

Federal Court of Appeal



Cour d'appel fédérale

Date: 20210114

**Dockets: A-486-19
A-482-19**

Citation: 2021 FCA 4

**CORAM: NEAR J.A.
LOCKE J.A.
MACTAVISH J.A.**

Docket: A-486-19

BETWEEN:

MCCAIN FOODS LIMITED

Appellant

and

**J.R. SIMPLOT COMPANY,
SIMPLOT CANADA (II) LIMITED and
ELEA VERTRIEBS-UND-VERMARKTUNGSGESELLSCHAFT, MBH**

Respondents

Docket: A-482-19

AND BETWEEN:

ELEA VERTRIEBS-UND-VERMARKTUNGSGESELLSCHAFT, MBH

Appellant

and

**MCCAIN FOODS LIMITED,
J.R. SIMPLOT COMPANY and
SIMPLOT CANADA (II) LIMITED**

Respondents

Heard by online video conference hosted by the registry, on December 9, 2020.

Judgment delivered at Ottawa, Ontario, on January 14, 2021.

REASONS FOR JUDGMENT BY:

LOCKE J.A.

CONCURRED IN BY:

NEAR J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

LOCKE J.A.

I. Background

[1] This decision concerns two appeals from a decision of the Federal Court (2019 FC 1635, per McVeigh J., hereinafter the Judge) which allowed in part an appeal of a decision of Prothonotary Aylen (the Prothonotary) in the context of a patent infringement action. In the action, McCain Foods Limited (McCain) alleges that J.R. Simplot Company and Simplot Canada (II) Limited (together, Simplot) infringe Canadian Patent No. 2,412,841 entitled “Process for Treating Vegetables and Fruit Before Cooking” (the Patent). Specifically, McCain alleges that Simplot’s use of a system that uses a pulsed electric field (PEF) to reduce the resistance of frozen fruits and vegetables to cutting after they are cooked infringes the Patent.

[2] The Prothonotary had granted Simplot leave to

- A. Amend its statement of defence and counterclaim to introduce allegations that Simplot benefited from an implicit license and/or from McCain’s alleged acquiescence, and
- B. Commence a third party claim against Elea Vertriebs-und-Vermarktungsgesellschaft, mbH (Elea), the supplier of the PEF systems used by Simplot in the alleged infringement.

[3] In addition to McCain's appeal of the Prothonotary's decision, the Judge was faced with a motion by Elea to strike or stay the third party claim.

[4] The Judge limited the scope of permissible allegations in the statement of defence and counterclaim and the third party claim, but refused to strike all of the new allegations therein. She also refused to stay the third party claim. The limitations that the judge imposed on the allegations are not in issue before this Court. Before us, McCain (in Court File No. A-486-19) seeks to strike the remaining implicit license and acquiescence allegations in the statement of defence and counterclaim, as well as the entirety of the third party claim, without leave to amend. In the other appeal (Court File No. A-482-19), Elea seeks to strike the third party claim only, again without leave to amend.

[5] For the reasons set out below, I would allow Elea's appeal, and strike the third party claim without leave to amend. I would allow McCain's appeal in part, likewise striking the third party claim without leave to amend, but dismissing the appeal as it relates to Simplot's implicit license and acquiescence defences.

II. Key Facts and Impugned Decisions

[6] The focus of the pleadings amendments and third party claim in this matter is the fact that the supplier of the PEF systems used by Simplot in the alleged infringement, Elea, also sold PEF systems to McCain.

[7] In its statement of defence and counterclaim, as amended, Simplot alleges the following in support of its position that it benefits from an implicit license and/or from McCain's acquiescence:

- A. Elea's website indicates that it has developed and installed over 100 of its impugned PEF systems that are in use around the world;
- B. In the contract between Simplot and Elea (the Contract), the latter warrants that its PEF systems do not infringe any patent, and that Simplot's use of such systems would not infringe any patent;
- C. Elea sold the same PEF systems to McCain, which uses them in Canada and the U.S.; and
- D. McCain is aware that Elea is manufacturing its PEF systems and selling them to others, including in Canada to Simplot, but took no steps to (i) stop Elea from doing so, or (ii) put Simplot on notice of the Patent, or prevent its purchase of Elea's PEF systems.

[8] In its third party claim, as amended, Simplot seeks declarations that, to the extent that Simplot is found to have infringed the Patent,

- A. Elea induced such infringement,
- B. Elea is liable, individually or jointly with Simplot, for such infringement and any remedies that may be awarded as a result thereof, and
- C. Elea is liable to Simplot in respect of its losses resulting from certain orders that might be issued in relation to such infringement.

[9] Simplot's third party claim is based on the following factual allegations, some of which are similar to those described above in respect of its statement of defence and counterclaim:

- A. Simplot purchased its allegedly-infringing PEF systems from Elea;
- B. In the Contract, Elea warranted that its PEF systems do not infringe any patent, and that Simplot's use of such systems would not infringe any patent;

- C. The Contract also obliges Elea to defend, save harmless and indemnify Simplot against all losses and liabilities related to McCain's infringement claim; and
- D. Elea was aware, before the Contract was executed, of McCain's U.S. patent that corresponds to the Patent.

[10] As indicated above, the Prothonotary granted leave to (i) amend Simplot's statement of defence and counterclaim to introduce the allegations described above, and (ii) commence the third party claim. The Judge allowed in part the appeal from the Prothonotary's decision, limiting some of the allegations Simplot had initially sought to make. However, the Judge did not interfere with the Prothonotary's decision as regards the allegations described above.

III. Issues

[11] As indicated, this decision concerns two appeals. The two appeals overlap as regards Simplot's third party claim.

[12] The issues in dispute can be classified as follows:

- A. Statement of Defence and Counterclaim
 - i. Implicit License Defence
 - ii. Acquiescence Defence
- B. Third Party Claim

IV. Analysis

A. *Standard of Review*

[13] The question of the standard of review applicable in this case is complicated by the fact that this is an appeal from the Judge's decision, which was itself partly on appeal from the Prothonotary. In such a situation, this Court's decision in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331 at para. 79 directs that the standard of review is as contemplated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (*Housen*): issues of law are reviewed on a standard of correctness, whereas issues of fact and of mixed fact and law with no extricable issue of law are reviewed on a standard of palpable and overriding error. The parties do not disagree on that.

[14] Moreover, because the Judge agreed with the Prothonotary on the issues that remain from the appeal from her decision, this Court must look to the Prothonotary's decision to determine whether the Judge erred in refusing to intervene: *Sikes v. EnCana Corporation*, 2017 FCA 37, [2017] F.C.J. No. 196 at para. 12; *Enercorp Sand Solutions Inc. v. Specialized Desanders Inc.*, 2018 FCA 215, 160 C.P.R. (4th) 79 at para. 15 (*Enercorp*).

