

Federal Court



Cour fédérale

Date: 20191218

Docket: T-1624-17

Citation: 2019 FC 1635

Ottawa, Ontario, December 18, 2019

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

MCCAIN FOODS LIMITED

**Plaintiff/
Defendant by Counterclaim**

and

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

**Defendants/
Plaintiffs by Counterclaim**

and

**ELEA VERTRIEBS-UND-
VERMARKTUNGSGESELLSCHAFT, MBH**

Third Party

ORDER AND REASONS

I. Overview

[1] This is a decision on a pair of motions related to the patent infringement action between McCain Foods Limited (“McCain”) and J.R. Simplot Company and Simplot Canada (II) Limited (collectively, “Simplot”).

[2] On June 25, 2019, Prothonotary Aylen granted Simplot’s motion to amend its Statement of Defence and Counterclaim and granted Simplot leave to serve and file a Third Party Claim. The first motion before this Court is an appeal of the Prothonotary’s order. The second is a motion to strike or stay the Third Party Claim, brought by third party Elea Vertriebs-und-Vermarktungsgesellschaft, mbH (“Elea”)

II. Facts

A. *Parties*

[3] The Plaintiff/Defendant by Counterclaim, McCain, is the owner of Canadian Letters Patent No. 2,412,841 (the “841 Patent”). The 841 Patent is entitled “Process for Treating Vegetables and Fruit Before Cooking.” The 841 Patent covers a process for treating frozen fruits and vegetables using a pulsed electric field (“PEF”) to reduce resistance to cutting after they are cooked.

[4] The Defendants/Plaintiffs by Counterclaim, Simplot, are two related companies. Simplot is one of McCain's competitors.

[5] The third party, Elea, is a German company. Elea manufactures PEF systems and sells them worldwide. Simplot purchased a PEF system from Elea for use in Simplot's Portage la Prairie, Manitoba facilities, under an Equipment Furnish Only Purchase Contract ("the Contract") dated January 21, 2013.

B. *Litigation history*

[6] On October 25, 2017, McCain sued Simplot for infringement of the 841 Patent. McCain alleged that Simplot's use of the PEF system violated the 841 Patent. On December 20, 2017, Simplot filed a Statement of Defence and Counterclaim. Simplot argued it did not infringe the 841 Patent and claimed that the 841 Patent is invalid. After the parties exchanged brief replies in January 2018, there were no steps in this Federal Court litigation until November 2018.

[7] Before McCain sued Simplot in Canada, in February 2017, McCain commenced an action for patent infringement against one of the Defendants (J.R. Simplot Company) in Illinois. McCain claims an infringement of its rights to U.S. Patent No. 6,821,540, governing a similar pulsed electric field system to treat fruits and vegetables (page 107 of Elea's motion record). This case was transferred to the US District Court for the District of Idaho in August 2017, and it was later consolidated with another action between McCain and Simplot. In July 2019, the Idaho court granted J.R. Simplot Company leave to bring a similar third party claim against Elea in the

US action. That third party claim relies on the same agreement, as the Contract at issue in this case governed the purchase of PEF systems for use by Simplot in multiple countries.

C. *Simplot's communications with Elea prior to the Third Party Claim*

[8] On October 26, 2017, the day Simplot was served with McCain's Statement of Claim, Simplot contacted Elea to inform them about this lawsuit. Simplot requested an indemnity from Elea in reliance on the Contract. Simplot did not receive a response, and so it sent follow-ups in November 2017, December 2017, and January 2019.

[9] On January 25, 2019, Elea refused Simplot's request for indemnity. On February 7, 2019, Simplot notified McCain that it was contemplating bringing a third party claim against Elea. This plan of action was confirmed in an in-person meeting on February 13, 2019.

D. *Simplot's motion to amend Statement of Defence and Counterclaim, and for an extension of time and leave to file the Third Party Claim against Elea*

[10] In light of Elea's refusal to indemnify Simplot in early 2019, on April 23, 2019, Simplot filed a motion to (1) amend its Statement of Defence and Counterclaim to include Elea-related defences and (2) to serve and file a Third Party Claim against Elea.

[11] McCain opposed Simplot's motion aside from two clerical amendments to the Statement of Defence and Counterclaim.

