Federal Court Cour fédérale

Date: 20210827

Docket: T-1624-17

Citation: 2021 FC 890

Ottawa, Ontario, August 27, 2021

PRESENT: Mr. Justice McHaffie

BETWEEN:

MCCAIN FOODS LIMITED

Plaintiff

and

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

Defendants

ORDER AND REASONS

I. Overview

[1] This appeal from a June 7, 2021 order of Case Management Judge Aylen, then a Prothonotary of this Court, raises one central issue: whether Rule 237(3) of the *Federal Courts Rules*, SOR/98-106 permits the Court to order that an employee of a company's subsidiary be examined for discovery as the company's representative where the company does not agree to them acting as such.

[2] The Case Management Judge held that Rule 237(3) does not permit such an order. She therefore declined to order that an employee of McCain Alimentaire SAS [McCain France] be examined on behalf of McCain Foods Limited [McCain]. For the reasons below, I find this conclusion was correct. Where an employee of another company, even a subsidiary, has not been given authority to act on the company's behalf, they are not a "representative" of the company as that term is used in Rule 237(1), and the Court therefore cannot order them to be examined under Rule 237(3).

[3] I also conclude the Case Management Judge did not err in declining to order McCain to identify and put forward another discovery representative, as this was not an order requested by the defendants [collectively, Simplot].

[4] The appeal is therefore dismissed. In accordance with the parties' agreement, costs of the appeal are fixed at $5,000, payable to McCain as the successful party in any event of the cause.

II. Issues

[5] I will address the issues raised by the parties in the following order:

A. Did the Case Management Judge err in concluding Rule 237(3) does not permit the Court to order that an employee of a party's subsidiary be examined for discovery as the party's representative?

B. Did the Case Management Judge err in not ordering McCain to identify and put forward another discovery representative and/or should this Court make such an order?

C. Is Simplot's motion for a substituted discovery representative premature?

III. Analysis

A. *Rule 237(3) does not permit the Court to order that an employee of a subsidiary be examined*

(1) Procedural background

[6] McCain's action alleges Simplot has infringed Canadian Patent No 2,412,841 ['841 Patent]. The '841 Patent pertains to a process for treating vegetables and/or fruit with a pulsed electrical field before cooking to reduce their resistance to cutting. Simplot denies infringement and alleges the '841 Patent is invalid. The evidence indicates that development of the technology underlying the '841 Patent, which issued on January 22, 2008, began in 1997. Simplot argues this development process is relevant to its invalidity claims, including its assertions of obviousness, overbroad claiming, and lack of utility.

[7] McCain selected Brian Ruff as its discovery representative pursuant to Rule 237(1). Mr. Ruff, who also swore McCain's affidavit of documents, has been with McCain since 1988 and is currently a Process Manager for Research and Development. Simplot examined Mr. Ruff for discovery for two days in February 2021 but was dissatisfied with his ability to answer questions. On April 30, 2021, Simplot brought a motion under Rule 237(3) seeking an order that Fabrice DeSailly, an employee of McCain France and one of the inventors of the '841 Patent, be examined in place of Mr. Ruff as McCain's representative. The relevant Rules read as follows:

Representative selected	**Interrogatoire d'une personne morale**
237 (1) A corporation, partnership or unincorporated association that is to be examined for discovery shall select a representative to be examined on its behalf.	**237 (1)** La personne morale, la société de personnes ou l'association sans personnalité morale qui est soumise à un interrogatoire préalable désigne un représentant pour répondre en son nom.
[…]	[…]
Order for substitution	**Substitution ordonnée**
(3) The Court may, on the motion of a party entitled to examine a person selected under subsection (1) or (2), order that some other person be examined.	**(3)** La Cour peut, sur requête d'une partie ayant le droit d'interroger une personne désignée conformément aux paragraphes (1) ou (2), ordonner qu'une autre personne soit interrogée à sa place.
[Emphasis added.]	[Je souligne.]

