

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20190211**

**Docket: A-94-17**

**Citation: 2019 FCA 29**

**CORAM: PELLETIER J.A.  
BOIVIN J.A.  
DE MONTIGNY J.A.**

**BETWEEN:**

**AIRBUS HELICOPTERS S.A.S.**

**Appellant**

**and**

**BELL HELICOPTER TEXTRON  
CANADA LIMITÉE**

**Respondent**

Heard at Montréal, Quebec, on October 23, 2018.

Judgment delivered at Ottawa, Ontario, on February 11, 2019.

**REASONS FOR JUDGMENT BY:**

**DE MONTIGNY J.A.**

**CONCURRED IN BY:**

**PELLETIER J.A.  
BOIVIN J.A.**

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**REASONS FOR JUDGMENT**

**DE MONTIGNY J.A.**

[1] This Court is seized with an appeal and a cross-appeal of a judgment of the Federal Court (per Justice Martineau), dated February 10, 2017 (Damages Judgment), amended March 2, 2017, which determined the quantum of damages to be awarded to Airbus Helicopters S.A.S. (the appellant) resulting from the infringement by Bell Helicopter Textron Canada Limited (the respondent) of Canadian Patent No. 2,207,787 (the '787 Patent), as established in a prior

decision. The Federal Court ordered the respondent to pay the appellant damages in the amount of \$1,500,000, comprised of \$500,000 in compensatory damages and \$1,000,000 in punitive damages. Only the amount of the punitive award is challenged before this Court.

[2] For the following reasons, I am of the view that the \$1,000,000 award of punitive damages should not be disturbed, as it is grounded in a correct interpretation of the applicable law and in a reasonable assessment of the facts.

I. Background

[3] For the most part, the facts are not contested and are aptly summarized in the reasons of the judge.

[4] Both parties are major producers of helicopters, which they market and sell worldwide. In the mid-1990's, the appellant developed a "sleigh type" landing gear known as the "Moustache", which is known to address issues of ground resonance instability, a major technical challenge with respect to landing gears. This gear formed the basis of the patent at issue, which was filed in Canada on June 5, 1997, with a priority date of June 10, 1996 based on a patent application filed in France. This patent is entitled "Train d'atterrissage à patins pour hélicoptère" (skid-type landing gear for helicopter), and is recorded as Canadian Patent No. 2,207,787.

[5] In 2003, in the process of developing its Bell 429 helicopter, the respondent studied the performance of an EC120, an Airbus helicopter equipped with the Moustache gear. It leased and

operated the EC120 from March to June 2003, and performed various tests on it. Its employees also received training on the EC120 helicopter around that same time.

[6] Between 2004 and 2007, the respondent developed the “Legacy” sleigh type landing gear, to be used on the Bell 429 helicopter. At the time, concerns were raised by the respondent’s engineer Robert Gardner to Malcom Foster, the technical lead and chief engineer, about the similarities between the Legacy and the Moustache gears. Mr. Foster nevertheless advised Mr. Gardner to “carry on” (Damages Judgment at para. 10). As a result, the development of the Legacy gear, and efforts to obtain certification with Transport Canada, were continued.

[7] Initial mock-ups of the Bell 429 with the Legacy gear were shown at various trade shows, from the Seoul Air Show in October 2005 up to the Farnborough Air Show in July 2008.

[8] In April 2008, at a conference in Montréal, Peter Minderhoud, the respondent’s landing gear expert, presented an article about the Legacy landing gear. In it, he praised the improved dynamic behaviour, energy absorption qualities and lower weight of the “sleigh type skid landing gear” over “the conventional type”. This landing gear, the article claimed, “has been designed for the first time by [the respondent] for use on [the Bell 429]” (Damages Judgment at para. 136).

[9] The Bell 429, equipped with the Legacy gear, achieved its first flight on February 27, 2007, at the respondent’s facilities in Mirabel, Québec.

[10] In May 2008, the appellant initiated an infringement action in Canada against the respondent. No cease and desist letter was received by the respondent before the proceedings were initiated. Litigation in other jurisdictions, specifically France and the United States, also ensued. In this context, the respondent developed a modified landing gear for the Bell 429, the “Production” gear, and quarantined the 21 Legacy gears produced so far (Damages Judgment at para. 405).

[11] On June 9, 2008, the appellant amended its statement of claim to include the new gear. In addition to a declaration of infringement and the issuance of a permanent injunction, it requested that the respondent be ordered to remit or destroy any infringing gear. It also sought compensatory damages, as well as punitive damages in the amount of \$25,000,000, with interest and costs.

[12] On January 30, 2012, after a long-drawn-out legal battle between the parties, the Federal Court (per Martineau J.) rendered judgment on the infringement claim (*Eurocopter v. Bell Helicopter Textron Canada Limitée*, 2012 FC 113 (Liability Judgment)). The Federal Court found that, by using the Legacy gear, the respondent had infringed claim 15 of the patent at issue. It also dismissed both the Gillette defence and the experimentation exception invoked by the respondent in this regard. The Federal Court nonetheless rejected the appellant’s infringement claim with respect to the Production gear, on the basis that not all of the essential elements of claim 1 were present in this new gear.

[13] In terms of remedies, the Federal Court ordered that the Legacy gear not be used until the patent expired, and that the 21 quarantined Legacy gears be destroyed. It declared, ultimately, that the appellant was entitled to damages, including punitive damages, the quantum of which was to be determined at a later stage, in accordance with the October 2, 2009 bifurcation order.

[14] Both parties appealed the 2012 decision before this Court. In its appeal, the respondent claimed that no patent infringement had occurred, and that it was inappropriate for the Federal Court to find, at this point, that punitive damages would be awarded. The appellant cross-appealed, arguing that the claims of the patent were all valid, and that the Production gear infringed them.

[15] On September 24, 2013, this Court dismissed both the appeal and the cross-appeal against the 2012 decision (*Bell Helicopter Textron Canada Limitée v. Eurocopter société par action simplifiée*, 2013 FCA 219 (Liability Appeal)). Notably, no reason was found to overturn the Federal Court's finding with respect to the appellant's right to damages, including punitive ones.

## II. The impugned decision

[16] On February 10, 2017, the Federal Court rendered judgment on the question of damages. It first dealt with the compensatory damages, which it set at \$500,000. This amount, it found, “falls within the range of acceptable outcomes of a hypothetical negotiation taking place in the fall of 2005 for the payment of a royalty payment corresponding to the infringing use of twenty-

one Legacy gears” (Damages Judgment at para. 307). This part of the judgment has not been appealed.

