore is not established in respect of any of the TD BENEFITS Design Marks as against the TD SHIELD over an [sic] above the lack of commonality aside from the different colours in the TD BENEFITS Marks when taken as a whole. It

should be noted that until recently, the Plaintiff had maintained its position that the Former TD BENEFITS Design Marks – both orange and blue – were confusingly similar to the TD Bank Marks. [footnotes omitted]

C. *The Plaintiff's Closing*

[40] At the start of the Plaintiff's Closing on October 30, 2025, after completing some housekeeping issues largely related to the filing of documents as TXs, counsel for the Plaintiff stated that it had put into evidence thirty-eight (38) trademark registrations, that the Defendant had admitted that the Plaintiff is the owner of each of those registrations, that they are valid, subsisting, and in good standing. Counsel for the Plaintiff then stated that “three of the registrations [...] are of particular importance to this matter [...] the TD word mark registration, TD Insurance word mark registration, and the TD shield” [Defendant's Responding Motion Record at 515, Exhibit C to the Affidavit of Mr. Miceli (Public Transcript, October 30, 2025 at 1285:19-24)].

[41] I then asked the following question:

THE COURT: May I ask you a question?

K. GILL: Yes.

THE COURT: So that was one of my questions. I know you mentioned the TD shield. When I was looking at the parties' joint statement of issues, I noticed in appendix – or it might be Schedule A, I don't have it with me – here, I do, that the registration for the TD shield is the TMA 6478311 [sic]. Is that the green one?

K. GILL: “Yes, and that was an error.”

Defendant's Responding Motion Record at 515-516, Exhibit C to the Affidavit of Mr. Miceli (Public Transcript, October 30, 2025 at 1285:25-1286:12).

[42] The exchange between counsel for the Plaintiff and the Court then continued:

THE COURT: Okay. So what I wanted to tell you was I see that as an error, and my understanding is that it should have been the TD TMA 6449111. [sic]

K. GILL: Exactly. Yes.

THE COURT: And that is part of your statement of claim. It has not been removed. And there's been a lot of last minute filing of, you know, joint statement of issues, et cetera. But my understanding is I have before me a TD non -- no colour claim mark.

K. GILL: Yes.

THE COURT: And I will be -- I will be dealing with that. Because that is the parties' -- that is the plaintiff's trademark asset.

K. GILL: Yes.

THE COURT: So I just wanted to check that and to make sure that the little pills that I take just for the sinus cold congestion has not obliterated my mind with regards to trademarks. So go ahead.

K. GILL: No. And, in fact, it's because the design appears in black and white.

THE COURT: Black and white, yes.

K. GILL: And it's actually the black and white version of it is the very first one on the Schedule A.

THE COURT: Yes.

K. GILL: How --

THE COURT: But it's okay. What I'm saying is that I'm just relieved to hear you say that because then I had a whole bunch of other questions --

K. GILL: Yeah, no.

THE COURT: -- I can get rid of those questions. I understand this is a bit of a surprise from my understanding of the facial expressions of the defendant. In a way -- I understand -- and, if necessary, you can adjust, which is another way you can adjust tomorrow.

For me, this is -- this joint -- that's why I like joint statements of issues to be filed before trial. The joint statement of issues came, I think, two days ago or the last day of the hearing.

K. GILL: Yes.

THE COURT: It's a black and white trademark, so it's -- I mean it's, whatever -- I'm not saying it's black and white. That's a wrong characterization. It's a no colour claim trademark, and that's part of their claim, so I think we need to deal with that. So go ahead.

Defendant's Responding Motion Record at 516-517, Exhibit C to the Affidavit of Mr. Miceli (Public Transcript, October 30, 2025 at 1286:3-1287:9).

[43] No objection or other interjection was raised by the Defendant's counsel during this exchange.

[44] The TMA '831 alleged error was then again briefly raised by counsel for the Plaintiff later in its Closing when referring to the Plaintiff's infringement analysis chart previously presented during the Plaintiff's Opening. Counsel for the Plaintiff referred to "the correction from this morning that should be placed on those TD shield marks in terms of the correct number." [Defendant's Responding Motion Record at 630, Exhibit C to the Affidavit of Mr. Miceli (Public Transcript, October 30, 2025 at 1400:18-21)]. Once again, counsel for the Defendant did not raise any contemporaneous objection to this statement.

[45] Counsel for the Plaintiff went on to make oral submissions with respect to the infringement of the TD Shield Design trademark (without any reference to the colour claim) without any contemporaneous objection or intervention from counsel of the Defendant:

K. GILL: So in terms of the analysis, for example, the word mark, the analysis would be TD Benefits as compared to TD, or TD Insurance.

And that is the same for all the defendant's marks, except for the three with the square around TD, where we say the shield itself is being infringed.

Defendant's Responding Motion Record at 631, Exhibit C to the Affidavit of Mr. Miceli (Public Transcript, October 30, 2025 at 1401:2-9).

[46] After the Plaintiff concluded its Closing on October 30, 2025, the Defendant's counsel for the first time raised an objection to the Plaintiff's alleged error and any purported change from the referenced TMA '831 to the TMA '911 without any colour claim. Counsel for the Defendant indicated that it had been operating on the understanding that only the green TD Shield mark, TMA '831, was at issue and allegedly infringed by the Defendant [Defendant's Responding Motion Record at 722, Exhibit C of the Affidavit of Mr. Miceli (Public Transcript at pages 1492:15-25 and 1493:1-5)].

[47] The draft Joint SOI from October 18, 2025 (narrowing to the asserted TD Shield Design mark to the colour mark registration TMA '831) was not referenced at this time. Counsel for the Defendant advised the Court that the Plaintiff "told us in advance that they limited it to those three marks." [Defendant's Responding Motion Record at 723, Exhibit C of the Affidavit of Mr. Miceli (Public Transcript of October 30, 2025 at 1493:3-5)].

[48] The Court pointed out that the Joint SOI, filed only a few days before, appeared to contain a clear typographical error as the referenced TMA '831 for the TD Shield Design was shown in black and white therein. The Court also pointed out that the Plaintiff had filed evidence

of its valid trademark registration for the TD Shield Design without a colour claim during the trial and had not narrowed any issues in its Statement of Claim [Responding Motion Record at 723-725, Exhibit C of the Affidavit of Mr. Miceli (Public Transcript at 1493:10-1495:8)].

[49] The Court raised several possible options for the Defendant's consideration and noted that the Court was open to hearing further submissions from the Defendant on its objection the following morning or for the Defendant to deliver a revised Closing.

[50] On the evening of October 30, 2025, this Court issued the following Direction:

In view of the Plaintiff's inadvertent error in the Joint Statement of Issues referencing the incorrect registration number for one of its "registered TD Trademarks (as shown in Schedule "A") that came to light during the Plaintiff's Closing Arguments during the trial earlier this morning, the Court directs the parties to confer and to come to the Court tomorrow morning with a joint proposal as to how they propose to deal with this issue for the remainder of the closing arguments.

