

Federal Court



Cour fédérale

**Date: 20150730**

**Docket: T-1353-13**

**Citation: 2015 FC 938**

**Ottawa, Ontario, July 30, 2015**

**PRESENT: Madam Prothonotary Mireille Tabib**

**Docket: T-1353-13**

**BETWEEN:**

**ARCTIC CAT INC. AND ARCTIC CAT  
SALES, INC.**

**Plaintiffs**

**and**

**BOMBARDIER RECREATIONAL  
PRODUCTS INC.**

**Defendant**

**REASONS FOR ORDER AND ORDER**

[1] With some three months left before the beginning of the trial, after a pre-trial conference has been held and the parties have exchanged their expert reports in chief, Bombardier Recreational Products Inc. (“BRP”) brings this motion for leave to amend its Statement of Defence and Counterclaim in order to significantly expand the list of prior art cited in support of its allegations of obviousness and anticipation and to include a new ground of invalidity. Arctic

Cat Inc. and Arctic Cat Sales Inc. (“Arctic Cat”) strenuously object to these amendments. The proposed amended pleading also included other miscellaneous amendments, to which Arctic Cat has consented.

I. The context and history of the proceedings

[2] BRP, by counterclaim, seeks a declaration that Arctic Cat’s ‘738 patent is invalid on the grounds, inter alia, of obviousness and anticipation. The counterclaim was first filed in 2013. It was amended in June 2014, on consent, to add numerous new prior art references to the existing allegations of anticipation and obviousness. At no time until June 15, 2015 had ambiguity been raised as a ground of invalidity.

[3] Discoveries were substantially completed in 2014 and it was agreed between the parties that preparation and filing of their respective expert reports would be deferred until after the conclusion of a six-week trial in another patent infringement action between the same parties (T-2025-11, heard in the spring of 2015).

[4] The trial in this action is scheduled to begin on September 14, 2015.

[5] The proposed new prior art references had been known to BRP and its experts and disclosed to Arctic Cat as relevant prior art in the context of US proceedings between the same parties regarding a series of patents corresponding to the ‘738 patent, before March 2, 2015. However, they were not disclosed, pleaded or produced in this litigation until the moment BRP delivered its expert report to Arctic Cat on June 15, 2015. BRP used the same expert, Glenn

Bower, for the US and Canadian litigations. Mr. Bower swore an affidavit in support of BRP's motion in which he asserts that, while he had been retained for the proceedings in both countries and had considered the prior art at issue for the purpose of the US litigation well before March 2015, the preparation of his report for this action took place "for the most part" in May and June 2015. It is during that period that he drew Canadian counsel for BRP's attention to these references. He asserts however that he only raised the argument of the ambiguity of the '738 patent with counsel for BRP "during the first week of June 2015". The fact that Mr. Bower specifies that he raised ambiguity in the first week of June, but is more vague with respect to the prior art, leads me to conclude that the prior art would have been and was raised with counsel earlier than that, and at least as early as May 2015.

[6] I therefore find as a fact that BRP's counsel was aware, in May 2015, that Mr. Bower had identified the new prior art as relevant to the issues of obviousness and anticipation and that counsel was aware, before June 11, 2015, that Mr. Bower had developed the opinion that certain claims of the patent were ambiguous.

[7] A pre-trial conference was held on June 11, 2015. Amendments to the pleadings and the timing of the delivery of expert reports were specifically discussed. The order resulting from that pre-trial conference especially notes as follows: "both parties contemplate amending their pleadings to narrow them in light of expert reports and it is expected that amendments can be done on consent" (emphasis added).

[8] The deadline for the parties' exchange of their respective expert reports in chief on infringement and invalidity was, at the time of the pre-trial conference, the following day, Friday, June 12, 2015. As mentioned, BRP's counsel knew full well at that time that its expert report would likely introduce new prior art as a basis for obviousness and anticipation and a new allegation of ambiguity. No one could possibly construe this as narrowing issues, or even mistake it as a mere shift or readjustment. BRP's written representations on this motion specifically admit and argue that the additions are not trivial or formalistic. BRP's expert report clearly requires adding to the pleadings in respect of prior art references for obviousness and anticipation and expanding them to include a new allegation of ambiguity. Inexplicably, BRP's counsel failed to bring this crucial fact to Arctic Cat and the Court's attention. Indeed, by stating that its amendments would narrow the issues without also advising that they might expand other issues, BRP effectively misled Arctic Cat and the Court. BRP has offered no justification for this conduct, and I cannot think of any.

