

Federal Court



Cour fédérale

Date: 20160527

Docket: T-737-08

Citation: 2016 FC 590

Montreal, Quebec, Ontario, May 27, 2016

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

AIRBUS HELICOPTERS

**Plaintiff/
Defendant by Counterclaim**

and

**BELL HELICOPTER TEXTRON CANADA
LIMITÉE**

**Defendant/
Plaintiff by Counterclaim**

ORDER AND REASONS

[1] This is a motion in writing made by the defendant, Bell Helicopter Textron Canada Limitée [Bell], whereby Bell seeks a direction from the Court that it may present and rely upon the expert reports of their four proposed expert witnesses in the portion of the trial on the quantification of damages beginning two days from now, that is, on May 30, 2016. In the alternative, Bell seeks an order granting leave to present and rely upon the expert reports of

Mr. Stephane Dupuis and Mr. Ronald T. Wojnar and their testimony, with the understanding that Mr. Michel O'Reilly and Mr. Steven Schwartz are included within their five "as of right" expert witnesses.

[2] The reports of the four proposed experts – Mr. O'Reilly, Mr. Schwartz, Mr. Dupuis and Mr. Wojnar [Bell damages experts] – have been served to the plaintiff, Airbus Helicopters, S.A.S. [Airbus]. Airbus, who intends to rely on and present at the continuation of the trial one expert, Mr. Bradley Heys, opposes the motion for direction or order made by Bell on the grounds that the total number of experts relied on by Bell in both the liability and damages phases of the proceeding will exceed the five witness maximum, as stipulated in section 7 of the *Canada Evidence Act*, RSC 1985, c C-5 [CEA], and that leave with respect to Mr. Dupuis and Mr. Wojnar should not be granted by the Court.

[3] I have considered the evidence and the representations submitted by the parties in their motion records, including the reply of Bell, as well as the relevant provisions and principles in light of the quantification issue before the Court. The present motion is dismissed. In view of the time constraints and urgency of the situation, the present reasons are issued in English, while the undersigned Judge reserves its right to correct clerical mistakes, errors or omissions.

Factual background

[4] This motion arises in the context of a patent infringement action where the liability and damage quantification phases of the trial were bifurcated. The action was initiated by Airbus

(then Eurocopter) on May 9, 2008, alleging infringement by Bell of Canadian Patent No. 2,207,787 [787 Patent].

[5] On October 2, 2009, Prothonotary Morneau granted on consent an order bifurcating the proceedings [Bifurcation Order]. The order was made under the authority of Rule 107(1) of the *Federal Courts Rules*, SOR/98-106 [Rules]. In particular, paragraphs 2 and 3 provide:

2. Pursuant to Rule 107(1) of the *Federal Courts Rules*, this matter may proceed to trial without requiring the parties to adduce evidence at trial, or to conduct examinations for discovery, or make production on any issue of fact where such evidence relates solely to:
 - a) the calculation of the quantum of profits made by the Defendant as a result of the infringement by the Defendant of Canadian Patent No. 2,207,787 (“the ‘787 Patent”);
 - b) the calculation of the quantum of damages suffered by the Plaintiff as a result of the infringement by the Defendant of the ‘787 Patent; and
 - c) the calculation of the quantum of punitive damages as a result of the infringement by the Defendant of the ‘787 Patent.
3. A hearing under Rules 107 and/or 153 of the *Federal Courts Rules* shall be conducted following the final determination of remaining issues herein, if it then appears that such issues are required to be decided, including necessary documentary and oral discovery.

[6] The trial for the liability phase of the proceeding was held before the Federal Court in January and February 2011. Bell called three expert witnesses at that time, but also served a fourth expert, Dr. Earl Dowell. Dr. Dowell produced three expert reports, but was not called at trial (affidavit of Joanie Lapalme at paras 5 to 7).

[7] In a judgment dated January 30, 2012 (2012 FC 113), the Court found that claim 15 of the 787 Patent was valid and enforceable, and that the defendant Bell had infringed claim 15 by using what has been labelled as the “Legacy gear”. In addition to granting injunctive relief in favour of the plaintiff and ordering the destruction of all the infringing landing gears (except one Legacy gear which Bell may store, or have stored, solely for the purpose of potential use in corresponding litigation in other jurisdictions), Eurocopter (now Airbus) was granted compensatory and punitive damages, the quantum of which is to be determined at the continuation of the trial, which is now set to commence on May 30, 2016.

[8] In its January 30, 2012 judgment, the Court decided not to permit the plaintiff to elect between an award of damages or an accounting of profits (see paras 406 to 416), while finding that “Eurocopter is entitled to general damages, which may comprise the loss of profits from sales, or perhaps lost royalty payment in the alternative”, in reference to the judgment rendered by the Supreme Court of Canada in *Monsanto Canada Inc v Schmeiser*, [2004] 1 SCR 902 at para 100 [*Schmeiser*], and by specifying that “[t]his award includes all compensatory damages suffered by Eurocopter, as long as they are a result of the infringement of claim 15 of the ‘787 Patent” (para 416).

[9] With respect to the plaintiff’s entitlement to claim damages, the Court noted at paras 407 and 408:

[407] The purpose of an award of damages is to restore the plaintiff to the position in which it would have been had the infringement never occurred. Every infringement is a separate wrong, and thus, each unit made infringes (in this case, each Legacy gear), but “[a] sense of proportion must, however be retained” (Vaver, above, at page 632). The fact that Bell allegedly

did not know its acts constituted infringement is irrelevant to its liability; damages for infringement track those for tort generally (Vaver, above, at pages 631-632). As stated by the Supreme Court of Canada in *Schmeiser*, above, at para 37, “[a]s a practical matter, inventors are normally deprived of the fruits of their invention and the full enjoyment of their monopoly when another person, without licence or permission, uses the invention to further a business interest”, which was clearly the case in this instance.

[408] Be that as it may, Bell nevertheless submits that there is no automatic right to damages flowing from a finding of infringement. Here, it is pleaded that there have been no sales made by Bell of a helicopter equipped with the Legacy gear and clients could care less what the landing gear looks like. According to Bell, any hypothetical damages suffered by Eurocopter as a result of the infringement would be *de minimis* and are too remote to be claimed. At this point of time, the quantum of any such damages does not have to be determined by the Court in view of the bifurcation order. However, Bell’s position that Eurocopter’s damages are minimal emphasises the need to address today the question whether punitive damages should be ordered as requested by Eurocopter who pleads that the granting of ordinary damages will be insufficient to meet the objectives of punishment, deterrence and denunciation in this case. This issue will be addressed later on in these reasons.

[Emphasis added]

[10] The Court also disposed of Bell’s argument that it should refrain from awarding punitive damages at this stage because it would be premature to do so or contrary to the Bifurcation Order (para 418). The Court notes at paragraphs 443 to 454:

[443] The Court also dismisses Bell’s argument that it would be premature at this stage to make a determination to award punitive or exemplary damages.

[444] Bell’s counsel relies on the following statement by Justice Sharlow, writing for the Federal Court of Appeal in *Apotex Inc v Merck & Co*, 2003 FCA 291 at para 34 (*Apotex*):

The purpose of punitive damages is to punish, to deter the wrongdoer and others, and to denounce wrongful behaviour. Punitive damages are awarded

only where compensatory damages and other normal civil remedies are insufficient to accomplish those objectives, and in an amount that is no greater than necessary to accomplish that objective: Whiten, *supra*; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130. It is axiomatic that until all the ordinary civil remedies are finally determined (which in this case would include a determination as to whether the remedy is an award of damages or an accounting of profits, and the quantum), it is impossible to determine whether punitive damages are required to meet the objectives of punishment, deterrence and denunciation.

[445] Eurocopter's counsel stresses that in *Apotex*, above, there had been no trial, but only a summary judgment, and that the whole issue of appropriate remedies, not just quantum, had been bifurcated, as noted in paras 23-24 of *Apotex*, above. Thus, the Federal Court of Appeal's general comments in para 34 have to be evaluated in their proper context. He suggests that the present case is very different from a factual point of view since evidence was adduced and argument was made at trial on the characterization of Bell's conduct.

[446] The Court agrees with Eurocopter's counsel. In order to properly put in context what the Federal Court of Appeal has stated in para 34 of *Apotex*, above, one must bear in mind that this case presented "an unusual situation that arose because the merits of the infringement claim were dealt with by way of summary judgment motions by both parties" and that this "resulted in a *de facto* bifurcation between the liability and remedy phases" [Emphasis added] (*Apotex*, above, at para 23).

[447] A major problem in *Apotex*, above, was that the motions judge should have first allowed "*Apotex* to discover Merck on issues of remedy so that it could make appropriate submissions on whether Merck should be entitled to make the election", before concluding, as the motions judge apparently did, that "the facts relating to entitlement have not changed" (*Apotex*, above, at para 33). The Federal Court of Appeal further noted that there was "a certain ambiguity in the judgment of the motions judge on the question of whether the referee was empowered to grant punitive damages, or merely to quantify them" (*Apotex*, above, at para 35).