[51] On the morning of October 31, 2025, the parties did not come to the Court with a joint proposal as to how they proposed to deal with the issue. The Court clarified that "again, I haven't made a determination on this. I know that, you know, you said there was a ruling, and maybe the record says ruling. And if I did make a ruling, I've reconsidered it. It's broader than what I realized, okay, after hearing you. So I want to make that clear on the record": Defendant's Responding Motion Record at 784, Exhibit D of the Affidavit of Mr. Miceli (Public Transcript, October 31, 2025 at 1553:3-9)]

[52] The Defendant maintained its position that it would be improper for the Court to consider TMA ‘911 in place of TMA ‘831. Defendant’s counsel submitted that it is common for parties to narrow the issues at trial without having to amend the pleadings, as the Plaintiff had done when it dropped its allegations regarding section 7(b) of the *Trademarks Act* in addition to narrowing its asserted registered trademarks to include TMA ‘831 (without amending its Statement of Claim) [Defendant’s Responding Motion Record at 735, Exhibit D of the Affidavit of Mr. Miceli (Public Transcript, October 31, 2025 at 1504:12-19)].

[53] Defendant’s counsel also submitted that one of its challenges was the fact that the Plaintiff had not asked for any relief in respect to the alleged error in the asserted marks, that the Court unilaterally indicated that it was going to proceed as if the Plaintiff had not made the alleged error, and that the Defendant was not afforded an opportunity to respond to the Court’s bench ruling, which fundamentally changes the landscape [Defendant’s Responding Motion Record at 736, Exhibit D of the Affidavit of Mr. Miceli (Public Transcript, October 31, 2025 at 1505:4-24)]].

[54] The Defendant also explained that the Plaintiff’s counsel confirmed it had identified the alleged error in preparing for Closing on October 29, 2025, and yet made no contact with the Defendant regarding the alleged error, which was only disclosed after the Court’s prompting. The Defendant communicated its intention to proceed with the trial with its Closing as its Closing Argument had been filed before the Plaintiff’s alleged error had been communicated.

[55] The Court then invited the Plaintiff to state its position on the record. The Plaintiff advised the Court:

K. GILL: Thank you. It was always our intention to put forward the shield without a colour claim. And at some point when we were trying to just put forward three marks for the court to consider in terms of the infringement analysis, we put the wrong TMA for the mark. They look, on the face of it, identical.

On Monday, in preparation – in preparing the written closing argument, at paragraph 24, we have a chart that was set out. And originally, it just had trademark, registration number, goods and services. I asked Mr. Foster to -- can you please include the filing date and the registration date, which he did.

And then when I was preparing, after it had been filed and I was preparing, I thought I better check the dates to make sure that they're accurate. Pulled the certified copy that was on the desk. And sure enough, the date was actually wrong on one of them. And when I look --the shield mark -- and when I was looking at that, I realized we had actually put in the coloured one instead of the thing. I had made a note to actually advise the court in opening, and I was just about to do so when your question arose. And that's the circumstances of when we discovered that we had put the wrong one down.

THE COURT: Right.

K. GILL: Thank you.

THE COURT: Thank you. Any reply?

E. DIPCHAND: Just a clarification. You meant in closing, right? In the beginning of your closing, not the opening of the case?

K. GILL: The closing, yes.

Defendant's Responding Motion Record at 740-742, Exhibit D of the Affidavit of Mr. Miceli (Public Transcript, October 31, 2025 at 1509:19-1511:6)

[56] The Defendant alleged that it would suffer prejudice if the Plaintiff was allowed to make the correction. The Defendant argued that it had a right to know the case that it had to meet, and

submitted that having to explain to the Court the alleged prejudice that the Defendant would experience if the Court considered TMA '911 instead of TMA '831 as part of its analysis of the Plaintiff's claims would be prejudicial in and of itself [Defendant's Responding Motion Record at 790-792, Exhibit D of the Affidavit of Mr. Miceli (Public Transcript, October 31, 2025 at 1559:13-1561:23)].

D. *Adjournment of Trial*

[57] On October 31, 2025, the Court noted it "still remain[s] surprised today that there's confusion as to the TD trademarks being asserted at this stage of the proceeding" [Defendant's Responding Motion Record at 744, Exhibit D of the Affidavit of Mr. Miceli (Public Transcript, October 31, 2025 at 1513:8-12)].

[58] The Court brought the decision of Justice Little in *Hughes v Canada (Human Rights Commission)*, 2020 FC 1096 [*Hughes*], to the attention of the parties which concerned a motion to amend an Agreed Statement of Facts under Rule 75 [Defendant's Responding Motion Record at 758, Exhibit D of the Affidavit of Mr. Miceli (Public Transcript, October 31, 2025 at 1527:16-20)]. The Court then advised the parties that the determination as to whether or not to allow the Plaintiff to proceed with the amendment should be made on the basis of motion records and the evidence contained therein [Defendant's Responding Motion Record at 765, Exhibit D of the Affidavit of Mr. Miceli (Public Transcript, October 31, 2025 at 1534:13-19)].

[59] The Court then advised the Plaintiff that it would need to formally seek leave to amend the parties' Joint SOI given the Defendant's objection. The Court asked and the Plaintiff

confirmed that it would therefore bring the present Motion to Amend. Given the parties did not come to an agreement on a procedural path forward, the Court determined to pause the proceedings in order to consider the present Motion to Amend from the Plaintiff [Defendant's Responding Motion Record at 794-795, Exhibit D of the Affidavit of Mr. Miceli (Public Transcript, October 31, 2025 at 1563:4-1564:17)].

E. *Plaintiff's Motion to Amend*

[60] On November 3, 2025, the Plaintiff filed its Motion Record for its Motion to Amend the Joint SOI, including the Affidavit of Ms. Panaroni sworn on November 3, 2025 and Exhibits A to HH, along with its written representations.

[61] On November 4, 2025, I directed the Defendant to advise the Court by November 5, 2025 of its proposed deadline to file the Defendant's Responding Motion Record and indicated that it would be ideal if the Defendant was to file its Responding Motion Record by Monday, November 10, 2025, which would give the Defendant one (1) week from the filing of the Plaintiff's Motion Record to respond, with a view of completing the determination of the Plaintiff's Motion to Amend in order to quickly reconvene the trial.

[62] On November 5, 2025, the Defendant advised the Court of its inability to provide a timeline for the delivery of the Defendant's Responding Motion Record and raised concerns with the Plaintiff's Motion Record, namely (1) the deficiency of the affidavit evidence, (2) its inability to cross-examine on the Affidavit of Ms. Panaroni, (3) that the Plaintiff ought to have provided affidavit evidence from counsel for the Plaintiff who had found the "error" for which it was

seeking relief in the Motion to Amend, and (4) that Gowling WLG should be prevented from presenting arguments on the Motion to Amend without leave of the Court in accordance with Rule 82 of the *Rules* [Defendant's Responding Motion Record at 912, Exhibit U of the Affidavit of Mr. Miceli]

[63] On November 10, 2025, the Plaintiff advised the Court that, to advance the Motion to Amend without further unnecessary delay, the Plaintiff would file an affidavit from counsel at Gowling WLG as requested by the Defendant and had retained outside counsel at McCarthy Tétrault LLP to represent the Plaintiff on this motion [Defendant's Responding Motion Record at 923, Exhibit V of the Affidavit of Mr. Miceli].

[64] On November 20, 2025, the affidavit duly executed by Mr. Kelly Gill of Gowling WLG was served upon the Defendant [Defendant's Responding Motion Record at 933, Exhibit Z of the Affidavit of Mr. Miceli].