[9] As will be more fully discussed below, quite significant consequences may flow from the amendments sought, that may well have been mitigated or altogether avoided had BRP come clean about its intentions at or before the pre-trial conference. Given the importance of the pre-trial conference and taking to heart the comments of the Federal Court of Appeal in *Bristol-Myers Squibb Company et al. v Apotex Inc.* 2011 FCA 34, at paragraph 28, BRP's conduct cannot be countenanced. It must be condemned in the strongest terms and any repetition must be dissuaded. The Federal Court of Appeal's comments in the above-mentioned case bear repeating at length here:

28 This exchange of pre-trial memoranda matters. Although the parties should be clear and candid at all times during the

litigation about what issues are in real dispute, they certainly must come clean and be perfectly clear at the time of the pre-trial conference. In their pre-trial memoranda, there has to be full and frank discussion about all live, real issues so that "the Court [can] canvass ... whether the issues to be determined at trial ... have been properly considered and identified": *Wenzel Downhole Tools Ltd. v. National-Oilwell Canada Ltd.*, 2010 FC 669 at paragraph 19 (Proth.). This prevents surprise or ambush at trial. This also prevents the Court from wasting its scarce resources by scheduling matters for trial when they are not ready. Due to the seriousness of the representations made in the pre-trial memorandum and the importance of the objectives of a pre-trial conference, parties can later be held to what they say or do not say at the pre-trial conference: *Wenzel*, at paragraph 20. In the pre-trial memorandum and in the discussions at the pre-trial conference, there is no place for strategic non-disclosure or purposeful non-clarification. If an issue is not placed squarely on the table, all are entitled to assume that it is not on the table.

## II. The factors to be considered and their application to this case.

[10] The very first consideration on a motion to amend is whether the proposed amendments disclose a reasonable cause of action. Arctic Cat concedes that the amendments to the list of prior art disclose a reasonably arguable case. It submits however that the proposed amendments to add ambiguity as a ground of invalidity of claims 11 and 16 do not disclose a reasonable cause of action.

[11] Arctic Cat argues that at law, a claim can only be invalid on the basis of ambiguity if it establishes that one of the terms of the claim or of the specification is incapable of being construed. If a term can be interpreted using grammatical rules and common sense, it cannot be ambiguous, and where there is more than one construction that can reasonably be reached, the Court must favour a construction which upholds the patent (*Mobil Oil Corp. v Hercules Canada Inc.* (1995), 63 CPR (3d) 473; *Letourneau v Clearbrook Iron Works Ltd.* (2005) 44 CPR (4<sup>th</sup>))

345 and *Uview Ultraviolet Systems Inc. v Brasscorp Ltd.*, 2009 FC 58). Given, on the record before me, that BRP's expert is clearly able to arrive at a construction for the allegedly ambiguous terms, with little apparent difficulty, the amendment would have no reasonable chance of success and should be refused. I agree. Even if I am wrong, I am satisfied that the chances of success of this amendment are so tenuous that their dubious merit ought to be factored in and considered in determining whether the amendments should be permitted.

[12] The non-exhaustive list of other factors identified in the authorities as needing to be considered and weighed is set out below, together with my assessment of each factor's applicability to the facts of this case.

A. *Do the amendments withdraw admissions or result in a radical change to the matters in controversy?*

[13] While entirely new, the addition of ambiguity as a ground of invalidity does not contradict an earlier pleading. I would not consider it a radical change.

[14] With respect to prior art, BRP has moved two pieces of prior art previously cited for obviousness to its allegation of anticipation and moved two pieces of prior art previously cited as anticipatory to its obviousness allegations. There is no radical departure there, and Arctic Cat concedes as much. On the other hand, BRP's proposed amendments seek to remove entirely two anticipatory references and replace them with one entirely new reference. For obviousness, the amendments remove 14 references from the previous list of 24 and add six new ones. Thus, the amendments substitute new art to 30 to 50% of BRP's case on obviousness and anticipation.