[8] Simplot argued that Mr. Ruff's inability to answer relevant questions makes him a "straw witness," such as described by Justice Phelan in *Teva Canada Limited v Eli Lilly Canada*, 2016 FC 1131 at para 12. It also relied on Mr. Ruff's concession that Mr. DeSailly would be better able to answer the questions that had been put to him in respect of at least some areas, particularly as it related to the development of the invention.

(2) The Case Management Judge's decision

[9] Case Management Judge Aylen dismissed Simplot's request. She noted this Court has set out a series of principles applicable on motions under Rule 237(3), making reference to *Liebmann v Canada (Minister of National Defence)*, [1996] FCJ No 536; *Benisti Import-Export*

Inc v Modes TXT Carbon Inc, 2004 FC 539 at para 3; *Lubrizol Corp v Imperial Oil Ltd*, 2000 CanLII 15750 (FC) at paras 2-7; *Angelcare Canada Inc v Munchkin, Inc*, 2021 FC 238 at para 65; *MediaTube Corp v Bell Canada*, 2015 FC 391 at paras 12–13; and *Ermineskin Indian Band v Canada*, [1995] 3 FC 544.

[10] The parties do not dispute either the general principles from these cases or the manner in which the Case Management Judge set them out. I will not repeat all of these principles here, as they are ultimately not determinative of this appeal. Among them, however, is the principle that the party being examined must put forward a "proper and knowledgeable witness" able to give "broad discovery": *Liebmann* at para 31.

[11] The Case Management Judge stated she had reviewed the entirety of Mr. Ruff's transcript and found he had "very little knowledge of the issues addressed at the examination for discovery." She noted that McCain's counsel was able to provide corporate information more frequently than Mr. Ruff, and that a significant portion of the questions Mr. Ruff could answer simply involved repeating what was in a document. She rejected McCain's contention that Mr. Ruff gave a "broad discovery." She found instead that his knowledge was generally limited to a brief period when he managed labs where scientists were working on the technology and that even then his involvement in the project was minimal. She concluded that:

> To the extent that Mr. Ruff prepared for his examination for discovery, I find that <u>his preparation was insufficient to render Mr. Ruff a proper and knowledgeable witness</u>.
>
> [Emphasis added.]

[12] Nonetheless, the Case Management Judge found Mr. DeSailly was not an appropriate substitute for Mr. Ruff. With reference to the Federal Court of Appeal's decision in *The Anangel Splendour*, she concluded that a "representative" on an examination for discovery must be a representative of the company: *Anangel Splendour (Ship) v Canada (Ship-Course Oil Pollution Fund)*, 2006 FCA 212 at paras 12–13.

[13] The Case Management Judge rejected Simplot's reliance on *Lubrizol*, in which Justice Hugessen accepted that a US parent and its Canadian subsidiary could nominate the same employee of the parent as their representative under Rule 237(1): *Lubrizol* at paras 3, 5, 8. She noted that the subsidiary Canadian company in that case chose to have the witness as a representative, and that the Court therefore made no determination as to whether it could compel the company to be represented by an employee of the US affiliate on a contested motion.

[14] The Case Management Judge found that Mr. DeSailly was not a representative of McCain but of McCain France, and that Rule 237(3) therefore did not permit the Court to order that he replace Mr. Ruff as McCain's representative. She stated, moreover, that "it would be inappropriate for the Court to compel a party to accept as its discovery representative someone who is not an employee and thus not under its control."

(3) The Case Management Judge did not err in her interpretation of Rule 237(3)

(a) *Standard of review*

[15] The parties agree the applicable standard of review of the Case Management Judge's decision is that set out in *Housen v Nikolaisen*, namely that questions of fact and of mixed fact and law are reviewable on a "palpable and overriding error" standard, while questions of law are reviewable on a correctness standard: *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras 64–69; *Housen v Nikolaisen*, 2002 SCC 33 at paras 7, 8, 10, 36–37; *Worldspan Marine Inc v Sargeant III*, 2021 FCA 130 at para 48.