[448] Therefore, it is not surprising that the Federal Court of Appeal found that “the motions judge erred in deciding, before the other remedies are determined, that *Apotex* is liable for punitive damages” (*Apotex*, above, at para 35). Bell’s counsel also relies on *Laboratoires Servier*, where the comments in *Apotex*, above, at para 34, were cited by Justice Snider, but in this case both parties had “agreed that it would be premature for [her] to make that determination prior to the reference on damages” (*Laboratoires Servier*, above, at para 514).

[449] The bifurcation order issued on consent on October 2, 2009 makes it crystal clear that the referee is not empowered to grant damages (or profits), including punitive damages, but merely to calculate the quantum of such damages (or profits). Moreover, only the quantum of damages, profits and punitive damages has been bifurcated and not the entitlement to any such remedies. Accordingly, the trial judge is the only person who can determine whether punitive damages should be allowed to Eurocopter.

[450] If the Court is to accept Bell’s argument that it is premature to decide whether Eurocopter is entitled to an award of punitive damages, this means that the amount of ordinary damages would first have to be calculated by the referee. Considering that in all likelihood both parties will file appeals and counter-appeals of this Judgment, the calculation of ordinary damages by the referee will have to wait the exhaustion of all such appeals and counter-appeals.

[451] Subject to any appeal of the referee’s decision on the quantum of ordinary damages, this may take several years before the matter of entitlement to punitive damages comes back to the trial judge. Assuming that the trial judge is still in function, he would have the burden of reviewing many years later the totality of the evidence submitted at trial (more than 20 days of hearing witnesses and some 540 exhibits) to determine whether the behaviour of Bell justifies the granting of punitive damages. Since the trial was conducted years earlier, it may be necessary to permit parties to present new evidence, and perhaps, to even order a new trial if the trial judge is not in function anymore.

[452] If the trial judge renders a final judgment granting punitive damages, Bell may then wish to file an appeal on Eurocopter’s entitlement to punitive damages. Again, a hearing by the referee on the calculation of such punitive damages would have to wait the exhaustion of all appeal procedures and a confirmation of the trial judge decision to award punitive damages. Then, and only then, if one accepts Bell’s argument, the referee could calculate the

amount of punitive damages as a result of the infringement by Bell of the '787 Patent.

[453] There is a key guiding principle, enshrined in Rule 3 of the *Federal Courts Rules*, SOR/98-106, that the application and interpretation of any procedural rule of conduct should not run contrary to the just, most expeditious and least expensive determination of every proceeding on its merits. Accordingly, the Court accepts the submission made by Eurocopter's counsel that it makes no practical sense to defer judgment on the issue of punitive damages, and that it is contrary to the best interests of the parties and the administration of justice not to decide at this stage on Eurocopter's entitlement to punitive damages.

[454] There was full discovery prior trial ample evidence at trial on the respective conduct of the parties. Bell notably claimed that Eurocopter was not entitled to any equitable remedies because of its conduct. The Court has already examined this issue above. The Court has refused to permit Eurocopter from electing between damages or profits although it found no fault on the part of Eurocopter. This leaves only the assessment of such damages. This makes this case very different from *Apotex*, above.

[Emphasis added]

[11] That being said, with respect to the plaintiff's entitlement to seek punitive or exemplary damages, the Court made a number of observations and findings based on the evidence and the applicable legal principles. Without asserting that these findings are limited to the following extracts, it is noteworthy to refer to paragraphs 417 and following:

[417] Eurocopter also seeks punitive damages; however, if allowed by the Court, their quantum should be assessed later by reference in view of the terms of the bifurcation order. Eurocopter submits that Bell knowingly and maliciously infringed the '787 Patent by the making and using of the Legacy gear, which was also shown to the public for the purpose of stimulating orders for the purchase of the Bell 429. Bell's outrageous conduct caused irremediable damages that simply cannot be corrected by an award of damages or an account of profits, and which are aggravated by the fact that Bell has mislead and continued to mislead the public into believing that the Bell 429 is the first helicopter to use a sleigh type skid landing gear.

[...]

[420] Punitive damages are awarded when a party's conduct has been malicious, oppressive and high-handed, or offends the court's sense of decency, or represents a marked departure from ordinary standards of decent behaviour (*Whiten v Pilot Insurance Co*, [2002] 1 SCR 595 at para 36 (*Whiten*)). Moreover, as cautioned by the Supreme Court of Canada in *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 196 (*Hill*), “it is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence”.

[421] Punitive and exemplary damages have been awarded in cases of trade-mark and copyright infringement, where, for example, the conduct of the defendants was “outrageous” or “highly reprehensible”, or where the defendant’s actions constituted a callous disregard for the rights of the plaintiff or for injunctions granted by the Court (*Microsoft Corporation v 9038-3746 Quebec Inc*, 2006 FC 1509 at paras 91, 92, 98 and 110-112; *Louis Vuitton Malletier SA v Yang*, 2007 FC 1179 at paras 45-53; *Louis Vuitton Malletier SA v 486353 BC Ltd*, 2008 BCSC 799 at para 86; and *Microsoft Corporation v PC Village Co Ltd*, 2009 FC 401 at paras 41-44; and *Robinson c Films Cinar inc*, 2009 QCCS 3793 at paras 1036-1072 (QSC), amount of punitive damages reduced in appeal, 2011 QCCA 1361 at paras 229-260).

[422] The standard of proof in punitive or exemplary damage cases, including in a patent infringement affair, is the civil standard of proof – on the balance of probabilities – not the criminal standard of proof – beyond a reasonable doubt (*Imperial Oil*, above, at para 32). While “there is no room for talk of *actus reus* and *mens rea*” (*Imperial Oil*, above, at para 38), the intentional character of the infringement, along with the overall conduct of the defendant, including the fact that the infringement was “planned and deliberate”, are relevant factors to consider (*Whiten*, above, at para 113).

[423] The alleged knowledge, or absence of knowledge, of the existence of the statutory monopoly conferred to Eurocopter by the ‘787 Patent (and in the United States and Europe by the American and French Patents) related to the “Moustache landing gear” (notably used on the EC120 for many years), can be proven by an admission of a party in a proceeding, a former declaration made out of court, the testimony of a witness, the documents produced at

trial, the actions taken by a party or its employees or representations, and any other means.

[424] Starting with section 2 of the Act, “patent” means “letters patent for an invention”, and all patents granted, applications for patents and documents filed in connection therewith, are open for public inspection at the Patent Office. As such, a “patent” is included in the definition of “regulation” found in section 2 of the *Interpretation Act*, RSC 1985, c I-21. That said, after the patent is issued, paragraph 43(2) of the Act creates a presumption of validity, as “it shall, in the absence of any evidence to the contrary, be valid and avail the patentee and the legal representatives of the patentee for [its] term”. In the case at bar, the ‘787 Patent was issued on December 31, 2002 to Eurocopter from an application filed on June 5, 1997, claiming priority based on French Patent application No. 96 07158, filed in France on June 10, 1996.

[425] Having considered the totality of the evidence, the Court finds that Bell’s assertion that it had no knowledge whatsoever of the ‘787 Patent prior to May 2008 is simply not plausible and contrary to the evidence. Mr. Lambert, Mr. Kohler and Mr. Gardner all testified that they had no personal knowledge of the ‘787 Patent, but the issue is whether there was corporate knowledge of same, and the answer is yes. Ignorance of the law is not a valid excuse, and there is no evidence supporting any genuinely held belief that Bell was the first to develop a sleigh type of landing gear having the features of claim 15 of the ‘787 Patent.

[426] Sometimes identified in the documentation as the “original gear”, the Legacy gear was developed by Bell between 2004 and 2007, that is, during the period of validity of the ‘787 Patent which will expire on June 5, 2017. As Bell had never designed a helicopter with an articulated rotor and a sleigh type landing gear, they studied the performance of an EC120 which is equipped with a Moustache landing gear. Bell leased and operated an EC120 helicopter from approximately March to June 2003, during which time Bell performed tests on the EC120 helicopter, including a handshake test. Moreover, Bell employees received training in Dorval, Quebec, on an EC120 helicopter in March 2003. It turned out that the Legacy gear used by Bell and publicised in multiple documents was no more than a slavish copy of the patented Moustache landing gear.

