

Federal Court



Cour fédérale

Date: 20220708

Docket: T-1066-17

Citation: 2022 FC 1008

Ottawa, Ontario, July 8, 2022

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

T-REX PROPERTY AB

**Plaintiff/
Defendant by Counterclaim**

and

**PATTISON OUTDOOR ADVERTISING LIMITED
PARTNERSHIP, PATTISON OUTDOOR ADVERTISING LTD,
JIM PATTISON INDUSTRIES LTD,
and ONESTOP MEDIA GROUP INC**

**Defendants/
Plaintiffs by Counterclaim**

ORDER AND REASONS

[1] The Defendants/Plaintiffs by Counterclaim (hereafter “Pattison”) move to exclude the Reply Expert Report of Zaydoon Jawadi dated December 17, 2021. This matter is one more incident in a trial about the alleged infringement of a patent owned by the Plaintiff/Defendant by Counterclaim (hereafter “T-Rex”).

[2] There are in this case two main experts who address squarely the alleged infringement and invalidity of a patent owned by T-Rex, the Canadian Patent no. 2,252,973 (the “973 Patent”). Mr. Zaydoon Jawadi was retained by T-Rex and he produced expert reports which support the allegation by T-Rex that a number of claims of the now expired 973 Patent were infringed by Pattison and defend against Pattison’s allegations that the 973 Patent is invalid on a number of grounds.

[3] Conversely, Professor Warren J. Gross is retained by Pattison and his reports are with respect to Pattison’s defence against the allegations of infringement and its allegations that the 973 Patent is invalid. Here are the reports of the two experts who deal with infringement and invalidity:

J. Jawadi:

- Claims Construction and Infringement (17 September 2021) [258 pages]
- Rebuttal Report on Validity (19 November 2021) [92 pages]
- Supplemental Rebuttal Report on Validity (7 February 2022) [17 pages]

W. J. Gross:

- Claims Construction and Invalidity (17 September 2021) [144 pages]
- Rebuttal Report on Claims Construction and Infringement (19 November 2021)
[108 pages]
- Reply Report on Claims Construction and Invalidity and Supplemental Report on Invalidity (17 December 2021) [14 pages]

Each of the Reports is supported by voluminous annexes.

[4] I add that, for good measure, Pattison has retained two experts in support of its contention that the 973 Patent runs afoul of section 53 of the *Patent Act*, RSC, 1985, c P-4). These reports have no bearing on the motion before the Court.

[5] What gives rise to the motion to exclude is a fourth report produced by Mr. Jawadi that he designated as a “Reply Expert Report (Claims Construction and Infringement)”. It is dated December 17, 2021, and it runs for 241 paragraphs, over 78 pages. The Report also comprises a number of annexes. Pattison contends that it does not constitute a proper reply.

I. The Reply Report

[6] As already seen, T-Rex produced a voluminous Report on September 17, 2021 addressing claims construction and infringement. The Report is of course with a view by T-Rex to discharge its burden to prove infringement. On that same day, Pattison sought to discharge its burden in attacking the validity of the 973 Patent. The response to these initial reports came on November 19, 2021, when Mr. Jawadi produced his rebuttal report on validity and Dr. Gross submitted his rebuttal report on claims construction and infringement. However, T-Rex saw fit to have a report in reply, which was served on December 17. Pattison confirmed it was challenging the Reply Report on January 17, 2022.

[7] In view of T-Rex’s withdrawal of a large number of paragraphs from the impugned Reply Report, the description of the contents of the Report can be shortened. T-Rex withdrew the bulk of the paragraphs: 8-10, 12-97 and 172-240. In effect, T-Rex chose to defend paragraphs 11 and 98 to 171.

[8] Mr. Jawadi's Reply Report starts with introductory paragraphs where he sets out his qualifications, the materials he reviewed and the instructions he received to reply to the Gross Report of November 19, 2021. He claims at paragraph 7 that the Gross Report raised new and unanticipated opinions to which he wished to respond.