[16] In my view, the interpretation of Rule 237 is an extricable issue of law, and the Case Management Judge's decision on the issue is therefore reviewable on the correctness standard: *Housen v Nikolaisen* at para 8. McCain stressed the importance of a case management judge's familiarity with the circumstances and issues in a proceeding and the deference to be afforded on factually suffused questions: *Hughes v Canada (Human Rights Commission)*, 2021 FC 728 at para 37. However, with one exception, the Case Management Judge's determination of this issue was based on her interpretation of Rule 237(3), and not the circumstances, issues, or facts of the case. The exception lies in the finding that Mr. DeSailly is not an employee or representative of McCain. This is a more factually suffused question on which deference is warranted, although as discussed below, the relevant facts are themselves not in significant dispute.

(b) *The meaning of "representative" in Rules 237(1) and (3)*

[17] Simplot argues the Case Management Judge erred in her application of *The Anangel Splendour*. It stresses that the Court of Appeal in that case was addressing a circumstance where a party was effectively seeking discovery of a non-party: *The Anangel Splendour* at paras 6–9, 12–13. It argues that nothing in *The Anangel Splendour* precludes an employee of an affiliate from being a representative on discovery, and cites *Lubrizol* as an example.

[18] As Simplot points out, *The Anangel Splendour* deals with a different factual situation. The Case Management Judge did not suggest otherwise. Nonetheless, the principles in the case are important.

[19] The plaintiff in *The Anangel Splendour* was the Administrator of the Ship-Source Oil Pollution Fund. It had paid a claim for clean-up expenses incurred by Fisheries and Oceans Canada and by Compagnie Minière Cartier Québec, and therefore had a subrogated claim against the defendants, the alleged polluters. The defendants sought to examine a representative of Cartier Québec and a representative of Fisheries and Oceans Canada as representatives of the Administrator. The Court of Appeal's rejection of the request for examination under Rule 237 is concise:

> Notwithstanding the arguments of counsel for the appellants, we have not been convinced that the judge erred in his interpretation of Rule 237(3) and Rule 238. <u>It is obvious that the "other person to be examined" mentioned in subsection 237(3) is a representative of the corporation, partnership or unincorporated association mentioned in subsection 237(1) or of the Crown in subsection 237(2)</u>.
>
> In fact, the appellants are asking us to create a new exception in Rule 237 by adding to it a subsection 8 that would include as persons representative of those mentioned in Rule 237(1) <u>the subrogators of the claims who are not parties to the proceedings</u>. In doing so, this Court would not only be circumventing and usurping

> the role of the Rules Committee, it would also ignore the specific provision enacted by the Rules Committee, and approved by the Governor in Council, in Rule 238 with respect to the examination of non-parties.
>
> [Emphasis added; *The Anangel Splendour* at paras 12–13.]

[20] The parties before me do not dispute the first principle set out above, namely that the "other person to be examined" mentioned in Rule 237(3) must be the same "representative of the corporation" referred to in Rule 237(1). The Court of Appeal in *The Anangel Splendour* applied that principle to conclude that representatives of subrogators who are not parties to the proceeding do not fall within the scope of "representative of the corporation" for purposes of Rule 237. The question on this appeal is how the principle applies to the different factual situation of an employee of a subsidiary.

[21] In my view, the answer lies in the term "representative" in Rule 237(1), read in the context of the rules governing examinations for discovery. Examination for discovery is an important part of the pre-trial process in the Federal Court as in other Canadian jurisdictions. It permits a party to discover relevant evidence, understand the opposing party's case, and obtain admissions for use at trial: see, *e.g.*, *Hershkovitz v Tyco Safety Products Canada Ltd*, 2006 FC 1228 at para 3. The potential to obtain admissions is strengthened by the ability to introduce any part of the discovery of an adverse party at trial, even if the witness has not testified: Rule 288. Unlike in some foreign jurisdictions, examination for discovery is generally permitted of only one representative of an opposing party.