[427] Bell and its parent company, Textron, are sophisticated corporate entities employing thousands of engineers and highly skilled personnel. Both have legal and intellectual property departments. Advanced software permit to search and find

applications and patents relevant in the field of helicopters worldwide. Indeed, at the time of infringement, there was a policy manual and guidelines with respect to intellectual property matters, including measures to avoid infringing on valid intellectual property rights held by others (see exhibits JB-397 and JB-398). The technical resource specialists (TRS's) have the responsibility to maintain cutting edge technical capabilities in their discipline, to maintain cognitions of competitive patents and other intellectual property outside the company, and to advise the leaders of the Integrated Product Teams (IPT's) of any concern regarding potential infringement that might occur during new product or process developments.

[428] There are a number of credibility concerns with respect to key aspects of the testimonies of Mr. Kohler and Mr. Lambert. For one, Mr. Kohler was not personally involved in the Bell 429 program and the Court has found his testimony to be far from candid. For example, Mr. Kohler first stated that Bell had received no purchase orders for the Bell 429 equipped with the Legacy gear; however, during cross-examination and being confronted with the documentary evidence, Mr. Kohler had to admit that more than 200 purchase orders had been received at that time for the Bell 429 (or the Bell 427i discontinued model) and that deposits totalling \$6 million dollars had been received by Bell (see notably exhibits JB-43, JB-233, JB-244 and JB-245).

[429] Mr. Lambert was Chief Engineer for the Bell 429 from 2004 until the time it was certified in 2009. He notably testified that, during the time that he was with Bell, he was aware that an EC120 had been leased to evaluate certain characteristics of the rotor and the landing gear. Mr. Lambert also stated that "benchmarking" with competitive products in the aeronautics industry is a usual practice, including at Bombardier where he is now. As aforementioned, in 2003, it was Mr. Malcolm Foster who was in charge of the MAPL program, and Mr. Lambert admitted that it is Mr. Foster who had brought the concept of a sleigh type of landing gear in the first place.

[430] That said, the documentary evidence (see notably JB-372 and JB-478), and Mr. Gardner's statements during discovery (see exhibit P-22) and his overall testimony at trial, contradict Bell's gratuitous suggestion that the tests and studies performed on the EC120 were strictly for "benchmarking" purposes. Bell did not just compare the performance of an existing Bell helicopter equipped with a conventional gear and the performance of a Eurocopter helicopter equipped with a sleigh type gear, Bell went a step ahead,

and decided to import and copy the unique and new patented technology developed by Eurocopter.

[431] There was no mistake of fact. It was known at Bell and Textron that the sleigh gear closely resembled the Moustache landing gear of the EC120. Mr. Gardner even testified that the Legacy gear has all of the characteristics of the Moustache landing gear (except for the lower curve). However, Mr. Lambert did not worry about that, as it was Mr. Foster's job to make the necessary inquiries. In fact, evidence obtained during discovery reveals that when concerns were raised about the similarity between the Legacy gear and the EC120 landing gear, Mr. Foster advised Bell's engineers to "carry on". In pursuing the project, Bell acted in a foolhardy manner (indeed their actions are contrary to their own policy manuals) and its conduct represented a marked departure from ordinary standards of decent behaviour.

[432] When it designed its sleigh type of gear, Bell knew or should have known of the '787 Patent. It is implausible that between 2003 and May 2008, Bell was ignorant of Eurocopter's intellectual property rights. Again, Mr. Foster was responsible to ensure that the chosen design did not infringe the '787 Patent; he was not called as a witness. Mr. Minderhoud who was closely involved in the calculations of the Legacy gear and publicly praised its performance should have known as well; he also did not testify at trial. Bell had an intellectual property service that was specifically responsible for verifying possible infringements; no employee of that department testified at trial, while Bell resisted on grounds of privilege requests for opinions, or has otherwise been evasive on the subject. Accordingly, the Court is allowed to draw a negative inference from these various omissions.

[433] On a balance of probability, the Court finds that there is clear evidence of bad faith and egregious conduct on the part of Bell. This is not a case where the infringement is small, trivial or isolated, or where the defendant is unsophisticated or ignorant. This is a case of wilful blindness or intentional and planned misappropriation of the claimed invention. Eurocopter has proven that the infringement of the '787 Patent by the making and use of the Legacy gear was not innocent or accidental.

[434] The evidence conclusively establishes that Bell had plans to manufacture and incorporate the Legacy gear in its Bell 429 model, as soon as it could obtain certification. Bell actively promoted the sales of the Bell 429 equipped with the Legacy gear. Bell has shown no remorse and offered no excuse for its behaviour. Denying that there was infringement, Bell took a vindictive

position throughout the proceeding, pleading that it could avail itself of the regulatory or experimental exception and that it was simply practising prior art.

[435] In exercising its discretion to award punitive damages, the Court also takes into account the fact that the development of a helicopter is a highly complex and costly endeavour, and that only a few players in the industries possess sufficient technology and employ the highly qualified personnel necessary to design, develop, test and manufacture a landing gear that will have all the required characteristics and advantages such a key piece equipment must have before same can be incorporated in a helicopter.

[436] Punitive damages are required in this case not only to punish Bell but to deter others from acting in a similar manner. The fact that only twenty-one Legacy gears were used by or made for Bell is besides the point and does not take into account the reality of the length of time, the gravity and planification of the infringement. Bell's overall conduct is highly reprehensible and constitutes a callous disregard for the rights of Eurocopter who was forced to institute the present action. Bell well knew how much time, research, testing and money expenditures were behind the development of the Moustache landing gear.

[437] In its article of April-May 2008 (JB-224), Mr. Minderhoud writes at page 9:

Looks are deceptive: the sleigh type landing gear is a visually simple design, but its development is very complex and challenging due to the large number of conflicting requirements. Tremendous improvements in predictive analysis tools and data processing have contributed to the development of the fixed skid landing gear from the Bell Model 47 (first flight in 1943) to the new sleigh type landing gear for the Model 429 (first flight 2007); see Fig. 11.

[438] Figure 11 of the Minderhoud article shows a picture of the Bell Model 47 (equipped with a conventional gear) on the ground and of the Bell 429 (equipped with the Legacy gear) in the air. The Legacy gear shown on the picture is presented as a nearly finished product and a major technological breakthrough compared to the conventional type of landing gear (although there may be still some further testing). Both in the summary and the article, reference is made to the fact that this sleigh type of gear "has been

designed for the first time” by Bell. This carries a very strong message to the public and the potential buyers.

[439] Bell’s counsel suggests that the Court should be indulgent. Readers of the Minderhoud article would have known that the EC120 was already equipped with a similar type of sleigh landing gear. If the statement above carries some ambiguity, any doubt should favour Bell. Having read same in the context of the totality of the Minderhoud article, the Court finds that there is an innuendo that Bell is the “first”, and it is debatable whether the careful chosen words suggest that Bell is the first to have designed a sleigh type of landing gear. Otherwise, there would be no purpose of celebrating in the article the fact that the Bell 429 model is the first helicopter designed by Bell using an already known technology in the field. It turns out that the main purpose of the article is to attract the attention on Bell’s technology and to stimulate sales of the Bell 429, and there is no reference whatsoever in the article or a footnote that the sleigh type of landing gear has been in use for some time in the industry.

[440] It is not requested here to entertain a general tort for alleged misrepresentations. The issue is whether punitive or exemplary damages should be awarded to Eurocopter following the Court’s finding that the infringing conduct was planned and deliberate, and that same persisted over a lengthy period of time (2004-2008) although only twenty-one landing gears were made for or used by Bell. In this context, the representations publicly made by Bell with respect to the development of the infringing Legacy gear are relevant to determine whether or not the conduct of Bell is truly outrageous. Indeed, the Court finds that the representations contained in the Minderhoud article are rationally connected to the infringement of the ‘787 Patent by Bell and add to its outrage at the egregious conduct of Bell.

[441] Not only did Bell profit from its misconduct – the development of the Production gear would not have been possible without the development of the Legacy gear – but the evidence shows that Bell concealed the fact to the public and the potential purchasers of the Bell 429 that it had imported from a competitor the sleigh type landing gear and copied the Moustache Landing gear from Eurocopter EC120, while suggesting that the Legacy gear was somewhat a “premiere” at Bell and publicly claiming in the Minderhoud article the unique advantages in terms of improved dynamic behaviour (ground resonance) and the lower weight of the Legacy gear, all advantages already publicly disclosed in the ‘787 Patent.

[442] Reference at the trial was also made to Bell's promotional videos showing the features of the Bell 429 (JB-86 and JB-225). These videos very briefly mention that the sleigh type landing gear is one of the key technologies from the MAPL Program. However, according to Bell, the sections of these videos that discuss the sleigh type landing do not suggest that Bell is the first helicopter manufacturer to adopt a sleigh type landing gear. Be that as it may, the Court finds that after the institution of the action in May 2008, Bell and its distributors have continued to promote the Bell 429 equipped with the Legacy gear (see notably exhibits JB-226 to JB-229) which constitutes reprehensible conduct which further aggravates the damages caused by the infringement of the '787 Patent.

[...]