BRP itself characterizes its amendments as neither trivial nor formalistic, and going to a critical aspect of the two main grounds of invalidity asserted. None of the new references were disclosed in affidavits of documents or canvassed on discovery. The fact that they might have been listed in US proceedings is irrelevant: they have never been contemplated for the purpose of this litigation. I find that these amendments constitute a radical change to the matters in controversy.

B. *Have the amendments been considered at a pre-trial conference?*

[15] As mentioned before, they have not, despite the fact that BRP was in a position to bring them up for consideration.

C. *Has a position of a party led the opposite party to pursue a course of action that may be difficult to alter?*

[16] I have already determined that the amendments to the list of prior art constitute a radical change. I also note the Federal Court's comments, at paragraphs 5 and 9 of *AbbVie Corporation et al. v Janssen Inc.* 2013 FC 1148 (reversed on appeal, but without disagreement on that issue, at *Janssen Inc. v AbbVie Corporation* 2014 FCA 242). These comments are to the effect that a change in prior art changes the entire landscape in which a person skilled in the art is operating and is critical to the way in which a party has shaped its case. I am satisfied that the nature of the amendments is such as to trigger the concern that BRP's position has led Arctic Cat to pursue a course of action that may be difficult to alter. It was BRP's burden to show, having regard to all relevant considerations including this one, that its amendments should be permitted. It has failed to satisfy me that its failure to invoke the new prior art until this late date has not led Arctic Cat to pursue a course of action that may be difficult to alter.

[17] I note, in particular, that as per the schedule set for this matter, both Arctic Cat and BRP served on each other their respective expert affidavits in chief on infringement and invalidity at the same time. Unbeknownst to Arctic Cat, BRP's expert was operating in a landscape that included significant new pieces of prior art, while Arctic Cat's expert was operating in a completely different landscape, one in which eight allegedly relevant or even crucial pieces of prior art might not have existed. As it was, Arctic Cat and its expert were drafting and producing their expert report without knowing the case they had to meet.

[18] BRP argues that Arctic Cat's expert report addressed infringement only and would not be affected by BRP's invalidity allegations. It adds that Arctic Cat also has an opportunity to respond to the new prior art in its responding report to BRP's expert report on invalidity.

Referring once again to the trial Judge's comments in *Janssen*, above, I cannot agree. Indeed, the Federal Court of Appeal on appeal confirmed that the concepts of infringement and obviousness are not entirely independent:

25 Although these concepts are independent and shed light on different issues, one could reasonably argue that their independence is somewhat limited as both noninfringement and validity of a patent depend on the scope of the patented invention and, as a result, on how the claims are construed. Indeed, whether STELARA(R) "falls within the parameters of each of claims 143 and 222" depends on what these claims mean. In like manner, invalidity grounds also depend on how the claims are construed, albeit to differing degrees. For instance, a defence of obviousness requires a comparison between the construed claims and the prior art. Once again, that comparison exercise brings to the fore the inventive concept of the claim (*Apotex Inc. v. Sanofi-Synthelabo Canada Inc.*, 2008 SCC 61, [2008] 3 S.C.R. 265 at paragraph 67, citing *Windsurfing International Inc. v. Tabur Marine (Great Britain) Ltd.*, [1985] R.P.C. 59 (C.A.)). In order to determine whether or not the prior art discloses any specific claim limitation, one must turn his mind to what the relevant claims' limitations are and what they mean. In the end, the conclusion on infringement



and how the Judge got there may have an impact on the rest of the analysis.

[19] Further, Arctic Cat has in its expert report dropped certain of the claims it had initially included in its infringement action, based on its understanding and assessment of the case as it stood. Had Arctic Cat known about the new allegations, it might have made different choices.

[20] I conclude that BRP's failure to produce, cite or plead the new prior art or to argue ambiguity until the service of its expert report and this motion to amend has led Arctic Cat to pursue a course of action that may be difficult to alter.

D. *The conduct of the parties and specifically the conduct of the party proposing the amendments.*

[21] As mentioned above, BRP's conduct in failing to disclose the new prior art and its expert's intention to raise ambiguity as soon as their relevance to the Canadian case was brought to its attention, and at the latest at the pre-trial conference, is inexcusable and unjustifiable. Arctic Cat's conduct is not at issue here.