[22] The fact that a corporate party is generally bound by the answers of the person examined is relevant to interpreting the term "representative." In the ordinary course, it is the corporate party that selects the individual. In doing so, it agrees to be bound by their answers and this agreement makes the individual the party's "representative" for purposes of Rule 237(1). Since the corporation has agreed to be represented by the individual for purposes of the discovery, the individual need not be, for example, an employee, officer, or director of the corporation. As the parties both accept, a corporation may agree to be represented by an employee of an affiliate (as in *Lubrizol*) or, depending on the circumstances, by someone else such as a former employee. Even where there is no other relationship, it is the very agreement to be represented for the purposes of discovery that makes the individual a representative. While this selection may be challenged by the opposing party based on the individual's knowledge and appropriateness, *Lubrizol* confirms that the fact that they are not an employee of the company is not alone a basis to find them to be a valid representative, where the company has agreed to be represented.

[23] What, then, of the case where the party has not agreed to be represented by an individual, which is the case under Rule 237(3)? As the Court of Appeal noted in *The Anangel Splendour*, what the Court is doing is ordering an individual to be the company's representative, *i.e.*, ordering the company to be bound by their answers on discovery.

[24] I agree with Case Management Judge Aylen that Rule 237(3) does not permit the Court to order someone who is not a "representative" of the corporation, either through the corporation's agreement to be represented by them or by virtue of their existing relationship with the corporation, to be examined for discovery in substitution for the corporation's selected

individual. While the Court of Appeal was not dealing with a parent-subsidiary or other affiliate relationships in *The Anangel Splendour*, the fact remains that where a corporation has not agreed to have the employee of an affiliate represent them, that employee is not their representative but is only the representative of a non-party, the affiliate. In the present case, as Case Management Judge Aylen concluded, McCain has not agreed to have Mr. DeSailly represent them on discovery in this proceeding, and he is not otherwise a representative of McCain; he is a representative of McCain France, a non-party. I further agree with Case Management Judge Aylen's observation that it is inappropriate for the Court to impose on a corporation a discovery representative who they have not agreed to be represented by and who, as a non-employee, is not under their control.

[25] Simplot argues that to draw such corporate distinctions between affiliates is a matter of technicality, and that the determination of whether an individual can act as representative ought to be determined as a more factual matter. I cannot agree. The separation of corporate entities is more than a mere technicality and goes to a fundamental aspect of Canadian corporate law. A parent cannot be considered as effectively the same as its subsidiary, and the subsidiary's employees to be representatives of the parent, without effectively lifting the "corporate veil" between the companies. This, the Court of Appeal has recently reminded us, ought only to be done where respecting separate corporate existence would yield a result "too flagrantly opposed to justice": *Delizia Limited v Nevsun Resources Ltd*, 2017 FCA 187 at paras 28–33, leave to appeal refused 2018 CanLII 26073 (SCC).

[26] I note that where the Rules permit the Court to impose obligations on a corporate party *vis-à-vis* its affiliates, it does so in clear language. Rule 225 provides that on motion, the Court may order a party to disclose in an affidavit of documents the documents that are in the power, possession, or control of a subsidiary, parent, or sister company. No similar language appears in Rule 237(3).

[27] Simplot also raised the spectre of a party arranging its affairs to avoid reasonable discovery by ensuring that those who are knowledgeable have no relationship with the corporation who is party to the proceeding. To the extent this is a concern in a given case, the Court has the ability to avoid such abuse of process through orders, which might include a broader order under Rule 237(3). Indeed, this is an example of where the test for lifting the corporate veil may be met. However, Simplot concedes there is no concern of this kind in this case. Mr. DeSailly has been an employee of McCain France throughout, and there is no evidence of any arrangements by either McCain or McCain France to arrange its affairs so that he is not employed by McCain, the owner of the ’814 Patent.

[28] Nonetheless, Simplot argues in essence that justice requires the same outcome in this case. It asserts that if it is not permitted to examine Mr. DeSailly as McCain’s representative, it will be prejudiced by being unable to obtain binding admissions to read in at trial directly from a knowledgeable witness, which it describes as an inequitable and absurd result. I cannot conclude that justice requires the Court to ignore the corporate distinction between McCain and McCain France in this case. The fact that one of the individuals involved in the historical development of the technology underlying the ’841 Patent is with a different company, albeit within the McCain corporate family, does not create any greater inherent injustice than it would if they had been

with an unrelated company. In such a case, which is far from unusual, a party to litigation must obtain its binding admissions from the corporate representative, and its evidence as to the development of the technology from third parties such as inventors.