[15] The aspect of the Judge's decision that concerned Elea's motion to strike or stay the third part claim was not, strictly speaking, dealing with an appeal from the Prothonotary. However, the applicable standard of review for this aspect of the Judge's decision is also as contemplated in *Housen*.

[16] The question of the standard of review applicable in this case is also complicated by the parties' disagreement on how to characterize the issues in dispute. McCain and Elea characterize all of the errors they argue were made by the Judge and/or the Prothonotary as errors of law, and hence subject to review on a standard of correctness. Indeed, this Court does not defer to the Federal Court on issues of law, so long as they are extricable from issues of fact or issues of mixed fact and law. However, by characterizing the alleged errors as errors of law, McCain and Elea signal that they do not challenge any factual conclusions by the Judge or the Prothonotary.

[17] For its part, Simplot argues that most of the issues in dispute involve matters of mixed fact and law, and should be reviewed on a standard of palpable and overriding error.

[18] I will say more about the applicable standard of review on the various issues in dispute as I discuss them.

B. *Law Applicable to Pleadings Amendments and to Third Party Claims*

(1) Law Applicable to Pleadings Amendments

[19] Neither the Judge nor either of the parties has taken issue with the Prothonotary's statement of the law applicable to pleadings amendments at paragraphs 11 to 17 of her decision. Such amendments are contemplated by Rules 75, 76, 200 and 201 of the *Federal Courts Rules*, S.O.R./98-106 (the Rules).

[20] The general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice: *Canderel Ltd. v. Canada*, [1994] 1 F.C. 3, 157 N.R. 380 (C.A.); *Enercorp* at para. 19. However, the Prothonotary noted that the proposed amendment must have a reasonable prospect of success: *Teva Canada Limited v. Gilead Sciences Inc.*, 2016 FCA 176, 140 C.P.R. (4th) 309 at paras. 29-32 (*Teva*). Another way to put this is that a proposed amendment will be refused if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 at para. 17 (*Imperial Tobacco*).

[21] In deciding whether an amendment has a reasonable prospect of success, its chances of success must be examined in the context of the law and the litigation process, and a realistic view must be taken: *Teva* at para. 30; *Imperial Tobacco* at para. 25.

[22] In determining whether an amendment to a defence should be allowed, it is often helpful for the Court to ask itself whether the amendment, if it were already part of the proposed pleadings, would be a plea capable of being struck out: *VISX Inc. v. Nidek Co.*, [1996] F.C.J. No. 1721, 72 C.P.R. (3d) 19 (F.C.A.) at para. 16. If yes, the amendment should not be allowed.

[23] Rule 174 of the Rules requires that material facts be pleaded. However, there is no bright line between material facts and bald allegations: *Mancuso v. Canada (National Health and*

Welfare), 2015 FCA 227, 476 N.R. 219 at para. 18 (*Mancuso*). Looking at the pleadings as a whole, the motions judge must ensure that they define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair: *Mancuso* at para. 18. In *Enercorp*, this Court recently developed the idea that proceedings should be manageable and fair:

[36] In deciding whether pleadings are “manageable and fair”, the Court should consider the whole of the circumstances, including the relative knowledge and means of knowledge of the parties. Rules as to sufficiency of pleadings must not be allowed to become instruments of oppression in the hands of those who have knowledge of material facts at the expense of those who seek to rely on those facts without, however, having the means of knowing those facts so as to be able to plead them with specificity.

[37] The statement at paragraph 19 of *Mancuso* that “The pleading must tell the defendant who, when, where, how and what gave rise to its liability” must be understood in light of the “manageable and fair” requirement. Where, as here, a party seeks to rely upon a transaction to which it is a stranger, it must be able to describe the transaction with sufficient particularity to allow the other party to identify the transaction in issue. If that criterion is met, the question of whether the pleadings are sufficient is to be assessed in light of all the circumstances including the respective means of knowledge of the parties.

[24] McCain’s arguments in this matter focus on the question of reasonable prospect of success, rather than on any other interests of justice or any injustice not capable of being compensated by an award of costs.

(2) Law Applicable to Third Party Claims

[25] Rules 193 and 194 of the Rules contemplate third party claims. The question of whether leave should be granted to commence a third party claim is based on the same factors as are relevant to whether a pleadings amendment should be allowed to introduce a new cause of

action: *Alberta v. Canada*, 2018 FCA 83, 425 D.L.R. (4th) 366 at para. 20. As with the pleadings amendments in this case, the viability of the third party claim turns on whether it has a reasonable prospect of success.

[26] A third party claim must stand on its own as an independent proceeding, separate from the main action and not merely incidental to it: *R. v. Thomas Fuller Construction Co. (1958) Ltd.*, [1980] 1 S.C.R. 695, 106 D.L.R. (3d) 193 at 709 (*Thomas Fuller*); *744185 Ontario Inc. v. Canada*, 2020 FCA 1, 441 D.L.R. (4th) 564 at para. 32 (*Air Muskoka*). That said, regard may be had to the main action if it assists in determining what is in issue in the related third party claim: *Canada (Attorney General) v. Gottfriedson*, 2014 FCA 55, 456 N.R. 391 at para. 34 (*Gottfriedson*).

C. *Appeal Concerning Statement of Defence and Counterclaim*

(1) *Implicit License Defence*

[27] McCain argues that Simplot's implicit license defence is legally insufficient in that it is not supported by the law on implied licenses, and that the factual allegations are inadequate.

[28] I understand Simplot's implicit license defence to be based on the allegation that Elea is a licensee under the Patent, licensed (either explicitly or implicitly) to sell its PEF systems to third parties, and hence Simplot's purchase from Elea of the PEF systems that put the Patent into practice makes it a sublicensee under the Patent.

[29] In support of its position that the defence is not supported by the law on implied licenses, McCain cites the Supreme Court of Canada decision in *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, 80 C.P.R. (3d) 321 (*Eli Lilly*). *Eli Lilly* explains at paragraphs 99 to 100 that, when a patentee (or its licensee) sells a patented article without specific restriction, it effectively also grants an implied license to the purchaser to use the article as contemplated in the patent, and to pass that license on to subsequent purchasers.

[30] McCain argues that the Prothonotary erred in law in stating that Simplot's implicit license defence is consistent with the principles described in *Eli Lilly*. McCain argues that the allegations in the present case are different in that the allegation is that Elea (the alleged licensee) sold PEF systems to McCain (the patentee), not the other way around. There is no allegation that McCain sold any article to Elea and therefore, McCain argues, no license flows to Elea.