E. *Will the amendments delay the expeditious trial of this matter?*

[22] BRP has provided no evidence or cogent argument to dispel the possibility of delay, despite the burden upon it and the radical change its proposed amendments would cause. However, Arctic Cat has not brought evidence to show that a delay in the start of the trial will be necessary, or even that there would be a likelihood of delay. I am mindful that Arctic Cat did not bear the evidentiary burden in this matter, and that it has had little time to consider the full

ramifications and consequences of the proposed amendments. However, had it been fairly obvious or clear to Arctic Cat that addressing the proposed new allegations might require an adjournment or delay in the start of the trial, it would have been its duty to inform the Court of the grounds for that conclusion without delay. Instead, Arctic cat has not even alluded to the possibility that the trial might be delayed. Accordingly, I cannot conclude, on the record before me, that the trial will necessarily or even probably be delayed if the amendments are permitted.

F. *The timeliness of the motion to amend*

[23] Although the motion was brought almost immediately following the production of the expert report that made the amendments necessary, I find that the motion was not timely. As mentioned above, BRP's counsel knew, in May 2015, that its expert had identified what he believed to be crucial prior art that had never been disclosed or raised as relevant for the purpose of the present action. BRP was also well aware that Arctic Cat and its expert were in the process of preparing their own expert report in chief. The time to bring the new prior art to the attention of Arctic Cat and to advise of the need to amend, if not to make the motion itself, was as soon as the expert had identified the new prior art, or at the latest at the pre-trial conference. Arctic Cat submits, and I accept this submission, that had it been advised of BRP's intention to introduce new prior art at the pre-trial conference, it would have sought – and I would have granted – additional time to serve its expert report on infringement so that Arctic Cat and its expert could have an opportunity to take the new art in consideration before finally committed themselves to the final shape of the expert report on infringement, or even to the choice of expert.

[24] With respect to the amendment pertaining to ambiguity, the evidence on the motion before me shows that BRP's expert delayed in discussing same with BRP's counsel. However, it remains that, on the evidence before me, BRP's counsel was aware of its expert's opinion in this regard at the time of the pre-trial conference, such that the motion is equally untimely with respect to that amendment.

G. *Prejudice which is not compensable by costs or otherwise.*

[25] As mentioned above, the introduction of so much new prior art in substitution to 30 to 50% of the prior art previously cited as relevant radically changes the matters in controversy and is of a nature to change the position that might have been taken by Arctic Cat's expert, or even the identity of the expert retained by Arctic Cat. It is therefore clear to me that the amendments and their timing are of a nature to cause prejudice that cannot be compensated in costs, and BRP's motion materials do not address this issue. On the other hand, while Arctic Cat has argued that it would suffer such prejudice, it has not led evidence to establish that its expert report would in fact have been materially different, that it would in fact have to instruct a different expert than initially considered, or the manner or degree in which it would otherwise be prejudiced. Again, Arctic Cat did not bear the evidentiary burden on this motion, and I also realise that it may be unfair to ask Arctic Cat to set out in detail the ways in which the proposed amendments might weaken the strategic position it had chosen to adopt or cause its expert to have to change the position he has already taken in the report served on BRP, since it would mean opening up its litigation brief to BRP ahead of the trial. Still, considering all the circumstance, including Arctic Cat's failure to lead any evidence as to prejudice not compensable in costs or otherwise, I am not

satisfied that allowing the proposed amendments would cause substantive prejudice to Arctic Cat that cannot be compensated in costs

[26] I am satisfied that the mere necessity for Arctic Cat to consider the ramifications of the change, let alone adjust to it, is disruptive, unsettling and distracting at a time where Arctic Cat should be concentrating on preparing and finalizing its case for trial as it was meant to be framed at the time of the pre-trial conference. However, this procedural unfairness is a prejudice that can be mitigated in costs.

[27] Because of the relative lack of merit of the proposed amendments relating to ambiguity, I cannot conclude that this addition would cause prejudice to Arctic Cat beyond the disruption and distraction that the addition of a new ground of invalidity, however weak, might cause this close to trial.