[17] The Federal Court then moved on to assess the quantum of the punitive damages to be awarded to the appellant “as a result of the infringement... and the deliberate and outrageous conduct of the [respondent]” (at para. 380). After reviewing the relevant findings of fact made in the Liability Judgment (at paras. 381-382), the Federal Court set out the six considerations identified in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 (*Whiten*) for the quantification of punitive damages (at paras. 384-385), and summarized the parties’ submissions (at paras. 386-395).

[18] Before moving on to the analysis of the *Whiten* factors, the Federal Court noted that the case of *Lubrizol Corp. v. Imperial Oil Ltd.*, [1994] F.C.J. No. 1441 (FC) (*Lubrizol*), in which punitive damages of \$15,000,000 were initially awarded, was not authoritative, as it had been overturned on appeal on the basis that the compensatory award had not been considered in the assessment of the punitive award (at para. 388). It also held that “the amount of \$500,000 in compensatory damages... would be insufficient in this case to achieve the goal of punishment and deterrence” (at para. 396), and that punitive damages were thus needed. The Federal Court added, as a “non-binding indication” from the case law, that damages in like cases “could be in the range of \$500,000 to \$2 million depending of the circumstances” (at para. 397).

[19] The first factor contemplated by the Federal Court was the blameworthiness of the respondent’s conduct (at para. 398). At the outset, the Federal Court mentioned its previous

determinations that the misconduct was “planned and deliberate”, that the “infringement continued for a number of years”, that the respondent’s senior management knew what it was doing “and persisted in its misconduct”, all the while claiming that the gear was its own technology (at para. 399, referring to Liability Judgment at paras. 431-434), and that it “profited from its misconduct” (at para. 401). The blameworthiness of the misconduct, the Federal Court found, “point[s] toward an award of significant punitive damages in order to precisely denounce this unacceptable behavior” (at para. 413).

[20] The Federal Court then went on to reject alleged mitigating factors. First, it deemed the apology from the respondent “very late” (at paras. 402-403). Second, it was not convinced that the switch to the new gear demonstrated, as was argued, “a clear commitment at that time to respect the [appellant]’s intellectual property rights” (at para. 407). It also questioned the weight to be given to the new policies and procedures implemented by the respondent with respect to intellectual property, noting that “similar policies existed at the time of the infringement” (at para. 408). It also held, on this topic, that a “significant amount of punitive damages will serve as a strong corporate deterrent to prevent such type of misconduct [from] happening again” (*Ibid.*). It also stressed the fact that the respondent and its parent company are “sophisticated corporate entities” and that, as such, their decision not to verify intellectual property rights in this case “was simply unacceptable”, and “amount[s] to willful blindness” (at para. 409). The Federal Court nonetheless “treated as an important mitigating factor” the steps taken to quarantine the infringing gears and to build the Production gear (at para. 414).



[21] The second factor considered by the judge was the vulnerability of the appellant (at para. 415). In this regard, the Federal Court found that, insofar as “no power imbalance” existed here, this factor “is more or less neutral” (at para. 416). It also rejected the respondent’s claim that “the grant of significant punitive damages in the case law is generally guided by the vulnerability of the plaintiff” (at para. 417). Rather, the Federal Court wrote, all the relevant factors must be balanced “in order to determine what sum would be proportionate to the need for deterrence” (at para. 418). Thus, according to the Federal Court, the fact that this factor is neutral here did not in itself warrant a lowering of the quantum.

[22] The third factor discussed by the Federal Court was the harm or potential harm directed at the appellant (at para. 419). The Federal Court began its analysis by noting that only a “small financial loss” resulted from the respondent’s “outrageous misconduct”, “no actual sales of Bell 429 helicopters equipped with the infringing Legacy gears” having occurred (at para. 420). It also mentioned that “only twenty-one Legacy gears were used by or made” by the respondent (at para. 421).

[23] The Federal Court was, however, of the view that this “does not take into account the reality of the length of time, the gravity and intention behind the infringement” (at para. 421). “The potential for harm” against the appellant, it further wrote, “was great in this case” (*Ibid.*). Not only was the appellant forced to institute proceedings, but its “overall business” was also harmed by the infringement, as the Bell 429 was marketed and advertised for a number of years with the infringing gear (at para. 422). That being said, “no evidence of reputational damages” was found by the Federal Court (at para. 423). Also, while it described the amount of the

compensatory award as “a modest sum”, the Federal Court resisted raising the quantum of the punitive damages, as the potential harm had been mitigated by the quarantine and the absence of sales (at para. 424).

[24] Moving on to the factor of deterrence, the Federal Court noted that, in determining an amount of damages “sufficiently important so as to attract the attention of the [respondent] and the community”, the relative size and profitability of the respondent (at para. 427), and the fact that the infringement lasted for four years (at para. 428), must be considered. The Federal Court also stressed that mitigating factors must be considered. The “good reputation” of the respondent, and the fact that it had never been condemned for intellectual property violations (at para. 428), are two of these factors. In light of the latter, and of the respondent’s conduct after the notice of infringement, the Federal Court felt “it would be unwarranted and unnecessary ... to award ... damages greater than \$1,000,000” (at paras. 429-430).

[25] With respect to the fifth factor, concerned with the “other civil or criminal sanctions imposed” (at para. 431), the Federal Court found it to be neutral in the present case (at para. 435). It held that while the “social impact” of legal proceedings could not be considered “as part of the said penalties”, and thus justify a reduction of the quantum (at para. 434), the fact remains that the respondent “has been sued in different countries for the same infringement” (at para. 435).

[26] Considering the last of the six factors from *Whiten*, the Federal Court found that “there were a number of advantages wrongfully gained by the [respondent]” here (at para. 439).

[27] In conclusion, the Federal Court said it was “satisfied that a total award of \$1,000,000 in punitive damages is proportionate” to the factors discussed above (at para. 440), that it “respects the boundaries of rationality”, and that it is “not excessive” (at para. 441). Two “major factors”, the Federal Court further held, militate for such a high quantum, “namely the blameworthiness of the [respondent] and the need for deterrence” (at para. 440). In light of the respondent’s reprehensible conduct, the Federal Court concluded that, to have a “real deterrence effect”, “\$1,000,000 is the minimum amount of punitive damages that can be awarded... to achieve those purposes” (at para. 441).

[28] The determinations of the judge with respect to costs and interest have not been appealed.

### III. Issues

[29] The issues raised by the appeal can be summarized as follows:

- A. Did the Federal Court err in law in constraining itself with a “two-million dollar ceiling”?
- B. Did the Federal Court err in finding that a \$1,000,000 award in punitive damages was sufficient to meet the objectives of such damages, *i.e.* retribution, deterrence and denunciation?
- C. Conversely, is the \$1,000,000 award the lowest amount required to achieve the purposes of punitive damages?