E. *Prothonotary's order (June 25, 2019)*

[12] On June 25, 2019, the Prothonotary granted Simplot leave to amend their Statement of Defence and Counterclaim and granted leave and the extension of time required to commence their Third Party Claim.

F. *Two motions*

[13] On July 4, 2019, McCain appealed the Prothonotary's order. McCain argues that the Prothonotary erred by granting leave to amend the Statement of Defence and Counterclaim and to commence the Third Party Claim.

[14] Shortly after Elea was served with the Third Party Claim, it brought its own motion to strike or stay the Third Party Claim. McCain submitted a letter saying it was aligned with Elea's position. Simplot opposed the motion to strike.

[15] I will address the appeal related to McCain's motion before turning to Elea's motion.

III. Standard of review for the appeal from the Prothonotary's decision

[16] The standard of review for a Prothonotary's decision on questions of law is correctness and on questions of fact or of mixed fact and law it is "palpable and overriding error" (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at para 66;

Progress Energy Canada Ltd v Enercorp Sand Solutions et al, 2018 FCA 215 at para 14 [Enercorp]).

[17] McCain argued that the standard of review is correctness because the appeal raises “multiple extricable legal errors.” Simplot in contrast submitted that the standard of review is palpable and overriding error. Simplot argued the Prothonotary’s conclusions were really about whether the causes of actions, based on the pleaded material facts, stood a reasonable prospect of success. Simplot says these are questions of mixed fact and law, which are entitled to deference.

[18] For the Amended Statement of Defence and Counterclaim, the three alleged errors involve whether the three patent defences (explicit licence, implicit licence, and acquiescence) have a reasonable prospect of success. No extricable legal issues have been raised. Therefore these questions of mixed fact and law are reviewable on the standard of “palpable and overriding error” (*Enercorp*, cited above, at para 14).

[19] For the Third Party Claim, the issues are whether the various licence, acquiescence, inducement and indemnity claims have a reasonable prospect of success based on the facts pleaded by Simplot. These are questions of mixed fact and law – there are no extricable legal questions – so the standard is palpable and overriding error.

IV. Issues raised by Motion #1 (McCain’s Appeal)

- 1) Did the Prothonotary err in granting leave to file the Amended Statement of Defence and Counterclaim?

- a. Did the Prothonotary make a palpable and overriding error in allowing Simplot to plead the licence defences?
 - b. Did the Prothonotary make a palpable and overriding error in allowing Simplot to plead the acquiescence defences?
- 2) Did the Prothonotary err in granting Simplot leave to file the Third Party Claim?
- a. Did the Prothonotary make a palpable and overriding error in allowing Simplot to seek a declaration of licence and acquiescence in the Third Party Claim?
 - b. Did the Prothonotary make a palpable and overriding error in allowing Simplot to seek a declaration of induced infringement in the Third Party Claim?
 - c. Did the Prothonotary make a palpable and overriding error in allowing Simplot to seek a declaration of contractual indemnity in the Third Party Claim?

V. Analysis for Motion #1 (McCain's Appeal)

- (1) *Did the Prothonotary err in granting leave to file the Amended Statement of Defence and Counterclaim?*

[20] The Prothonotary correctly set out the legal tests and the relevant jurisprudence for granting leave to amend pleadings under Rule 75 at paragraphs 11-17 of her decision. As the Prothonotary noted, Simplot's amendments must have a reasonable prospect of success in the context of the law and the litigation process (*Teva Canada Limited v Gilead Sciences Inc*, 2016 FCA 176 at para 30).

[21] McCain argued that the Prothonotary erred in granting leave to add to the licence and acquiescence defences because none of the facts pleaded support the legal conclusions necessary for the defence and these defences do not have a reasonable prospect of success.

[22] McCain claims that because Simplot purchased the PEF system from Elea, and not McCain (the patentee, who is the one who is traditionally able to grant a licence), the licence defences have no application on the facts. As for the acquiescence defence, McCain says they are the patentee and can pick and choose who they take action against.

[23] The terms “explicit” and “implicit” are used in the Amended Statement of Defence and Counterclaim however often in the jurisprudence and commentaries the terms “express” and “implied” are used instead. They are the same ideas and concepts.