[65] On December 5, 2025, the Affidavit of Mr. Gill was filed in support of the Plaintiff's Motion to Amend, stating the following:

- i. Mr. Gill affirmed that while working on the draft Joint SOI, on October 16, 2025, he sought to streamline the infringement analysis by narrowing Schedule "A" to 3 registrations, and explained the origin of the error in including the TMA '631 with the colour claim (rather than the broader TMA '911) in the table of Schedule "A" to the draft Joint SOI resulting from his cutting and pasting the wrong row in the table.
- ii. Mr. Gill affirmed that it was always his intention to remove the colour claim TD Shield Design trademark (TMA '631) and maintain the registration without a colour claim (TMA '911).
- iii. Mr. Gill affirmed that this incorrect revised Schedule "A" chart continued through subsequent without prejudice drafts of the JSI exchanged by the parties throughout trial, was also carried over into both the Plaintiff's Revised SOI dated October 20,

- 2025, filed by the Plaintiff on the first day of trial, and the Plaintiff's infringement analysis chart that he presented during his opening statement.
- iv. After the Plaintiff's Closing Argument was filed on October 28, 2025, while preparing his oral submissions on the morning of October 29, 2025, Mr. Gill affirmed having checked the accuracy of the particulars of the trademark in the chart at para 24 of his Closing Argument and noted that the registration date and registration number had been incorrectly written, namely the one that included the colour claim instead of the one with no colour claim. Mr. Gill confirmed that this was the first time he – or indeed anyone working for the Plaintiff- had noticed this error since it first occurred on October 16, 2025 in the draft Joint SOI. He noted that this is not surprising given that the marks in the table otherwise appear identical, filed on the same date, and are registered for use in association with identical services.
 - v. Mr. Gill affirms that it was his intention to raise this issue with the Defendant and the Court on the morning of October 30, 2025 at the start of the Plaintiff's Closing, which he did in response to a question from the Court.
 - vi. Mr. Gill affirmed that his opening submissions, Closing Argument, and his Closing are consistent with his intention, and belief, that he was presenting the case based on the TD Shield Design registration without a colour claim.

[66] On December 19, 2025, the Defendant filed its Responding Motion Record, including the Affidavit of Lucas Miceli sworn on December 19, 2025 and Exhibits A to AA, the Affidavit of Mr. Gill affirmed on November 19, 2025 (without Exhibits) along with written representations.

[67] On January 5, 2026, McCarthy Tétrault filed the Plaintiff's Reply Motion Record including the Affidavit of Christina Vincent affirmed on January 5, 2026 and Exhibits A to C as well as written representations in reply.

III. Analysis

A. *Preliminary Issue*

[68] In its Written Representations in Reply, the Plaintiff raises as a preliminary issue the improper nature of the Defendant's reliance on the Affidavit of Mr. Miceli in the Defendant's

Responding Motion Record. The Plaintiff submits the affidavit is improper because it was filed without the consent of the Plaintiff or leave of the Court, after the Defendant had conducted its cross-examinations contrary to Rule 84(2), and contrary to the Defendant's previous advice that it would not file responding affidavits. The Plaintiff objects to any exhibits attached to the Affidavit of Mr. Miceli that are not on the trial record, such as email correspondence between counsel that included draft Joint SOI and asserts that they should be disregarded as improper.

[69] By letter to the Court dated January 12, 2026, the Defendant admits that failure to seek consent of the Plaintiff prior to filing the Affidavit of Mr. Miceli was a "technical breach of Rule 84(2)" and is now seeking leave of the Court to allow the Affidavit of Mr. Miceli to stand on the record. The Defendant notes that that the Affidavit of Mr. Miceli does not contain any contested evidence from Mr. Miceli himself, and that the Plaintiff has not mentioned any disadvantage resulting from its inability to cross-examine Mr. Miceli.

[70] I agree with the Plaintiff that the Affidavit of Mr. Miceli was filed contrary to Rule 84(2) and contrary to the undertaking made by the Defendant to the Plaintiff. Exhibits E-M, Q, S, T, and W-Y consist of email correspondence between Plaintiff and Defendant's counsels, as well as various draft Joint SOI exchanged between the parties subject to without prejudice language, that were improperly included in the Affidavit of Mr. Miceli filed in support of the Defendant's Responding Motion Record, which I will not consider in the context of this Motion to Amend. Exhibit R contains a letter from the Defendant to the Court dated November 3, 2025 in which the Defendant reiterates its "position, objections and concerns" regarding the Motion to Amend. This letter was also improperly included in the Defendant's Responding Motion Record and is not

useful as repetitive of what the Defendant has already properly submitted in its written representations and other exhibits in its Responding Motion Record.

[71] Given the Plaintiff's limited objection to those parts of the Affidavit of Mr. Miceli that relate to documents not on the trial record and the Defendant's request for leave of the Court to be relieved of its breach of Rule 84(2) and presumably its breach of the above-referenced undertaking to the Plaintiff, I am allowing the Exhibits listed below in the Affidavit of Mr. Miceli to stand. They are important as they provide context and useful information related to documents filed during or resulting from the trial (e.g. trial transcripts) or from the Motion to Amend (e.g. cross-examination transcripts of Mr. Gill on his affidavit), which are helpful to the Court in its determination of the Motion to Amend. Furthermore, Exhibits U, V and Z are useful because they detail the procedural history of this motion, as described above at paragraphs 62-64:

- Exhibits A-D: Public versions of the trial transcripts;
- Exhibit N: The Defendant's Revised SOI filed as TX-7;
- Exhibit O: Excerpts from the Plaintiff's Closing Argument filed as TX-102 and dated October 28, 2025;
- Exhibit P: Excerpts from the Defendant's Memorandum of Fact and Law dated October 29, 2025;
- Exhibit U: Letter from the Defendant to the Court dated November 5, 2025;
- Exhibit V: Letter from the Plaintiff to the Court dated November 10, 2025;
- Exhibit Z: Email from McCarthy Tétrault serving the Affidavit of Mr. Gill; and
- Exhibit AA: Transcript of the cross-examination of Mr. Gill held December 8, 2025.

B. *Principles applicable to amendments of documents*

[72] Rule 75 governs the amendment of documents, requiring the party seeking an amendment to bring a motion. The Court is empowered under this rule to make amendments on terms that will protect the rights of all parties.

[73] The onus is on the moving party seeking the amendment, in this case, the Plaintiff, to show the amendments should be allowed: *Merck & Co v Apotex Inc (FCA)*, 2003 FCA 488 at paras 35-36 [*Merck*].

[74] The FCA has held that 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 (i) the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and (ii) it would serve the interests of justice: *Enercorp Sand Solutions Inc v Specialized Desanders Inc*, 2018 FCA 215 at para 19, quoting *Canderel Ltd v Canada (C.A)*, 1993 CanLII 2990 (FCA), [1994] 1 FC 3 [*Canderel*] at p 10. The failure to meet either one of these criteria may result in the amendment being refused: *Sanofi* at para 15.

[75] The judge deciding on a motion to amend must first ensure that the amendment satisfies the threshold requirement that it has a reasonable prospect of success: *Teva Canada Limited v Gilead Sciences Inc*, 2016 FCA 176 at paras 29-32 [*Teva*]. Only once this threshold is met will the Court go further and consider the two criteria set out above in *Canderel: Teva* at para 31.