IV. Analysis

[30] It is now well established that appellate intervention with respect to an award of punitive damages will only be warranted where the trial court made an error of law or a “wholly erroneous assessment” of the quantum of damages (*Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265 at para. 190 (*Time*)). In *Cinar Corporation v. Robinson*, 2013 SCC 73, [2013] 3 S.C.R. 1168 (*Cinar*), the Supreme Court summarized the applicable standard of review in the following way:

In [*Time*], this Court held that an appellate court may only interfere with a trial judge’s assessment of punitive damages (1) if there is an error of law; or (2) if the amount is not rationally connected to the purposes for which the damages are awarded, namely prevention, deterrence (both specific and general), and denunciation ...

*Cinar* at para. 134.

[31] In *Time*, the Supreme Court emphasized that appellate courts “must show considerable deference before varying the quantum of damages” (at para. 189), since the trial judges’ task to consider all the specific circumstances of each case in light of the principles underlying punitive damages is essentially a factual assessment. Only when a palpable and overriding error has been shown can a “trial judge’s decision in respect of findings and inferences of fact related to the assessment of damages” be set aside (*Ibid.*).

[32] That being said, it should be remembered that appellate courts can be more interventionist when reviewing an award of punitive damages as opposed to general damages. When dealing with the latter, courts may only intervene if the award is “so exorbitant or so grossly out of proportion [to the injury] as to shock the court’s conscience and sense of justice”

(*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 159), whereas in the case of the former, the court's emphasis will be on the rationality of the award. In other words, as summed up by the Supreme Court in *Whiten*, "[t]he focus [when reviewing an award of punitive damages] is on whether the court's sense of reason is offended rather than on whether its conscience is shocked" (at para. 108).

[33] In keeping with this standard of review, I will now look into the issues raised in the appeal and cross-appeal.

A. *Did the Federal Court err in law in constraining itself with a "two-million dollar ceiling"?*

[34] The appellant claims that the judge's determination of the quantum of punitive damages was based on his erroneous belief in the existence of a \$2,000,000 ceiling. Such a ceiling, the appellant argues, has no foundation in law, whether statutory or jurisprudential, and it risks compromising, in cases such as this one, the achievement of the purposes sought by punitive awards. The appellant further relies, to support its position, on *Lubrizol*, allegedly the only comparable case involving two large multinational companies. In that case, the Federal Court awarded punitive damages in the amount of \$15,000,000, a finding which the appellant says was implicitly confirmed on appeal.

[35] Having carefully read the reasons of the judge, I am unable to agree with these submissions. In fact, the appellant's argument appears to be based on a narrow reading of two

isolated excerpts of the judge's 61 paragraphs devoted to punitive damages. These two paragraphs read as follows:

[397] ... Considering the case law, if any non-binding indication should be provided by this Court, an amount of punitive damages in litigation involving two multinational companies could be in the range of \$500,000 to \$2 million depending of the circumstances. The Court has retained the sum of \$1,000,000, which is the middle range. This flows from the fact that, while there are aggravating factors, there are also mitigating factors in this particular case.

...

[413] Following this principle, the Court attaches much importance to the blameworthiness of the defendant's conduct... In short, all these elements point toward an award of significant punitive damages in order to precisely denounce this unacceptable behavior. This is why the amount of the award should not be in the lower range of the punitive damages spectrum as suggested by the defendant.

[36] On a fair reading of these two paragraphs, especially when they are read in the context of the judge's reasons as a whole, I find it hard to consider that he felt "limited" or "bound" by a so-called \$2,000,000 ceiling. Rather, it seems clear to me, from his own characterization of these comments as a "non-binding indication" (Damages Judgment at para. 397), that he saw this scale simply as a helpful indication of the range of punitive damages previously awarded.

[37] In my view, there is nothing untoward or inappropriate in using a range of previous awards, as guideposts, in assessing the quantum of punitive damages. Even the Supreme Court, in *Whiten*, took such a range into account, when it concluded that the award was "certainly at the upper end of a sustainable award on these facts but not beyond it" (at para. 4). It is, in fact, a very common practice, and a sound one for that matter, to consider previous awards in assessing the quantum of punitive damages in a particular case (see, e.g., *Pate Estate v. Galway-Cavendish and Harvey (Township)*, 2013 ONCA 669 at para. 148; *Mont-Tremblant Residence Trust c.*

*Chartier*, 2013 QCCA 199 at para. 58; *Elgert v. Home Hardware Stores Limited*, 2011 ABCA 112 at para. 102, leave to appeal to the S.C.C. denied, 34335 (November 24, 2011)).

[38] Moreover, it is clear that the judge properly considered and applied the relevant factors set out in *Whiten* to determine the punitive damages award that would be proportional and necessary to achieve the three overarching goals of retribution, deterrence and denunciation identified by the Supreme Court. After explicitly endorsing the general principle established by this Court in *Lubrizol* “regarding the great discretion of the trial judges in deciding the appropriate amount for punitive damages” (Damages Judgment at para. 388), the judge strove to find an amount that was no greater than necessary to rationally accomplish the stated objectives of these damages. Nowhere in his reasons do we find any indication that the judge felt constrained in his search or bound in any way by a “fixed cap” on punitive damages. Quite to the contrary, he considered all the particular facts of the case to determine the amount that would be proportionate to the blameworthiness of the defendant’s conduct, to the degree of vulnerability of the plaintiff, to the harm directed specifically at the plaintiff, to the need for deterrence, to the other penalties, and to any advantage wrongfully gained by a defendant from the misconduct. In short, the judge properly instructed himself as to the applicable law and did not operate under any misconception in relation to an artificial ceiling.

[39] Indeed, the gist of the appellant’s argument (and of the respondent in the cross-appeal) goes to the weighing of the different factors by the judge. The appellant is clearly of the view that the judge did not attach sufficient importance to the blameworthiness of the respondent’s conduct and therefore failed to come up with an award that would truly have a deterrent effect,

while the respondent would have liked the judge to pay more attention to some counterbalancing factors. Whatever their merit, however, these arguments do not substantiate the claim that the judge erred in law or misdirected himself in identifying the legal test and factors pertaining to punitive damages.