(a) *Did the Prothonotary make a palpable and overriding error in allowing Simplot to plead the licence defences?*

[24] The Prothonotary granted leave to allow Simplot to add four possible licence defences:

- McCain by purchasing the Elea systems has “explicitly and/or implicitly licensed to Elea the right to manufacture and sell the impugned PEF systems to other parties including the Defendants” (paragraph 17(a)); and/or
- McCain by purchasing the Elea systems has “explicitly and/or implicitly licensed the Defendants to use the impugned Elea PEF systems in Canada” (paragraph 17(b)).

[25] An explicit licence is an explicit transfer of rights by the patentee. As defined in *Eli Lilly & Co v Novopharm Ltd.*, [1998] 2 SCR 129 at 163, an explicit licence is given where “the patentee grants to the licensee the right to act in a certain way vis à vis the patented article, a right which, but for the licence, the licensee would not enjoy.”

[26] Simplot says that requiring it to plead additional material facts about an explicit licence would unfairly protect those with “knowledge of material facts at the expense of those who seek to rely on those facts without, however, having the means of knowing those facts so as to be able to plead them with specificity,” as held by the Prothonotary when granting leave to add the explicit licence defence.

[27] As shown by the “and/or” language, Simplot argues there was an implicit licence as an alternative to the explicit licence defences. If there is an implicit licence from McCain to users like Simplot (i.e. an unwritten licence as an operation of law), or an implicit licence granted by McCain to Elea (which Elea then relied upon to sell its PEF systems to purchasers like Simplot), then McCain would be unable to claim infringement by Simplot.

[28] The grounds Simplot uses to argue for an implied licence in paragraphs 17(a) and 17(b) are novel. Simplot’s argument is that when McCain bought an Elea machine (a) McCain implicitly licensed Elea to sell its machines to other parties like Simplot, and/or (b) McCain

implicitly licensed third parties like Simplot to use the impugned PEF systems in Canada. An implicit licence on one or both of these grounds is arguably supported by the following facts:

- Elea advertises that it has developed and installed over 100 Elea PEF systems and McCain is aware of these sales to others;
- Elea warranted to Simplot in the contract that the systems do not infringe any patent; and
- Elea sold the same PEF systems to McCain.

[29] The implicit licence defences could see Simplot rely on an idea of sub-licences similar to the licences in *Signalisation de Montreal Inc v Services de Beton Universels Ltee* (1992), 46 CPR (3d) 199 (FCA). In that case, an implicit licence from the patentee to a purchaser conveyed a right to the purchaser to resell that article and convey to his purchaser an equal right to use and sell the item. The roles of the parties in this case are reversed, but still roughly analogous: here, the original transaction was not a sale by the patentee, but instead a purchase of equipment by the patentee, with knowledge that the manufacturer was selling its PEF systems to others. Under this argument, and like *de Korompay v Ontario Hydro* (1989), 26 CPR (3d) 464 (FCTD) [*de Korompay*], the manufacturer Elea may have then implied to Simplot that Elea had the authority of the patentee McCain to license use of PEF systems to others. Simplot would then use this two-licence argument under paragraph 17(a) or 17(b) to escape liability for infringement.

[30] I agree with the Prothonotary's assessment of Simplot's defence at paragraph 17(a) that McCain could have explicitly and/or implicitly licensed Elea to sell the machines. Simplot has pleaded material facts about the dealings of McCain and Elea and says this conduct gives "rise to the inference that there is... a licensing relationship." As the Prothonotary noted at paragraph 23

of her decision, “Simplot seeks to rely upon a transaction to which it is a stranger... Simplot is not in a position to presently know any more about the relationship between McCain and Elea and through what authority, if any, Elea has manufactured and sold the PEF systems which McCain asserts embody the 841 Patent.”

[31] The Prothonotary’s reasoning on paragraph 17(a) was consistent with the well-settled idea that the rules about material facts should be considered in the context and “must not be allowed to become instruments of oppression in the hands of those who have knowledge of material facts at the expense of those who seek to rely on those facts without, however, having the means of knowing those facts so as to be able to plead them with specificity” (*Enercorp*, cited above, at para 36). In light of the conduct of the other parties, how could Simplot know anything else about dealings between McCain and Elea, and whether there was an explicit or implicit licence at this time? I find that paragraph 17(a) should be left to stand as is, and the discoveries will be helpful for providing Simplot with additional information that it could not know at this time.