[455] Perhaps, this case is exceptional and very different from other patent infringement cases. In these instances, the extent of infringement is generally unknown. This is not the case here. Moreover, it is undisputed that twenty-one Legacy gears were made or used by Bell. It also appears that there were no sales of any Bell 429 model equipped with a Legacy gear, although pre-orders were made and deposits were received by Bell prior to the institution of the action in infringement and the certification of the Bell 429 with the Production gear. Considering the evidence presently on record, chances are that, in any case, an award of ordinary damages – which, as submitted by Bell, will be minimal if Eurocopter is unable to prove any losses of sales and causation as a result of the infringement – will simply not be enough to achieve the goal of punishment and deterrence.

[456] In final analysis, the Court finds that Eurocopter is entitled to punitive damages as a result of the infringement by Bell of the '787 Patent and the deliberate and outrageous conduct of Bell in this case. However, the quantum of any such damages suffered by Eurocopter as a result of the infringement by Bell of the '787 Patent is a matter left for future determination in view of the bifurcation order.

[Emphasis added]

[12] With respect to the determination of the quantum of damages, the Court stated at paragraphs 457 to 459:

[457] Both parties ask that the quantum of damages be adjudged either by a referee or by the trial judge, if he so chooses and is available to conduct a hearing (after completion of discovery if necessary).

[458] Contrary to a referee, the undersigned Judge is already familiar with the voluminous evidence adduced by the parties. This presents the advantage of avoiding unnecessary duplication of the evidence and imposing a supplementary financial burden on the parties. Moreover, the undersigned Judge is in a privileged position to determine the amount of compensatory and punitive damages, considering that the balancing of aggravating and mitigating factors are also relevant in such an exercise.

[459] Accordingly, the Court shall declare that Eurocopter is entitled to all damages, including punitive damages, resulting from the infringement by Bell of claim 15 of the '787 Patent, the quantum of which is to be determined by the trial judge or a referee (if the trial judge is not otherwise available) at a later hearing after exhaustion of all appeals, pursuant to the terms of the bifurcation order, and subject to any further direction or order of the Court.

[13] Bell appealed the January 30, 2012 judgment to the Federal Court of Appeal (2013 FCA 219), which confirmed the Federal Court's decision on September 24, 2013. In particular, the Federal Court of Appeal decided that there was no reason to overturn the Court's findings and consequent decision with respect to the plaintiff's entitlement to claim damages, including punitive damages (paras 163 to 193). In so doing, the Federal Court of Appeal dismissed Bell's argument that the Court had erred in law in granting punitive damages before assessing the quantum of general damages (paras 168 to 179). The Federal Court of Appeal also dismissed Bell's argument that punitive damages should not be available, as a matter of law, for intentionally infringing a patent (paras 180 to 184), and that the Court had made palpable and overriding errors in assessing the evidence and otherwise erred in law in awarding such damages (paras 185 to 193).

[14] On November 21, 2014, about a year following the exhaustion of all Bell's appeal rights, Airbus served a "*Demande d'audition et énoncé des questions en litige*" with respect to the quantification of its claims in compensatory damages and punitive damages against Bell.

[15] On February 25, 2015, following the representations made by the parties, the Judicial Administrator ordered that the trial on damages pursuant to Rule 107 take place before the Court on Monday, the 30th day of May, 2016 at 9:30 in the forenoon for a duration of ten (10) days.

[16] On August 18, 2015, following the representations made by the parties to amend the scheduling order made on January 28, 2015, the Court ordered the parties to abide by a revised schedule, which notably provided that the examinations for discovery would be completed by November 20, 2015 and the responses to undertakings by December 11, 2015, while Airbus and Bell would respectively serve their expert reports by February 12, 2016 and April 8, 2016. However, it now appears that the parties had difficulties complying with the revised schedule.

[17] On March 4, 2016, Airbus served the expert report of Mr. Heys.

[18] On April 29, 2016, Bell served the reports of the four damages experts.

[19] On May 6, 2016, the parties respectively exchanged their lists of witnesses and will-say statements. On May 6, 2016, Airbus notified Bell that it objected to the number of Bell expert witnesses on the grounds that Bell had exceed the number of expert witnesses allowed per

proceeding under section 7 of the CEA. Counsel for Airbus also stated that the reports of Mr. Wojnar and Mr. O'Reilly do not contain expert opinion and are "tout au plus une récitation de faits".

[20] On May 9, 2016, a Trial Management Conference took place by way of a conference call before the undersigned Judge. The parties were directed to serve and file any preliminary motions in writing by Wednesday, May 11, 2016; responding records by Monday, May 16, 2016; and replies by Wednesday, May 18, 2016.

Issues

[21] This motion raises two distinct issues:

1. Does Bell require leave to call more than five expert witnesses?
2. If leave is required, should it be granted?

Relevant Provisions

[22] Section 7 the *Canada Evidence Act* stipulates:

Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called on either side without the leave of the court or judge or person	Lorsque, dans un procès ou autre procédure pénale ou civile, le poursuivant ou la défense, ou toute autre partie, se propose d'interroger comme témoins des experts professionnels ou autres autorisés par la loi ou la pratique à rendre des témoignages d'opinion, il ne peut être appelé plus de cinq de ces témoins de chaque côté
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presiding.

sans la permission du tribunal, du juge ou de la personne qui préside.

[23] Rule 52.4 provides:

52.4 (1) A party intending to call more than five expert witnesses in a proceeding shall seek leave of the Court in accordance with section 7 of the *Canada Evidence Act*.

52.4 (1) La partie qui compte produire plus de cinq témoins experts dans une instance en demande l'autorisation à la Cour conformément à l'article 7 de la *Loi sur la preuve au Canada*.

(2) In deciding whether to grant leave, the Court shall consider all relevant matters, including

(2) Dans sa décision la Cour tient compte de tout facteur pertinent, notamment :

(a) the nature of the litigation, its public significance and any need to clarify the law;

a) la nature du litige, son importance pour le public et la nécessité de clarifier le droit;

(b) the number, complexity or technical nature of the issues in dispute; and

b) le nombre, la complexité ou la nature technique des questions en litige;

(c) the likely expense involved in calling the expert witnesses in relation to the amount in dispute in the proceeding.

c) les coûts probables afférents à la production de témoins experts par rapport à la somme en litige.

[24] Rules 106 and 107 address the separate determination of claims and issues:

106 Where the hearing of two or more claims or parties in a single proceeding would cause undue complication or delay or would prejudice a party, the Court may order that

106 Lorsque l'audition de deux ou plusieurs causes d'action ou parties dans une même instance compliquerait indûment ou retarderait le déroulement de celle-ci ou porterait préjudice à une partie, la Cour peut ordonner :

(a) claims against one or more parties be pursued separately;	a) que les causes d'action contre une ou plusieurs parties soient poursuivies en tant qu'instances distinctes;
(b) one or more claims be pursued separately;	b) qu'une ou plusieurs causes d'action soient poursuivies en tant qu'instances distinctes;
(c) a party be compensated for, or relieved from, attending any part of the proceeding in which the party does not have an interest; or	c) qu'une indemnité soit versée à la partie qui doit assister à toute étape de l'instance dans laquelle elle n'a aucun intérêt, ou que la partie soit dispensée d'y assister;
(d) the proceeding against a party be stayed on condition that the party is bound by any findings against another party.	d) qu'il soit sursis à l'instance engagée contre une partie à la condition que celle-ci soit liée par les conclusions tirées contre une autre partie.
107 (1) The Court may, at any time, order the trial of an issue or that issues in a proceeding be determined separately.	107 (1) La Cour peut, à tout moment, ordonner l'instruction d'une question soulevée ou ordonner que les questions en litige dans une instance soient jugées séparément.
[...]	[...]

Summary of the Proposed Expert Witnesses

[25] The proposed expert witnesses have not yet testified and their reports have not been formally produced in the record by the parties. At this point, they are not part of the evidence. That being said, the parties have accepted that the Trial Judge – that is the undersigned – examine and read their content prior to the date of the trial on the quantification of damages (compensatory and punitive). The present summary does not purport to analyse in depth the

reasoning and opinions included in the Heys report tendered by Airbus and in the reports of Bell's damages experts, but simply to give to the reader of these reasons an overview of any such proposed evidence in light of the Court's exercise of its discretion to allow Bell to exceed the five witness maximum stipulated at section 7 of the CEA, as the case may be.

[26] Mr. Heys is presented by Airbus as an expert in the fields of business, securities and intellectual property valuation, financial investigation, finance and economics. In assisting the Court in determining the amount of compensatory damages owed to Airbus, Mr. Heys notably describes in his report a framework for the calculation of the range of a reasonable royalty applicable to a licence that would have provided Bell with the legal entitlement to use Airbus' invention (the "Moustache gear").