[29] In this case, as the Case Management Judge points out, Simplot has the ability to examine Mr. DeSailly for discovery as an inventor, *i.e.*, as an assignor pursuant to Rule 237(4). While such evidence is not binding against McCain in the formal sense, and cannot be simply read in pursuant to Rule 288, the availability of such examination is relevant to the assessment of whether justice requires the Court to ignore the corporate distinction. Indeed, the reason that such an examination cannot simply be read in at trial is that the inventor is *not* a party to the action: *Eli Lilly and Co v Apotex Inc*, 2006 FC 282 at paras 14–15. This does not change simply because the inventor is an employee of a subsidiary.

[30] Simplot relies on amendments to the predecessor to Rule 237(1) that were promulgated in 1990. Previously, Rule 456(2) required the corporation to select "an informed officer, director, member or employee to be examined on its behalf." Simplot argues that the term "representative" must be given a broader meaning than the limited list of potential representatives previously enumerated in the provision. As noted above, I have no difficulty accepting that a party may agree to be represented by someone who is not an officer, director, member, or employee. Indeed, *Lubrizol* confirms this. However, I do not believe this means the Court can make an order under Rule 237(3) to substitute someone who has neither a pre-existing representative relationship (such as an officer, director, employee, or agent—I need not decide in this case whether former officers, directors, employees, or agents would fall in this category) nor a representative relationship created by the corporation's agreement to be represented by them.

(c) *Simplot's challenges to the Case Management Judge's description of Mr. DeSailly*

[31] Simplot also takes issue with two other aspects of the Case Management Judge's conclusions regarding Mr. DeSailly and his relationship with McCain. First, it argues the Case Management Judge erred in asserting there was "no evidence or suggestion that he is an employee, officer or director of McCain, nor any acknowledgment by McCain that he represents or could represent McCain." Simplot concedes Mr. DeSailly is not an employee, officer, or director of McCain. However, it argues McCain has "impliedly acknowledged" Mr. DeSailly can and does represent McCain, by voluntarily putting him forward as a corporate discovery witness in parallel litigation in the United States involving the US equivalent to the '841 Patent. I disagree. The fact that McCain tendered Mr. DeSailly to give evidence in a different jurisdiction, with different rules governing discovery, cannot be taken to mean it has agreed Mr. DeSailly is its representative for all purposes, including litigation in this Court. The Case Management Judge made no palpable and overriding error in this regard.

[32] Second, Simplot argues the Case Management Judge erred in concluding Mr. DeSailly was not under the "control" of McCain. It suggests that as a matter of practical reality, the employees of any McCain subsidiary are ultimately under the effective control of McCain. Again, I cannot accept this as a general principle or as having been demonstrated in this particular case. On my read of her decision, the Case Management Judge was referring to "control" in the sense of the relationship between an employee and their employer. That relationship is different from the relationship between an employee and the shareholders of their employer, even if those shareholders control the company or are a single corporation. In any

event, to the extent that some form of "control" test is relevant to the determination, Simplot has not demonstrated a material degree of control by McCain over the employees of McCain France in general or Mr. DeSailly in particular, providing no evidence regarding matters such as hiring or termination decisions, discipline, direction, or work performed. Again, I see no palpable and overriding error. For clarity, none of the foregoing should be taken as making any statements regarding employment law or labour relations, on which the Court had no submissions; the sole issue is the interpretation of the Rules governing discovery in the Federal Court.

[33] I therefore conclude that Case Management Judge Aylen did not err in concluding that Rule 237(3) did not permit her to make the order sought and dismissing the motion on this basis.

