

Federal Court



Cour fédérale

Date: 20201223

Docket: T-151-16

Citation: 2020 FC 1185

Ottawa, Ontario, December 23, 2020

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

**ANGELCARE DEVELOPMENT INC.
AND
EDGEWELL PERSONAL CARE CANADA ULC
AND
PLAYTEX PRODUCTS, LLC
AND
ANGELCARE CANADA INC.**

**Plaintiffs/
Defendants by counterclaim**

and

**MUNCHKIN, INC.
AND
MUNCHKIN BABY CANADA, LTD.**

**Defendants/
Plaintiffs by counterclaim**

JUDGMENT AND REASONS

[1] This is a motion brought by the Plaintiffs/Defendants by counterclaim (hereinafter “Angelcare”) seeking leave to serve the Reply Report of Mr. Michel Morelli, dated October 27, 2020.

[2] The motion is in relation with an action for patent infringement. The parties are competitors on the baby care products market. In the case at hand, the dispute concerns six Canadian patents held by Angelcare for diaper pails and “diaper pail cassettes”. As has become customary, the Defendants not only deny infringement but they counterclaim that the patents-in-suit are invalid for a variety of reasons. The trial is set to begin on January 25, 2021, for a period of six weeks.

[3] Expert reports relevant to the action and the counterclaim were dated August 14, 2020 and October 2, 2020:

- Expert report in chief of Michel Morelli: August 14, 2020 (infringement);
- Expert report in chief of Kevin Bailey: August 14, 2020 (validity);
- Expert report in response of Michel Morelli: October 2, 2020 (on validity);
- Expert report in response of Kevin Bailey: October 2, 2020 (on infringement).

[4] Mr. Michel Morelli seeks to reply to Mr. Bailey’s response with respect to the violation of the various patents-in-suit. He states at paragraph 4 of his Report in reply that he was instructed to identify the parts of Mr. Bailey’s response report with which he agrees and those with which he disagrees. He is to indicate whether his opinion has changed or remained the same.

I. Introduction

[5] The parties attended a motion hearing on December 8th, 2020 to argue the Plaintiffs' request for leave to file reply expert evidence in the form of a report written by expert witness Michel Morelli. The Defendants submit that this report does not constitute proper reply, stating that it "is either duplicative of opinions already expressed, or properly dealt with by cross-examination or argument ... Angelcare is simply attempting to reiterate its evidence, have the final words or worse, split its case" (Defendants' Written Representations, para 4). For the reasons that follow, I largely agree with the Defendants' position. I first conduct a brief overview of the recent jurisprudence that informs the scope of reply evidence and the factors the Court may use in determining whether to admit such evidence. I then turn to the impugned Morelli Reply Report, proceeding section by section to explain why the contents extend beyond the scope of what the current jurisprudence explains is the proper scope for reply evidence.

II. The Legal Framework: Recent Jurisprudence on Reply Evidence

[6] Paragraph 274(c) of the *Federal Courts Rules*, SOR/98-106 [the Rules] provides the parties with the possibility to file reply evidence during a trial.

274 (1) Subject to subsection (2), at the trial of an action, unless the Court directs otherwise,

...

(c) when the defendant's evidence is concluded, the plaintiff may adduce reply evidence.

274 (1) Sous réserve du paragraphe (2), à l'instruction d'une action, sauf directives contraires de la Cour :

[...]

c) après que le défendeur a présenté sa preuve, le demandeur peut présenter une contre-preuve.

[7] However, as noted by Justice Pelletier in *Halford v Seed Hawk Inc.*, 2003 FCT 141 [*Halford*] at paragraph 7, “this does not define the scope of reply evidence. It simply provides that a plaintiff may lead such evidence as is properly within the scope of reply evidence”.

[8] The Court grapples with the scope of reply evidence in *Halford*, explaining the general principle that a party must exhaust the evidence they wish to present in the first instance of its presentation (para 13). This means that parties cannot engage in “case splitting”, whereby a party presents evidence in the first instance, waits to hear the adverse party’s evidence, and then responds with additional evidence that simply bolsters their initial position, accounting for any weaknesses that the adverse party pointed out (para 13).