[32] However, at paragraph 17(b) of its Amended Statement of Defence and Counterclaim, Simplot says “McCain has... explicitly and/or implicitly licensed the Defendants to use the impugned Elea PEF systems in Canada.” If there was an explicit licence to Simplot, Simplot would be party to it and Simplot would have knowledge to plead more detail about its explicit dealings with McCain. I agree with McCain’s argument that Simplot is not a stranger to any transactions between McCain and Simplot: Simplot would be a party to these interactions and yet it did not plead material facts in support of an explicit licence. Any licence from McCain to

Simplot would have to be implicit. Therefore, I am striking the “explicitly and/or” language from paragraph 17(b) and I grant Simplot leave to amend the Amended Statement of Defence and Counterclaim to remedy this error.

[33] I agree with the Prothonotary (with the appropriate amendment to 17(b)) that it is not plain and obvious that the amendments have no reasonable prospect of success, because Simplot has pleaded sufficient material facts in this context and because this area of law is unsettled.

While the licence defences are novel, they are an extension of well-established defences to patent infringement. The fact that the defences are novel does not mean they lack a reasonable prospect of success and in fact supports the Prothonotary’s decision not to strike the defences at the pleadings stage (*Genentech, Inc. v Celltrion Healthcare Co. Ltd.*, 2019 FC 293 at para 41; *Khadr v Canada*, 2014 FC 1001 at para 13).

[34] Finally, I agree with the Prothonotary’s finding at paragraph 25 that the amendments allow McCain to properly understand the defences asserted against it and allow McCain to respond to them accordingly.

(b) *Did the Prothonotary make a palpable and overriding error in allowing Simplot to plead the acquiescence defence?*

[35] McCain also disputes the Prothonotary’s decision to allow Simplot to plead the defence of acquiescence. McCain says acquiescence is “very difficult to meet” and Simplot did not plead material facts to support that McCain acquiesced to Elea’s sales or to Simplot’s use of the

product it brought from Elea. McCain says that to allow this defence to proceed would inappropriately suggest that positive action is required by McCain to enforce its patent.

[36] Simplot responds that McCain knew Elea was selling the same PEF systems it sold McCain to third parties in Canada, and that McCain nevertheless abstained from asserting its legal rights. Simplot says it has pleaded sufficient material facts, including that Elea has sold the same machine to both Simplot and McCain.

[37] As it did with the licence defences, Simplot pleaded alternative versions of the acquiescence defence: that McCain acquiesced vis-à-vis the manufacture and sale of PEF systems by Elea, and that McCain acquiesced vis-à-vis the use of PEF systems by its competitor Simplot.

[38] The requirements for acquiescence were summarized by Justice Shore in *Remo Imports Ltd. v Jaguar Cars Ltd.*, 2005 FC 870 at para 53 (citations omitted):

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

[39] These four elements, while difficult to fulfill, are not plainly and obviously doomed in the present case. On each element, and together as a whole, there is a reasonable prospect of success:

1. Simplot has alleged that McCain was more than silent: Simplot says McCain bought its own PEF system from Elea. From

McCain's own materials it is clear that Elea was selling these machines to others and not just McCain;

2. Simplot has alleged McCain was "aware" its rights were being breached by Elea and by third parties buying Elea PEF systems which themselves allegedly infringe the 841 Patent;

3. Encouragement is a difficult ground for Simplot to make out here, though McCain's conduct in purchasing machines from Elea without mentioning its patent could possibly be found to have encouraged Elea's infringement, and

4. Simplot now claims that it and/or Elea relied on McCain's encouragement in infringing the patent.

[40] Simplot pleaded accordingly, by adding paragraphs 15 and 16 to the Statement of Defence to include the facts needed to support the acquiescence defence: specifically, McCain was aware Elea was selling its PEF systems to others, took no steps to prevent this and in fact encouraged others to use the patent through its inactivity, and has therefore abstained from asserting its legal rights.

[41] McCain's characterized the Prothonotary's decision as putting an unfair obligation on McCain to positively assert its patent rights. I do not agree as the Prothonotary's order will not disrupt the well-established principle that a patentee may choose who to enforce their patent against. Instead, at trial the issue will come down to whether McCain waited too long to assert its rights in addition to somehow encouraging Simplot it would not rely on its strict patent rights to sue Simplot, as indicated by Kelly Gill in *Fox on Canadian Law of Trade-marks and Unfair Competition* (4th ed) at 9.12.