[9] Mr. Jawadi then proceeds to respond to various critiques of his original report. These go from the Jawadi Report being difficult to read and understand to leaving the reader to speculate how the various elements of the Pattison system, which allegedly infringe the 973 Patent, interact together. It is also said that the Gross Report criticizes the generalization made by Mr. Jawadi, as the various Pattison networks have differences in characteristics, features and properties which are not reflected in the infringement analysis conducted by Mr. Jawadi.

[10] In view of the withdrawal made by T-Rex of some 2/3 of the Reply Report, it will suffice, for our purposes, to list the various elements presented originally as proper reply which were withdrawn:

- Responses and opinions about critiques raised in the Gross rebuttal report regarding the structure of the Jawadi expert report
 - the Jawadi expert report's use of exhibits is not confusing or unusual
 - the Jawadi expert report's use of "great number" of citations and documents is not confusing or unusual
 - the Jawadi expert report provides sufficient explanations of end notes and citations

- Responses and opinions about critiques raised in the Gross rebuttal report regarding the Pattison Onestop Digital Advertising Networks
 - the Jawadi expert report does not improperly treat the Pattison Onestop Digital Advertising Networks as a single network
 - the Jawadi expert report describes the hardware, software, and capabilities of the Pattison Onestop Digital Advertising Networks
 - the Gross rebuttal report does not describe the Pattison Onestop Digital Advertising Networks or their specificities and does not address how such specificities relate to the infringement of the 973 Patent by these networks
 - the Gross rebuttal report uses the undefined term “Pattison Systems and Networks” as a catchall term
- Responses and opinions about critiques raised in the Gross rebuttal report regarding two features
 - the Pattison Onestop Digital Advertising Networks include infringement modes that do not require the two features
 - the Pattison Onestop Digital Advertising Networks are capable of performing the elements of the asserted claims with or without the two features
 - the two Pattison features act as mediators under the Gross report’s identification/interpretation of mediator.

This tedious list, which covers paragraphs 12 to 97 of the Reply Report, does not include various other titles, subtitles or sub-subtitles. I have read the whole report. The list serves only the purpose of underlining that, although T-Rex withdrew these paragraphs “without any admission

as to whether or not this evidence constitutes proper reply” (T-Rex’s written case, para 14), the withdrawal allowed the examination to focus on paragraphs where better arguments could be presented; T-Rex was judicious in withdrawing the bulk of the paragraphs that were presented as reply.

[11] The same can be said of paragraphs 172 to 240, which were also withdrawn by T-Rex.

These paragraphs address:

- Responses and opinions about critiques raised in the Gross rebuttal report regarding claims construction, POSITA and CGK
- Responses and opinions about critiques raised in the Gross rebuttal report regarding infringement analysis

For close to 60 paragraphs, Mr. Jawadi defends and re-asserts his construction of various terms in the 973 Patent. He seeks to justify the positions he has already adopted and, in doing so, he is argumentative and seeks to have the last word.

II. Paragraphs 11 and 98 to 171

[12] That leaves the section of the Jawadi Reply Report which continues to be submitted as a reply. The section constitutes what the Reply Report’s author refers to as “Responses and opinions about critiques raised in the Gross rebuttal report regarding source code citations”.

[13] In essence, paragraphs 98 to 171 are Mr. Jawadi’s attempt at justifying that the versions of the source code he claims he used to demonstrate infringement on Pattison’s part are

representative of the relevant period. The versions of source code are identified as PG-909 for year 2017, PG-915 for year 2013 and PG-916 for year 2015. Prof. Gross found that the three files were not the same across the three versions. That suggests, he claims, that the last version is not representative of the period under consideration.

[14] Pattison asserts that the existence of the three versions of the source code is not new: they were communicated during discovery. Indeed, the affiant for Pattison testified that “Mr. Jawadi affirmed during his testimony at trial that he consulted the various versions of Pattison’s source code that he had in his possession when drafting his Report in Chief and affirmed having done a comparative analysis at the time of said report”.

[15] The argument made by Pattison is that the Jawadi reply report is nothing other than an attempt by T-Rex to split its case and re-assert what had already been discussed in Mr. Jawadi’s first report. Neither one of these purposes can be made the subject of a valid reply to the report of Prof. Gross of November 2021.