[9] The Supreme Court of Canada warned against case splitting and justified the rationale for the rule against it in *R. v Krause*, 1986 CanLII 39 (SCC), [1986] 2 SCR 466, as applicable in both the criminal and civil contexts. At page 473, Justice McIntyre wrote:

At the outset, it may be observed that the law relating to the calling of rebuttal evidence in criminal cases derived originally from, and remains generally consistent with, the rules of law and practice governing the procedures followed in civil and criminal trials. The general rule is that the Crown, or in civil matters the plaintiff, will not be allowed to split its case. The Crown or the plaintiff must produce and enter in its own case all the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to all the issues raised in the pleadings; in a criminal case the indictment and any particulars: see *R. v Bruno* (1975), 1975 CanLII 1240 (ON CA), 27 C.C.C. (2d) 318 (Ont. C.A.), *per* Mackinnon J.A., at p. 320, and for a civil case see: *Allcock Laight & Westwood Ltd. v. Patten, Bernard and Dynamic Displays Ltd.*, 1966 CanLII 282 (ON CA), [1967] 1 O.R. 18 (Ont. C.A.), *per* Schroeder J.A., at pp. 21-22. This rule prevents unfair surprise, prejudice and confusion which could result if the Crown or the plaintiff were allowed to split its case, that is, to put in part of its evidence--as much as it deemed necessary at the outset--then to close the case and after the defence is

complete to add further evidence to bolster the position originally advanced. The underlying reason for this rule is that the defendant or the accused is entitled at the close of the Crown's case to have before it the full case for the Crown so that it is known from the outset what must be met in response.

[My emphasis.]

[10] From the principle against case splitting, Justice Pelletier in *Halford* draws a general rule on the scope of reply evidence, stating at paragraph 14 that:

14. ... evidence which simply confirms or repeats evidence given in chief is not to be allowed as reply evidence. It must add something new. But since the plaintiff is not allowed to split its case, that something new must be evidence which was not part of its case in chief. That can only leave evidence relating to matters arising in defence which were not raised in the plaintiff's case in chief. ...

[My emphasis.]

The general rule against case splitting means the party must advance all the evidence they want to bring forward in the first instance; they will not be allowed to make up for their failure to do so in their reply. That suggests that reply evidence would be short and to the point.

[11] Justice Pelletier accordingly states four principles at paragraph 15, which have been repeated often in this Court's case law, that are to guide the decision on the appropriate scope of reply evidence, assisting the Court in differentiating what was or ought to have been part of the case in chief from what is new and thus properly submitted on reply :

1- Evidence which is simply confirmatory of evidence already before the court is not be allowed.

2- Evidence which is directed to a matter raised for the first time in cross examination and which ought to have been part of the plaintiff's case in chief is not be allowed. Any other new matter

relevant to a matter in issue, and not simply for the purpose of contradicting a defence witness, may be allowed.

3- Evidence which is simply a rebuttal of evidence led as part of the defence case and which could have been led in chief is not to be admitted.

To these principles, I add one further. Evidence which is excluded because it should have been led as part of the plaintiffs' case in chief will be examined to determine if it should be admitted in the exercise of my discretion.

[12] These four principles articulated in *Halford* have become the factors for determining the scope of reply evidence, with recent citation and application by Justice Fothergrill in *Swist v Meg Energy Corp*, 2020 FC 759 [*Swist*] at paragraph 9, by Justice Grammond in *Bauer Hockey Ltd. v Sport Maska Inc.*, 2020 FC 212 [*Bauer*] at paragraph 15 and by Justice Manson in *Janssen Inc. v Teva Canada Limited*, 2019 FC 1309 [*Janssen*] at paragraph 16. In *Janssen*, Justice Manson makes clear that these factors properly apply to expert reports as well (para 17).

[13] These recent cases have also clarified what may be properly submitted as reply evidence and what might be better addressed in argument or on cross-examination. In *Janssen*, Justice Manson explains at paragraph 17 that

[17] ... (m)ere disagreement with statements made by another witness is not proper subject matter for reply evidence. Disagreements between experts can be addressed by cross-examination.