[42] With the additional facts pleaded in the Amended Statement of Defence and Counterclaim in accordance with the Prothonotary's decision, acquiescence has at least a reasonable prospect of success. It was not a palpable and overriding error to find otherwise. I would thus dismiss the appeal from the Prothonotary's decision to allow Simplot to plead acquiescence as a defence.

(2) Did the Prothonotary err in granting Simplot leave to file the Third Party Claim?

[43] McCain appealed the Prothonotary's decision to grant leave to file the Third Party Claim. The third party Elea also brought an action to strike the Third Party Claim against it, which will be addressed below.

[44] Rules 193 and 194 of the *Federal Courts Rules* (SOR/98-106) govern third party claims. Rule 193 allows third party claims against a person "who the defendant claims is or may be liable to the defendant for all or part of the plaintiff's claim." Rule 194 allows third party claims against a person who the defendant claims "(a) is or may be liable to the defendant for relief, other than that referred to in rule 193, relating to the subject-matter of the action; or (b) should be bound by the determination of an issue between the plaintiff and the defendant."

[45] A third party claim must stand on its own as an independent and separate claim (*R v Thomas Fuller Construction Co (1958) Limited et al* (1979), [1980] 1 SCR 695 at 709 [*Thomas Fuller Construction*]). McCain claims that allowing Simplot to seek declarations of licence and acquiescence, inducement, and contractual indemnity in its Third Party Claim was an error as these cannot be causes of action in claims before this Court.

- (a) *Did the Prothonotary make a palpable and overriding error in allowing Simplot to seek a declaration of licence and acquiescence in the Third Party Claim?*

[46] McCain argues that there was an error in law, as licence and acquiescence are impermissible causes of action. McCain relies on *Nintendo of America Inc. v Battery Technologies*, 2001 FCT 596 [*Nintendo*], where this Court found licence and acquiescence can only be used in defence and not as the basis for a claim. McCain says the Prothonotary did not analyze the Third Party Claim against Elea as its own proceeding, as required by law. McCain further argues that relief is improperly being sought against McCain (the patentee) and not Elea (the third party).

[47] Simplot counters by arguing that declaratory relief is often used to obtain a pronouncement on the applicability of a defence: for example a declaration of non-infringement. Simplot says that it pleaded sufficient material facts, that the Prothonotary is allowed to reference the subject matter in the main action as she did, and that it is not seeking to use the defence as a “sword” but rather to receive the narrow remedy of a “shield-like” declaration that binds Elea.

[48] Simplot presented that the Third Party Claim is not based on contract and the relief is not sought against McCain contrary to what McCain argued. McCain is mentioned because of its relationship to Simplot and Elea only and there is no “claim” against McCain. Instead, Simplot contends that the licence and acquiescence declarations are captured by Rule 194(b): these third

party claims are available because Elea “should be bound by the determination of an issue between the plaintiff and the defendant.”

[49] As noted above, Simplot’s various licence and acquiescence defences have a reasonable prospect of succeeding, so this sub-issue comes down to whether declarations to this effect can be sought in a third party claim as permitted by the Prothonotary’s decision. However, third party claims must be assessed on their own as a substantive, separate proceeding, in assessing whether it is plain and obvious that the claim cannot succeed (*Thomas Fuller Construction*, cited above, at 709).

[50] The question therefore becomes whether you can assert licence and acquiescence as actions against a third party. In other words, can Simplot use these allegations on the offence (as a sword) rather than as mere defence (as a shield).

[51] There is case law that has held these defences do not have a reasonable prospect of success when asserted as a “sword” in a claim. Justice Lemieux’s decision in *Nintendo*, above, indicates acquiescence cannot form the basis for a cause of action nor can it be wielded as a sword (in that case, in a counterclaim) because “its application is in defence only” (para 28). Justice Lemieux reached the same result for the licence allegations at paragraphs 29–30 of the *Nintendo* case, citing an instructive passage from *Innotech Pty. Ltd v Phoenix Rotary Spike Harrows Ltd.* (1997), 74 CPR (3d) 275 (FCA) [*Innotech*]. For these reasons, Justice Lemieux found the licence and acquiescence claims lacked a reasonable prospect of success and they were struck.