[31] McCain argues that the Judge also erred when she recognized this distinction but found that the roles of the parties remained "roughly analogous."

[32] I recognize that the factual allegations in this case are not on all fours with the facts in *Eli Lilly*. But the question here is whether the Prothonotary and the Judge erred in finding that those allegations have a reasonable prospect of success in supporting the argument that McCain granted a license, either explicit or implicit, to Elea to manufacture and sell its PEF systems to third parties. While Simplot's implicit license defence is light on details, and it may prove difficult for it to adduce evidence sufficient to prove the existence of a license that would benefit it, I do not accept that it was an error of law for the Prothonotary and the Judge to find that there

is a reasonable prospect of success. Simplot may be able to benefit from an inference that there is some sort of arrangement or understanding between McCain and Elea amounting to a license. Such an inference could be based on the allegation that McCain, knowing of Elea's ongoing allegedly infringing activities, not only did nothing to stop it, but actually encouraged it by entering into a transaction with Elea to purchase the very PEF systems in controversy.

[33] If Simplot is successful in proving the existence of a license from McCain permitting Elea to sell its PEF systems to third parties, it would also seem that Simplot would have at least a reasonable prospect of establishing that a sublicense to use those PEF systems as intended follows those sales.

[34] These are not intended as conclusions on the merits of Simplot's implicit license defence. But they do amount to a conclusion that Simplot should be allowed to argue this defence.

[35] McCain's other attack on the implicit license defence is that the factual allegations are inadequate. In support of this attack, McCain argues that the Prothonotary made two errors of law. First, McCain argues that the Prothonotary, at paragraph 23 of her reasons, wrongly excused Simplot from pleading material facts because the defence is based on an implied license. Second, McCain argues that the Prothonotary misapplied the *Enercorp* decision.

[36] McCain's reference to an implied license in relation to the first of these alleged errors of law seems to relate to the last sentence of paragraph 23 of the Prothonotary's reasons, which

concerns the alleged license from Elea to Simplot, not that from McCain to Elea. The sentence reads as follows:

Moreover, I note that the alleged resulting license granted to Simplot would be by way of operation of law and as such, no additional material facts would need to be pled beyond the purchase of the PEF system.

[37] I see no error in this sentence. McCain does not suggest what additional material fact might be required. In my view, the allegation that McCain licensed Elea to manufacture and sell its PEF systems to third parties, together with the principle described in *Eli Lilly* that the right to use a licensed article typically follows the article when it is sold, is sufficient to support Simplot's allegation that it is implicitly licensed to use its PEF systems.

[38] Regarding the second alleged error of law, based on *Enercorp*, McCain argues that the Prothonotary relied too heavily on the fact that Simplot is a stranger to the transaction between McCain and Elea, and ignored the principle that pleadings cannot be purely speculative: per *Caterpillar Tractor Co. v. Babcock Allatt Ltd.*, [1983] 1 F.C. 487, 67 C.P.R. (2d) 135, aff'd (1983), 72 C.P.R. (2d) 286 (F.C.A.), 1983 CarswellNat 824; *Painblanc v. Kastner*, [1994] F.C.J. No. 1671, 58 C.P.R. (3d) 502 (F.C.A.). McCain argues that it was an error of law for the Prothonotary to allow Simplot to maintain its implicit license defence based on the single material fact of the sale of PEF systems from Elea to McCain.

[39] Paragraph 23 of the Prothonotary's reasons discusses the idea set out in *Enercorp* at paragraph 36 that the relative knowledge and means of knowledge of the parties should be taken into consideration in assessing whether a proposed pleading is manageable and fair (see quote from *Enercorp* at paragraph 23 above). The Prothonotary concluded that, since Simplot is a

stranger to the transaction between McCain and Elea, its ability to provide details thereon is limited, and this limitation should be considered. I see no error in this discussion. Moreover, the factual allegations in support of Simplot's implicit license defence are sufficient to allow McCain to identify the transactions that are in issue. In my view, the pleading of the implicit license defence is manageable and fair.

[40] I also disagree with McCain's assertion that Simplot's implicit license defence is based solely on the sale from Elea to McCain. As I have indicated above, another important material allegation is that McCain entered into this transaction with Elea knowing that the latter was also selling its PEF systems (systems that it alleges are used to infringe) to third parties. I see no error in law in the conclusion that these allegations are sufficient to give Simplot's implicit license defence a reasonable prospect of success.

(2) Acquiescence Defence

[41] Simplot's acquiescence defence depends on the same set of factual allegations as its implicit license defence (as summarized in paragraph 7 above). Specifically, Simplot alleges that, in view of those factual allegations, McCain has:

Acquiesced to Elea selling the PEF systems in Canada, and to the use of the same by third party purchasers such as [Simplot], such that McCain is estopped from asserting the [Patent] against third party purchasers such as [Simplot].

[42] McCain characterizes Simplot's acquiescence defence as having two parts: (i) McCain's acquiescence in Elea's manufacturing and sales of its PEF systems to third parties, and (ii)

McCain's acquiescence in the use of such PEF systems by said third parties (including Simplot) to perform the patented process.

[43] McCain argues that there is an absence of authority to support the second part of Simplot's acquiescence defence: that McCain's inaction against, and relationship with, one party (Elea) could result in acquiescence in favour of another party (Simplot). In my view, this second part of Simplot's acquiescence defence does not present a particular difficulty. If Simplot is successful in establishing that McCain acquiesced in Elea's manufacture and sale of its PEF systems to third parties, then (much as discussed in respect of the implicit license defence at paragraph 33 above) it would also seem that Simplot would have at least a reasonable prospect of establishing that the estoppel that results from such acquiescence follows the sales of those PEF systems.

[44] I disagree with McCain's argument that the Judge erred by failing to consider the two parts of Simplot's acquiescence defence (as described by McCain) separately.

[45] McCain does not argue that the Judge erred in quoting the following passage from *Remo Imports Ltd. v. Jaguar Canada Ltd.*, 2005 FC 870, 41 C.P.R. (4th) 111 at para. 53 (*Remo Imports*), for the legal test for acquiescence:

The criteria needed to establish acquiescence are the following. 1. Something more than mere delay is required. Silence alone is not sufficient to bar a proceeding [...]; 2. the rights holder must know of its right and must know of the other party's breach of that right [...]; 3. the rights holder must encourage the other party to continue the breach [...]; and 4. the other party must act to its detriment in reliance upon the encouragement by the rights holder [...].