Justice Manson, in applying said principles, denies the admissibility of expert evidence in reply which amounts to correcting statements adduced in the respondent's expert report or confirming the expert evidence submitted in the case in chief (see, for example, paras 30-34). Often, these

disagreements stemmed from conflicting accounts of facts that would inform legal principles, such as the POSITA or the inventive concept, as well as the construction of claims or particular terms used therein (see, for example, paras 41, 46-47). An expert's attempts to clarify, in a reply report, the opposing expert's misapprehension or mischaracterization of his or her opinion was held to constitute improper reply in *Swist*, at paragraph 34. It actually boils down more often than not to having a report that is argumentative instead of being truly reply evidence.

[14] In *Bauer*, Justice Grammond echoes Justice Manson's notion in *Janssen* that reply evidence should not be admitted in order to raise disagreements between experts. He writes at paragraph 16 that parties should not seek to admit reply evidence "simply to emphasize perceived shortcomings in the other party's expert evidence". Like Justice Manson in *Janssen*, Justice Grammond states that there are other, better suited, procedural vehicles for disagreements and perceived shortcomings to be brought to the court's attention, namely during cross-examination or in argument (para 16). Indeed, Justice Grammond drives home the principle that the purpose of reply evidence "is to enable the plaintiff to respond to unanticipated issues that arise from the defendant's evidence" and that it should therefore be limited in scope (para 12).

[15] To further guide the Court in determining the permissible scope of reply evidence in the case at hand, Justice Stratas in *Amgen Canada Inc. v Apotex Inc.*, 2016 FCA 121 [*Amgen*] advocates an approach that is grounded in asking whether permitting the evidence would be in the interests of justice (para 13). He suggests that consideration of procedural fairness and the need to make a proper determination may support in some circumstances to allow reply evidence. However, the comments in *Amgen* are of limited utility given the facts in that case.

These may be used as general guidance in spite of the fact that the *Amgen* case dealt with a motion in writing. The case was about a mootness motion brought by Apotex with respect to an appeal. Amgen had raised in response an issue which, if not addressed by Apotex, may get the Court of Appeal to dismiss its mootness motion. As the Court noted, reply evidence is not provided for in the Rules with respect to a motion in writing. Amgen was arguing that it is rules concerning fresh evidence on appeal that ought to govern, a test notoriously hard to meet. The Court was therefore concerned it may be deprived of evidence that may assist in disposing of a motion in writing. It may be necessary for a court to allow reply evidence where the motion is in writing; there is no trial to supplement the record. But the filing of reply evidence on such a motion is permitted only in “unusual circumstances” where procedural or substantive considerations such as these are live: ... But caution must be exercised” (para 11). Evidently, the discretion to be exercised in *Amgen* is in the nature of a safety valve. Here is how Stratas J.A. describes both considerations at paragraph 10:

- *Procedural fairness*. Sometimes a party has to be given the opportunity to file evidence on an issue that it could not practically or meaningfully address earlier.
- *The need to make a proper determination*. Where an issue in the motion might determine its outcome, sometimes the Court must allow additional evidence to be filed so that it can decide that issue on the basis of all proper and relevant facts, not just one side’s version of the facts.

[Italics in Original]

Justice Stratas puts forward three factors at paragraph 13 to assist in determining whether reply evidence ought to be admitted on this narrow basis:

- the evidence will assist the court (in particular, its relevance and sufficient probative value);

- admitting the evidence will cause substantial or serious prejudice to the other side;
- the evidence was available when the party filed its affidavits or it could have been discovered with the exercise of due diligence.

These considerations are also discussed by Justice Fothergill in *Swist* at paragraph 10. To this he adds considerations of the relevance of the impugned evidence, whether it might unduly delay proceedings, and “the recognition that parties cannot be expected to anticipate every argument” (para 11).