[27] Mr. O'Reilly is an expert in the characteristics of the helicopter industry and the repair, overhaul, valuing, buying, selling and leasing of new and used commercial helicopters. His expert opinion relates to how in his experience, customers choose one helicopter model over another and do not contemplate a specific landing gear in the process. He also provides an overview of the civil helicopter industry based on his observations and client contact, and discusses what he believes are competing models with the Bell 429 helicopter, as well as a historical perspective on helicopters having certain design features.

[28] Dr. Schwartz is an expert in economic matters, namely intellectual property valuation disputes. His report notably discusses his opinion on the determination of a reasonable royalty resulting from a hypothetical royalty negotiation in this case.

[29] Mr. Dupuis is an economist and an expert in economic issues related to the determination of transfer prices and the valuation of intellectual property. His report addresses various pricing evaluations relating to helicopter landing gear products and components for the determination of a fair quantum of damages. He will also address the amount of the reasonable royalty that would result from a hypothetical licence negotiation between Bell and Airbus for a licence granting Bell the right to exploit the technology in the 787 Patent. Mr. Dupuis' qualifications and expertise differ from those of Mr. Schwartz, purportedly allowing the Court to benefit from different perspectives in the calculation of a reasonable royalty.

[30] Mr. Wojnar is a former Deputy Director at the Federal Aviation Administration and an expert in the aircraft certification process in the United States and Canada. In his report, he provides his expert opinion on the information, analysis, and testing required for a helicopter to be approved for flight and sale to end-users. His report also addresses the opinions expressed by Mr. Heys in his expert report regarding what had to be done by Bell to obtain certification of the Bell 429 helicopter. According to Bell, this will purportedly assist the Court in considering Airbus' allegation of economic benefits allegedly enjoyed by Bell from the infringement of the 787 Patent.

Does Bell require leave to call more than five expert witnesses?

[31] Airbus submits that Bell has, in fact, already used four of five "as of right" experts under section 7 of the CEA, and that it is only entitled to have one expert heard at the continuation of the trial. Accordingly, Bell must obtain leave to have three additional experts heard. Airbus originally believed Bell had used three of its permitted five experts, as three experts were called

at trial during the liability phase. However, Bell had in fact previously served four expert reports on Airbus, even though the fourth expert, Dr. Dowell, was not called at trial. Airbus was reminded that under this Court's jurisprudence, no distinction should be drawn between the number of expert witnesses who may be called at trial and the number of expert reports that may be served in advance of trial (*Apotex v Sanofi-Aventis*, 2010 FC 1282 at para 31 [*Sanofi-Aventis*]). In the present case, Airbus only learned that Dr. Dowell would not be testifying during the trial itself, after having to review his report and prepare for his appearance at trial. Airbus submits that this Court should apply the ruling in *Sanofi-Aventis* to the present case, as it raises the same legal issue. Therefore, if leave is granted to Bell to file additional reports, it should only be allowed to adduce a single additional report, bringing its total for this litigation to six experts.

[32] Bell challenges the legal interpretation made by Airbus of section 7 of the CEA. Bell takes the position that it can use, without leave of the Court, all four proposed damages experts at the continuation of the trial, which it labels the "Damages Proceeding". It distinguishes the Damages Proceeding from the earlier phase, which dealt with patent infringement and validity, and is designated by Bell as the "Liability Proceeding". Bell submits in essence that section 7 of the CEA allows for five expert witnesses per "trial" or "proceeding", and that by calling upon the testimony of four expert witnesses at the trial of the Damages Proceeding, Bell has not surpassed this number, as these experts are relied upon in a "trial" or "proceeding" other than the Liability Proceeding. This position aligns with Bell's counsel's past practice at the Federal Court.

[33] Indeed, Bell submits that a review of the case law interpreting the purpose and scope of the prohibition against more than five experts without leave in section 7 of the CEA indicates

that it is meant to prevent abuse and delay in requiring the trier of fact to consider an overwhelming amount of evidence on a single set of issues. Bell maintains that this reasoning does not reflect the circumstances in which its expert evidence is now tendered. Rather, these four expert reports are tendered in response to the opinions of Airbus' expert Mr. Heys, which Bell asserts are in some cases based on incorrect and misleading assumptions that "appear to be either contrary to, or unsupported by, findings of fact made by Justice Martineau in the Liability Judgment". Moreover, Bell states that it has no record of Airbus communicating to Bell its narrow understanding of the number of allowable expert witnesses for the Damages Proceeding, while Airbus' objection came three weeks before trial, one week after the service of Bell's expert reports, and only after the "fresh step" of an examination for discovery of Bell's representative Mr. Robert Gardner.

[34] In particular, with respect to the scope of section 7 of the CEA, Bell states that the terms "trial" and "proceeding" have separate meanings within the CEA, with the term "proceeding" being broader than a "trial". Bell submits that even if the Damages Proceeding is heard before the same judge who was involved in the Liability Proceeding, both proceedings are not the same. For example, the parties agreed on a new court schedule, filed new pleadings which dealt with a new set of issues, served new affidavits of documents, prepared and filed new read-ins and have agreed to identify the portions of trial transcripts from the Liability Proceeding that will be referred to and adopted in the Damages Proceeding. Bell notes that the affidavit of Denise Pope lists recent examples of bifurcated proceedings in which more than five experts were relied on by a party without prior leave from the Court and without any objection.

[35] Bell also notes that based on the language of Rules 106 and 107(1), which allow one or more claims to be pursued as separate “proceedings”, the accepted Federal Court practice dictates that when a patent infringement action is bifurcated into a liability stage and a quantification of damages stage, these stages are considered as separate proceedings insofar as the application of rules of procedure are concerned (see, e.g., *JJ MacKay v Société en commandite Stationnement de Montréal*, 2005 FC 985 at para 29; *Gauthier v Produits de Sport I-Tech Inc*, 2003 FCT 468 at para 9). According to Bell, it is therefore clear that a bifurcated proceeding for the quantification of damages constitutes a discrete “proceeding” or “action at law” as understood by the courts. Thus, by intending to call four expert witnesses during the Damages Proceeding, Bell has not exceeded the number of witnesses allowed under section 7 of the CEA.

[36] Moreover, Bell submits that the prohibition against calling more than five witnesses is not meant to apply to bifurcated proceedings. Concerned with the proliferation of expert reports of “questionable value”, the limit on expert witnesses seeks to simplify the conduct of a discrete proceeding by curtailing reliance on more than five witnesses on a single set of issues. Bell submits that the entire line of jurisprudence pertaining to the interpretation and scope of section 7 of the CEA in intellectual property cases stems from determinations made in a discrete and finite type of proceeding dealing with issues of patent infringement and validity, where the “case as a whole” is restricted to these issues alone, rather than in a bifurcated damage quantification proceeding where technical patent issues are no longer in suit.

[37] Conversely, Airbus strenuously objects to the above line of reasoning which is not compatible with the scope and purpose of section 7 of the CEA, nor with the general object of

Rules 52.4, 106 and 107. Airbus states that under Bell’s interpretation, it would have the right to serve up to ten expert reports despite section 7 of the CEA’s prohibition on serving more than five expert reports in a given proceeding. Bell’s core argument that a bifurcated proceeding is actually two separate proceedings is incorrect in law because a bifurcated proceeding remains a single proceeding; severance of a proceeding is not available under Rule 107; and Bell’s core argument seeks to resurrect an interpretation of section 7 of the CEA that has been repeatedly rejected by this Court. Airbus states that the Rules define an action as a single proceeding (Rule 2: “‘action’ means a proceeding referred to in rule 169”). In this context, bifurcation involves the postponement of certain issues within the context of a single proceeding, rather than resulting in two separate proceedings. Moreover, as the Federal Court of Appeal held in *Realsearch Inc v Valon Kone Brunette Ltd.*, 2004 FCA 5 at para 10 [*Realsearch*], Rule 107 is directed at issues, not proceedings: “[t]he rule contemplates the bifurcation of an issue or issues for purposes of trial.” The situation is similar in provincial courts. The Ontario Court of Justice has repeatedly held that “[a] bifurcated proceeding is still only one proceeding” (*Children’s Aid Society of Algoma v A(B)*, [2001] OJ 2745 (OCJ) at para 21 [*Children’s Aid Society of Algoma*]).

[38] Airbus also notes that the Model Bifurcation Order refers to the “liability phase” of a single proceeding, and bifurcation under the Model Order involves the separation of the “liability issues” from “quantification issues”, whereas it is counsel for Bell who have coined the terms “liability proceeding” and “damages proceeding”. In the present case, the bifurcation order merely postpones discovery and adjudication on damages issues; it does not sever the proceeding or order a separate proceeding on damages. Indeed, Bell’s statutory interpretation arguments conflate a bifurcation of issues pursuant to Rule 107 with the severance of proceedings pursuant

to Rule 106. Rule 107 does not allow the Court to split one proceeding into two or more separate proceedings; rather, that must occur through a severance order under Rule 106. The distinction between Rules 106 and 107 is more apparent in French, as Rule 107 refers to the separate determination of issues within “une instance”, whereas Rule 106 refers to issues or causes of action continuing “en tant qu’instances distinctes”. Therefore, a Rule 107 order does not generate a new proceeding, and the bifurcation in the present case was issued under Rule 107(1).