H. *Will the amendments facilitate the Court's consideration of the real issues in dispute?*

[28] With respect to the amendment adding ambiguity as a ground of invalidity, I am not satisfied that the amendments would facilitate the Court's consideration of the real issues in dispute. The ambiguity raised by BRP's expert has never been an issue in dispute between the parties. As discussed above, it does not present a reasonably arguable case, and if it did, its merits would be tenuous. Allowing it to be raised at this late stage would tend to detract rather than facilitate the Court's consideration of the real issues in dispute, which centre on the infringement of the patent and on whether it is anticipated or obvious.

[29] With respect to the new prior art going to obviousness and anticipation, two of the main issues in dispute in this action, I am bound to consider and apply the Federal Court of Appeal's decision in *Janssen*, above, given that the facts of that case are so similar to the facts of the case before me.

[30] In the trial decision giving rise to the appeal decision in *Janssen*, Justice Hughes, as trial Judge, refused to allow amendments to add to the list of prior art cited in support of a plea of obviousness, where the new prior art was only disclosed in Janssen's expert report three months before trial and where the motion to amend was brought some six weeks prior to the start of the trial. On appeal, the Federal Court of Appeal reversed the trial judge and allowed the amendments despite the trial Judge's finding that the amendments were not timely, would require the other party to change its position and would delay the trial. The Court of Appeal did not expressly disagree with the trial Judge's findings of fact, or with the test he applied. Rather, the Federal Court of Appeal found that the trial Judge did not give sufficient weight to all relevant considerations. One of the considerations to which the Federal Court of Appeal held the Judge had not given sufficient weight was that "it would have served the interests of justice that all the relevant prior art be before the Judge to allow him to fully address the issue of obviousness"(at para 17 of the reasons). I am unable to identify how the material facts of the case before me might differ from the facts in *Janssen* and am therefore bound by the rules of *stare decisis* to apply the Federal Court of Appeal's ruling and conclude that allowing the amendment would facilitate the Court's consideration of the issue of obviousness, which is one of the issues in dispute. I cannot see how the conclusion would differ for the issue of anticipation, another of the main issues in dispute.

### III. Weighing the factors

[31] The case law, and in particular, *Continental Bank Leasing Corp. v R* [1993] TCJ No. 18, teaches us that the above-mentioned factors must be considered and weighed on a case by case basis and that “No single factor predominates nor is its presence or absence necessarily determinative. All must be assigned their proper weight in the context of the particular case. Ultimately, it boils down to a consideration of simple fairness, common sense and the interest that the courts have that justice be done”.

[32] As mentioned above, the facts of this case bear very close resemblance to those in the *Janssen* case, and I have found, as instructed by the Court of Appeal’s decision, that it is in the interest of justice that the trial Judge have before him all relevant prior art to fully consider the issues of obviousness and anticipation. The Federal Court of Appeal’s decision should not however be taken as a general statement to the effect that this factor should necessarily be given more weight than other considerations going to the interests of justice, such as the waste of judicial resources caused by untimely amendments in general and adjournments in particular and the need for the Court to control its process, curb abuses of process and ensure respect for its rules and their aims. The Federal Court of Appeal in *Janssen* did not express an intention to reverse its earlier decisions or change the law as it relates to amendments. To hold *Janssen* as a pronouncement that relevant prior art can always be added where obviousness is at issue, no matter how late, and without regard to the fact that it would delay the trial or cause its adjournment by as much as a year, would be to go back to the once prevalent view, since expressly disavowed by the Federal Court of Appeal itself, that an amendment that discloses a

reasonable cause of action ought to be allowed, no matter how late, so long as it does not cause prejudice to the other side that cannot be compensated in costs. (See *Bristol Myers Squibb*, above and *Merck & Co. Inc. et al. v Apotex Inc.* 2003 FCA 488 at para 42).

[33] The weight given by the Court of Appeal to this factor must be understood in light of the particular circumstances of that case. I note that the Court of Appeal was seized of the appeal of the decision to deny the amendments at the same time as it was seized of the appeal of the judgment on the trial itself. It also appears that the Court had before it a comprehensive record as to how the parties' experts had considered the prior art at issue. For example, it appears that the experts were in agreement that one of the key pieces of prior art actually formed part of the common general knowledge. While the record before me is a lot less extensive than was the record before the Court in *Janssen*, it does include the as yet unchallenged evidence of BRP's expert to the effect that the new prior art is not merely relevant, but that it even forms part of the general common knowledge.