[16] Furthermore, Justice Fothergill explains that it is up to the Court’s discretion to admit evidence and that these above-listed factors might be weighed on a case-by-case basis (*Swist*, para 11). Exemplary of this discretion, Justice Grammond in *Bauer* used these factors to admit some reply reports even in spite of potential breach of the rules of reply evidence, noting at paragraph 29 that the reply report at issue was useful in comparing the parties’ positions and its admittance did not cause any prejudice to the opposing party. Justice Fothergill in *Swist*, in a similarly flexible approach, determined that the reply evidence is inadmissible but stated that he would remain open to reconsidering the scope of reply evidence as the trial unfolded (para 16). The Court’s discretion accordingly plays a role in ensuring that it has what it needs to make the necessary determinations in the case before it, without being unduly limited by technical rules on reply evidence admissibility. Will the evidence assist the Court or are they merely a rehash of the evidence already offered?

[17] I note that Justice Grammond accepts that the adversarial principle requires to give the opportunity to address further evidence, but only to the extent needed to address a limited purpose of fostering trial fairness, ensuring that the case to meet is known, but without “an endless alternation between the parties in adducing evidence” (para 13). In that vein, reply reports are not “to simply emphasize shortcomings in the other party’s expert evidence. Those shortcomings may be explored during cross-examination or highlighted in argument” (para 16). A reply report is not meant to afford a plaintiff an opportunity to have the last word.

[18] During the hearing of the motion to allow reply evidence from Mr. Morelli, I inquired of counsel for Munchkin whether at trial there will be an objection raised when the witness, Mr. Morelli, will testify as to what was raised by Mr. Bailey in his response. Counsel responded that there will not be an objection. That is in line with the position taken by Munchkin that there were no unanticipated issues in its responding expert report. It would be surprising, in such circumstances, if evidence from Mr. Morelli should not be admissible where he was to testify as to his report and the response provided by Mr. Bailey.

III. What is not in issue

[19] It is understood that Angelcare, through its expert’s concession in his Reply Report at paragraphs 8, 15 to 22 and 57 to 60, does not assert any more claim one of Patent 2,686,128 (the 128 Patent) for some of the allegedly infringing products of the Defendants. Thus, Munchkin products of the second, third and fourth generations do not infringe claim 1 of the 128 Patent and, by extension, claims 2, 20 and 21 (Reply Report of Michel Morelli dated October 27, 2020).

[20] Similarly, a number of clerical errors to Mr. Morelli's second report were identified. They are listed in his report of October 27, at paragraph 81. Although it is doubtful that they can be part of a reply report, counsel for both parties were in agreement that they constitute mistakes that should easily be corrected. I reproduce for ease of reference paragraph 81 of Mr. Morelli's report:

81. Mon Deuxième Rapport contient quelques erreurs cléricales de références croisées à certains paragraphes, qui doivent être corrigées ainsi :

(a) Au paragraphe 67, la référence au paragraphe 320 de mon Premier Rapport devrait être une référence aux paragraphes 323 et 324 de mon Premier Rapport.

(b) Aux sous-paragraphes 192(d)(1) et (2), la référence au paragraphe 224(c) du premier rapport de M. Bailey devrait être une référence au paragraphe 244(c) du premier rapport de M. Bailey.

(c) Au paragraphe 280, la référence aux paragraphes 263 et 264 de mon Deuxième Rapport devrait être référence aux paragraphes 263 à 267 de mon Deuxième Rapport.

(d) Au paragraphe 309, la référence au paragraphe (b) de mon Deuxième Rapport devrait être une référence au paragraphe 290(b) de mon Deuxième Rapport.

(e) Au paragraphe 404, la référence au paragraphe 401 de mon Deuxième Rapport devrait plutôt être une référence aux paragraphes 59 et 239 de mon Premier rapport, et au paragraphe 79 de mon Deuxième Rapport.

[Underlining in Original.]

IV. The Expert Reply Evidence at Issue

[21] The following categories of reply evidence submitted by the Plaintiffs in the Morelli Reply Report were raised as problematic at paragraph 16 of the Defendants' responding motion record :

1. General impressions of Mr. Bailey's Responding Report and an overview of some findings in response to that report at paragraphs 6 to 14 of the Morelli Reply Report;
2. Interpretations of the terms "gap", "cover", "alignment", "clearance", and "closing mechanism" at paragraphs 15-35 and 40-56 of the Morelli Reply Report;
3. General Comments about the Angelcare Patents at paragraphs 36-39 of the Morelli Reply Report;
4. Infringement analyses of all the patents in issue before the Court at paragraphs 54 to 80 of the Morelli Reply Report.