[46] Neither does McCain argue that the Prothonotary erred in relying on *Omark Industries, Inc. v. Sabre Saw Chain (1963) Ltd.*, [1976] F.C.J. No. 303, 28 C.P.R. (2d) 119 at 137 (F.C.T.D.) (*Omark*) to support the following list of requirements for an acquiescence defence:

(i) the second person must be mistaken as to his own legal rights; (ii) the second person must have expended some money or done some act on the faith of his mistaken belief; (iii) the patentee must know of the existence of its own right which is inconsistent with the right claimed by the second person; (iv) the patentee must know of the second person's mistaken belief in its rights; and (v) the patentee must have encouraged the second person in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting the patentee's legal right.

[47] McCain argues that a patentee may choose who it wants to sue and that it cannot be compelled to sue every putative infringer. McCain argues that the Prothonotary and the Judge erred in law in disagreeing with this principle by effectively compelling it to sue Elea. In my view, neither the Prothonotary nor the Judge disagreed with the principle described by McCain. Rather, they disagreed that compelling McCain to sue Elea was the import of Simplot's acquiescence defence (see paragraph 27 of the Prothonotary's reasons and paragraph 41 of the Judge's reasons).

[48] McCain's dispute on this point amounts to an issue of mixed fact and law. Therefore, the standard of review on this issue is palpable and overriding error. I see no such error.

[49] McCain argues that Simplot has failed to plead certain necessary elements of an acquiescence defence, including: (i) facts that suggest that Elea is infringing the Patent, (ii) facts that McCain is aware of Elea's mistaken belief, and (iii) facts that McCain did anything to encourage Elea to continue to infringe the Patent to its own detriment.

[50] The first alleged gap (facts that suggest that Elea is infringing the Patent) would seem to be filled by Simplot's argument that Elea infringes by manufacturing and selling PEF systems whose only purpose is to perform the patented process. In my view, this position is at least arguable and has a reasonable prospect of success: see *de Korompay v. Ontario Hydro*, [1989] F.C.J. No. 447, 26 C.P.R. (3d) 464 at 466 (F.C.T.D.).

[51] The second alleged gap (McCain's awareness of Elea's mistaken belief) concerns a requirement that is identified in *Omark*, but not in *Remo Imports*. Accordingly, there is a reasonable argument that this is not a legal requirement of Simplot's acquiescence defence. Moreover, from the allegations that (i) McCain is aware of Elea's manufacture and sales of its PEF systems, and (ii) McCain has purchased one of these systems, one could reasonably infer that McCain was aware that Elea believed it was not infringing any patent rights held by McCain.

[52] The third alleged gap, concerning encouragement by McCain, is arguably filled by McCain's purchase of one of Elea's PEF systems.

[53] As with Simplot's implicit license defence, it may prove difficult for it to adduce evidence sufficient to establish an acquiescence defence, but I do not accept that either the Prothonotary or the Judge erred in finding that this defence has a reasonable prospect of success.

(3) Conclusion on Appeal Concerning Defence and Counterclaim

[54] I would dismiss McCain's appeal as it relates to the implicit license and acquiescence defences.

D. *Appeal Concerning Third Party Claim*

[55] Both McCain and Elea argue that the Prothonotary and the Judge erred in allowing the commencement of Simplot's third party claim against Elea. They argue that the third party claim is essentially based on a commercial contract and is therefore outside the jurisdiction of the Federal Court. For its part, Simplot argues that its third party claim is based essentially on inducement by Elea to infringe the Patent, and therefore the Federal Court has jurisdiction.

[56] Since the propriety of the third party claim depends on the jurisdiction of the Federal Court, it is appropriate to start with a discussion of that subject.

(1) Jurisdiction of the Federal Court

[57] The Federal Court is not like the provincial superior courts, which have inherent jurisdiction. The Federal Court was created pursuant to section 101 of *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c. 3, which provides as follows:

VII. JUDICATURE

General Court of Appeal, etc.

101. The Parliament of Canada may, notwithstanding anything in this Act,

VII. JUDICATURE

Cour générale d'appel, etc.

101. Le parlement du Canada pourra, nonobstant toute disposition contraire

from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

énoncée dans la présente loi, lorsque l'occasion le requerra, adopter des mesures à l'effet de créer, maintenir et organiser une cour générale d'appel pour le Canada, et établir des tribunaux additionnels pour la meilleure administration des lois du Canada.

[58] The Federal Court, and this Court, owe their existence to the *Federal Courts Act*, R.S.C. 1985, c. F-7. The following passage from *Air Muskoka* helpfully summarizes general principles governing the jurisdiction of the Federal Court that will be necessary to consider in this case:

[28] It is axiomatic that, as a statutory court, the Federal Court possesses only the jurisdiction that has been conferred upon it by statute (as well as such inherent powers of a superior court of record as are required to effectively manage and decide cases before the Court, as was noted in *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 at paras. 35-38, 157 D.L.R. (4th) 385, and subsequent cases of this Court such as *Canada (National Revenue) v. RBC Life Insurance Co.*, 2013 FCA 50 at paras. 34-36, 443 N.R. 378). Very frequently, the source of the Federal Court's statutory jurisdiction is found in the *Federal Courts Act* itself.

[29] However, there are constitutional limits to such jurisdiction. Under section 101 of the *Constitution Act, 1867*, the federal Parliament possesses jurisdiction to establish additional Courts "for the better Administration of the Laws of Canada". By reason of this limitation, the jurisdiction-conferring provisions in the *Federal Courts Act* were interpreted in conformity with the requirements of section 101 of the *Constitution Act, 1867* in a trilogy of cases decided several decades ago by the Supreme Court of Canada.

[30] In *ITO [ITO-Int'l Terminal Operators v. Miida Electronics]*, [1986] 1 S.C.R. 752, 68 N.R. 241], the Supreme Court of Canada set out what has now become the universally-applied test for Federal Court jurisdiction, drawing on the principles outlined in its earlier decisions in *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.* (1976), [1977] 2 S.C.R. 1054, 9 N.R. 471 and *McNamara Construction (Western) Ltd. et al. v. The Queen*, [1977] 2 S.C.R. 654, 13 N.R. 181 [*McNamara Construction*]. As noted by the Prothonotary, the *ITO* test requires a party seeking to bring a matter within the Court's jurisdiction to establish three things:

1. There must be a statutory grant of jurisdiction by the federal Parliament;

2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction; and
3. The law on which the case is based must be a “law of Canada” as the phrase is used in section 101 of the *Constitution Act, 1867* (U.K.)...