[76] The criterion based 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 11, quoting Lord Griffiths in *Ketteman v Hansel Properties Ltd*, [1988] 1 ALL ER 38 (HL) at 62; *Sanofi-Aventis Canada Inc v Teva Canada Limited*, 2014 FCA 65 [*Sanofi*] at para 17; *Janssen Inc v Abbvie Corporation*, 2014 FCA 242 at para 3.

[77] The interests of justice criterion also allow a Court to consider factors related to the proper and efficient administration of justice:

Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of the proceedings.

Sanofi at para 16.

[78] Monetary compensation to the other litigants through costs awards, even where possible, is thus not the only factor that must be considered and weighed. Also included in the balancing exercise is the efficiency of the judicial process itself: *Sanofi* at para 17.

C. *Application of Principles to the Facts*

[79] As explained below, I am not convinced that the Plaintiff has met the test for granting leave to amend the Joint SOI to restore the Plaintiff's TMA '911 for the TD Shield Design without a colour claim as one of three TD trademark registrations that are alleged to be infringed. The interests of justice do not militate in favor of granting the amendment.

[80] Even after finding the Plaintiff's proposed amendment meets the threshold requirement, I find that the Plaintiff's Motion to Amend is otherwise untimely in the circumstances of this case, that the amendment sought will not facilitate the Court's consideration of the true substance of the dispute between the parties as it was narrowed by the Plaintiff's Revised SOI and that the amendment would not prevent this Court from doing justice between the parties. In addition, allowing the amendment would further delay these proceedings and would be unfair to the Defendant, as it relied on the Plaintiff's Revised SOI to plan its litigation strategy, conduct cross-examinations and prepare its Closing Argument.

(1) Preliminary Consideration - Application of Rule 75 to (Joint) SOI

[81] Before I turn to the interests of justice of the Plaintiff's proposed amendment to the parties' Joint SOI, I must address the applicability of Rule 75 to a Joint SOI, as the document the Plaintiff is seeking to amend is not a typical pleading. The Plaintiff submits that it is important to specify that its Motion to Amend specifically seeks leave to amend the parties' Joint SOI filed on October 27, 2025, and not the draft Joint SOI sent to the Defendant on October 18th, or the Plaintiff's SOI as filed on October 20th as these documents were either non-binding (in the case of the draft Joint SOI) or non-operative following the filing of the October 27th Joint SOI (in the case of the Plaintiff's SOI of October 20th).

[82] The first question is whether a Joint SOI or a SOI filed unilaterally by a party before this Court is a "document" that may be amended under Rule 75. In my view, both a SOI filed unilaterally by a party and a Joint SOI filed jointly by parties qualify as a "document" that may be amended under Rule 75.

[83] This Court has previously held that an Agreed Statement of Facts is a “document” that may be amended under Rule 75 as an Agreed Statement of Facts is sufficiently akin to and performs important functions like the documents that are expressly contemplated or required to be filed by the *Rules* such as pleadings: *Hughes* at para 43. This Court has also previously held that a SOI is tantamount to a pleading in that it defines the matters in issue: *Bayer Inc v Cobalt Pharmaceuticals Company*, 2017 FC 775 [*Bayer*] at para 7.

[84] While the Plaintiff agrees with the jurisprudence indicating a SOI is tantamount to a pleading, the Plaintiff submits that there is no suggestion that this extends to a *draft* SOI or a unilaterally filed version of a SOI such as its Revised SOI dated October 20, 2025.

[85] I agree with the Plaintiff that this does not extend to the draft Joint SOI Issues that it circulated to the Defendant on October 18, 2025 or to any other draft Joint SOI circulated between the parties. This is so given their *draft* and “non-binding” nature, the without prejudice language under which they were circulated in this case, and the fact that the drafts were not filed with the Court. A “document” under Rule 75 refers to a pleading, originating document or document required by the *Rules* to be filed in this Court: *Hughes* at para 42.

[86] However, I am unable to agree with the Plaintiff that this jurisprudence does not extend to a SOI unilaterally filed by one party. A review of *Bayer* at para 6 reveals that Bayer unilaterally served and filed its SOI in the remedies phase and the Court still considered its SOI a pleading. Common sense also demands that the Revised SOI that were filed unilaterally by both the Plaintiff on October 20, 2025 as TX-1 and the Defendant on the same day as TX-7 in this

proceeding are each party's respective pleadings as to the issues before the Court. This is the result of the parties being unable to come to any agreement on a Joint SOI and in such cases, the Court is left with each parties' proposition of the issues in their respective SOI for the Court's determination.

[87] While the Joint SOI filed on October 27, 2025 (the fifth day of trial) served to replace the parties' prior unilateral SOI, I disagree with the Plaintiff that the October 27, 2025 Joint SOI rendered the prior SOI entirely inoperative. The parties' prior unilateral SOI filed as TX-1 and TX-7 referenced the TMA '831 for the TD Shield Design mark having a colour claim (despite the fact that it was shown in greyscale black and white), and served to set out the issues for the parties and the Court for the first five days of the trial, during which the parties:

- made their Openings;
- proceeded with the testimony of the Plaintiff's fact witnesses (all of whom provided fact witness affidavits well in advance of trial, except for Catherine Delorme, whose evidence has no bearing on the present issue), including cross-examinations by the Defendant of these witnesses; and
- proceeded with the testimony of the Defendant's 3 expert witnesses (Michael Mulvey, Kevin Dougherty, and Jonathan Hochman) and 3 fact witnesses (Tom Dyas, Maxime Dehart, and Dan Rogers) whose affidavits were filed well in advance of trial, including cross-examinations by the Plaintiff of these witnesses.

(2) *Plaintiff has met the threshold requirement*

[88] The parties dispute whether the Plaintiff's proposed amendment restoring TMA '911 for the TD Shield Design (without a colour claim) to Schedule "A" of asserted trademarks satisfies the threshold requirement of a reasonable prospect of success.

[89] The Plaintiff submits that the threshold requirement is a low bar. This requirement seeks only to determine whether the amendment sought has a reasonable prospect of success: *Teva* at para 31. The Plaintiff argues that from the outset of this action, the Plaintiff has alleged infringement of TMA ‘911 for the TD Shield without a colour claim. The Plaintiff maintained this allegation for over four years of litigation and never amended this pleading or otherwise resiled from this position.

[90] The Defendant submits this Court should take a realistic view of the proposed amendment: *Teva* at para 30. The Defendant argues this “realistic view” includes the fact that the Plaintiff’s error caused it to believe TMA ‘831 for the TD Shield with a colour claim was at play during the trial and that the Defendant relied on the Plaintiff’s narrowing of the issues to determine its litigation strategy, conducting its cross-examinations and prepare its Memorandum of Fact and Law.

[91] In Reply, the Plaintiff submits the Defendant misunderstood the threshold requirement.

[92] When one considers the correct threshold requirement of whether the Plaintiff’s proposed amendment of restoring TMA ‘911 for the TD Shield Design (without a colour claim) to Schedule “A” of asserted trademarks satisfies the threshold requirement of a reasonable prospect of success, there can be no dispute. TMA ‘911 for the TD Shield Design (without a colour claim) has a broader scope of protection than TMA ‘831 for the TD Shield Design with a colour claim for white letters on a green background. Thus TMA ‘911 for the TD Shield Design (without a

colour claim) is more easily asserted against the Defendant's TD Benefits trademarks that do not have the colour green in either their background design or letters.