As can be readily seen, the Defendants object for all intents and purposes to the whole of the Report offered by Mr. Morelli.

[22] The Defendants argue that these various parts of a report in reply to the response offered by Mr. Bailey cannot be a valid reply. They are said to be argumentative and repetitive of the evidence already offered by Mr. Morelli, without responding to new unanticipated issues. In the view of the Defendants, the Report expands on the voluminous opinion reports of the expert offered by Angelcare. As such, the interests of justice are not served if the Report is admitted into evidence as a reply report, as the reply provides no further assistance to the Court. Reply evidence is not meant to gain the last word by seeking to rebut expert opinions and therefore confirm evidence already provided.

[23] Angelcare takes a more expansive view of the ability to offer evidence in the form of a report in reply. In a nutshell, if something is raised in Mr. Bailey's response, Mr. Morelli is

entitled to offer a reply. Although the Plaintiffs concede that reply evidence is appropriate only in certain circumstances, they disagree with the Defendants on what those circumstances may be.

[24] The Plaintiffs argue that the four areas already identified (at para 21) should be the subject of an appropriate reply report.

V. Analysis and discussion

[25] It seems to me that an appropriate starting point may well be the conclusion in the *Janssen* case where my colleague Mr. Justice Michael Manson comments on the need to apply with a measure of rigour the guidance concerning reply evidence:

[57] This Court cannot allow case-splitting or improper reply evidence seeking to bolster a party's evidence in chief or merely rebut an opposing party's evidence, particularly in light of the "litigation culture change prescribed by the Supreme Court of Canada in *Hryniak v Maudlin*, 2014 SCC 7" (*Amgen* at para 24).

In that case, the Court repeatedly found that the alleged reply by experts was rather "mere rebuttal or disagreement", "the correctness of statements could be addressed during cross-examination", "attempts to contradict and then amplify one's own report", "affirming one's own initial report while attempting to contradict the other expert's opinion".

[26] In *Bauer*, Mr. Justice Sébastien Grammond agreed with this theme and insisted, as previously noted, that a motion to file an expert witness' reply report should not be brought "simply to emphasize perceived shortcomings in the other party's expert evidence. Those

shortcomings may be explored during cross-examination or highlighted in argument.

Unnecessary motions simply hamper the efficient resolution of the case” (para 16).

[27] The same kind of findings were made in *Swist*. Moreover, I would echo the comment made by Mr. Justice Simon Fothergill as I find his caution to be applicable here:

[15] Regrettably, in the analysis that follows I conclude that most of the expert evidence the parties seek to adduce in reply restates opinions previously expressed, attempts to clarify misapprehensions, expresses mere disagreement with opposing experts, or discusses matters that should have been anticipated and addressed in the responding reports. Some of the proposed expert reply evidence also raises the risk of case-splitting.

[16] Given the limited time available, the formidable length of the expert reports, the technical nature of the evidence, and my gatekeeping role as described in *Hryniak*, it is possible that I have applied an overly-broad brush. I remain open to reconsidering the scope of reply evidence as the trial unfolds, and as circumstances may warrant.

[28] In my view, the Reply Report reads largely as an opportunity seized by the expert to re-assert the views expressed before. Rebutting the opinions of other experts and thus confirming views already expressed is not what reply evidence is about. Such an approach does not provide assistance to the Court and does not advance the interests of justice, especially in the context of the litigation culture change advocated by senior courts.

[29] The Plaintiffs wish to re-assert their opinion on the construction of certain claimed terms. It is argued that the expert for Munchkin is not consistent. This should be left to cross-examination, if there is in fact inconsistencies, and arguments. Mr. Morelli should be allowed to explain why his construction should stand. The Plaintiffs also wish to respond to

mischaracterizations of their expert's opinion. A witness should be allowed to deal with that at trial. When read as a whole, the Reply Report is mostly about seeking to have the last word. It reads like a general response to the Bailey Responding Report instead of being a true reply which identifies clearly issues that which could not have been anticipated (*Bauer*, para 21). This kind of approach can only be an invitation to allow the other side to offer its own view of the reply evidence.