[31] In analyzing whether a claim meets these requirements, it is necessary to characterize the claim to determine its essential nature, or to use terminology sometimes used in the case law, to ascertain the “pith and substance” of the claim. Justice Karakatsanis described this portion of the analysis at paragraphs 26 and 27 of the majority reasons in *Windsor Bridge [Windsor (City) v. Canadian Transit Co.]*, 2016 SCC 54, [2016] 2 S.C.R. 617]:

26. The essential nature of the claim must be determined on “a realistic appreciation of the practical result sought by the claimant” (*Domtar Inc. v. Canada (Attorney General)*, 2009 FCA 218 (CanLII), 392 N.R. 200, at para. 28, per Sharlow J.A.). The “statement of claim is not to be blindly read at its face meaning” (*Roitman v. Canada*, 2006 FCA 266 (CanLII), 353 N.R. 75, at para. 16, per Décary J.A.). Rather, the court must “look beyond the words used, the facts alleged and the remedy sought and ensure ... that the statement of claim is not a disguised attempt to reach before the Federal Court a result otherwise unreachable in that Court” (*ibid.*; see also *Canadian Pacific Railway v. R.*, 2013 FC 161 (CanLII), [2014] 1 C.T.C. 223, at para. 36; *Verdicchio v. R.*, 2010 FC 117 (CanLII), [2010] 3 C.T.C. 80, at para. 24).

27. On the other hand, genuine strategic choices should not be maligned as artful pleading. The question is whether the court has jurisdiction over the particular claim the claimant has chosen to bring, not a similar claim the respondent says the claimant really ought, for one reason or another, to have brought.

[32] When applying this analysis to a third-party claim, the third-party claim must be characterized separately from the main claim. As Justice Evans, writing for this Court, noted at paragraph 56 of *Peter G. White Management Ltd. v. Canada (Minister of Canadian Heritage)*, 2006 FCA 190, [2007] 2 F.C.R. 475 [*Peter G. White*] “[...] a claim not otherwise based on federal law is not brought within the jurisdiction of the Federal Court merely because it arises from essentially the same facts as a related claim which is within federal jurisdiction”. (See also, to similar effect, *Fuller [R. v. Thomas Fuller Construction (1958) Ltd. et al.]*, [1980] 1 S.C.R. 695, 30 N.R. 249 (S.C.C.)] at p. 711 and *Canadian Forest Products Ltd. v. Canada (Attorney General)*, 2005 FCA 220 at paras. 50-52, (sub nom. *Stoney Band v. Canada (Minister of Indian Affairs and Northern Development)*, [2006] 1 F.C.R. 570 [*Stoney Band*]).) That said, regard may nonetheless be given to the main claim to assist in ascertaining the essential

nature of the third-party claim, as was done by this Court in *Canada (Attorney General) v. Gottfriedson*, 2014 FCA 55 at para. 34, 456 N.R. 391 [*Gottfriedson*].

[59] In determining whether the Federal Court has jurisdiction in respect of a particular claim, the focus should be on the basis for the cause of action or the remedy sought: *Windsor Bridge* at paras. 41-42.

[60] There is no dispute that the Federal Court has jurisdiction in a matter that is in essence an action for patent infringement. Subsection 20(2) of the *Federal Courts Act* provides the basis for Federal Court jurisdiction in matters where a remedy is sought under the authority of an Act of Parliament or at law or in equity respecting a patent:

Industrial property, concurrent jurisdiction

20 (2) The Federal Court has concurrent jurisdiction in all cases, other than those mentioned in subsection (1), in which a remedy is sought under the authority of an Act of Parliament or at law or in equity respecting any patent of invention, certificate of supplementary protection issued under the *Patent Act*, copyright, trademark, industrial design or topography referred to in paragraph (1)(a).

Propriété industrielle : compétence concurrente

20 (2) Elle a compétence concurrente dans tous les autres cas de recours sous le régime d'une loi fédérale ou de toute autre règle de droit non visés par le paragraphe (1) relativement à un brevet d'invention, à un certificat de protection supplémentaire délivré sous le régime de la *Loi sur les brevets*, à un droit d'auteur, à une marque de commerce, à un dessin industriel ou à une topographie au sens de la *Loi sur les topographies de circuits intégrés*.

[61] For patent infringement, the relevant Act of Parliament is the *Patent Act*, R.S.C. 1985, c.

P-4. The specific authority for a remedy for patent infringement is subsection 55(1):

Liability for patent infringement

55 (1) A person who infringes a patent is liable to the patentee and to

Contrefaçon et recours

55 (1) Quiconque contrefait un brevet est responsable envers le breveté et

<p>all persons claiming under the patentee for all damage sustained by the patentee or by any such person, after the grant of the patent, by reason of the infringement.</p>	<p>toute personne se réclamant de celui-ci du dommage que cette contrefaçon leur a fait subir après l’octroi du brevet.</p>
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[62] There is also no dispute that inducing infringement is a form of patent infringement, not a distinct tort: *Hospira Healthcare Corporation v. Kennedy Trust for Rheumatology Research*, 2020 FCA 30, 2020 CarswellNat 247 at para. 45, leave to appeal to SCC refused, 39099 (23 December 2020) (*Hospira 2020*); *Bauer Hockey Corp. v. Easton Sports Canada Inc.*, 2010 FC 361, 366 F.T.R. 242 at para. 199, aff’d 2011 FCA 83, 414 N.R. 69. Accordingly, the jurisdiction of the Federal Court to adjudicate a proper claim of inducing patent infringement is not in dispute. If Simplot’s third party claim is indeed based essentially on inducing patent infringement, the appeal should be dismissed.

[63] On the other side of the debate, there appears to be no dispute that the Federal Court does not have jurisdiction to adjudicate a matter that is in essence one of breach of contract between private parties. This Court has recently clarified that the Federal Court does have jurisdiction to interpret contracts between private citizens as long as it is done under a sphere of valid federal jurisdiction vested in the Federal Court: *Salt Canada Inc. v. Baker*, 2020 FCA 127, 2020 CarswellNat 2843 at para. 24 (*Salt*). However, there must be a specific statutory grant of jurisdiction to the Federal Court. This Court went on in *Salt* at paragraph 40 to state, “[w]here contracts arise within its [*sic*] jurisdiction, the Federal Courts are empowered to resolve these disputes [over the interpretation of agreements] just as any other court does, and they do so all the time.” However, *Salt* concerned an application under section 52 of the *Patent Act* to vary an

entry in the records of the Patent Office. Section 52 of the *Patent Act* therefore constituted a specific statutory grant of jurisdiction to the Federal Court.