[34] Accordingly, while I might not ascribe as much weight as the Federal Court of Appeal did in *Janssen* to the interest of justice of having all relevant prior art before the Court, neither is this factor counterbalanced, on the record before me, by a finding that the amendment would require the adjournment of the trial, or by positive evidence from the party opposing the amendment of the procedural harm the amendments would cause.

[35] On the other hand, the facts in *Janssen* and the facts before me also differ in respect of the timing of the pre-trial conference, of the disclosure of the new prior art to counsel by the

experts and of the exchange of experts reports. I note that the trial judge in *Janssen* did not conclude that Janssen's counsel had been told of the existence of the prior art at the time of the trial management conference, contrary to my express finding in this case. Also, judging from the chronology as set out in the trial Judge's reasons for order, it is not clear that AbbVie's expert reports in chief were, as here, served simultaneously with Janssen's reports. The circumstances of the case before me weigh very heavily against allowing the amendments, as allowing amendments in the circumstances would tend to condone BRP's conduct and its disrespect for the process and aims of the pre-trial conference.

[36] In the end, the balance tilts in favour of allowing the amendments to add to the list of prior art, but not to add the allegation of ambiguity. That said, given my determination that BRP's conduct was inexcusable and that the procedural prejudice caused to Arctic Cat could have been avoided altogether or at least greatly mitigated had BRP complied with its disclosure obligations and informed Arctic Cat of its intentions in a timely fashion, it follows that BRP must compensate Arctic Cat in full for any and all consequences of the amendments that could have been avoided had the amendments been announced in a timely fashion and at the latest on June 11, 2015. Unless that compensation is made on the basis of solicitor and client costs, payable in any event of the cause, the costs incurred by Arctic Cat by having to consider the full impact and ramifications of the amendments on its existing expert report and trial strategies and having to take whatever steps are necessary to adjust its strategies to avoid substantive prejudice would be a prejudice not compensated by costs.



[37] To further underline and sanction the conduct of BRP in failing to apprise Arctic Cat and the Court of its intention to amend at the pre-trial conference while it knew that its expert report would require amendments and in effectively misleading the Court by announcing that it would amend to narrow the pleadings, Arctic Cat's costs of opposing this motion shall be payable by BRP forthwith and in any event of the cause, on a solicitor and client basis.

**ORDER**

**THIS COURT ORDERS that:**

1. The defendant/plaintiff by counterclaim has leave to amend its statement of defence and counterclaim in the form set out in its motion record, with the exception of the amendments to add subparagraphs 42.2 and 42.3 and the immediately preceding subtitle.
2. The costs of this motion shall be payable by BRP to Arctic Cat forthwith and in any event of the cause, on a solicitor and client basis.
3. BRP shall also pay to Arctic Cat all costs reasonably incurred by Arctic Cat in considering and reacting to the amendments, on a solicitor and client basis, in any event of the cause. Arctic Cat will immediately take steps to record and account for its costs of considering and reacting to the amendments separately from the other costs of this litigation.
4. Arctic Cat shall also be entitled to make representations to the trial Judge at the appropriate time, whether it be at trial or subsequent to judgment, to claim the costs not otherwise recovered pursuant to the preceding paragraph, of any step which it can show it would not have taken or any expense that it would have avoided had BRP announced its intention to amend in a timely fashion. The matter of whether Arctic Cat should be awarded such costs and the basis on which they should be awarded or calculated shall be in the discretion of the trial Judge.

"Mireille Tabib"

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Prothonotary

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1353-13

**STYLE OF CAUSE:** ARCTIC CAT INC. AND ARCTIC CAT SALES, INC. v  
BOMBARDIER RECREATIONAL PRODUCTS INC.

**PLACE OF HEARING:** MONTRÉAL, QUEBEC

**DATE OF HEARING:** JULY 22, 2015

**REASONS FOR ORDER AND  
ORDER:** TABIB P.

**DATED:** JULY 30, 2015

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