[40] Lastly, I find the argument of the appellant that the judge erred in failing to rely on the *Lubrizol* decision to be without merit. The judge clearly explained, at paragraphs 387 and 388 of his reasons, why he thought this decision should be distinguished from the present case, and why it has limited precedential value. The judge noted that, not only did the *Lubrizol* decision have to do with the breach of an interlocutory injunction, thus setting it apart from the facts of the present case, but it was also overturned on appeal because the quantum of the compensatory damages had not been considered in the analysis. As noted by the judge:

[388] ...Although the Federal Court of Appeal did not *per se* invalidate the quantum of punitive damages, it did not confirm the quantum of punitive damages either. The Federal Court of Appeal underlines the principle that exemplary damages may be awarded only “where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence”... The Federal Court of Appeal then decided that they could not assess the proper amount of exemplary damages until it decides whether the general damages were insufficient for punishment and deterrent purposes. The Federal Court of Appeal was never given the opportunity to reassess the matter as the parties settled the case. This case cannot therefore have a form of precedent regarding the amount allocated for punitive or exemplary damages in the first instance...

[41] The appellant has not convinced me that this reading by the judge of the decision of this Court in *Lubrizol Corp v. Imperial Oil Ltd.*, [1996] 3 F.C. 40, [1996] F.C.J. No. 454 (FCA) is erroneous. It simply asserts, based on its own reading of the decision, that this Court has



“implicitly agreed” that such substantial damages could reasonably be awarded. This submission is based on a paragraph from the above-noted decision which, when read in full, states that:

As for the amount that may be awarded ultimately, it may still be \$15,000,000 or it may be less or even more. It depends on what figure would be required to deter this appellant and others, in all the circumstances of this case... This Court makes no comment on what the appropriate amount, if any, might be for this case, but will leave it for the Trial Judge on the further continuance to decide, based on all the evidence, both new and old, the principles set out in these reasons and having regard to the compensatory damages figure that will have been assessed.

[Emphasis added.]

[42] In light of this paragraph, I cannot find that this Court “implicitly” agreed on any amount of damages, or that the judge erred in this respect. Additionally, I note the comments of the Supreme Court, in *Whiten*, about the *Lubrizol* case:

[125] On the other hand, care must be taken not to employ the “wrongful profit” factor irrationally. Thus, in [*Lubrizol*], the court ordered the defendant to account to the plaintiff for all profits gained by infringing the plaintiff’s patent, with interest, then added \$15 million in punitive damages (without waiting for the profits to be ascertained) because, *per* Cullen J., “[t]he volume of [patented] product sold, although not quantified, must be enormous” and the defendant was “a large corporation with annual sales of 10 billion dollars” (p. 209). The duplicative remedies thus relieved the defendant of the profit twice, once through the accounting remedy and a second time (at least in part) through an award of punitive damages. The trial judge’s approach was reversed on appeal...

[43] In closing, I wish to add that *Lubrizol* was decided almost 25 years ago and does not seem to have been given much precedential value. I have been unable to find any other case where such a large award of punitive damages has been made, and counsel has not drawn our attention to any such case. Indeed, counsel for the respondent asserts in its Memorandum of Fact and Law (at para. 64) that a survey of the cases where Canadian courts have awarded punitive damages in the intellectual property context between 1994 and 2017 shows that these awards

were generally in the \$10,000 to \$100,000 range, the most notable exceptions being the \$500,000 award by the Supreme Court in *Cinar* and that of \$1,000,000 by the Federal Court in *Nintendo of America Inc. v. King*, 2017 FC 246 ; that claim has not been disputed by the appellant. *Lubrizol* would therefore appear to be the outlier in terms of the significance of the award in punitive damages, and the judge was certainly entitled to distinguish that decision from the present case.

B. *Did the Federal Court err in finding that a \$1,000,000 award in punitive damages was sufficient to meet the objectives of such damages, i.e. retribution, deterrence and denunciation?*

[44] The appellant argues that a \$1,000,000 award of punitive damages is insufficient, in the present case, to achieve the purposes of retribution, deterrence, and denunciation. Specifically, it asserts that the important financial situation of the respondent, and of its parent company, the fact that it still benefits from its misconduct, the highly reprehensible nature of said misconduct and the very purpose of patent law all call for an award of punitive damages in the amount of \$25,000,000. The appellant also argues that the judge granted too low an award as a result of two errors of law in his application of the *Whiten* factors. I will now deal with each of these arguments in turn.

(1) Blameworthiness of the Conduct

[45] The appellant asserts that a \$1,000,000 award of punitive damages is insufficient to denounce the highly reprehensible nature of the misconduct at issue. Quoting from *Whiten*, according to which “[t]he more reprehensible the conduct, the higher the *rational* limits to the

potential award” (at para. 112), the appellant highlights a number of findings made by the judge relating to the seriousness of the respondent’s behaviour:

- The misconduct of the respondent, a sophisticated company, was “planned and deliberate” (Damages Judgment at paras. 399, 413 and 424; Liability Judgment at paras. 425, 430-433, 440 and 456; Liability Appeal at paras. 56, 186 and 192);
- The misconduct amounted to “willful blindness” on the part of the respondent. The latter acted in a “foolhardy manner” (Damages Judgment at para. 409; Liability Judgment at paras. 425, 430-433; Liability Appeal at paras. 56, 186 and 190);
- The misconduct lasted “for a number of years”, even to some extent after the notice of infringement was received (Damages Judgment at paras. 399, 421, 422 and 428; Liability Judgment at paras. 440 and 442);
- The respondent concealed the misconduct from the public, and claimed the gear was its own invention (Damages Judgment at paras. 399, 413, and 430; Liability Judgment at paras. 272-273 and 439-441; Liability Appeal at paras. 191-192);
- The respondent profited from its misconduct with respect to the development of a highly complex piece of equipment, the landing gear (Damages Judgment at paras. 218, 328-329, 373, 401 and 439; Liability Judgment at paras. 435 and 441);
- The overall business of the appellant was harmed (Damages Judgment at para. 422). The potential harm to the appellant was also great (Damages Judgment at para. 421; Liability Judgment at para. 436);
- The misconduct of the respondent goes against the very core and purpose of patent law (Damages Judgment at paras. 430 and 441);

- There was no corporate action taken against members of management personally responsible for the reprehensible conduct, which shows the need for a “strong corporate deterrent” (Damages Judgment at para. 408).

[46] On the basis of these findings, the judge concluded that the blameworthiness of the respondent’s misconduct “point toward an award of significant punitive damages in order to precisely denounce this unacceptable behavior” (Damages Judgment at paras. 413 and 440-441). Yet, objects the appellant, the judge failed to award an amount of punitive damages that is proportionate enough to the blameworthiness of the respondent’s conduct, especially in light of the fact that the respondent profited from its misconduct and continues to do so to this day. The appellant contends that, in circumstances such as those in the case at bar, where compensatory damages are so modest as to amount to nothing more than a licence fee to earn greater profits from the infringement, an award of punitive damages in the amount of \$1,000,000 is not rational.