(3) *1st Canderel criterion - Interests of justice lie in refusing the amendment*

[93] With that being said, the Plaintiff has not met its onus in demonstrating that the Court permitting the requested amendment to restore the TMA '911 for the TD Shield Design without a colour claim would serve the interests of justice for several reasons.

(a) *Preliminary remarks regarding the alleged error*

[94] The Defendant has had the chance to challenge counsel for the Plaintiff's sworn evidence that the error was inadvertent that only came to his attention the day before Closing and that it was always the Plaintiff's intention to advance TMA '911 for the TD Shield Design mark without the colour claim.

[95] After review, the Defendant's cross-examination of Mr. Gill did not reveal any challenge to his evidence that this was an inadvertent error, that it only came to his attention on October 29th, the day before Closing, and that it was always the Plaintiff's intention to advance the TMA '911 for the TD Shield Design mark without the colour claim. Indeed, nowhere in its Responding Motion Record does the Defendant dispute Mr. Gill's sworn evidence on the inadvertence of his error. In fact, the Defendant's written submissions make limited use of Mr. Gill's cross-examination and simply refer to the Plaintiff's narrowing of the asserted marks from six (6) to three (3) marks.

[96] I agree with the Plaintiff that its counsel made an unintentional error in including TMA ‘831 for the TD Shield Design trademark with the colour claim in its Schedule “A” of asserted trademarks in its draft Joint SOI on October 16, 2025. I cannot conceive, as the Defendant proposes, that the Plaintiff would have willingly chosen to narrow its asserted TD Shield Design trademark to the one that had a colour claim for white letters on a green background (to the exclusion of its broader TD Shield Design trademark without the colour claim) when the Defendant has never used green in its allegedly infringing TD formative trademarks. There is no logical reason why the Plaintiff would have chosen to limit itself to the version of the TD Shield Design trademark registration which claimed a specific colour not used by the Defendant.

[97] However, the fact that the Plaintiff’s error was inadvertent and unintentional is not determinative of this Motion to Amend. I must consider the nature of the error and its impact on both parties and on the administration of justice. As I have come to realize, the error was not a “one-off” but was repeated in several documents filed by the Plaintiff during the course of the trial. This means that while the first error may have been by inadvertence and unintentional, its incorporation without verification into subsequent documents have not been explained or justified by counsel for the Plaintiff to my satisfaction. As the Plaintiff explained:

This incorrect revised Schedule “A” chart continued through subsequent without prejudice drafts of the JSI exchanged by the parties throughout the trial. This incorrect Schedule “A” was also carried over into the Plaintiff’s Statement of Issues filed by the Plaintiff on the first day of trial, and the Plaintiff’s infringement analysis chart that I presented during my opening statement.

[Defendant’s Responding Motion Record at 979, Affidavit of Mr. Gill at para 8]

[98] While there is an explanation as to how the error in including TMA ‘831 for the TD Shield Design trademark with the colour claim in its Schedule “A” of asserted trademarks in its draft Joint SOI on October 16, 2025 first arose, I find that the explanation that the error was simply carried over, from one document to the next, from the very first TX in the Plaintiff’s Revised SOI to the Plaintiff’s Closing Argument, is not sufficient.

[99] I must also consider this error from the perspective of the Defendant who relied on the numerous above-mentioned documents of the Plaintiff incorporating TMA ‘831 for the TD Shield Design mark with the colour claim that were filed from the outset of the trial and then again in the Joint SOI filed on the fifth day of trial. The Defendant also incorporated the above noted Schedule “A” in its respective Revised SOI filed on the first day of trial during its Opening.

[100] While I find that the Defendant’s perspective trumps the perspective of the Plaintiff is because of the repetitive filing of documents incorporating TMA ‘831, I must consider its impact on the parties and on the administration of justice. Ultimately, I must decide whether it serves the interests of justice to grant leave to the Plaintiff to make the amendment sought to the Joint SOI at this advanced stage of the trial, right before the Defendant presents its Closing.

[101] With those preliminary remarks, I will turn my attention to address the factors referenced in *Canderel*.

(b) *Untimeliness of the Motion to Amend*

[102] The Plaintiff submits that there was no delay in bringing the Motion to Amend, much less any inordinate delay. The pleadings had, from the outset, alleged infringement of the TMA ‘911 TD Shield Design mark without any colour claim. The Plaintiff submits that the Joint SOI that inadvertently narrowed the asserted marks to the TMA ‘831 TD Shield Design mark with colour claim instead of the TMA ‘911 TD Shield Design mark without a colour claim was only provided to the Court on October 27, 2025. Counsel for the Plaintiff became aware of the error two days later, on the morning of Wednesday, October 29, 2025, and notified the Court and the Defendant of the error the next day. The issues were then discussed between counsel and the Court during the last day of trial on Friday, October 31, 2025, at which point it became clear that the Defendant would not consent to the amendment. The Plaintiff then immediately brought the Motion to Amend on Monday, November 3, 2025.

[103] The Plaintiff submits that in any event, the timeliness of the Motion to Amend is not determinative and relies on *Richardson International, Ltd v Mys Chikhacheva (The)* (CA), 2002 FCA 97 [*Richardson*], where a party sought to amend its maritime lien claim at the last possible stage of the action, just prior to its closing argument: *Richardson* at 49. The FCA confirmed the decision of the Federal Court to allow an amendment to include specific invoices, adding to the “sum total of the lien amount” claimed, indicating that the party opposing the amendment failed to demonstrate any prejudice: *Richardson* at paras 51-52.

[104] However, *Richardson* should be distinguished from this case as the nature of the amendment sought is different. In the case before me, the amendment sought would alter the basis on which the Plaintiff is alleging infringement. On the other hand, in *Richardson*, the party

seeking the amendment wanted to add invoices to increase the amount of their already existing claim. The FCA noted the importance of the nature of the amendment sought by indicating:

the addition of the invoice as anything more than a numerical alteration to the sum total of the lien amount, a type of amendment which was expressly authorized by this Court in *Meyer v. Canada* (1985), 62 N.R. 70 (F.C.A.), on the basis that such amendments are in the interests of justice, and cannot act to prejudice the opposing party in a meaningful way.

Richardson at para 52.

[105] In my view, in the uncommon circumstances of this case, the timeliness of the Plaintiff's motion to amend involves a consideration of both: (i) the timing of when the error occurred and was placed on the record, (ii) how many documents containing the error were placed on the record and how long these documents persisted on the record before being corrected; and (iii) the timeliness of the Plaintiff in advising the Defendant and the Court of its detection of the error.

[106] The evidence clearly shows that the error originated on October 18, 2025 in the draft Joint SOI that was shared with the Defendant, two days before the commencement of trial while the Plaintiff was busy preparing for trial. However, given the draft nature of the documents and for the reasons expressed above, I find the error did not crystalize until the Plaintiff filed its Revised SOI as TX-1 on October 20, 2025, the first day of trial. Plaintiff's Revised SOI [TX-1] referenced the TMA '831 for the TD Shield Design with colour claim trademark. The error was then repeated in the Plaintiff's infringement analysis chart [Plaintiff's Opening Argument Compendium, TX-4 at Tab 25] during the Plaintiff's Opening, which also referenced TMA '831 instead of TMA '911. Both these documents on the first day of trial effectively narrowed the Plaintiff's asserted marks to exclude the TMA '911 TD Shield Design (without a colour claim).