[16] It is argued that Mr. Jawadi relied exclusively on the source code of 2017 in his evidence on infringement of the 973 Patent. Prof. Gross offered a challenge that the 2017 source code is not representative of the whole period under consideration (2011 to 2017) because of constant changes to the source code. He states at paragraph 70 of his November 2021 report that there is no demonstration, or even a suggestion in the Jawadi September 2021 report, that the source code files for years 2013 and 2015 were used in the analysis of infringement. He states that they

are not mentioned in the Infringement Chart with endnotes (Exhibit D to the first Jawadi report (September 17, 2021)).

[17] Dr. Gross goes on to say at paragraph 86 that he cannot find information or comments that Mr. Jawadi considered the changes made to the source code over the years such that he could consider that the 2017 source code is representative of the source code during the relevant period of 2011 to 2017 (more precisely, the relevant period for the purpose of this litigation is from July 20, 2011 to April 23, 2017). Neither did he “see information or comments in Mr. Jawadi’s report that his infringement analysis depends on any Oneshop source code files contained in PG-915 or PG-916”. As a reminder, PG-915 corresponds to a source code used for 2013 while PG-916 corresponds to year 2015.

[18] It is asserted that there is no attempt to establish that PG-909 (2017) was actually representative of the other two years, 2013 and 2015, or even portions of the source code that would be relevant throughout the 6 years. There was no attempt to show such representativeness. That makes Prof. Gross conclude at paragraph 92:

92. For these reasons, when Mr. Jawadi refers to PG-909 in his report in order to support his infringement contentions, these contentions can only be asserted in connection with the source code at the moment the “snapshot” was taken, that is in April 2017 (i.e., around the date the 973 Patent expired). These contentions cannot be extended even to the source code as it existed in the preceding days, because changes were made daily.

[19] Pattison’s counsel took the Court to Mr. Jawadi’s initial report, that of September 17, 2021. The report runs for 647 paragraphs, followed by a number of exhibits. One of these

exhibits is the so-called “Exhibit D, Infringement Chart”, which is itself 107 pages long. Another exhibit, referred to by counsel for Pattison at the hearing, is Exhibit F which is described as follows at paragraph 324 of Mr. Jawadi’s report of September 17, 2021:

324 Exhibit F provides a list of Pattison source code files cited in this report along with where within (in which version(s) [PG-0909, PG-0915, PG-0916] of) the Pattison source code productions the cited source code files appear, as well as full path names, file sizes, and dates and times of the cited source code files.

[20] Exhibit F shows unequivocally that cited files can be found in various versions of the source code, whether they be alone or together with other versions of the source code. As the summary of the table indicates, source code version PG-909 is found receiving by itself cited files ten times, while versions PG-909 and PG-916 together receive cited files twice, versions PG-909 and PG-915 together receive cited files 33 times and the three versions together receive the same cited files 46 times. Thus, 10 cited files are to be found solely in version PG-909. In other cases the cited files will be found in two versions of the source code. In 46 instances the cited files are to be found in PG-909 (2017), PG-915 (2013) and PG-916 (2015). There is no doubt that Mr. Jawadi was aware of differences between versions of the source code given his own Exhibit F, yet the contention is that he did not even attempt to make the case that the differences had no bearing on his conclusions as he chose to argue his case based on PG-909. Pattison argues that if representativeness of the relevant period is an issue, T-Rex had to make its case in chief. Trying to address the issue as part of a reply is clearly the epitome of splitting its case. Furthermore, Mr. Jawadi merely disagrees at times with Dr. Gross: that is not proper reply evidence. Re-asserting views already expressed in the first report is deserving of the same fate.

[21] In sum, the only issue before the Court to be disposed of is the section of his report, some 20 pages long, that bears the title “Responses and Opinions about Critiques Raised in the Gross Rebuttal Report Regarding Source Code Citations”. Surprisingly in my view, Mr. Jawadi seems to have a peculiar understanding of what constitutes new and unanticipated issues coming from another expert. He writes at paragraph 100 of his Reply Report, which is at the beginning of the chapter left for consideration on this motion to exclude, that “[a]s I will explain, the above two Gross Rebuttal Report statements are false and therefore are new and unanticipated”. That appears to be a novel proposition: it seems to state that once experts disagree, that leaves open the door to a reply.