[47] As the appellant itself made clear in its submissions, there is no doubt the judge was well aware of the respondent’s blatant disregard of the ‘787 Patent and the seriousness of the respondent’s conduct. In his overall conclusion on punitive damages, the judge went as far as singling out the blameworthiness of the respondent and the need for deterrence as the two major factors that militate for higher punitive damages (Damages Judgment at para. 440). Yet the judge also aptly identified a number of mitigating factors that, in his view, made it “unwarranted and unnecessary” to award damages greater than \$1,000,000:

- The respondent enjoys a good reputation and has not been condemned in the past for any other major intellectual property violation (Damages Judgment at para. 48);

- There were no sales of any of the 21 infringing Legacy gears, or of any Bell 429 helicopters equipped with said gear (Damages Judgment at paras. 420 and 424);
- The respondent quarantined the infringing gears upon being notified of the legal proceedings (Damages Judgment at paras. 414, 424 and 429-430);
- The respondent developed a replacement gear, the “Production” gear, upon being notified of the legal proceedings (Damages Judgment at paras. 414 and 430).

[48] The judge also considered various factors to have a neutral impact on his analysis:

- There is no power imbalance between the parties (Damages Judgment at para. 416);
- While there ultimately were public apologies from the respondent’s senior management, they came “very late”, and do not “translate a true sense of repentance” (Damages Judgment at para. 403);
- While noting that new policies and procedures were implemented by the respondent with respect to intellectual property, the judge nonetheless held that “similar policies existed at the time of the infringement” and did not prevent it (Damages Judgment at paras. 408-409);
- There was no evidence of reputational damages to the appellant (Damages Judgment at para. 423);
- The financial situation of the appellant and its parent company, while relevant to the question of deterrence, is of a “limited importance” (Damages Judgment at paras. 426-427);

- The social impact of legal proceedings is not “another sanction” imposed on the respondent. The fact that it was sued in other countries is. On the whole, it remains that this factor is “more neutral” (Damages Judgment at para. 435).

[49] It is only after having considered all these factors, and having looked at the proportionality of the punitive damages award “in several dimensions” (*Whiten* at para. 111), that the judge decided on a total amount of \$1,000,000. He found that such an award was proportionate to the factors identified in *Whiten*, that it “respects the boundaries of rationality” and that it was “not excessive” (Damages Judgment at paras. 440-441). He also found that it was “the minimum amount of punitive damages that can be awarded... to achieve [the] purposes” of a punitive award, and especially the goal of deterrence (at para. 441).

[50] The appellant (and, for that matter, the respondent, although for diametrically opposite reasons) is obviously dissatisfied with the judge’s final assessment of punitive damages. There is, however, no reason for this Court to intervene. The judge correctly identified the factors going to the proportionality of a permissible quantum of punitive damages, and properly applied them to the facts of this case. Such an exercise is highly contextual in nature (*Lam v. Chanel S. De R.L.*, 2017 FCA 38 at para. 13). Having carefully reviewed the facts of this case, I am of the view that the award of \$1,000,000 in punitive damages is consistent with the objectives of punitive damages - retribution, deterrence and denunciation - and is well within the bounds of rationality.

[51] Not only was the judge clearly sensitive to the blameworthiness of the respondent, but he did not fail to appreciate the need for deterrence, both at an individual and at a societal level. The

appellant argues that a \$1,000,000 award of punitive damages does not send a strong enough signal that it is not an option for a multinational company to save on research and development and rely instead on innovations from competitors. Yet again, a careful reading of the judge's reasons reveals that he was well aware of that risk and did not fail to take this factor into consideration in setting at \$1,000,000 the amount of the punitive damages, as exemplified by the two following paragraphs:

[401] Bell also profited from its misconduct. As this Court has already found, in 2012, Airbus' experts assum[e] that the economic benefits realized by Bell include saved costs of capital relating to the solicitation and collection of customer deposits using the 429 helicopters equipped with an infringing landing gear; saved costs and incremental profits from not having to redo the optimization and certification testing; saved costs and incremental profits from the adoption of the infringing landing gear rather than using its own independently developed landing gear; and improved customer relationships and brand value as a result of Bell's bringing to market the Bell 429 helicopter model (2012 FC 113, at para 441) ...An award of \$1,000,000 in punitive damages is certainly not out of proportion with the defendant's blameworthiness, as well as the direct and indirect benefits derived from its misconduct. In this respect, this sum also takes into account mitigating factors militating in favour of the defendant.

...

[439] ...[t]here were a number of advantages wrongfully gained by the defendant that have been already mentioned by the Court, and this despite the defendant's claim that there is no causal link with the infringement. Be that as it may, Bell submits that punitive damages are not, by nature, compensatory, and that it would be wrong to include the four categories of economic benefits identified... To make this matter clear, the Court has assured itself that there is no "double recovery". In this respect, the amount of \$1,000,000 in punitive damages does not duplicate the amount of \$500,000 in compensatory damages, and in the Court's view is proportionate to any advantage wrongfully gained by the defendant from the misconduct.

[Emphasis added.]

[52] Once again, it is obvious from the reasons of the judge that he took this factor into account in setting at \$1,000,000 the amount of the punitive damages. This is consistent with the

holding of the Supreme Court in *Whiten* that punitive damages notably serve to “ensure that the defendant does not treat compensatory damages merely as a licence to get its way irrespective of the legal or other rights of the plaintiff” (at para. 124). At the same time, the judge also considered, as he makes clear in the above-quoted paragraphs, mitigating factors in favour of the respondent; it was also open to the judge to do so. In so doing, he made sure “not to employ the ‘wrongful profit’ factor irrationally” (*Whiten* at para. 125). In this context, I find that the \$1,000,000 award in punitive damages is not irrational and that it should not be set aside.

(2) Financial Means of the Respondent

[53] The appellant also makes the case that, in light of the size and financial means of the respondent and of its two parent companies, Bell Helicopter Textron Incorporated (BHTI) and Textron Incorporated (Textron Inc.), a \$25,000,000 award of punitive damages would be necessary in this case to achieve the purpose of deterrence. This argument of the appellant was not really fleshed out either orally or in its factum, and appears to rest on bare assumptions. The only evidence in this respect appears to be the cross-examination of Mr. Donald Hatcher, who confirmed that the absence of any mention of the appellant’s \$25,000,000 punitive damages claim in the annual report that Textron Inc. must submit pursuant to the *American Securities Exchange Act of 1934*, 48 Stat. 881 is an indication that it was not considered material.