A. *General impressions of Mr. Bailey's Responding Report and an overview of some findings in response to that report at paragraphs 6 to 14 of the Morelli Reply Report*

[30] These general impressions, save for paragraph 8, are improper reply. The allegations of confusion, imprecision and contradictory interpretations of the claims are simply disagreements regarding the evidence presented by Mr. Bailey and arguments against it. This functions "simply to emphasize perceived shortcomings in the other party's expert evidence" and is thus improper reply, as was held in *Bauer* at paragraph 16. Concerns about mischaracterization of one expert's claim by another, as stated in *Swift* at paragraph 34, is also more adequately dealt with in cross-examination than in a reply report. Accordingly, this is not proper reply. The exception is paragraph 8, which serves to explain that Mr. Morelli has changed his opinion regarding the interpretation of the terms "gap" and "cover" to be in agreement with Mr. Bailey's interpretations. The Defendants state at paragraph 14 of their written representations that they are willing to accept a report from the Plaintiffs that sets out any corrections they wish to make, in particular those made at paragraphs 15-22 and 57-60 of the Morelli Reply Report, which are the corrections to which paragraph 8 refers.

[31] These general impressions set the tone for what was to follow. Disagreement between experts should not open the door to reply evidence. That would simply promote replies and re-replies *ad infinitum*. Mr. Morelli complains at paragraph 10 of the unduly restrictive construction put on claims by Mr. Bailey. He also claims that the Defendants' expert mischaracterized his conclusion which justifies "une réponse additionnelle" (para 12). Mr. Morelli challenges the construction of claims as being "confuse, en contradiction avec le premier rapport Bailey, en contradiction avec la description des brevets en cause et contraire à l'interprétation à laquelle serait arrivée la personne versée dans l'art [...]" (para 12b). He claims that the construction given is limited to preferred embodiments. In effect, paragraph 14 of the Reply Report is basically a further affirmation that Mr. Morelli is right, replying to statements made by Mr. Bailey that can hardly be seen as unanticipated assertions that command a reply in the form of an additional response. Matters of this nature can be addressed as part of the trial. These are arguments, not reply evidence.

B. *Interpretations of the terms "gap", "cover", "alignment", "clearance", and "closing mechanism" at paragraphs 15-35 and 40-56 of the Morelli Reply Report*

[32] The Defendants are express in stating that they take no issue with Mr. Morelli, at paragraphs 15-22 of his Reply Report, correcting his opinion to align with that of Mr. Bailey on the interpretation of "cover" and "gap" in relation to claim 1 of the 128 Patent. However, Mr. Morelli's concerns regarding Mr. Bailey's mischaracterizations of the terms "alignment", "clearance" and "closing mechanism" in the paragraphs that follow are not the proper subject of reply evidence (*Swist*, para 34). In raising these concerns, Mr. Morelli highlights disagreements between his own opinion and that of Mr. Bailey (see, for example, para 25 : « Ce n'est cependant

pas l'interprétation que j'ai donnée à la revendication 11 du brevet 128 dans mon Premier Rapport » or para 28 where he says that “M. Bailey et moi sommes en désaccord sur la manière dont cet alignement doit être caractérisé”). The proper forum for this is argument or cross-examination, not reply evidence (*Janssen*, para 17; *Bauer*, para 16). Indeed, disputes over the proper construction of terms in patent claims was held in *Janssen* to constitute improper reply (see para 41).

[33] The confusion or contradictions as to which interpretation of “clearance” Mr. Bailey takes up in his Report, as adduced at paragraphs 40-50, appear primarily to highlight perceived shortcomings and would similarly be more adequately dealt with in cross-examination (see *Bauer*, paragraph 16). Indeed, the framing of Mr. Morelli's reply in these paragraphs is indicative of the confirmatory nature of this section, resulting in Mr. Morelli's confirming his initial position on the interpretation of “clearance” at paragraph 51:

Pour les raisons qui précèdent, je maintiens l'interprétation du terme « dégagement » à laquelle je suis arrivé dans mon Premier Rapport et dans mon Deuxième Rapport.