[22] The Reply Report then proceeds to present the methodology Mr. Jawadi wishes to apply in the analysis that follows for the purpose of attempting to show representativeness. As confirmed by counsel for T-Rex (written case, paras 47 to 49) this constitutes new methodology in response to the criticism from Dr. Gross. That constitutes new evidence.

[23] Mr. Jawadi spends an inordinate amount of time trying to supplement what Dr. Gross claims is missing from the initial report. He claims throughout that the differences between versions of the source code are immaterial or trivial, that Dr. Gross did not provide information about the changes and their materiality, although Mr. Jawadi agrees now that PG-909, PG-915 and PG-916 are not the same. Nevertheless, I have no doubt that this constitutes new evidence which was not proffered in the initial report. I note in passing that the demonstration offered by Mr. Jawadi is for the purpose of arguing that the differences between the versions of the source code do not affect his attempt at establishing infringement. At any rate, that is an attempt at

offering evidence which is supposed to support the argument that although the source code files in PG-909, PG-915 and PG-916 are different, “the claim elements are still implemented in PG-909, PG-915, PG-916” (Reply Report of December 17, 2021, para 154). Mr. Jawadi declares more than he demonstrates in the following paragraph that “the source code relied on by the Jawadi Expert Report is representative of the source code sets as they existed during the relevant period”. What is clear is that the demonstration in the Reply Report was not made in the report of September 2021 when T-Rex had the burden to establish infringement. The question is whether that can be made the subject matter of a reply report.

[24] It is worth noting that Mr. Jawadi also relies in the Reply Report (paras 156 to 171) on his initial expert report and its Exhibit D. This is no more than re-asserting what is already in that initial report.

III. Analysis

[25] The starting point must be what is the issue that the Court must resolve. It is simply whether or not the reply report that T-Rex wishes to introduce into evidence can be entered validly. Pattison says that it cannot be. This constitutes an egregious example of case splitting and of a witness who seeks to have the last word. T-Rex carried the burden of proving infringement and it also carries the burden of satisfying the Court that the report of December 2021 constitutes a true reply. In the case at bar, there was no new and unanticipated evidence coming from Prof. Gross which would allow for a proper reply. T-Rex chose to rely on PG-909 to make its case without considering PG-915 and 916. It cannot attempt to remedy at a later stage that which it did not do in chief, that is to advance all the needed evidence to satisfy its burden.

There is nothing admitting of a proper reply in bringing up the lack of representativeness of the version of the source code chosen by T-Rex, in view of the differences between the three versions of the source code. It is not permissible to present some evidence, sit back to hear what will the defendant's evidence be and then palliate weaknesses as identified by the opposing expert.

[26] T-Rex for its part submits that the rules have to be applied with some flexibility. An expert cannot be expected to anticipate every argument, without making the burden on the justice system unbearable. It cites in support of that proposition *Takeda Canada Inc v Canada (Minister of Health)*, 2014 CarswellNat 8773 [*Takeda*]:

[8] It may be that an expert could anticipate and address most of the possible attacks on his or her opinion, from the trivial to the arcane, and many of the distinctions and caveats that could be raised in respect of the works and documents which he or she might cite in support of the opinion given, and thus possibly eliminate all need for reply. However, such an exercise can equally result in much unnecessary evidence and in even more voluminous records than is already often the case. In considering a motion for leave to file reply, a careful balance must therefore be struck. Just because an issue could possibly have been anticipated does not mean that it should reasonably have been addressed in chief, and that reply should not be permitted.

[27] In this case, the issue of representativeness raised by Dr. Ross could not reasonably be, and was not, anticipated. Dr. Gross is faulted by T-Rex for not being more specific about the materiality of differences, leading to an impact on the infringement analysis. Furthermore, T-Rex argues that there were many files in PG-909 and it would be difficult to anticipate due to the sheer volume of data.

[28] T-Rex also argues that the analysis would be unnecessary because the differences are not material.

[29] In a similar vein, T-Rex suggests that its methodology used for its reply report was for the very purpose of addressing the unanticipated argument about representativeness. The explanation about the methodology used must be part of the reply evidence.