[52] With respect, it appears that although it is the same licence which is involved in both the Amended Statement of Defence and Counterclaim and the Third Party Claim, it is invoked for a different purpose in each pleading. In the Amended Statement of Defence and Counterclaim it is being used as a shield against a claim of infringement. In the Counterclaim it is being used as a sword, a basis for obtaining remedies against Elea for its conduct.

[53] The Prothonotary found it was not plain and obvious that the licence and acquiescence defences were doomed to fail based on *Nintendo* since it was not clear that the defences were being used in sword rather than in the shield form of declarative relief. As noted above, however, the Third Party Claim is not a defence but rather an independent claim that must stand alone, and so as independent claims the licence and acquiescence defences in paragraphs 1(a) and 1(b) are being used as a sword by Simplot rather than a shield. I find there is no reasonable prospect of success for Simplot's quest to obtain declarations in the Third Party Claim to the effect that (a) McCain licensed Elea who then licensed Simplot, or (b) McCain acquiesced to Elea selling the PEF systems to Simplot, such that McCain is estopped from asserting Patent 841.

[54] As was the case in *Innotech*, above, Simplot can still attempt to argue licence and acquiescence as defences in the main action – therefore, there may be alternative way for them to achieve a similar result to the declaration sought in the Third Party Claim that there was licence and acquiescence. The key distinction is the purpose for which licence and acquiescence are being raised in each pleading: as a defence vs. as a cause of action.

[55] It was an error that declaratory relief proclaiming the licence and acquiescence (paragraphs 1 (a) and (b)) are available in Simplot's claim against the manufacturer Elea. Accordingly, I would order paragraphs 1(a) and 1(b) to be struck from the Third Party Claim. I uphold the rest of the decision and adopt the Prothonotary's reasoning otherwise.

- (b) *Did the Prothonotary make a palpable and overriding error in allowing Simplot to seek a declaration of induced infringement in the Third Party Claim?*

[56] Under paragraph 1(c) Simplot seeks a declaration of induced infringement, and in paragraph 1(d) it says that in reliance on the 1(c) declaration, Elea should be liable, individually or jointly, for any remedies ordered against Simplot. Together these are described as the induced infringement declarations.

[57] McCain submitted that paragraphs 1(c) and 1(d) of the Third Party Claim fail to stand on their own and are really a claim for contribution and indemnity dressed up with arguments about inducement. McCain suggests the Prothonotary improperly relied on *Calgon Carbon Corp v North Bay (City)*, 2006 FC 1373 at paras 214-217 [*Calgon*] to find inducement of patent infringement could form the basis of a third party claim by a defendant. At the hearing McCain's counsel said *Calgon* was a very different case as in that case the plaintiff was claiming infringement by the defendant North Bay *and* inducement by the other defendant Trojan Technologies. It was not a defendant claiming induced infringement against a third party.

[58] Further section 55 of the *Patent Act* (RSC, 1985, c P-4) indicates a person who infringes a patentee is liable to the patentee and to all people claiming under the patent but it does not say

it is open to a defendant to claim against others in an infringement action. Relying on this, McCain says the induced infringement claims are not supported by the *Patent Act*. As a result, Simplot's rights and remedies depend on the Contract with Elea. *ITO-International Terminal Operators v Miida Electronic*, [1986] 1 SCR 752 [ITO] teaches that contract law is not ordinarily a subject where the Federal Court has jurisdiction.

[59] Simplot responds that the declaration falls within Rule 194(b) as this is a case where the third party Elea "should be bound by the determination" of the main action. Simplot argues that it is "settled law that one who induces or procures another to infringe a patent is also liable for infringement of the patent." Simplot further points out that McCain is the one who first mentioned Elea in this litigation, by referring to Elea extensively in both its Statement of Claim and its Annex. Simplot agrees with the Prothonotary's conclusion that the case law does not foreclose Simplot's right to pursue an induced infringement argument.

[60] I believe the Prothonotary correctly decided that a declaration of induced infringement can be sought in a Third Party Claim.