B. *Case Management Judge Aylen did not err in making a generalized order for another representative*

[34] After concluding she could not order Mr. DeSailly to be McCain's representative, Case Management Judge Aylen made the following statement:

> Rule 237(3) motions are specific to the individual sought to be ordered as the substitute representative. As Simplot has not sought, in the alternative, an order for any other individual to be substituted for Mr. Ruff, the Court cannot grant Simplot's motion, notwithstanding the Court's findings regarding Mr. Ruff's suitability to act as McCain's corporate representative.
>
> [Emphasis added.]

[35] Simplot argues that having concluded Mr. Ruff was not a proper and knowledgeable witness, it was an error for Case Management Judge Aylen not to have made an order for

substitution. In particular, it argues she should have required McCain to identify and put forward a different witness who was proper and knowledgeable.

[36] In my view, this argument must fail for the simple reason that Simplot did not seek the order it now asserts the Case Management Judge should have made. It sought an order substituting Mr. DeSailly as McCain's representative. It did not seek, in the alternative or at all, an order substituting anyone else as McCain's representative or—even assuming such an order may be granted under Rule 237(3)—a general order requiring McCain to identify another witness.

[37] Rule 359(*b*) requires a party to set out in its notice of motion "the relief sought." As McCain points out, the general rule is that "[a]bsent unusual circumstances, or consent, a court may only grant relief sought in the notice of motion": *Energizer Brands, LLC v The Gillette Company*, 2020 FCA 49 at paras 38–39; *Pascal v Canada (Attorney General)*, 2005 FCA 31 at para 2.

[38] Simplot's notice of motion before Case Management Judge Aylen sought only "[a]n order for substitution of McCain's discovery representative, permitting Simplot to examine for discovery Fabrice DeSailly as McCain's discovery representative, and that McCain bear the cost of that examination," together with costs and the usual "[s]uch further and other relief as to this Honourable Court may seem just." The "Order Sought" section of Simplot's Written Representations similarly referred only to the examination of Mr. DeSailly as McCain's discovery representative at McCain's expense.

[39] This is not a question of mere formality. The requirement to state the relief sought in the notice of motion gives the responding party fair notice of the case to be met on the motion. McCain contended on this appeal that, despite the Case Management Judge's concerns, there was no better representative of McCain than Mr. Ruff. While the evidentiary record was not very clear on this point, this is precisely the issue. Had McCain known that Simplot sought discovery of another representative other than Mr. DeSailly, it could have tendered evidence and argument to respond to that request, including as to the availability of any better witness.

[40] Simplot relies on its inclusion of the standard "basket clause" in its notice of motion, seeking "[s]uch further and other relief as to this Honourable Court may seem just." The Court has some discretion to provide certain relief not otherwise sought on the basis of such a clause: *Native Women's Assn of Canada v Canada*, [1994] 3 SCR 627 at pp 647–648; *SC Prodal 94 SRL v Spirits International BV*, 2009 FCA 88 at para 11. However, this discretion should be exercised with caution, particularly where a party seeks entirely new relief that would call for different arguments and different evidence. Put another way, it does not "seem just" to this Honourable Court to permit Simplot to now seek an order that was not previously requested from Case Management Judge Aylen, and on which McCain therefore had no adequate opportunity to respond.

[41] For the foregoing reasons, Simplot's appeal will be dismissed.

C. *Simplot's motion will not be dismissed for prematurity*

[42] Although not determinative, I will briefly address McCain's prematurity argument, as there are aspects of it that may affect a future motion.

[43] On this appeal, McCain claims Simplot's motion suffered from the "fatal flaw" of having been brought prematurely, and that Case Management Judge Aylen dismissed it for that reason. McCain goes so far as to contend that Case Management Judge Aylen's ruling left open the possibility that Simplot could bring the same motion again seeking to substitute Mr. DeSailly for Mr. Ruff.

[44] In my view, there is simply no basis to find that the Case Management Judge dismissed the motion on grounds of prematurity. McCain did not argue before Case Management Judge Aylen that the motion was premature, and her reasons for decision make clear that she dismissed the motion on its merits and not based on its timing.