[30] At any rate, the ultimate criteria must be the interests of justice and the need to assist the Court in the determination of the merits of the case. While T-Rex argues that the issue raised by Pattison was not anticipated, it now argues that “the differences in the source code files between the three versions is so fundamental that it needs to be fully explored” (written case, para 51). T-Rex pleads that discretion to allow its reply report be exercised because the matter is complex and Pattison will not suffer any serious prejudice as Pattison will be able to cross-examine Mr. Jawadi. In fact, the Court may order a sur-reply if it finds that undue prejudice may be suffered.

[31] I repeat, the only issue that is before the Court is that of the admissibility in evidence of a reply report T-Rex wishes to introduce at the trial that will resume in October. Whether or not the issue of the representativeness will end up before the Court and, if so, whether it is significant remain to be seen. While it appears that representativeness will be raised by Dr. Gross, its importance and the nature of differences, if any, are not in evidence at this stage. That is for another day, where the evidence will be tested.

[32] I have reached the conclusion that the reply report offered by Mr. Jawadi does not meet the requirements for admissibility and should not be admitted as part of the residual discretion a court has when the interests of justice and the assistance from such a report could be served.

Here is why.

[33] The golden thread throughout the case law is that a plaintiff cannot split its case and only a new matter which could not reasonably have been anticipated can be made the subject of a valid reply. The rule was enunciated by the Supreme Court of Canada more than 35 years ago in *R. v Krause*, [1986] 2 SCR 466 at pages 473-474 [*Krause*]:

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

16. The plaintiff or the Crown may be allowed to call evidence in rebuttal after completion of the defence case, where the defence has raised some new matter or defence which the Crown has had no opportunity to deal with and which the Crown or the plaintiff could not reasonably have anticipated. But rebuttal will not be

permitted regarding matters which merely confirm or reinforce earlier evidence adduced in the Crown's case which could have been brought before the defence was made. It will be permitted only when it is necessary to insure that at the end of the day each party will have had an equal opportunity to hear and respond to the full submissions of the other.

[My emphasis.]

[34] Another longstanding pillar in this area of the law is of course *Halford v Seed Hawk Inc*, 2003 FCT 141, 24 CPR (4th) 220 [*Halford*]:

14. The conclusion which I draw from this passage is that evidence which simply confirms or repeats evidence given in chief is not to be allowed as reply evidence. It must add something new. But since the plaintiff is not allowed to split its case, that something new must be evidence which was not part of its case in chief. That can only leave evidence relating to matters arising in defence which were not raised in the plaintiff's case in chief. But even this is subject to a limitation which is expressed in the following passage from Sopinka et al. *The Law of Evidence in Canada* 2nd Edition at p. 882:

Should reply evidence be excluded if the point in respect of which contradictory evidence is sought to be adduced in reply arose in cross-examination of the other parties' witness rather than their evidence in chief? In *Mersey Paper Co v. Queens (County)* [(1959) 18 D.L.R. (2nd) 19 (N.S.C.A.)], The Nova Scotia Court of Appeal considered this to be an unjustifiable technical distinction. It is submitted that, at least in civil cases, it would depend on whether the matter was part of the plaintiff's case and one which might have been adduced in the plaintiff's case-in-chief. A plaintiff cannot leave part of its case until cross-examination of the defendant's witnesses and then when that goes badly make up for it in reply.

Although the authorities are not entirely clear on this point, the better view is that reply evidence that conforms with the principles stated above can be adduced as of right. There is, however, a discretionary power vested in the trial judge to

admit such evidence, notwithstanding that it may not be the proper subject of reply.

15. Consequently, I believe that the following principles govern the admissibility of reply evidence:

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

2- Evidence which is directed to a matter raised for the first time in cross examination and which ought to have been part of the plaintiff's case in chief is not be allowed. Any other new matter relevant to a matter in issue, and not simply for the purpose of contradicting a defence witness, may be allowed.