[61] First, as a preliminary issue, section 55 of the *Patent Act* says that a "person who infringes a patent is liable to the patentee and to all persons claiming under the patentee for all damage sustained by the patentee or by any such person, after the grant of the patent, by reason of the infringement." McCain tries to argue Simplot lacks standing as Simplot is not a person "claiming under" the patentee. However, because there is no conclusive jurisprudence on who can bring an inducement claim, it is not plain and obvious that Simplot is not a person claiming

under the patentee McCain, when it argues Elea induced the breach. Moreover, as Simplot's counsel argued at the hearing, reliance on section 55 of the *Patent Act* may not be necessary to bring a third party claim against a manufacturer who induced infringement, as the issue has not been addressed before and so there is no authority that says one way or another whether you must fit your claim into section 55. As a result, Section 55 of the *Patent Act* does not prevent the induced infringement declaration.

[62] Second, the facts pleaded by Simplot suggest at least a reasonable prospect of success on the inducement argument. Unlike the licence and acquiescence case law above, there are no authorities to the effect that induced infringement declarations cannot stand as a cause of action. In *Corlac Inc. v Weatherford Canada Inc.*, 2011 FCA 228 at paragraph 162, the Court of Appeal noted that it is “settled law that one who induces or procures another to infringe a patent is guilty of infringement of the patent.”

[63] Simplot has pleaded facts to support the three prongs of the inducement test: act of infringement by the direct infringer (Simplot's use of a patented PEF system), the completion of the acts of infringement was influenced by the acts of the alleged influencer (Simplot bought the product from Elea, in reliance on representations in the contract with Elea), and the influence was knowingly exercised by the inducer (Elea had dealings with McCain, the patentee, yet continued to actively promote the systems to others). The contractual indemnity itself may even have been an inducement, or evidence used to show an inducement (*Calgon*, cited above, at paras 214-217). While it may not succeed at trial, the inducement analysis can be completed

more comprehensively after discoveries give Simplot better knowledge of Elea's actions with respect to McCain's patent.

[64] Third, this inducement claim fits within jurisdiction of the Federal Court, specifically under the third party claim rules. Simplot is not simply seeking a declaration of the applicability of a defence but rather Simplot is pointing the finger at Elea and saying Elea induced the breach by selling them a patent-infringing system, coming to Canada to install the system, and all the while warranting that the machine did not infringe a Canadian patent. These claims fit within Rule 194(b): Simplot is saying that Elea should be bound by the determination of the patent infringement issue (because Elea's conduct is the reason Simplot infringed the patent). This inducement and liability claim has a reasonable prospect of success.

[65] Fourth, the inducement issue is really a patent inducement claim rather than a contractual relief claim, and the contract is merely incidental to the analysis.

[66] Finally, there is a sufficient factual basis for Elea to know the case against it, and to give the inducement claim a reasonable prospect of success. Elea made contractual representations that use of its PEF systems would not infringe Canadian patents and sold its products to both McCain and Simplot, and now Simplot is being sued for using this machinery in its Portage la Prairie facilities.

[67] Keeping in mind the fact that McCain must show it is plain and obvious that the induced infringement claims have no reasonable prospect of success, along with the desire to avoid a

multiplicity of proceedings, I believe these matters were properly allowed into the Third Party Claim.

- (c) *Did the Prothonotary make a palpable and overriding error in allowing Simplot to seek a declaration of contractual indemnity in the Third Party Claim?*

[68] Lastly, McCain argues Simplot's contractual claims are beyond the Federal Court's jurisdiction. This argument applies to the indemnity declarations sought under paragraphs 1(e) and 1(f) which are, respectively, the "save harmless declaration" and the "contract indemnity declaration." Paragraphs 1(e) and 1(f) of the Third Party Claim sets out that if remedies such as an injunction are ordered against Simplot then they are looking to Elea because of the contractual indemnity provisions.

[69] McCain says these claims are grounded in a commercial contract between Elea and Simplot. McCain argues the declarations fail to meet the three-step test to ensure the Federal Court does not overstep its jurisdiction (the test is from *ITO*, cited above; see also *Windsor (City) v Canada Transit Co*, 2016 SCC 54). Simplot, on the other hand, says this three-step *ITO* test was satisfied.