[54] Again, I find that no reviewable error has been shown in the decision below. It is clear from *Whiten* that the financial means of a defendant may be a relevant consideration in some circumstances (at para. 119). As the Supreme Court stated in *Time*, when discussing article 1621 of the *Civil Code of Québec*, S.Q. 1991, c. 64 (“C.C.Q.”), “...the larger the debtor’s



patrimony, the higher the award of punitive damages must be to ensure that the general objectives of such damages are achieved and to discourage any repetition” (at para. 201). That being said, it is a factor of “limited importance” (*Whiten* at para. 118), and the ultimate consideration will always be the rational connection between the amount of the award and the purposes for which punitive damages are awarded (*Time* at para. 201).

[55] In *Whiten*, Justice Binnie outlined three situations where a defendant’s financial power may become relevant: a) if the defendant chooses to argue financial hardship; b) if the defendant’s financial clout is directly relevant to its misconduct; and c) other circumstances where it may rationally be established that a lesser award would be insufficient to achieve deterrence (at para. 119). The first two factors have not been demonstrated here, and the third one has not been substantiated.

[56] As for the financial means of Textron Inc., it is not a party to the litigation. Pursuant to article 1621 of the *C.C.Q.*, which governs the award of punitive damages in the Province, it is the patrimonial situation of the debtor that must be taken into consideration. Exceptionally, the patrimony of a third person can be taken into account if it is shown that this third person will be assuming, in whole or in part, the payment of the damages (*Time* at para. 213). Again, there is no evidence on the record that such will be the case here. Apart from the fact that the \$25,000,000 claim for punitive damages was not mentioned in Textron Inc.’s annual report, the only findings of the judge are that: 1) the respondent is a “subsidiary of BHTI who, in turn, is wholly owned by Textron Inc.” (Damages Judgment, at para. 427; Liability Judgment at para. 4); 2) the profits of the respondent flow into BHTI (*Ibid.*); and 3) Textron Inc.’s annual report covers activities of

both the respondent and BHTI (Damages Judgment at para. 427). This is a far cry from showing that any of the respondent's parent companies would be liable for the payment of an award of punitive damages. Consequently, the financial means of Textron Inc. or of any of its affiliated companies are not relevant to the quantification of punitive damages.

[57] It bears emphasizing, moreover, that while the judge might not have given a great deal of weight to the financial means of the respondent, he nonetheless considered it as a relevant factor in his analysis (in particular at paras. 426 and 427 of the Damages Judgment). If he ultimately decided against giving too much weight to this factor, it is at least in part because he also identified mitigating factors in this respect, notably the good reputation and past history of the respondent. This is in accordance with the teaching of the Supreme Court in *Whiten* (at paras. 118, 120 and 121), and his conclusion in this regard is entitled to a high degree of deference.

[58] Finally, the appellant argues that the judge committed two errors of law in his application of the *Whiten* factors. First, it claims that the judge was wrong to accept the conduct of the respondent after the initiation of the action as a mitigating factor in his analysis of the infringement's "potential harm". For this "potential harm" factor to have any meaning, says the appellant, its evaluation must be done at the moment of the violation, and not at a later time. Otherwise, no distinction remains between "actual" and "potential" harm. Second, it is argued that the judge should not have considered as a mitigating factor the fact that the respondent has been sued in other countries. In the appellant's view, this is not a "sanction/penalty" within the meaning of *Whiten*, nor does it relate to the same infringement. I will deal with each of these alleged errors in turn.

## (3) Potential and Actual Harm

[59] The appellant first takes issue with paragraph 424 of the decision below, where the judge, after having concluded that “the potential for harm against the plaintiff was great” (at para. 421), went on to state:

[424] Moreover, while the amount of \$500,000 in compensatory damages ... may look significant, in reality, ...this is really a modest sum. On the other hand, the Court resisted any temptation to substantially raise the amount of punitive damages, considering that the potential harm [caused to] the plaintiff by the defendant’s planned and deliberate actions was mitigated by the decision taken by the defendant to quarantine the twenty-one infringing Legacy gear and the fact that no Bell 429 was sold with the infringing Legacy gear. All these elements were specifically taken in consideration by the Court in determining that an award of \$1,000,000 in punitive damages would be proportionate to the harm or potential harm directed specifically at the plaintiff.

[Emphasis added.]

[60] The appellant argues that the judge was mistaken to consider the conduct of the respondent after the initiation of the legal proceedings in his evaluation of the “potential harm” and thereby emptied this factor of its meaning. Relying on the heading preceding the discussion of the third factor in *Whiten* (“Proportionate to the Harm or Potential Harm Directed Specifically at the Plaintiff”), the appellant claims that both the actual and the potential harm must be considered, and that the seriousness of the prejudice must be assessed at the time of the wrongful behaviour, whether or not actual prejudice ensued.

[61] In my view, this is not what the Supreme Court had in mind when it considered this factor. When reading the only paragraph devoted to this criterion (*Whiten* at para. 117), it is clear that what the Court wanted to stress in holding that both potential and actual harm be considered

was that the author of the misconduct “is not necessarily excused because fortuitously [its conduct] result[ed] in little damage” (emphasis added). The use of the word “fortuitously” clearly shows, in my view, that what the Court really wanted to prevent was for bare luck to be considered as a mitigating factor.

[62] In the case at bar, the judge found that it was the diligent conduct of the respondent after the initiation of the proceedings that reduced, at least in part, both the actual and potential harm resulting from the misconduct. He found, more specifically, that the steps taken by the respondent - the quarantine and the creation of a replacement gear - not only reduced the “actual harm”, that is the sales of infringing material, but also the “potential harm”, that is the possibility of future sales. As noted by the judge in his discussion of the next factor (whether the award is proportionate to the need for deterrence), this behaviour is to be contrasted with that of defendants who continue to infringe intellectual property rights even after being notified of the infringement and sometimes even during the course of the trial (Damages Judgment at para. 429). In this context, it was open to the judge to regard the steps taken by the respondent after the infringement as a mitigating factor.

[63] Adopting the approach advocated by the appellant, moreover, would not be in keeping with the holistic and balanced approach developed by the Supreme Court in assessing the proportionality of punitive damages. In *Whiten*, Justice Binnie made it clear that a proper award must look at proportionality “in several dimensions” (at para. 111), pointing out that if potential as well as actual harm is a reasonable measure of misconduct, so are the other factors mentioned in that case such as motive, planning, vulnerability, abuse of dominance and other fines or

penalties (at para. 127). Not taking into account the conduct of the respondent after being notified of the violation would be antithetical to that approach.