Accordingly, the confirmatory and disagreement-oriented contents of this section puts Mr. Morelli's evidence largely outside of the realm of proper reply (see, e.g., *Amgen*, para 12; *Janssen*, para 16; *Bauer* para 16). It goes without saying that Mr. Morelli will be allowed to testify at trial on all of his areas of disagreement with the position, or positions, advanced by Mr. Bailey.

C. *General Comments about the Angelcare Patents at paragraphs 36-39 of the Morelli Reply Report*

[34] This section discusses alleged mischaracterizations by Mr. Bailey of Mr. Morelli's opinion and methodology. These paragraphs read defensively, with Mr. Morelli restating the methodology he employed to construct the claims of the Plaintiffs' patents. Merely confirmatory evidence is exemplary of improper reply evidence and should therefore not be admissible (see, e.g., *Halford*, para 15; *Amgen*, para 12; *Janssen*, para 13). Moreover, as discussed above, mischaracterizations of an expert's reply evidence are not the proper subject of reply (*Janssen*, para 41). Mr. Morelli will be able to attempt to correct mischaracterizations about his opinion and the methodology he followed (rule 280 of the *Federal Courts Rules*).

D. *Infringement analyses of all the patents in issue before the Court at paragraphs 54 to 80 of the Morelli Reply Report*

[35] Again, these infringement analyses are primarily argumentative, with Mr. Morelli using it as an opportunity to express disagreement on the interpretation of claims and the terms contained therein, which is beyond the purview of reply evidence (*Bauer*, para 16; *Janssen*, para 17). He uses phrases that indicate this to be the case, stating "Je suis plutôt d'avis que [...]" at para 54 or "Je ne suis pas d'accord avec cette interprétation" at para 62. Taking the example of paragraphs 76 to 80, Mr. Morelli is doing nothing more than expressing disagreement with Mr. Bailey's opinion on claims construction for the 312 and 415 Patents and confirming his own opinion as already contained in his first report, as revealed at paragraph 80:

Pour les raisons qui précèdent, et en tenant compte de l'interprétation des revendications des brevets 312 et 415 à laquelle serait arrivée la personne versée dans l'art telle que rapportée dans

mon Premier Rapport, je maintiens les conclusions auxquelles je suis arrivé dans mon Premier Rapport quant à la contrefaçon des revendications des brevet 312 et 415 par les produits des Défenderesses.

[My emphasis.]

Mr. Morelli also continues to discuss supposed mischaracterizations of his opinion by Mr. Bailey and in doing so presents confirmatory evidence, drawing on his first report to contradict these misinterpretations (see, for example, paras 66-67). This serves as further indication that this section constitutes improper reply insofar that it is used by Mr. Morelli to express disagreement, warn against mischaracterizations, and reiterate opinions already adduced in Mr. Morelli's reports on file.

[36] As a matter of fact, part of the difficulty in the consideration of Mr. Morelli's Reply Report is that it is intertwined with comments made by Mr. Bailey in his Response Report and with his own comments the purpose of which is to attempt to have the last word by re-asserting the correctness of his own conclusions. This is better left to testimony in chief at trial, cross-examination of experts and argument.

[37] Counsel for the Plaintiffs argued at the hearing that if Mr. Morelli is allowed to testify at trial about various statements made by Mr. Bailey, there is no harm in allowing the Reply Report to be filed into evidence. The Court's discretion should be exercised in favour of the Plaintiffs.

[38] With all due respect, I would not entertain such proposition because it has the unfortunate effect of blurring the lines. Unless the evidence is needed to allow for a proper determination of the issues, so that the interests of justice will be better served, it is better to allow the trial to

proceed without more documentation that is largely a rehash of the previous reports dressed up as reply evidence. Evidence that is confirmatory is not rebuttal evidence and its place is at trial where the witness is given the leeway to address that which has been put forth by another expert. I note in passing that there is in fact a large portion of the so-called "Reply Report" that is in the nature of an argument. That which is in essence argumentative is better handled by counsel. Indeed, in order to avoid protracted discussions on what constitutes proper reply evidence, it may be appropriate to consider having expert witnesses testify on an expert witness panel (rules 282.1 and 282.2 of the *Federal Courts Rules*), but to have the arguments later on in the trial.