[39] Airbus further submits that an issue-based determination of section 7 of the CEA (that is, “five experts per issue”) has repeatedly been rejected by the Federal Court and by provincial superior courts (*Altana Pharma v Novopharm*, 2007 FC 1095 at para 55 [*Novopharm*]; *Eli Lilly & Co v Apotex*, 2007 FC 1041 at paras 11, 12 and 27; *Bank of America Canada v Mutual Trust Company*, [1998] OJ 1525; *Sam v British Columbia*, 2016 BCSC 86 at para 30). According to Airbus, Bell is effectively attempting to reintroduce the per-issue interpretation of section 7 of the CEA, contrary to the weight of judicial authority. Airbus also refutes Bell’s argument that its counsel’s alleged practice of using more than five experts in bifurcated proceedings enable it to bypass the statutory leave requirement. Bell’s practices are irrelevant, as the issue in the present matter is how to interpret and apply the CEA, which is an issue of statutory interpretation to be determined by the Court. Airbus notes in this regard that the cases cited by Bell are based on consent orders and there is no indication that section 7 of the CEA or Rule 52.4 were raised by the other parties or by the Court in those cases.

[40] Finally, Airbus submits that Bell’s “fresh step” argument is invalid. Bell argues that by examining its representative Mr. Gardner on two tardily-disclosed documents, Airbus took a

“fresh step” in the litigation, waiving Bell’s obligation to comply with section 7 of the CEA. Nevertheless, the statutory leave requirement to tender more than five experts vests discretion in the Court; there is nothing that Airbus could do to remove this Court’s discretion to grant or withhold leave. Moreover, factually speaking, there was no “fresh step” in the litigation. Mr. Gardner’s examination was necessitated by Bell’s delayed disclosure and should have no bearing on the number of experts that Bell is entitled to call.

[41] In its reply to Airbus’ written submissions, Bell states that Airbus misapprehends what it calls Bell’s “core argument”, and states that Airbus’ own “English case-law cited with approval by the Federal Court of Appeal” at paragraph 6 of its submissions defines bifurcation as “separate trials of separate issues” (*Realsearch* at para 11). Bell also emphasizes that it does not seek to “resurrect” a rejected interpretation of section 7 of the CEA by adopting a “per issue” approach. The prohibition against a “per issue” approach is practically grounded and meant to avoid the multiplicity of experts on a single issue in a single proceeding, thus overwhelming the trier of fact. In this case, the Damages Proceeding requires the Court to be assisted by experts having different qualifications than the ones that testified in the Liability Proceeding. Moreover, Bell asserts that Airbus has not shown that the Federal Court or any provincial court has adopted its interpretation of section 7 of the CEA. For example, Airbus’ citation of *Children’s Aid Society of Algoma* represents a single determination by a provincial court on different issues in a different context and therefore does not stand for the broad proposition suggested by Airbus. Rather, the bifurcated Damages Proceeding leads to a “separate determination by trial”, as aligned with the understanding of the Court in *Visx Inc. v Nidek Co.*, [1998] FCJ No 811 at para 4.

[42] Moreover, Bell submits that it should not be faulted for not raising its “understanding” of section 7 of the CEA earlier, as it was unreasonable to expect that Bell should have anticipated the need to lead expert evidence from a specific number of witnesses on matters that remained opaque before service of the Heys report. Bell also objects to the fact that Airbus is now broadening the scope of its objection from two to three experts. In Airbus’ letter dated May 6, 2016, Airbus stated that Bell had relied on the testimony of three expert witnesses and that it objected to Bell having more than five – a position that was reiterated in the Trial Management Conference on May 9, 2016. Bell relied on Airbus’ initial objection and the Court’s direction during the Trial Management Conference to identify the reports for which leave is sought and to craft its submissions accordingly. As a result, Bell only sought leave to rely on the reports and testimony of Mr. Wojnar and Mr. Dupuis, with the understanding that Mr. O’Reilly and Mr. Schwartz were within the five expert limit. Airbus should not now be allowed to change its position in a prejudicial fashion.

[43] Finally, Bell contends that Airbus has not cited proper authority for the contention that Bell has already used four “as of right” experts. The *Sanofi-Aventis* decision does not stand for the proposition that Bell has already “used up” four of its five experts, as that decision was not made in the context of a bifurcated proceeding. Rather, the issue addressed therein was one of procedural unfairness if a party were allowed to serve more than five expert reports in a single proceeding and then decide at the trial of that same proceeding to call a lesser number to testify, which is not the case here. Nor has Airbus established that the circumstances are against granting leave to Bell. Airbus’ claim of irremediable prejudice is speculative and unjustified. Airbus will have had the Bell damages experts’ reports for over a month before trial, giving ample time to

consider their testimony in chief and prepare for cross-examination at trial. At the Trial Management Conference, both Airbus and Bell undertook to respect the time they were allocated at trial. Moreover, Airbus waited seven days to object to Bell's damages experts' reports. Bell also vigorously denies the allegation that it intended to gain a tactical advantage by "unilaterally" filing its reports on the Court record. Finally, Bell asserts that it has complied with all its continuing disclosure obligations.

[44] I basically endorse the reasoning and the interpretation proposed by Airbus, which is not only the correct one, but is more compatible with the purpose and object of the impugned provisions. I also agree with Airbus that, according to the jurisprudence, Bell has already used four of its five "as of right" expert witnesses, as it served four experts' reports on Airbus during the liability phase, even though the fourth expert, Dr. Dowell, was never actually called at trial.

In *Sanofi-Aventis*, this Court stated:

[31] Finally, and for the sake of clarity, the Court finds that no distinction should be drawn between the number of expert witnesses who may be called at trial and the number of expert reports that may be served in advance of trial. It would be unfair to one party if the opposing party was allowed to serve more than five (5) expert reports and subsequently decide to call a lesser number than the number of expert witnesses at trial. The opposing party would have to prepare and submit rebuttal with respect of each expert report served on the assumption that all of the experts may be called at trial. Such tactics should not be encouraged by the Court.

[45] Bell argues that this should not be considered applicable to the current case, as it was not made in the context of a bifurcated proceeding. Instead, the issue addressed in that case was related to procedural fairness. Nevertheless, I believe that similar considerations of fairness do arise in the case at hand, as Airbus was required to invest time and resources for each expert

report that was served, only becoming aware at trial that Dr. Dowell would not be called. These concerns are not alleviated simply by the fact that the present proceeding is a bifurcated one. As a result, Airbus is correct to state that Bell has already used four of five “as of right” experts.

[46] For the sake of clarity, I also agree with Airbus that Bell requires leave to call more than five expert witnesses. The Court has not yet ruled specifically on the issue of the five expert “as of right” limit in the context of a bifurcated proceeding having both liability and damages phases. Bell suggests that in its past practice involving similar litigation before the Federal Court, the Court has consistently allowed more than five expert witnesses to tender evidence in a bifurcated damages proceeding without leave. However, merely citing decisions in which experts were called without leave is not sufficient to “override” the express statutory provision; rather, the Court would need to have rendered a decision addressing this issue, which it has not yet done.

[47] Moreover, it seems quite clear that the present bifurcated proceeding constitutes a single “trial” or “proceeding” for the purposes of Rule 52.4 and section 7 of the CEA. As submitted by Airbus, the construction of Rules 106 and 107 supports this interpretation. Rule 106 deals specifically with the *severance* of proceedings, in contradistinction with Rule 107, which permits bifurcation. If Rule 107 were also interpreted as leading to severance, it would be redundant. As Airbus points out, the French version of the Rules makes this difference more apparent, as Rule 107 refers to the separate determination of issues within “une instance”, whereas Rule 106 refers to issues or causes of action continuing “en tant qu’instances distinctes”. The bifurcation in the present case was ordered under Rule 107(1), and therefore did not create a separate “proceeding” or “trial” for the purposes of section 7 of the CEA or Rule 52.4.

[48] Accepting that the Bifurcation Order did not create a separate trial or proceeding, it also appears clear that the statutory limitations apply to the total number of experts a party can call in an *action*, rather than the ability to call experts in relation to a particular *issue*. The decision of the Federal Court in *Novopharm* is clear on this point:

[44] Although the section 7 interpretation issues have most recently arisen in this Court in the context of NOC proceedings or other intellectual property cases, its application is much more broadly based. The problems inherent in the NOC process cannot drive the interpretation, although they underscore the mischief to which section 7 was directed. Other cases of a civil and criminal nature can have just as difficult and multi-faceted issues and sub-issues for which opinion evidence seems to be ripe.