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

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

The currency of *Halford* was acknowledged recently in *Janssen Inc v Teva Canada Limited*, 2019 FC 1309 at para 16 [*Janssen*]; *Bauer Hockey Ltd v Sport Masko Inc*, 2020 FC 212 at para 15 [*Bauer Hockey*]; *Swist v Meg Energy Corp*, 2020 FC 759 at para 9 [*Swist*]; *Merck Sharp & Dohme Corp v Wyeth LLC*, 2020 FC 1087 at para 9 [*Merck Sharp & Dohme*]; *Angelcare Development Inc v Munchkin, Inc*, 2020 FC 1185 at para 11 [*Angelcare*].

[35] A report in reply which is argumentative or seeks to confirm what was exposed in chief will rarely be worth the exercise of discretion by the Court. I share the view expressed by my colleague Mr. Justice Michael Manson in *Janssen*:

[57] This Court cannot allow case-splitting or improper reply evidence seeking to bolster a party's evidence in chief or merely rebut an opposing party's evidence, particularly in light of the

“litigation culture change prescribed by the Supreme Court of Canada in *Hryniak v Maudlin*, 2014 SCC 7” (*Amgen* at para 24).

Similarly, Mr. Justice Simon Fothergill expressed the same kind of concern in *Swist*:

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

In *Angelcare*, I agreed with colleagues and had this to say:

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

[36] There is no doubt that there will be cases where the exercise of discretion will be appropriate because it serves the interests of justice, particularly where it may assist in making a determination on the merits (*Merck-Frosst v Canada (Health)*, 2009 FC 914). But, this has to be measured against the rule concerning one’s case splitting. A party cannot present some evidence, wait to hear the other side’s evidence and then respond with additional evidence to account for the weaknesses identified by another expert. No one suggests that an expert has to anticipate every possible issue another expert may dredge up and thus should have been led in chief (*Merck Sharp & Dohme* at para 21; *Swist* at para 11). But such is not the nature of the concerns raised in this case.

[37] As Justice Grammond pointed out in *Bauer Hockey*, if an issue is unanticipated, it should be possible to reply. But trial fairness and efficiency command that reply be limited. The defendant must know the case it has to meet when the defence is presented and there must be avoidance “of endless alternation between parties in adducing evidence” (para 13). That confirms that the party that seeks to adduce reply evidence bears the burden of establishing that it is proper. In turn, that required that T-Rex show that issues raised in the report of Dr. Gross could not have been unanticipated.

[38] That case has not been made on this record. T-Rex has not satisfied the Court that its reply report is in order. T-Rex has not discharged its burden (*Pharmascience Inc. v Meda AB*, 2021 FC 1209 at para 8). If there is new evidence in paragraphs 11 and 98 to 171, this constitutes impermissible case splitting because representativeness should have been anticipated in view of the facts.

[39] The rationale given by Mr. Jawadi was that statements made by Dr. Gross “are false and therefore are new and unanticipated” (Reply Report of December 17, 2021, para 100). The expert then proceeds in the following paragraphs to disagree with Dr. Gross and explain why he should prevail. I fail to see how the issue of representativeness could be claimed to be a new issue.

[40] T-Rex decided to put in play in order to make its case on infringement, at least in part, using three versions of the source code obtained from Pattison: PG-909 (2017), PG-915 (2013) and PG-916 (2015). It is clear from Mr. Jawadi’s first report (September 17, 2021) that there

were differences between the versions. His Exhibit F to that report “provides a list of Pattison source code files cited in this report along with where within (in which version(s) [PG-0909, PG-0915, PG-0916] of) the Pattison source code productions the cited source code files appear, as well as full path names, file sizes, and dates and times of the cited source code files” (Expert Report of Zaydoon (“Jay”) Jawadi (Claims construction and Infringement) September 17, 2021, para 354). In fact, Mr. Jawadi notes himself in his Report that there are differences between the versions. Indeed the table is color-coded. Obviously, the data was available to Mr. Jawadi and he had already acknowledged in Exhibit F that there were differences in the versions of the code. It was incumbent on him to address these in his first report if he so wished on account of representativeness of the PG-909 version. This is case splitting. In the words of the Supreme Court in *Krause*, “The Crown or the plaintiff must produce and enter in its own case all the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to all the issues raised in the pleadings”. The Court even defines case splitting, “to put in part of its evidence – as much as it deemed necessary at the outset – then to close the case and after the defence is complete to add further evidence to bolster the position originally advanced” (para 15).