[45] McCain points to two main aspects of Case Management Judge Aylen's decision in support of its argument. Neither of these gives any indication the motion was dismissed for prematurity. First, McCain points to the following statements early in the decision:

> The examinations for discovery have been conducted. McCain appointed Brian Ruff as its discovery representative and Mr. Ruff was examined over the course of two days. Answers to undertakings and positions on refusals have not yet been exchanged and thus no determinations have been made by the Court on any refusals motions.
>
> Simplot has not yet sought to examine any of the inventors of the 841 Patent pursuant to Rule 237(4) of the *Federal Courts Rules*.
>
> [Emphasis added.]

[46] On my reading, this is simply a recitation of the procedural status of the matter. Case Management Judge Aylen placed no reliance on the fact that undertakings and refusals motions had not yet been determined, or that inventor discovery has not been conducted, in concluding that the motion should be dismissed. Rather, she set out her reasons based on Rule 237(3) and the fact that Mr. DeSailly was not a representative of McCain, and stated that "[a]ccordingly, the motion will be dismissed." The fact that Case Management Judge Aylen subsequently repeated that Mr. DeSailly could be examined as an inventor appears to be no more than a confirmation of the status and options, to clarify that her ruling did not affect McCain's rights under Rule 237(4).

[47] McCain also points to the fact that Case Management Judge Aylen dismissed the motion without prejudice to Simplot's ability to bring a further motion:

> Accordingly, Simplot's motion shall be dismissed. However, the dismissal of this motion is <u>without prejudice to Simplot's right to bring a motion for substitution at a later point in this proceeding</u>, following the exchange of answers to undertakings and positions on refusals and the Court's determination of any refusals motions, <u>should Simplot be able to identify a suitable substitute representative for McCain</u>.
>
> [Emphasis added.]

[48] I agree with Simplot that this passage cannot be read as either dismissing the motion for prematurity or allowing Simplot to bring the same motion again with respect to Mr. DeSailly. The Case Management Judge's analysis, conclusions, and dismissal of the motion are all directed to Mr. DeSailly not being a representative of McCain and the limits on Rule 237(3). The "without prejudice" remedy is related to the issue addressed in the immediately preceding paragraph of her decision (reproduced at paragraph [34] above), which addressed the possibility

of a different McCain representative (not a McCain France representative) being put forward in place of Mr. Ruff.

[49] The fact that Case Management Judge Aylen concluded that such a motion, if brought, should await the outcome of refusals motions is a discretionary assessment based on her knowledge of the case. It is not one this Court should or will interfere with. It cannot be taken as an implicit dismissal of the motion on prematurity grounds, particularly where there is no such conclusion to be found in the decision.

[50] I note further that McCain did not argue before Case Management Judge Aylen that Simplot's motion was premature. Nor did it seek to have Simplot's motion adjourned or postponed until after the refusals motion. While McCain cited passages in its written representations before Case Management Judge Aylen that refer to refusals and to Simplot's ability to examine Mr. DeSailly as an inventor, none of these were directed to an argument that the motion was premature or ought to be dismissed on that basis. Parties are generally not permitted to raise new issues on appeal that were not addressed before the Case Management Judge: *Starr v Canada,* 2001 FCT 338 at para 16, aff'd 2002 FCA 95 at para 4; *ViiV Healthcare Company v Gilead Sciences Canada, Inc*, 2019 FC 1579 at para 50, aff'd 2021 FCA 122 at para 9. McCain has not convinced me that this is an appropriate case to permit argument on prematurity, nor has it demonstrated why a motion under 237(3) must await the outcome of refusals motions or inventor examinations.

IV. Conclusion

[51] Simplot's appeal motion is therefore dismissed. The parties agreed that costs should be awarded in the amount of $5,000 to the successful party on this appeal in any event of the cause. Those costs are awarded to McCain.

ORDER IN T-1624-17

THIS COURT ORDERS that

1. The motion for appeal is dismissed.
2. Costs are fixed at $5,000, payable to McCain Foods Limited in any event of the cause.

"Nicholas McHaffie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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