[...]

[55] As the purpose of section 7 is, at least in part, to prevent abuse, trouble, expense and delay caused by excessive use of expert evidence, it is more consistent with that purpose to interpret the restriction to apply to the case as a whole rather than to each and every issue which may arise. In fact, an interpretation in favour of “by issue” creates the very mischief which the provision was intended to cure.

[Emphasis added]

[49] In light of this explicit statement, it is difficult to understand Bell’s assertion that Airbus has not shown that the Federal Court has adopted its interpretation of section 7 of the CEA. The fact that the proceedings have been bifurcated into two phases does not negate the underlying concern animating section 7 of the CEA; rather, the concerns for efficiency and cost that motivate bifurcation are best served by rejecting the “per issue” interpretation of section 7 of the CEA, and applying the five expert limit to the entire case.

If leave is required, should it be granted?

[50] In the alternative, if the Court is not satisfied that Bell may rely on up to five expert witnesses in the Damages Proceeding without leave, Bell seeks leave to rely upon the expert reports and testimony of Mr. Wojnar and Mr. Dupuis at trial, with the understanding that the reports of Mr. O'Reilly and Mr. Schwartz are within the five expert limit prescribed by the most restrictive interpretation of section 7 of the CEA. In light of Mr. Heys' testimony, which Bell asserts often appears to go against the findings of this Court during the Liability Proceeding, the number and complexity of issues, as well as the public significance of this litigation and the nominal cost of tendering the evidence compared to the unprecedented amounts claimed by Airbus, leave to admit the two additional experts' evidence is justified.

[51] I will not repeat the arguments made by Bell and Airbus which I have already summarized above in dealing with the scope of section 7 of the CEA, and which have been reasserted by the parties in the context of the granting or denying of leave. This includes Bell's submissions in reply as well.

[52] Rule 52.4 codifies the application of the parameters of section 7 of the CEA, providing the Court with guidance on the factors justifying leave to call more than five expert witnesses. As explained in *Altana Pharma Inc v Novopharm*, 2007 FC 637 at para 37, a moving party must show that a greater number of experts is necessary for the determination of the issues, that there are no unnecessary duplications in the evidence, and that the additional strain on the time and resources of the Court and the parties is justified. Bell maintains that in the Damages Proceeding, the case it has to meet is to provide evidence on the determination of a fair and rational quantum

of compensatory and punitive damages from the infringement by Bell of 21 Legacy gears. Bell asserts that the expert evidence sought to be adduced pertains to some of Airbus' incorrect assumptions that will have an impact on this calculation, is not duplicative, and will not add additional strain on the time and resources of the Court and parties.

[53] In particular, Bell asserts that the number and complexity of issues in dispute justify leave. Mr. Dupuis discusses the different approaches for the determination of royalties and their applicability to the present case. He determines that the cost and market approach are applicable, and proceeds to calculate a reasonable royalty following these two approaches. His report is not duplicative of the report of Mr. Schwartz, and Bell states that the Court will benefit from the different perspective on the calculation of a reasonable royalty. Mr. Wojnar will provide a neutral expert opinion on the certification process of the Bell 429 helicopter to allow the Court to assess Airbus' allegation of economic benefits, and will also respond to Mr. Heys' incorrect assumptions regarding benefits allegedly enjoyed by Bell during the certification process of the Bell 429.

[54] Bell also notes that Airbus objects to the reports of Mr. Wojnar and Mr. O'Reilly on the basis that they do not contain proper expert opinion. Bell states that if leave to file Mr. Wojnar's report is refused and Mr. Wojnar instead testifies as a fact witness, Airbus cannot then make an objection at trial that they are providing opinion evidence when discussing the contents of the report.

[55] Furthermore, Bell states that the nature of the litigation, its public significance and the need to clarify the law also justify leave. The decision in the Liability Proceeding remains the leading statement on the law on punitive damages for patent infringement, and the judgment from the Damages Proceeding will likely have a similar precedential value, clarifying the law in this respect. Fairness also dictates that Bell should be granted leave to call more witnesses, as it has already experienced significant stigma for being found liable for punitive damages.

[56] Finally, Bell states that the amount in dispute greatly exceeds the expense involved in calling two additional expert witnesses.

[57] On the other hand, Airbus submits that leave should be denied to Bell, based on the factors listed in Rule 52.4, as well as the surrounding circumstances. The test for leave to call more than five experts is one of necessity (*Sanofi-Aventis* at para 26; *Eli Lilly & Co v Apotex*, 2007 FC 1041 at para 30). Does the party seeking leave require the additional experts in order to make its case? Furthermore, the jurisprudence of this Court has established a high threshold to meet this requirement (*Sanofi-Aventis* at para 20). Taking into consideration the factors listed in Rule 52.4, Airbus submits that Bell has failed to meet this high threshold.

[58] While Airbus agrees that this is an important and high-profile case, it asserts that there is no logical or causal connection between the nature and public significance of the trial, and the expert evidence that Bell wishes to tender. For example, while the 2012 liability decision put the public on notice about what type of conduct will attract punitive damages for patent infringement, the damages decision will only quantify the extent of the liability. Nor will the

proposed expert evidence address issues of public significance. Airbus points out that Mr. Wojnar's evidence concerns a narrow factual issue of no public interest or broader legal significance, while Mr. Dupuis' report is a standard reasonable royalty analysis of the kind routinely submitted in patent litigation and is largely duplicative of the analysis contained in Mr. Schwartz's report. Moreover, contrary to Bell's assertion that the judgment at the end of the damages phase will "clarify the law" regarding punitive damages for patent infringement, this submission misapprehends the nature of punitive damages and their quantification. Rather, the same rules apply for all punitive damages claims, regardless of the underlying cause of action. Since *Whiten v Pilot Insurance Co*, 2002 SCC 18, special rules for punitive damages in cases of patent infringement are precluded. In addition, the quantification of damages is essentially a question of fact. As such, quantification in this trial will not serve to "clarify the law".

[59] In particular, with respect to the number, complexity or technical nature of the issues, Airbus states that there are in fact only two issues in play for the damages phase of this proceeding: the determination of a reasonable royalty, and the quantification of punitive damages. Airbus notes that it was able to address these questions with a single expert witness, and that the issues are neither complex nor technical in nature. Airbus notes that Bell itself states that there are no longer any "technical patent issues" in suit. In addition, Airbus notes that two of Bell's damages experts' reports address non-technical factual issues, and therefore do not constitute a proper subject of expert opinion. For example, Mr. Wojnar's report will address "Mr. Heys' incorrect assumptions" about how Bell obtained certification for the 429 helicopter, yet the correctness of these assumptions is a factual issue and not a matter for which expert opinion is required. Airbus further submits that the high monetary stakes of this litigation cannot be

equated with high complexity. With respect to the expense involved in calling additional expert witnesses, Airbus states that the consideration pursuant to Rule 52.4(1)(c) is not whether the amount at stake exceeds the cost of the additional experts, but rather, requires a consideration of proportionality, both between the parties and with respect to the Court. In the present case, Bell's additional experts impose considerable costs on the Court and on Airbus. Counsel for Airbus must review these reports in detail, prepare expert fact witnesses to rebut the extra reports, and prepare cross-examination. In addition, the Court is faced with hundreds of pages of additional testimony to review before the trial, as well as hours of additional expert testimony to consider during trial, and increased drafting time when the testimony must be incorporated into the Court's reasons. In addition, the two reports that are subject to objections concerning their authors' expert qualification will require a *voir dire* at trial before they can be admitted.

[60] Airbus also submits that Bell's unilateral decision to file the expert reports into the Court's record was an improper attempt to present Airbus and the Court with a *fait accompli*, and as a result, these factors should weigh against leave, not for it. Finally, Airbus notes that there are other relevant matters that the Court should consider, including experience in similar trials showing that five experts is sufficient. Airbus is satisfied that it can make out its case with only one expert witness on the issue of damages, despite the fact that it is Airbus, and not Bell, who bears the burden of proof. Bell should not require four times as many experts when it does not even bear the burden of proof. Airbus also notes that Bell waited until the last moment to communicate its intent to rely on more than five experts in the proceeding, depriving Airbus of any chance to respond. Airbus cites *Sanofi-Aventis*, in which the Court held that a "significant" factor in denying leave to file additional experts was that Apotex's notice that it intended to serve

more than five reports was filed in an “untimely” fashion, even though it occurred six months before trial. In the present case, the notice was served only one month before trial.