[107] The error was then adopted by the Defendant who incorporated the Plaintiff's Schedule "A" into its Revised SOI as depicted below. The Defendant confirmed to the Court during its Opening that there was an agreement on Issue 2, noting on the record that it was "happy to agree on Issue 2 the way that my friends have characterized it" [Defendant's Responding Motion Record at 116, Exhibit A to the Affidavit of Mr. Miceli (Public Transcript at 107:13-15)].

[108] By the Defendant's activity of incorporating these three narrowed asserted trademarks in its Schedule "A" of the Defendant's Revised SOI [TX-7] suggests to me that this is what the Defendant believed were the three asserted TD trademarks (which included the TMA '831 and not the TMA '911). This was confirmed by the Defendant's counsel during its Opening remarks who advised the Court that it had revised its SOI "on the understanding that our friends were asserting 3 registered marks ending in 087, 831, and 808". The Defendant submits it relied upon this narrowing of the asserted marks (allegedly infringed by the Defendant and relied upon by the Plaintiff) for the duration of the trial. The Defendant relied on this narrowing to TMA '831 to form its litigation strategy and specifically when conducting its cross-examinations of the Plaintiff's witnesses.

[109] I turn to how long the error persisted on the record before being corrected. The Plaintiff only addresses the error as being in the parties' Joint SOI [TX-80] and on the record starting on October 27, 2025 when TX-80 was filed. This is incorrect. The error appeared on multiple documents on the record. The error appeared in three separate documents: the Plaintiff's SOI [TX-1], the Plaintiff's infringement analysis chart [Plaintiff's Opening Argument Compendium, TX-4 at Tab 25] and the Defendant's Revised SOI [TX-7]. TX-1, TX-4 and TX-7 were filed on

the first day of trial. The error also persisted on the record for many days of trial with it only being raised on the sixth day of trial during the Plaintiff's Closing after the evidence phase was completed and the Defendant's written Closing Argument had been filed. In other words, the significance of the error grew the more times it was repeated and the longer it stayed on the trial record such that characterizing it as a minor error becomes more difficult with the time that passed.

[110] I turn to the timeliness of the Plaintiff to advise both the Defendant and the Court of its detection of the error.

[111] The Plaintiff submits that it informed the Court and the Defendant of the error the first day after discovering it. The Defendant submits that the Plaintiff's motion was not brought at the first opportunity.

[112] In my view, the Plaintiff was not timely in bringing its error to the attention of both the Defendant and the Court. The Plaintiff did not bring the error to the attention of the Defendant as soon as it learned it was made on the morning of October 29, 2025 in advance of the Defendant filing its Closing Argument. The Plaintiff also did not bring its error to the attention of the Court as soon as it learned it made the error, which delay took both the Defendant and the Court by surprise during the day of closing arguments and which led to a delay in the Plaintiff's seeking leave to amend its Joint SOI until after its oral closing arguments were completed.

[113] As this Court held in *Easter*:

Timeliness (...) must be viewed in context. [...] (t)he earlier the amendment is sought, the greater the chance the likelihood of prejudice will be reduced. I find the converse is equally true – the later in a proceeding’s life cycle the amendment is sought, the greater the chance of prejudice to the other party, especially where the amendment is more substantive as opposed to a correction of an alleged minor omission.

Easter v Alexander, 2024 FC 568 [*Easter*] at para 18.

[114] A party’s need for timely action is accentuated during a trial. The Plaintiff’s Motion to Amend comes at an extremely late stage in the trial, after its closing arguments and just before the Defendant’s closing arguments. This is later than the Rule 75 amendment sought in *Richardson* “at an extremely late stage in the trial”, just prior to its closing argument: *Richardson* at para 51. In *Richardson*, the FCA upheld the lower court’s decision to permit the amendment confirming that the key element of the *Canderel* test is “the interests of justice”: *Richardson* at para 51.

[115] For these reasons, I am of the view that the timing of the amendment sought by the Plaintiff is improper.

(c) *The amendments sought will not facilitate the Court’s consideration of the true substance of the dispute on its merits*

[116] The Plaintiff submits that it is obvious in view of the factual and legal issues in this case from the outset, the Plaintiff’s discovery answers, the record before the Court at trial, and the Plaintiff’s litigation strategy to date, that the Plaintiff’s withdrawal of TMA ‘911 was a mistake that can, and should be, corrected to accord with the real issues in controversy between the parties. The Plaintiff submits that its proposed amendment seeks to remedy an inadvertent

clerical error and ensure that the real issues between the parties are determined so that justice can be done between the parties by the Court. If leave is not granted, the Plaintiff submits that it would be contrary to the interests of justice, as it sidelines an issue that both parties and the Court know to be relevant to properly adjudicating the matters in dispute.

[117] In my view, the “true substance of the dispute on its merits” is what the issues became when they were narrowed by the Plaintiff during its Opening when it filed the Plaintiff’s Revised SOI dated October 20, 2025 as TX-1 and made its Opening. The Revised SOI specifically alleged infringement only based on three TD registrations identified in its Schedule “A”: the TD word mark (TMA396,097), the TD INSURANCE trademark (TMA516,808) and the TD Shield Design trademark (TMA ‘831 with colour claim). During his Opening, counsel for the Plaintiff also submitted an infringement analysis chart, indicating that the same registrations “should form the analysis for the infringement” [Defendant’s Responding Motion Record at 48, Exhibit A to the Affidavit of Mr. Miceli (Public Transcript at 39:3)].

[118] The fact that the Plaintiff did not refile a Statement of Claim abandoning or no longer relying on its previously asserted TM registrations not included in its October 20, 2025 Schedule “A” is not determinative. I agree with Defendant’s counsel that it is common for parties to narrow the issues at trial without amending their pleadings, as the Plaintiff had done when it dropped its allegations regarding section 7(b) of the *Trademarks Act* in addition to narrowing their asserted registered trademarks to three (3) without amending its Statement of Claim.

[119] Also, the true nature of the dispute must be considered conservatively through the eyes of both parties, including the Defendant whose counsel indicated it “relied on my friend, who wrote books on this issue” and on the Plaintiff’s “giant team and his massive client to get that right” [Defendant’s Responding Motion Record at 772, Exhibit D to the Affidavit of Mr. Miceli (Public Transcript at 1541:16-18)]. It is important to consider what the Defendant understood from the Plaintiff’s Revised SOI filed as TX-1 incorporating Schedule “A” with reference to the TMA ‘831 TD Shield Design with a colour claim.

(d) *Doing justice between the parties*

[120] Refusing the proposed amendment to restore TMA ‘911 for the TD Shield Design mark without the colour claim does not prevent this Court from doing justice in this case between the parties. Three TD and TD-formative trademark registrations remain at issue (allegedly infringed by the Defendant and relied upon by the Plaintiff) as shown in Schedule “A” of the Plaintiff’s Registered TD Trademarks, which includes TMA396,097 for the TD word mark.