[64] The need for such an approach is particularly obvious in this case. After all, if the judge concerned himself with “potential harm” in the first place, it was because he felt that the “actual harm” did not, in his words, “take into account the reality of the length of time, the gravity and intention behind the infringement” (at para. 421). If these particular elements, which all relate to the blameworthiness of the respondent’s conduct, can be taken into consideration as aggravating factors in the evaluation of the “potential harm” element, it would be entirely illogical that the respondent’s post-infringement conduct, which also relates to the issue of blameworthiness, should not be accepted as a mitigating factor.

#### (4) Other Sanctions and Penalties

[65] As for the appellant’s second argument that the judge erred in law in considering other penalties that have been or are likely to be inflicted on the respondent for the same misconduct, I find that it is likewise of no merit. First of all, it seems to me that the question of whether or not these other sanctions relate to the “same misconduct” is not truly a question of law but rather a mixed question of fact and law, and as such the judge’s conclusion in this respect is entitled to much deference.

[66] More importantly, I disagree with the appellant that the civil proceedings in the United States and in France do not relate to the same infringement since they were based on the violation of different patents (*i.e.* the American and French patents corresponding to the

Canadian '787 patent). In *Whiten*, the Supreme Court focused its analysis not so much on the legal instrument underlying the violation but rather on the “misconduct”. For example, Justice Binnie spoke of “the same misconduct” (heading of para. 123), of “the misconduct in question” (at para. 94), and, in its comparative analysis, of an “offence arising out of substantially the same facts” (at para. 69). In light of such a broad language, and of the purpose of this factor, which is to account for other forms of retribution and deterrence in assessing the amount of punitive damages needed, I find the judge’s reasoning and conclusion unimpeachable.

[67] As for the appellant’s argument that a lawsuit does not constitute a “sanction” or a “penalty” for the purposes of this criterion, I find that such a narrow reading of *Whiten* is unwarranted and unsubstantiated at least in the particular context of this case. Of course, the mere institution of a legal proceeding might not in all cases be sufficient to constitute a penalty “which ha[s] been”, or which “[is] likely to be” inflicted (*Whiten* at para. 123 (heading)), as an action may well be bereft of any chance of success or eventually be dismissed. Such is not the case here. As the judge makes clear at paragraphs 33 to 37 of the judgment, a seizure was ordered in France, injunctions were also granted in both the United States and France, and compensatory damages are under assessment in the latter country. Therefore, it can be said that sanctions were indeed inflicted on the respondent in these countries, and that another sanction will likely be imposed in the near future, all in addition to the damages awarded in Canada.

[68] There is no indication, either in *Whiten* or in subsequent case law, that the Supreme Court intended a geographical limit to this factor, or that only sanctions and penalties imposed in Canada be contemplated. In fact, the very broad language employed by the Court in referring to

this notion seems to indicate quite the opposite. The Court speaks, for example, of “any other fines or penalties suffered...for the misconduct in question” (*Whiten* at para. 94), of “Other Penalties, Both Civil and Criminal” (at para. 123, in the heading), and of “*all* other penalties” (at para. 123; emphasis in the original). It also talks, in the same paragraph, of “other retribution, denunciation or deterrence, either civil or criminal, for the misconduct in question” (at para. 123). In light of that broad language, I believe that the Court wanted both the type of sanctions and the *locus* of their imposition to be as wide as possible. This is, indeed, the most compatible interpretation consistent with the purpose of this factor, which is, once again, to ensure that punitive damages be awarded “if, but only if” all other penalties are inadequate to accomplish the objectives of retribution, deterrence and denunciation (*Whiten* at para. 123).

[69] In any event, it is not as if the judge found that the legal proceedings in other countries were a factor mitigating the blameworthiness of the respondent. Not only did the judge refuse to consider the social impact of legal proceedings as a penalty, but he also came to the conclusion that the other civil sanctions imposed on the respondent are a “neutral” factor in this case. The appellant has not persuaded me that such a finding is irrational, or that a \$1,000,000 award in punitive damages is less than proportionate and would thus fail to achieve its purposes.

[70] For all of the above reasons, I am therefore of the opinion that the appeal should be dismissed.

C. *Conversely, is the \$1,000,000 award the lowest amount required to achieve the purposes of punitive damages?*

(1) Blameworthiness of the Conduct

[71] The respondent is of the view that a \$1,000,000 award of punitive damages exceeds the lowest amount required to meet its purposes. The irrationality of this amount is clear, the respondent says, if we consider it was only found liable for its “careless behavior” in not investigating the intellectual property rights of others, that its post-infringement conduct was exemplary, and that it had already been sanctioned in other countries. The respondent also argues that the irrationality of this amount is evident in light of comparable awards in the case law.

[72] The respondent’s attempt to downplay the factual conclusions of the judge with respect to the blameworthiness of its conduct is ill-advised and inappropriate. Contrary to what the respondent suggests, the judge did not find that it was liable merely for its “careless behavior” in not investigating the intellectual property rights of the appellant (Memorandum of Fact and Law of the Respondent at para. 45), or for its “carelessness and ... failure to do patent validity ... searches” (*Ibid.* at para. 76). Rather, the judge concluded, in his Liability Judgment, that the respondent’s “assertion that it had no knowledge whatsoever of the ‘787 Patent prior to May 2008 is simply not plausible and contrary to the evidence” (at para. 425). He held, moreover, that Bell’s infringing conduct was “planned and deliberate” and persisted over a lengthy period of time (at para. 440), that its conduct represented “a marked departure from ordinary standards of decent behaviour” (at para. 431), that it is “implausible” that Bell was ignorant of the appellant’s intellectual property rights for all those years (at para. 432), that there is clear evidence of “bad faith and egregious conduct” (at para. 433), and that Bell’s overall conduct is “highly reprehensible” and constitutes a “callous disregard” for the rights of the appellant (at para. 436). These conclusions of fact were all confirmed by this Court in its 2013 judgment (see, in particular, Liability Appeal at paras. 189, 190 and 192).



[73] It is on the basis of these findings that the judge found that the appellant was entitled to punitive damages as a result of the infringement by the respondent of the '787 Patent and of its deliberate and outrageous conduct. Far from recoiling from these findings, the judge substantially reiterated them in his Damages Judgment. After quoting many of the paragraphs from the Liability Judgment already referred to, the judge wrote:

[399] The Court has already found in 2012 that Bell's misconduct was planned and deliberate...; that its intent and motive was to produce a lighter gear having the advantages (ground resonance) mentioned in the '787 Patent; that the infringement continued for a number of years; that the Bell's directions knew that Bell was doing wrong and persisted in its misconduct, while claiming that the Legacy gear was its own technology and promoting sales of the Bell 429.