[61] Finally, Airbus states the following additional factors in favour of denial of leave:

- If Bell is allowed to introduce what is effectively fact evidence from Mr. Wojnar and Mr. O’Reilly in the guise of expert reports, Bell will gain a tactical advantage at trial, since it will be able to economize its own trial time by adducing significant parts of its case in chief through written reports rather than oral testimony, contrary to Rule 282(1).
- Given the 10-day duration of the trial, allowing Bell to submit four expert reports risks delay and time overruns.
- Bell is seeking leave to call evidence of eight experts. This Court has previously held that nine experts was a “substantial and onerous” amount of evidence that would unduly tax the resources of the parties and the judiciary (*Novopharm* at para 59).
- Bell remains free to call Mr. Wojnar and Mr. O’Reilly as fact witnesses.
- It will still be open to Bell to seek leave to call additional experts at a later time should the Court feel that it requires additional expert guidance.

[62] I have considered Bell’s and Airbus’ respective submissions (including Bell’s reply) in light of Rule 52.4(2), which states that in deciding whether to grant leave to a party to call more than five expert witnesses, the Court shall consider all relevant matters, including the following factors: (a) the nature of the litigation, its public significance and any need to clarify the law; (b) the number, complexity or technical nature of the issues in dispute; and (c) the likely expense involved in calling the expert witnesses in relation to the amount in dispute in the proceeding. I

have found the additional factors identified by Airbus also relevant and I have kept in mind that the Court's exercise of its discretion, particularly on the eve of the upcoming trial, must "secure the just, most expeditious and least expensive determination of every proceeding on its merits" (Rule 3). This naturally includes the upcoming trial, which is to be exclusively focused on the quantum of compensatory and punitive damages.

[63] To be fair and equitable to the parties, the result achieved by the leave order must be proportionate, strike a proper balance and serve the best interests of justice in assuring the prompt conduct of the trial at an efficient cost, considering the number, complexity or technical nature of the issues in dispute. Accordingly, I have decided to allow Bell to rely upon the two expert reports and testimonies of Mr. O'Reilly and Mr. Schwartz (one expert above the five expert limit) and to refuse leave to have Mr. Dupuis and Mr. Wojnar testify in this proceeding as two additional experts on the issue of damages (unless Bell decides to substitute either of them for Mr. O'Reilly or Mr. Schwartz).

[64] In particular, I have kept in mind that the bar for granting leave for additional expert witnesses has been held by this Court to be high. As Justice Boivin stated in *Sanofi-Aventis*:

[20] In light of the jurisprudence of this Court with regard to section 7 of the *Canada Evidence Act*, Rule 52.4 may be viewed as a codification of the parameters regarding the application of section 7 of the *Canada Evidence Act*. Further, considering the concern over the proliferation of experts as expressed by the Supreme Court of Canada in *R. v D.D.*, 2000 SCC 43 (CanLII), [2000] 2 SCR 275, as well as by this Court, Rule 52.4 must be viewed as a provision designed to safeguard against the undue expansion of the number of expert witnesses. The burden imposed on the party seeking to call more than five (5) expert witnesses is thus considerable as the factors set forth under Rule 52.4 impose a

high threshold. In other words, leave under Rule 52.4 shall not be granted by this Court lightly.

[Emphasis added]

[65] I am also cognisant of the fact that the Supreme Court of Canada has also stated in *R v Mohan*, [1994] 2 SCR 9 [*Mohan*] that expert evidence must be necessary – that is, it must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature; it must provide information which is likely to be outside the experience and knowledge of a judge or jury; and the subject matter of the inquiry must be such that ordinary people are unlikely to form a correct judgement about it, if unassisted by persons with special knowledge (see: *R v K(A)*, 1999 CanLII 3793 (ON CA) at para 91). In the present case, Bell has simply not demonstrated to the satisfaction of the Court that it has met this high threshold for justifying leave, and at the risk of repeating myself, I basically endorse the arguments and reasoning advanced by Airbus.

[66] To make it clearer for the reader of these reasons, while the present case remains an important one for the law of patents in Canada, it is the liability phase of the proceeding that put the public on notice with respect to punitive damages for patent infringement (see the extracts quoted earlier of the January 30, 2012 judgment and the references to the judgment of the Federal Court of Appeal of September 24, 2013). By contrast, at this stage of the proceeding, the decision on the quantification of damages is largely a question of fact and will only determine the extent of this liability, rather than helping to “clarify” the law in this regard. Nor does the number, complexity or technical nature of the issues in this case justify granting leave to Bell for two additional expert witnesses on damages (Mr. Dupuis and Mr. Wojnar) over and above the

one additional expert allowed by the Court (Mr. O'Reilly or Mr. Schwartz). In fact, there are only two issues that must be decided: the determination of a reasonable royalty for the purposes of compensatory damages, and the quantification of punitive damages – the latter issue falling mostly within the Court's own expertise and evaluation, considering the evidence of intentional infringement already accepted by the Court and the particular circumstances of this case which may impact the quantification of damages. Taking account of the principles enunciated by the Supreme Court in *Mohan*, to be deemed "necessary" in this context, expert opinion on these issues must be outside the experience and knowledge of the Court – for example, on issues of economics and accounting, particularly in the aeronautics industry. In this regard, several issues that may have a direct impact on the quantification of damages in this case have already been dealt with in the liability phase. For example, evidence on the issue of the certification process, which is addressed by the Wojnar report, was already heard during the liability phase of the trial.

[67] Moreover, as Airbus notes, two of the four proposed expert reports tendered by Bell address non-technical factual issues. For example, Mr. Wojnar's report will address "Mr. Heys' incorrect assumptions" about how Bell obtained certification for the 429 helicopter. Yet the correctness of these assumptions is factual in nature and therefore not an appropriate matter for expert opinion. I also agree with Airbus that the consideration of the likely expense involved in calling the expert witnesses in relation to the amount in dispute in the proceeding requires a broader consideration of proportionality between the parties and the Court. Nor should the high monetary values being claimed be confused with the complexity of the issues to be decided. To this end, the time and resources of the Court required to deal with additional expert witnesses should be taken into consideration, as well as the time and resources of Airbus. It should also be

noted that for this phase of the trial, Airbus has only tendered one expert witness compared to Bell's four, in spite of the fact that Airbus bears the burden of proof. Finally, there is a real concern that despite the assurances of Bell's counsel, granting leave for Bell to call additional expert witnesses would risk overrunning the time allocated for the trial.

[68] In conclusion, Bell has already used in this proceeding four of its five "as of right" expert witnesses; this leaves one expert "as of right". I note that on the issue of the quantum of damages, Airbus has managed to present one single expert, Mr. Heys, while Bell's plan at the continuation of the trial is to rely on and present four experts on the damages issue and in rebuttal of the Heys report. Taking all of the relevant factors into consideration, I do not believe that Bell's submissions with respect to tendering additional expert witnesses are sufficiently convincing to overcome the high threshold for this Court to grant leave pursuant to Rule 52.4. Nevertheless, given the initial failure of Airbus to raise the issue that Bell had used four, rather than three, of its expert witnesses during the liability phase of the trial, in all fairness, Bell should be allowed to present and rely upon the expert reports and the testimonies of Mr. O'Reilly and Mr. Schwartz (which is one expert above the five expert limit), unless it decides to substitute any of them by Mr. Dupuis and/or Mr. Wojnar, and as long as Bell advises Airbus and the Court sufficiently in advance of any such change. All objections of the parties concerning the qualifications of the experts and the objectionable content of parts of their reports, and all other objections left undecided by the following order may be presented by counsel at trial.

[69] In view of the result, costs are in favour of Airbus.

ORDER

THIS COURT ORDERS that the motion in writing made by Bell for a direction that it is entitled to rely on and present at the upcoming trial on the issue of the quantum of damages the reports and the testimonies of Mr. O'Reilly, Mr. Schwartz, Mr. Dupuis and Mr. Wojnar, or alternatively, for an order granting leave to present and rely upon the expert reports of Mr. Dupuis and Mr. Wojnar and their testimony, with the understanding that Mr. O'Reilly and Mr. Schwartz are included within their five "as of right" expert witnesses, is denied. While Bell has already used in the proceeding four of five "as of right" experts under section 7 of the *Canada Evidence Act*, Bell is allowed to have both Mr. O'Reilly and Mr. Schwartz present their reports and be heard as expert witnesses at the continuation of the trial (one additional expert above the five expert limit), unless Bell decides to substitute any of them for Mr. Dupuis and/or Mr. Wojnar, and as long as Bell advises Airbus and the Court sufficiently in advance of any such change. All objections of the parties concerning the qualifications of the experts and the objectionable content of parts of their reports, and all other objections left undecided by the present order may be presented by counsel at trial. Costs of the present motion are in favour of Airbus.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-737-08

STYLE OF CAUSE: AIRBUS HELICOPTERS v BELL HELICOPTER
TEXTRON CANADA LIMITÉE

MOTION IN WRITING CONSIDERED AT MONTREAL, QUEBEC

ORDER AND REASONS: MARTINEAU J.

DATED: MAY 27, 2016

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