(e) *The extent to which the proposed amendment would delay the proceedings*

[121] While the Defendant has not sought an adjournment to re-conduct any cross-examinations of witnesses, it is not impossible that it would seek some relief that would delay the proceedings if the Defendant were to be unsuccessful on the Plaintiff’s Motion to Amend. For example, the Defendant may seek the Court’s permission to cross-examine the Plaintiff’s corporate witnesses on a newly asserted TMA ‘911 and/or use of the TD Shield Design mark to

the exclusion of the green and white TD Shield Design trademark, which would further delay the proceedings.

- (f) *The extent to which a position taken originally by the Plaintiff has led the Defendant to follow a course of action in the litigation which it would be difficult or impossible to alter*

[122] The Federal Court of Appeal in *Canderel* endorsed that “if the amendment is allowed now, will the [party] be in the same position as if the [amending party] had pleaded correctly in the first instance?”: *Canderel* at page 10. In my view, if the amendment was to be allowed at this point in the proceedings, the Defendant would not be in the same position as if the Plaintiff had pleaded correctly in the first instance.

[123] While I agree with the Plaintiff that there can be no suggestion that the Defendant relied on any narrowing of the TD trademark registration to exclude the TMA ‘911 to shape its evidence in chief, as the affidavit evidence was filed in advance of trial, this does not dispose of the issue. In fact, it ignores the fact that the Defendant completed all its cross-examinations after the Plaintiff filed its Revised SOI as TX-1 on the first day of the trial.

[124] Neither the Plaintiff’s Revised SOI [TX-1] nor the parties’ Joint SOI [TX-80] include the broader TMA ‘911 TD Shield Design without a colour claim. As mentioned above, the Defendant relied on the Plaintiff’s allegation of infringement of its asserted TMA ‘831 for its TD Shield Design mark with a colour claim as opposed to its virtually identical asserted TMA ‘911 for the TD Shield Design mark without a colour claim. This caused the Defendant to follow a

course of action from which it is not easy to pivot at this stage after the evidence phase is closed (particularly with the Defendant's cross-examinations of the witnesses' affidavits completed).

[125] The Defendant submits that if the Plaintiff's amendment to restore the TMA '911 as an asserted trademark registration was allowed after Openings were made and after the evidence phase of the trial concluded, it would mean that that a SOI, whether joint or individual in nature, has no impact on the expectations of the parties on the issues that need be addressed at trial, which is clearly not the case in trial practice. This is particularly concerning to me as a SOI, whether joint or individual, filed during a trial is a relevant consideration that a party relies on to structure its litigation strategy and evidence at trial. In this particular context, I agree with the Defendant that its expectation on the issues to be addressed at trial and litigation strategy cannot be corrected because the Defendant not only relied on the Plaintiff's Revised SOI (with its Schedule "A"), the Defendant incorporated it into its Revised SOI filed at trial, but also confirmed on the trial record its agreement with the Plaintiff's language of the infringement issue 2 with the narrowed Schedule "A" marks incorporating TMA'831, and submits that it relied on it for its litigation strategy and its cross-examinations at trial, which are completed at this stage.

[126] This would mean that it would change the case against the Defendant by broadening the ambit of protection of the asserted TD Shield Design mark to remove the colour claim subject of TMA '831 registration. This would arguably deny the Defendant's right to know the case against them and its right to having a full and fair chance to respond at this late stage of the trial. As set out in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paragraph 56, procedural fairness demands that the Defendant be given the opportunity to know

the case against them in advance of trial, had a full and fair chance to respond and was given the right to be heard.

[127] This is similar to the case of *Biogen*, where the Court held that the plaintiff could not re-broaden its invalidity allegations to claims beyond those contained in the Joint SOI after the evidentiary phase of the trial concluded, as this would be unfair and prejudicial to the defendant: *Biogen Canada Inc v Taro Pharmaceuticals Inc*, 2020 FC 621 at paras 117-119 [*Biogen*]. The principle in *Biogen* was also applied in *NCS Multistage Inc v Kobold Corporation*, 2023 FC 1486 [*NCS Multistage*], to reach the same refused amendment, although I note that the amendment sought in that case would not only have re-broadened the issues as contained in a Joint SOI but also went beyond the amending parties' own expert reports: *NCS Multistage* at paras 1563-1565.

[128] Similarly, in this matter before me, the amendment sought by the Plaintiff would broaden the issues after the evidentiary phase of the trial concluded. Effectively, Schedule "A" and Issue 2, as agreed upon by both the Defendant and the Plaintiff in their respective Revised SOI both filed individually on October 20, 2025, had crystallized at the outset of trial. The documents filed subsequently, notably the Joint SOI, confirm that its contents were no longer in flux as trial proceeded.

[129] "Complex, high-stakes intellectual property proceedings are governed by procedural rules aimed at fairness, full and timely disclosure, and efficiency.": *Apotex Inc v Bristol-Myers Squibb Company*, 2011 FCA 34 at para. 37. It is unfair to broaden the Plaintiff's asserted trademark

claim against the Defendant at this late stage of the trial after the Plaintiff narrowed it in its Revised SOI on the first day of trial, despite its inadvertence. Procedural fairness and the proper administration of justice require that I deny the Motion to Amend at this very late stage.

(4) *2nd Canderel criterion – Whether the Defendant will suffer non-compensable injustice*

[130] The parties in this case made extensive submissions regarding the presumption of prejudice, and more specifically whose burden it was to either show prejudice or disprove it.

[131] The Defendant argues that prejudice must be presumed in this case as a matter of fairness, meaning that the Plaintiff should bear the burden to provide a reasonable explanation for the delay, or evidence that the Defendant would not be subjected to a non compensable prejudice: *1588444 Ontario Ltd v State Farm Fire and Casualty Company*, 2017 ONCA 42 at paras 36-37. The Defendant relies on *Easter* to argue that, since the evidentiary phase of the trial has been closed, it cannot change its litigation strategy after the fact. The Defendant argues that prejudice must therefore be presumed relying on *Easter* at para 15.

[132] The Plaintiff submits that the Defendant's reliance on the *Easter* case is misplaced. As the Plaintiff points out, in *Easter*, the Crown sought to amend its Statement of Claim five years after the action was commenced. Furthermore, the Crown had failed to file any evidence explaining the reasons why it was now requesting an amendment, and the party opposing the amendment filed ample evidence proving that allowing the amendment would result in non-compensable prejudice, which the Defendant failed to do here: *Easter* at paras 9-11.

[133] The Plaintiff argues that the Defendant's complete failure to identify actual prejudice of any kind is relevant to the determination of this motion. The Plaintiff relies on *Arctic Cat Inc v Bombardier Recreational Products Inc*, 2015 FC 938 [*Arctic Cat*], where Prothonotary Tabib noted that the party opposing the amendment's "failure to lead any evidence as to prejudice not compensable in costs or otherwise" was to be considered in the determination of whether the interests of justice would be served by allowing the amendment: *Arctic Cat* at para 25.