...

[413] ...the Court attaches much importance to the blameworthiness of the defendant's conduct. The findings in the first phase of trial established that the defendant's misconduct was planned and deliberate. Indeed, Bell intentionally leased and operated an EC120 helicopter, not under "benchmarking" motive with competitive products, but rather to import and copy the unique and new patented technology developed by the plaintiff... [References omitted.]

[74] It is very clear, from these paragraphs, that the misconduct for which the respondent was found liable, and for which punitive damages were awarded, is much more serious than the latter suggests. Specifically, the judge found that the respondent knew of the existence of the patent, that said patent was to be presumed valid pursuant to subsection 43(2) of the *Patent Act*, R.S.C., 1985, c. P-4, and that, notwithstanding this knowledge, the respondent decided to carry on with the infringement (Liability Judgment at paras. 423-425 and 431-433). It is too late for the respondent to challenge, albeit indirectly, these findings of fact.

[75] In light of these findings, it was open to the judge to conclude that the blameworthiness of the respondent's conduct "point[s] toward an award of significant punitive damages in order

to ... denounce this unacceptable behavior” (Damages Judgment at paras. 413 and 440-441). The judge was also free, in this context, to find that “the amount of the award should not be in the lower range of the punitive damages spectrum” (at para. 413). Indeed, the “more reprehensible the conduct, the higher the *rational* limits to the potential award [are]” (*Whiten* at para. 112; emphasis in the original).

(2) Mitigating Factors

[76] I also find without merit the respondent’s claim that the judge did not pay attention to the fact that its post-infringement conduct was exemplary. In his discussion of the need for deterrence, the judge explicitly referred to the fact that the respondent enjoys a good reputation and has never been condemned for any major violation of intellectual property rights in the past (Damages Judgment at para. 428). The Federal Court also found that it would be unwarranted to award an amount of damages greater than \$1,000,000 in view of the fact that Bell did not sell any helicopter with the infringing gear, quarantined all 21 infringing Legacy gears, and quickly moved to bring to market a non-infringing Production gear (Damages Judgment at paras. 414, 420, 424 and 429-430). In his concluding paragraph on deterrence, the judge clearly turned his mind to these mitigating factors when he stated:

[430] ... On the other hand, although the infringement was perpetrated at a grand scale and authorized at a very high level, the defendant’s behaviour after the institution of the proceeding - despite being motivated by mitigating the risk factor (and not repentance) - must nevertheless also be taken into account by the Court in determining whether the amount of punitive damages is proportionate to the need of deterrence. ...

[77] This statement, in my view, is a complete answer to the respondent’s allegation.

(3) “Comparable” Awards

[78] The respondent ultimately argues that the excessive nature of the \$1,000,000 award in punitive damages is obvious when comparable awards are considered. A survey of 127 punitive damage awards considered by Canadian courts outside Quebec between 2011 and 2017, and of 41 punitive damages awards granted by Quebec courts between 1994 and 2017, apparently establishes that the vast majority are in the range of \$5,000 to \$200,000. In those rare cases where higher amounts were granted, states the respondent, the defining factor was either the vulnerability of the individual plaintiff or the quasi-criminal conduct of the defendant. Neither of these factors is said to be present here.

[79] In my view, the respondent makes too much of the power imbalance factor. In *Whiten*, the \$1,000,000 award in punitive damages was deemed rational not only because of the vulnerability of the plaintiff but also because of the blameworthiness of the defendant’s conduct, and its attempt to profit financially from it (*Whiten* at paras. 112 and 131). In my view, the judge was similarly right to consider that the vulnerability of the plaintiff was only one factor among others, and that the same aggravating factors found in *Whiten* were also present in this case (Damages Judgment at paras. 401, 413, 439, 440 and 441).

[80] Moreover, it bears repeating that each case turns on its own facts. For example, I do not think that the decision of the Supreme Court in *Time* can be relied upon in support of the respondent’s argument that the \$1,000,000 award at issue here is excessive and disproportionate. While it is true that the Court only awarded \$15,000 in punitive damages to the plaintiff in *Time*,

the facts of that case were very different from the ones here. While the misconduct was deliberate in both cases, the Court in *Time* took into consideration two mitigating factors, namely the limited impact of the defendant's fault on the plaintiff (*Time* at para. 212) and the fact that the plaintiff's attitude had contributed to the proportions the case had ultimately reached (*Time* at paras. 211-212). This is to be contrasted with the present case, where the judge found that the overall business of the appellant was harmed by the misconduct (Damages Judgment at para. 422), that the potential harm was also great (at para. 421), that the respondent profited from it (at paras. 401 and 439), that it lasted for a number of years and that it was concealed from the public (at para. 399). Furthermore, the judge has explicitly rejected, in the Liability Judgment, the respondent's claim that the appellant had contributed to its prejudice (Liability Judgment at paras. 398-402). For all of these reasons, not to mention the fact that *Time* was not rendered in the context of a patent infringement, this case is not conclusive and cannot be relied upon as a controlling precedent.

[81] Lastly, one should not lose sight, when comparing cases, of the amounts awarded in compensatory damages. In *Cinar*, for example, the Supreme Court reassessed the quantum of punitive damages to \$500,000, but compensatory damages were also awarded in an amount of more than \$2,600,000 (at paras. 71, 146-147). This is not to be forgotten in comparing the amount of punitive damages awarded in each case, especially since one of the purposes of punitive damages is "to relieve a wrongdoer of its profit where compensatory damages would amount to nothing more than a licence fee to earn greater profits" through egregious flouting of the rights of others (*Whiten* at para. 72).

[82] In conclusion, and for all of the above reasons, I am of the view that the cross-appeal should be dismissed. I cannot refrain from thinking that when both parties challenge an award of punitive damages for being either too high or too low, it is a good indicia that it is neither so high as to exceed the bounds of rationality nor so low as to prevent its purposes from being achieved.

V. Conclusion

[83] The appeal and the cross-appeal are dismissed. As a result, each party shall bear its own costs.

“Yves de Montigny”

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J.A.

“I agree  
J. D. Denis Pelletier J.A.”

“I agree  
Richard Boivin J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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CANADA LIMITÉE

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**CONCURRED IN BY:** PELLETIER J.A.  
BOIVIN J.A.

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