[64] There is no dispute that the Federal Court does not have jurisdiction to adjudicate Simplot's third party claim unless it can base its claim on a specific statutory grant of jurisdiction. Without that, Simplot's third party claim is outside the jurisdiction of the Federal Court, and should accordingly be struck.

[65] As indicated above, assessing the question of the Federal Court's jurisdiction in the third party claim requires determining the essential nature of that claim. The standard of review for the determination of the essential nature of that claim is correctness: *Air Muskoka* at para. 49. Before stating a conclusion concerning the essential nature of the third party claim, I will consider the various arguments put forward by Simplot.

(2) Jurisdiction Based on the *Patent Act*

[66] I turn now to consider whether the jurisdiction of the Federal Court in relation to the third party claim can be based on the *Patent Act*.

[67] As indicated above, the real dispute here is not whether the Federal Court has jurisdiction to adjudicate an action alleging inducing patent infringement. It does. Rather, the debate concerns whether the essential nature of Simplot's third party claim is actually inducing patent infringement.

[68] The three requirements for inducing patent infringement are well known. Per *Hospira 2020* at para. 38, quoting from *Corlac Inc. v. Weatherford Canada Inc.*, 2011 FCA 228, 95 C.P.R. (4th) 101 at para. 162:

First, the act of infringement must have been completed by the direct infringer. Second, the completion of the acts of infringement must be influenced by the acts of the alleged inducer to the point that, without the influence, direct infringement would not take place. Third, the influence must knowingly be exercised by the inducer, that is, the inducer knows that this influence will result in the completion of the act of infringement [...].

[69] Simplot argues that the allegations in its third party claim are sufficient to support all three of the requirements for inducing patent infringement. The principal dilemma for Simplot is that, either Simplot does not infringe McCain's patent (in which case it will have no liability to McCain that could ground a claim against Elea), or Simplot does infringe (in which case it cannot claim to be a person claiming under the patentee, and hence lacks standing to sue). I elaborate in the following paragraphs.

[70] Simplot's inducement claim must be based on a conclusion that it has infringed the Patent. The first requirement of inducing infringement is an act of infringement by a direct infringer. Clearly, Simplot's theory that Elea has induced infringement is based on Simplot itself as the direct infringer who was induced: see paragraph 1(c) of the Amended Third Party Claim.

[71] However, Simplot's role as the direct infringer is inconsistent with the role of a plaintiff in a claim of inducing patent infringement.

[72] Canada's patent regime is wholly statutory: *Apotex Inc. v. Sanofi-Synthelabo Canada Inc.*, 2008 SCC 61, [2008] 3 S.C.R. 265, at para. 12. While there are aspects of Canadian patent law that are not provided for explicitly in the *Patent Act*, or any other statute, and have been developed instead through jurisprudence (inducing patent infringement itself being a good example), all such aspects must be based on a statutory text.

[73] As indicated above, inducing patent infringement is simply a form of infringement, not a separate tort. Therefore, the statutory foundation for a claim of inducing infringement is the same as that for direct infringement: subsection 55(1), which is reproduced at paragraph 61 above.

[74] Simplot argues (at paragraph 78 of its memorandum responding to Elea's appeal, Court File No. A-482-19), and the Judge accepted (at paragraph 61 of her reasons), that "reliance on section 55 of the *Patent Act* may not be necessary to bring a third party claim against a manufacturer who induced infringement, as the issue has not been addressed before." The Judge went on to observe that there is no authority one way or the other concerning whether a claim of inducing patent infringement must fit within section 55. However, in order to conclude that Simplot's third party claim has any reasonable prospect of success, there must be something on which to base that conclusion. It is not enough to take a "you never know what might happen" approach.

[75] Neither Simplot nor the Judge has pointed to any other provision of the *Patent Act* as potential support for the third party claim in this case. Simplot observes that infringement is not defined in the *Patent Act*, and therefore it cannot be expected that its inducement claim will be

provided for explicitly. Simplot notes that a body of jurisprudence (which it calls federal common law) has developed around almost every aspect of patent law, and encourages this Court to further develop the jurisprudence to address its third party claim.

[76] It is true that the *Patent Act* does not define infringement, but it does define the exclusive rights that a patent provides (see section 42), and jurisprudence has developed a definition of infringement based on interference with those exclusive rights (*Monsanto Canada Inc. v. Schmeiser*, 2004 SCC 34, [2004] 1 S.C.R. 902 at para. 34). More importantly, the *Patent Act* defines in section 55 those to whom an infringer may be liable. In my view, no other provision of the *Patent Act* can support a claim of standing to sue for patent infringement (*Signalisation de Montréal Inc. v. Services de Béton Universels Ltée*, [1993] 1 F.C. 341, 46 C.P.R. (3d) 199 (F.C.A.) at para. 3 (*Signalisation*)), or inducing patent infringement.

[77] So the question here becomes whether Simplot's third party claim can be supported based on subsection 55(1) (the other subsections of section 55 are not relevant here). That provision contemplates an infringer's liability "to the patentee and to all persons claiming under the patentee." Simplot is clearly not the patentee, so it must show at least a reasonable prospect of success in establishing that it is a person "claiming under the patentee."

[78] A person claiming under the patentee is a person who derives his rights to use the patented invention, at whatever degree, from the patentee: *Hospira 2020* at para. 108; see also *Signalisation* at para. 24; *Teva Canada Limited v. Janssen Inc.*, 2018 FCA 33, 420 D.L.R. (4th) 493 at para. 127. The jurisprudence has held that "persons claiming under the patentee" can

include exclusive licensees (*Spun Rock Wools Ltd. v. Fiberglas Canada Ltd.*, [1943] S.C.R. 547, 3 C.P.R. 87), non-exclusive licensees (*Armstrong Cork Canada Ltd. v. Domco Industries Ltd.*, [1982] 1 S.C.R. 907, 42 N.R. 254), implied licensees (*Jay-Lor International Inc. v. Penta Farm Systems Ltd.*, 2007 FC 358, 59 C.P.R. (4th) 228), and even purchasers of patented products or products used to perform a patented process (*Signalisation*).

[79] As an infringer (according to the theory of its third party claim), Simplot derives no rights from the patentee, and cannot reasonably be considered to be a person who fits the definition of a person claiming under the patentee. Moreover, Simplot's role in the circumstances alleged in the third party claim cannot be likened to that of a person claiming under the patentee by any kind of reasonable analogy. It is easy enough to understand the logic that a person who derives rights from the patentee (a licensee, for example) should be able to enforce its rights in the patent and to be compensated for its damages resulting from an infringement of the patent. But Simplot can claim no similar right. Quite the contrary; Simplot is the party alleged to infringe the Patent, and from whom damages are claimed. Effectively, Simplot seeks to assert against Elea a right held only by McCain.