VI. Conclusion

[39] The clerical corrections at paragraph 81 of the Morelli Reply Report should be accepted. Based on what is stated at paragraph 14 of the Defendants' written representations, the Defendants appear to accept the corrections submitted in Mr. Morelli's Report and do not object to him filing a short report setting out, if he so wishes, said corrections. At any rate, they are part of the record. While paragraph 81 of the Morelli Reply Report is not expressly listed among the paragraphs that the Defendants would accept, it does not appear that this would be a contentious issue given the Defendants' general willingness to accept corrections. Moreover, it would be in the interests of justice to allow Mr. Morelli to make minor clerical corrections to his report, as they will allow the Court to accurately determine the paragraphs to which Mr. Morelli refers. The Defendants do not allege any harm resulting therefrom and I cannot see how allowing these corrections will result in anything but a smoother procedure.

[40] With the exception of the corrections at paragraphs 8, 15-22, 57-60, and 80-81, which are accepted by both parties, the Morelli Reply Report does not fall within the scope of proper reply evidence and it does not appear to be within the interests of justice to admit it nonetheless. The Court will not be deprived of essential information needed to reach a just outcome. The impugned report consists primarily of confirmatory and argumentative evidence; discussion of inconsistency, confusion and disagreement are more appropriately dealt with at the cross-examination or arguments phase of trial and serve only to complicate the proceedings by introducing them where they ought not be. Additional confirmatory material is repetitive, adding needlessly to a file that is already voluminous and complex. Indeed, Mr. Morelli's mandate itself, described at paragraph 4 of his Reply Report, sheds light onto why the Report is not proper reply evidence. Mr. Morelli was instructed to identify the aspects of the report he agreed or disagreed with, and state whether his opinion had changed in response to Mr. Bailey's report. Such instructions have resulted in a 31-page Reply Report. The very nature of the mandate was thus to express disagreement or to adduce confirmatory evidence, both beyond the scope of appropriate reply evidence. Allowing the Plaintiffs to submit the impugned Report would also be unfair to the Defendants, giving the Plaintiffs the opportunity to have the last word where the Defendants do not because the Reply Report serves as an additional forum for the Plaintiffs to argue against the Defendants' position. In sum, the bulk of the Morelli Reply Report does not appear to fall within the scope of proper reply evidence and ought not to be admitted.

[41] However, as conceded by counsel for the Defendants, if it is true that there are no truly unanticipated issues raised by Mr. Bailey, it must be possible for an expert at trial to explain fully "any of the content of an affidavit or statement that has been read into evidence" (rule

280(1)(b) of the *Federal Courts Rules*). It may be that the length of the various expert reports and the technical nature of the evidence (together with the gatekeeping role played by a trial judge, as described in *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87) favour the Court remaining open to reconsider some specific aspects of the reply evidence offered by the Plaintiffs at the trial proper, in case the Court has applied an overly-broad brush in its consideration of the Reply Report. At any rate, if need be, the Court may resort to rule 280(1.1) when appropriate and necessary.

JUDGMENT in T-151-16

THIS COURT ORDERS:

1. With the exception of paragraphs 8, 15 to 22, 57 to 60 and 80-81 of the Morelli Reply report, the Plaintiffs' motion to adduce the said Morelli Reply Report is refused in its entirety.

2. As the parties agreed that an appropriate amount of costs on the motion should be \$1,500, including disbursements and taxes, the Defendants are entitled to costs of this motion found to be \$1,500, all-inclusive.

"Yvan Roy"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-151-16

STYLE OF CAUSE: ANGELCARE DEVELOPMENT INC. ET AL
v MUNCHKIN, INC. ET AL

PLACE OF HEARING: BY VIDEOCONFERENCE BETWEEN OTTAWA
(ONTARIO) AND MONTRÉAL (QUÉBEC)

DATE OF HEARING: DECEMBER 18, 2020

JUDGMENT AND REASONS: ROY J.

DATED: DECEMBER 23, 2020

APPEARANCES:

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