[41] In the case at bar, Mr. Jawadi disagrees with the other expert who seems to advance that the evidence on which Mr. Jawadi wishes to rely lacks representativeness. Whether or not it does is unknown at this stage. It was for Mr. Jawadi to establish representativeness, if it constitutes a real issue. Otherwise, the matter could be addressed differently. Disagreements between experts are not a new phenomenon. If there are shortcomings in the position advanced by Dr. Gross, they may “be explored during cross-examination or highlighted in argument” (*Bauer Hockey*, at para

16). A reply report is not meant to re-argue one's position or to split one's case. This in my view is the long and short of the 74 paragraphs presented as reply evidence.

[42] Similarly, Mr. Jawadi had to explain his methodology used to reach his conclusion in his Reply Report. Waiting for a possible reply is in my estimation case splitting. It is unfair to Pattison to bring that information in a reply, thus making it impossible for Dr. Gross to comment and critique. Expert evidence should not be allowed to become a "see-saw" battle, the endless alternation between parties in advancing expert evidence. One of the reasons for the rule relative to reply reports concerns the efficiency of the trial process. That is a rule in need of being enforced in this case.

[43] Finally, the Reply Report under consideration is long and unduly argumentative. The title to the chapter of the Reply Report is telling: Responses and Opinions about Critiques Raised in the Gross Rebuttal Report Regarding Source Code Citation. Mr. Jawadi seems to want to have the last word. That does not constitute proper reply. Repeatedly, Dr. Gross is faulted for not providing indications of the changes between the three versions of the source code. Differences identified by Mr. Jawadi are often said to be trivial or immaterial, or immaterial from an infringement perspective. If the criticism made by Dr. Gross is, in whole or in part, unwarranted, that is a matter to be explored in cross-examination.

[44] There is discretion in the trial judge to admit evidence that would otherwise be inadmissible reply evidence when it would be in the interests of justice to do so. As already said at paragraph 30 of these reasons, in support for their plea, T-Rex argues that "the parties'

position on the significance, if any, of the differences in the source code files between the three versions is so fundamental that it needs to be fully explored” (written case, para 51). It is rather paradoxical that T-Rex, who chose to argue that the source code files would assist in making its case on infringement, then noted in its own annex to the first Jawadi Report that there were differences between the code files and did not address the representativeness of the chosen source code files in its evidence in chief, would now claim that it should have another kick at the can through a long reply report. If the issue is potentially that significant, surely it should have been presented in chief.

[45] T-Rex relies to some extent on some passages taken from *Akebia Therapeutics, Inc v Fibrogen, Inc*, 2021 FC 171 [*Akebia*]. However, *Akebia* dealt with brief reply reports. Such is not the case here. On the contrary, we have a long exposé which is in the nature of someone who splits its case and argues that he was right. That is not what a reply report is for. In fact, the interests of justice favour that the report be declared to be inadmissible as not being a proper reply.

IV. Conclusion

[46] Accordingly, paragraphs 11 and 98 to 171 of the Reply Report of December 17, 2021 are inadmissible in evidence at the trial to resume on October 24, 2022. Given that the other paragraphs have already been withdrawn by T-Rex, the whole Reply Report will not be filed in evidence.

ORDER in T-1066-17

THIS COURT ORDERS:

1. The Defendants/Plaintiffs by Counterclaim's motion for the exclusion of the Reply Report of Zaydoon Jawadi dated December 17, 2021 is granted.
2. Costs of the motion, fixed at \$5,000 payable immediately and in any event of the cause, are awarded to the Defendants/Plaintiffs by Counterclaim.

"Yvan Roy"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1066-17

STYLE OF CAUSE: T-REX PROPERTY AB v PATTISON OUTDOOR
ADVERTISING LIMITED PARTNERSHIP,
PATTISON OUTDOOR ADVERTISING LTD,
JIM PATTISON INDUSTRIES LTD,
and ONESTOP MEDIA GROUP INC

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: JUNE 6, 2022

ORDER AND REASONS: ROY J.

DATED: JULY 8, 2022

APPEARANCES:

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Joanie Lapalme
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