[80] In my view, it is plain and obvious that Simplot has no reasonable prospect of establishing that it is a person claiming under the patentee.

[81] Simplot also argues that its third party claim is merely incidental to the main claim, and that the Federal Court has jurisdiction over the third party claim because it has jurisdiction over the main claim. However, as indicated in the jurisprudence cited at paragraph 26 above, a third

party claim must stand on its own as an independent proceeding, separate from the main action and not merely incidental to it. In addition, a claim not otherwise based on federal law is not brought within the jurisdiction of the Federal Court merely because it arises from essentially the same facts as a related claim which is within federal jurisdiction: *Peter G. White* at para. 56. It is clear that Simplot's third party claim is indeed an independent claim against Elea, independent of McCain's claim against Simplot. Though Elea's potential liability to Simplot in the third party claim would depend in part on the outcome of the main claim, the cause of action in the third party claim arises from the terms of the relationship between Elea and Simplot. Issues of patent infringement would be incidental. This remains the case even in light of the reference in *Gottfriedson* at para. 34 to the possibility of having regard to the main action if it assists in determining what is in issue in the third party claim.

[82] I would conclude that it is plain and obvious that Simplot has no reasonable prospect of establishing that it has standing to maintain the third party claim based on the *Patent Act*. If Simplot is to establish a reasonable prospect of success in its third party claim, it would have to base its argument for the jurisdiction of the Federal Court on something other than the *Patent Act*.

(3) Jurisdiction Based on the *Federal Courts Act*

[83] Simplot argues that a foundation for the jurisdiction of the Federal Court over the third party claim can be found in subsection 20(2) of the *Federal Courts Act*, reproduced at paragraph 60 above.

[84] Since I have already concluded that the *Patent Act* cannot be the basis for the Federal Court's jurisdiction over the third party claim, one important question regarding this provision is whether the "Act of Parliament" referred to in this provision to support the Federal Court's jurisdiction can be the *Federal Courts Act* itself. In other words, can this provision be self-referential.

[85] In *Windsor Bridge*, the Supreme Court of Canada considered the same question in relation to a different but similar provision of the *Federal Courts Act*, section 23. That provision gives the Federal Court concurrent jurisdiction "in all cases in which a claim for relief is made or a remedy is sought under an Act of Parliament or otherwise" in relation to certain matters. The Supreme Court concluded at paragraph 52 that it would be circular to reason that the *Federal Courts Act* could itself be the federal law contemplated by the term "an Act of Parliament or otherwise" in section 23.

[86] In my view, the same reasoning must apply to the question of whether the *Federal Courts Act* is contemplated as being "the authority of an Act of Parliament or at law or in equity" in subsection 20(2): see *Alpha Marathon Technologies Inc. v. Dual Spiral Systems Inc.*, 2017 FC 1119, 2017 CarswellNat 7058 at paras. 78-80. Such reasoning would be circular.

[87] Simplot notes the passage in *Apotex Inc. v. Merck & Co.*, 2006 FCA 323, [2007] 3 F.C.R. 588 at para. 123, indicating that nothing in section 20 of the *Federal Courts Act* suggests that it is intended to limit a judge's creativity in fashioning appropriate remedies. I do not doubt this. However, I see nothing inconsistent between a judge's freedom in fashioning remedies, and the

requirement that there first be a statutory grant of jurisdiction by Parliament, per step 1 of *ITO* (reproduced at paragraph 58 above).

[88] Simplot notes that the jurisdiction of the Federal Court need not be based on an Act of Parliament, and may instead be based on authority “at law or in equity.” But this cannot help Simplot’s case. Because both the jurisdiction of the Federal Court and patent law in general must be based on statute, Simplot must nevertheless base its argument on a federal statute. For the reasons already discussed, Simplot cannot base its third party claim on either the *Patent Act* or the *Federal Courts Act*. No other federal statute has been suggested as a basis for the Federal Court’s jurisdiction.

[89] Simplot argues that Rule 194 of the Rules should be interpreted broadly to give effect to its intended purpose of avoiding a multiplicity of proceedings. Rule 194 provides that “[w]ith leave of the Court, a defendant may commence a third party claim against [...] another person who is not a defendant to the action, who the defendant claims [...] should be bound by the determination of an issue between the plaintiff and the defendant.” While Rule 194 contemplates third party claims, it is a procedural provision. It cannot be the source of jurisdiction for the Federal Court independent of the *Federal Courts Act* itself.

[90] Simplot argues that it would be put in an absurd position of having to prove infringement in a separate provincial court proceeding in order claim its indemnity. However, concerns about a multiplicity of proceedings and/or inconsistent results cannot justify finding that the Federal Court has jurisdiction where no federal statute grants it jurisdiction. The Supreme Court of

Canada had occasion to consider the issue of inconvenience in *Bank of Montreal v. Royal Bank of Canada*, [1933] S.C.R. 311, [1933] 3 D.L.R. 444 at p. 316, where the Supreme Court acknowledged, “[t]here is a great deal to be said also on grounds of convenience in favour of investing the Court with jurisdiction to entertain such claims for indemnity.” However, the Supreme Court refused to find jurisdiction based on inconvenience. The Supreme Court considered this issue again many years later in *Thomas Fuller* and reached the same conclusion, as did the Federal Court of Appeal in *Innotech Pty. Ltd. v. Phoenix Rotary Spike Harrows Ltd.*, [1997] F.C.J. No. 855, 74 C.P.R. (3d) 275.

[91] I have sympathy for Simplot’s situation of having to commence separate legal proceedings in a different court to enforce its claims in warranty and indemnity against Elea. However, that difficulty cannot resolve the problem of the Federal Court’s absence of jurisdiction in this case.

[92] Simplot relies on the decision in *Libbey-Owens-Ford Glass Co. v. Ford Motor Co.* (1968), 55 C.P.R. 165 (Ex. Ct.), 1968 CarswellNat 27 (*Libbey-Owens-Ford*). This case found that there was a “good arguable case” that a claim against a third party for indemnity based on contract, by a defendant in the context of a patent infringement action, fell within the jurisdiction of the Exchequer Court. The Court cited subsection 21(c) of the *Exchequer Court Act*, R.S.C. 1952, c. 98, as the basis for jurisdiction. Subsection 21(c) was very similar to subsection 20(2) of the current *Federal Courts Act*, contemplating jurisdiction “in all other cases in which a remedy is sought under the authority of any Act of the Parliament of Canada or at common law or in equity, respecting any patent of invention [...]”.