[134] In the circumstances of this case, I need not treat the Defendant's alleged failure to identify actual prejudice of any kind, because the Federal Court of Appeal has indicated that:

[42] Finally, contrary to what is argued by counsel, the absence of a specific allegation of prejudice by the opposing party is not decisive. As noted by Strayer J.A. in *Scottish & York Insurance Co. v. Canada* (1999), 239 N.R. 131 (F.C.A.), there is a "principle that, in the absence of prejudice to an opposing party, an amendment to pleadings should be allowed, if otherwise proper" (at paragraph 6) (my emphasis). Other factors, including that of the interests of justice, may well militate against allowing an amendment even where no prejudice is expressly alleged. Furthermore, some prejudice may appear on the face of the record without there being any need for the opposing party to expressly rely on it.

Merck at para 42.

[135] As I found above, the proposed amendment is not proper because the overriding consideration of the interests of justice militates against it being allowed at this very late stage of the trial and in the circumstances of this case where multiple SOI and documents confirming the narrowing of the issues to exclude TMA '911 were filed from the outset of the trial and extended to the Closing. Based on this finding, I am of the view that that they militate against allowing an amendment even where no prejudice is expressly alleged: *Merck* at para 42. The Plaintiff's

failure to show that the amendment would serve the interests of justice requires the Motion to Amend to be refused.

[136] While I have considered whether allowing the amendment would result in an injustice to the other party not capable of being compensated by an award of costs, this is not decisive as I have weighed the other factors relating to the interests of justice as more being more relevant in this context. Failure to meet either one of the *Canderel* criteria may result in the amendment being refused: *Sanofi* at para 15.

IV. Conclusion

[137] The Plaintiff is asserting the infringement of the three TD trademark registrations in Schedule “A” and is asserting a family of TD registrations. The Plaintiff has filed certified copies of all thirty-eight (38) TD and TD-formative trademark registrations at trial [TX-12 to TX-49], which included TMA ‘911 [TX-12]. The Plaintiff has put on the record the Defendant’s admissions that the Plaintiff is the owner of each of those registrations, that they are valid, subsisting, and in good standing [TX-2, Plaintiff’s Request to Admit Item #15 and 16]. The Plaintiff has argued the family of TD trademarks throughout the trial. Relying on its family of TD trademark registrations, the Plaintiff argues that the jurisprudence is to the effect that where there is a family of marks, the owner is entitled to a broader ambit of protection for the common characteristic than would otherwise be the case if there existed only one registration. The Plaintiff has also argued that a family of marks in such a situation is a further factor supporting its argument of a likelihood of confusion [TX-102, Plaintiff’s Closing Argument at paras 20-21, 140, 159; Plaintiff’s Motion Record at 489-490, 518 (Written Representations of the Plaintiff at

paras 20-21, 110), see also Defendant's Responding Motion Record at 991-992 (Written Representations of the Defendant at para 25)].

[138] Therefore, I want to make it clear that my determination above that the Plaintiff cannot rely on the TMA '911 as one of the three asserted marks that are infringed by the Defendant's TD Benefits trademarks does not mean that the Plaintiff cannot continue to rely on its family of thirty-eight (38) TD and TD-formative trademarks as it has done throughout the trial, and continue in its confusion analysis to make its argument of the family of trademarks.

[139] Given the dismissal of the Motion to Amend the Joint SOI to restore the TMA '911 thereto, this Court will need to consider in its trademark infringement analysis (i) the TMA '831 for the TD Shield Design trademark having the colour claim as one of the three asserted trademarks at issue relied upon by the Plaintiff as allegedly infringed by the Defendant, and (ii) the Plaintiff's family of TD trademarks, which includes the TMA '911 for the TD Shield Design trademark (without the colour claim).

V. Steps leading to the resumption of the trial

[140] With TMA '911 as one of the thirty-eight (38) TD and TD-formative trademarks registrations making up the Plaintiff's family of TD and TD-formative trademarks that are part of these proceedings, the Court must give the Plaintiff the opportunity to explain how they move forward with same.

[141] The Court must also give the Plaintiff the opportunity to explain how their Closing Argument needs to be amended given my determination to refuse their Motion to Amend. The Plaintiff's Closing Argument was prepared while the Plaintiff's counsel was under the impression that the TD Shield Design trademark without the colour claim was being asserted in its trademark infringement analysis. I believe counsel to the Plaintiff who affirmed that its intention and belief was that it was presenting the case based on the TD Shield Design registration without a colour claim (TMA '911). As such, while the Plaintiff's Closing Argument refers to TMA '831 for the TD Shield Design with colour mark, the Plaintiff believed it was submitting arguments on TMA '911 for the TD Shield Design without colour mark. The Court is thus without written arguments from the Plaintiff on the infringement analysis with the TMA '831 for the TD Shield Design with colour.

[142] In fairness, the Court will provide the Plaintiff with the opportunity to amend its Closing Argument and more specifically its trademark infringement analysis to rely on a) the three (3) asserted infringing TD trademarks, including TMA '831 for the TD Shield Design mark with the colour claim, and b) the TMA '911 for the TD Shield Design mark without the colour claim as part of its family of trademarks. The Defendant will then have an opportunity to amend its Closing Argument, in consequence and if it deems it necessary, before it delivers its Closing. Such amended Closing Arguments would also assist the Court in its infringement analysis and deliberations.

VI. Order

[143] The Plaintiff's motion for an order granting leave to amend the Joint SOI to restore the Plaintiff's trademark Registration TMA '911 for the TD Shield Design without a colour claim as one of three registrations for the TD trademarks at issue (allegedly infringed by the Defendant and relied upon by the Plaintiff), rather than its trademark Registration No. TMA647831 [TMA '831] for the TD Shield Design with a colour claim, is dismissed, with costs awarded to the Defendant in the cause.

ORDER in T-886-21**THIS COURT ORDERS that:**

1. The motion of the Plaintiff, The Toronto-Dominion Bank v Thomas John Dyas d/b/a TD Benefits and d/ba TD Benefits Solutions [TD Bank], for an order granting leave to amend the Joint Statement of Issues to restore the Plaintiff's trademark Registration No. TMA 644911 [TMA '911] for the TD Shield Design without a colour claim as one of three registrations for the TD trademarks at issue (allegedly infringed by the Defendant and relied upon by the Plaintiff), rather than its trademark Registration No. TMA647831 [TMA '831] for the TD Shield Design with a colour claim, is dismissed.
2. The Plaintiff, TD Bank, shall file its Amended Closing Argument at the latest by 2 pm on Tuesday, February 17, 2026.
3. The Defendant, Thomas John Dyas d/b/a TD Benefits and d/b/a TD Benefits Solutions [TD Benefits], shall file, if necessary, its Amended Closing Argument at the latest by 2 pm on Thursday, February 19, 2026.
4. The parties will follow the proper manner of amending their Closing Arguments by underlining all their amendments as required under Rule 79(1)(b) of the *Federal Courts Rules*.
5. The trial will resume on February 25, 2026 at 9:30 am (Eastern) in Toronto for a duration of 1.5 days.
6. Costs are awarded to the Defendant, TD Benefits, in the cause.

"Ekaterina Tsimberis"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-886-21

STYLE OF CAUSE: THE TORONTO-DOMINION BANK v THOMAS JOHN DYAS D/B/A TD BENEFITS AND d/b/a TD BENEFIT SOLUTIONS

DATE OF HEARING: MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO RULE 369 OF THE FEDERAL COURTS RULES

ORDER AND REASONS: TSIMBERIS J.

DATED: JANUARY 21, 2026

WRITTEN REPRESENTATIONS BY:

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