[93] *Libbey-Owens-Ford* does indeed favour Simplot's argument. However, I cannot reconcile it with subsequent jurisprudence. In *ITO*, the Supreme Court ruled that the jurisdiction of the Federal Court requires a statutory grant of jurisdiction by the federal Parliament. This requirement would have applied equally to the jurisdiction of the Exchequer Court. The conclusion in *Windsor Bridge* at paragraph 52 that wording similar to that in subsection 20(2) of the *Federal Courts Act* is not intended to be self-referential would seem to apply equally to subsection 21(c) of the *Exchequer Court Act*. Accordingly, applying the law as it exists today, I cannot see how the defendant in *Libbey-Owens-Ford* could have an arguable case concerning the Court's jurisdiction over its third party claim.

[94] It is notable that a more recent decision of the Federal Court, *Burns Foods (1985) Ltd. v. Maple Lodge Farms Ltd.*, [1994] F.C.J. No. 1692, 58 C.P.R. (3d) 234 (*Burns Foods*), reached a conclusion opposite to that in *Libbey-Owens-Ford*. *Burns Foods* also concerned the question of the Court's jurisdiction over a claim against a third party for indemnity based on contract, by a defendant in the context of a patent infringement action. The Court in *Burns Foods* concluded that it did not have jurisdiction to adjudicate such an indemnity claim. Simplot argues that the Court made clear that its decision was based on the evidence in that case. However, the only distinction that Simplot notes is that *Burns Foods* did not involve a claim of inducement to infringe a patent. That distinction cannot assist Simplot because, as I have already indicated, Simplot's inducement allegation has no reasonable prospect of success.

[95] In conclusion, it is my view that the *Federal Courts Act* does not grant the Federal Court jurisdiction over Simplot's third party claim.

(4) Jurisdiction Based on Contract

[96] Simplot does not seriously argue that the Federal Court has jurisdiction based on contract alone. I understand all of its arguments to be that the basis for the Federal Court's jurisdiction is elsewhere, e.g. the *Patent Act* and/or the *Federal Courts Act*, and that the contractual aspect of Simplot's third party claim is incidental.

[97] Having concluded above that the Federal Court's jurisdiction cannot be based on either of the foregoing statutes, or any aspect of the law or equity not otherwise tied to those statutes, it is not necessary to discuss further the issue of Federal Court jurisdiction based on contract.

(5) Conclusion on the Appeal Concerning Third Party Claim

[98] Having found that the Federal Court's jurisdiction over the third party claim cannot be based on any of the *Patent Act*, the *Federal Courts Act*, or contract alone, I would conclude that the Federal Court does not have jurisdiction in respect of the third party claim regardless of its essential nature. That said, I take this opportunity to state my view that the essential nature of the third party claim is in contract, based on the Contract between Elea and Simplot. Simplot's liability to McCain for patent infringement is a requirement of Simplot's third party claim, but the basis for the third party claim is the relationship between Simplot and Elea, as defined in the Contract. Simplot can have no claim of inducement. The *Patent Act* is not directly relevant to the third party claim, and is merely of incidental relevance by virtue of the main claim.

[99] I would allow the appeal as it relates to the third party claim. I would strike the third party claim in its entirety without leave to amend.

V. Conclusion

[100] As indicated in paragraph 4 above, there are two appeals before the Court. Based on the foregoing, I would allow Elea's appeal in Court File No. A-482-19, and I would allow in part McCain's appeal in Court File No. A-486-19. I would dismiss the latter appeal as it relates to the statement of defence and counterclaim, and allow it as it relates the third party claim. I would also strike the third party claim in its entirety without leave to amend.

[101] By letter submitted to the Court following the hearing, the parties have indicated their agreement on the manner of determining costs and the quantum thereof. I would follow that agreement. Since Elea has been successful in its appeal, I would order that Simplot pay Elea its costs before this Court in the all-inclusive amount of \$2500. Moreover, I would set aside the Federal Court's award of costs against Elea, and order that (i) the amount paid to Simplot by Elea in respect of such award of costs be returned with interest, and (ii) Elea receive its costs before the Federal Court in an amount to be agreed between Elea and Simplot or, failing agreement, to be determined by the Federal Court.

[102] With regard to McCain's appeal, success is divided. Pursuant to the parties' agreement, I would order no costs on that appeal.

[103] Before concluding, I wish to thank counsel for the excellent quality of their submissions, both written and oral, and for their cooperation with one another in this matter. This was of great assistance in considering the issues in dispute and in preparing these reasons.

"George R. Locke"

J.A.

"I agree.
D.G. Near J.A."

"I agree.
Anne L. Mactavish J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS: A-486-19 and A-482-19

DOCKET: A-486-19

STYLE OF CAUSE: MCCAIN FOODS LIMITED v.
J.R. SIMPLOT COMPANY,
SIMPLOT CANADA (II)
LIMITED and ELEA
VERTRIEBS-UND-
VERMARKTUNGSGESELLSCH
AFT, MBH

AND DOCKET: A-482-19

STYLE OF CAUSE: ELEA VERTRIEBS-UND-
VERMARKTUNGSGESELLSCH
AFT, MBH v. MCCAIN FOODS
LIMITED, J.R. SIMPLOT
COMPANY and SIMPLOT
CANADA (II) LIMITED

PLACE OF HEARING: BY ONLINE VIDEO
CONFERENCE

DATE OF HEARING: DECEMBER 9, 2020

REASONS FOR JUDGMENT BY: LOCKE J.A.

CONCURRED IN BY: NEAR J.A.
MACTAVISH J.A.

DATED: JANUARY 14, 2021

APPEARANCES:

Mark Davis
Kassandra Shortt

Steven B. Garland
Daniel J. Hnatchuk

Peter Wilcox
Benjamin Reingold

FOR MCCAIN FOODS LIMITED

J.R. SIMPLOT COMPANY and
SIMPLOT CANADA (II)
LIMITED

ELEA VERTRIEBS-UND-
VERMARKTUNGSGESELLSCH
AFT, MBH

SOLICITORS OF RECORD:

NORTON ROSE FULBRIGHT CANADA LLP
Toronto, Ontario

SMART & BIGGAR LLP
Ottawa, Ontario

BELMORE NEIDRAUER LLP
Toronto, Ontario

MCCAIN FOODS LIMITED

J.R. SIMPLOT COMPANY AND
SIMPLOT CANADA (II)
LIMITED

ELEA VERTRIEBS-UND-
VERMARKTUNGSGESELLSCH
AFT, MBH