[70] I adopt the Prothonotary's reasoning when she determined that Simplot's contractual indemnity claims were incidental to the main action and therefore fell within the Federal Court's jurisdiction. The Prothonotary was correct when deciding that it was not plain and obvious that the essential nature of paragraphs 1(e) and 1(f) were contractual and thus outside this Court's jurisdiction.

[71] Rule 64 of the *Federal Courts Rules* (SOR/98-106) gives the Court broad jurisdiction regarding declarations. The declarations sought here are against the inducer which is a co-infringer.

[72] As Simplot stated at the hearing, a third party claim is not made in a silo and the liability suggested by the Third Party Claim was for Elea's induced infringement of the 841 Patent. Even though a third party claim must be a standalone claim, it must be looked at in the context of McCain's claim not to the exclusion of the main claim; in other words, reference can still be had to the main action (*Gottfriedson v Canada (Attorney General)*, 2014 FCA 55 at para 34). Though the Prothonotary did not mention this specifically, the Third Party Claim here is part and parcel with a patent infringement action which falls under this Court's jurisdiction according to section 20 of the *Federal Courts Act*.

[73] There must be more than a crumb of a cause of action (*Merck & Co., Inc. v Nu-Pharm Inc.*, 2001 FCT 790 at para 28) and here the dealings between the parties show a patent infringement action where an inducement claim is connected to the main action.

[74] The language of the contract further shows that the declarations sought by 1(e) and 1(f) have a reasonable prospect of success. At clause 17 of the contract, Elea says it will "defend, save harmless, and indemnify Simplot" for patent infringement cases arising from the work, and work is defined at clause 1.3 as including "any and all... services, materials, goods, consumables, equipment..." and other listed items. The relief sought in paragraphs 1(e) and 1(f)

mirrors this language and I find that the Prothonotary correctly held that these declarations have a reasonable prospect of success.

VI. Conclusions on Motion #1 (McCain's Appeal)

[75] The appeal is allowed in part as follows:

- a) The “explicitly and/or” language is struck from paragraph 17(b) of the Amended Statement of Defence and Counterclaim with leave to amend the Amended Statement of Defence and Counterclaim to remedy this error; and
- b) Paragraphs 1(a) and 1(b) of the Third Party Claim are struck with leave granted to file an Amended Third Party Claim

VII. Issues raised by Motion #2 (Elea's Motion to Strike or Stay the Third Party Claim)

- 1) Do paragraphs 1(a) and 1(b) of the Third Party Claim disclose reasonable causes of action?
- 2) Does this Court have jurisdiction to grant the relief sought in paragraphs 1(c)–1(f) of the Third Party Claim against Elea?
- 3) Should the Third Party Claim be struck for a lack of jurisdiction *simpliciter*?
- 4) Should the Third Party Claim be stayed or dismissed on the basis of *forum non conveniens*?
- 5) Should the claim be struck or stayed until the main action is completed?

VIII. Analysis for Motion #2 (Elea's Motion to Strike or Stay the Third Party Claim)

[76] Before considering Elea's largely jurisdiction-based arguments in support of its motion to strike or stay the Third Party Claim, it helps to consider the law on striking pleadings. A claim must have no reasonable prospect of success if it is to be struck. If the motion to strike alleges a lack of jurisdiction, that lack of jurisdiction must be plain and obvious to justify striking the pleading (*Farmobile LLC v Farmers Edge Inc.*, 2018 FC 1269 at para 5).

[77] With these principles in mind, and for the following reasons, I will dismiss Elea's motion to strike the Third Party Claim with the exception of paragraphs 1(a) and 1(b) of the claim, which I already struck in my decision on McCain's appeal above.

- (1) *Do paragraphs 1(a) and 1(b) of the Third Party Claim disclose reasonable causes of action?*

[78] This issue overlaps with the first motion. Elea says Simplot has failed to show that the Court has jurisdiction to grant the declarations sought by paragraphs 1(a) and 1(b) of the Third Party Claim, and Elea also argues that they have no reasonable prospect of success.

[79] *Innotech* and *Nintendo* make it clear that licence and acquiescence are defences that cannot be used as a cause of action. For the reasons stated at paragraphs [52] to [55] I find that allegations in paragraphs 1(a) and (b) cannot be asserted as causes of action. As I already found, the allegations in the Third Party Claim related to these should be struck and the Simplot has been granted leave to file an Amended Third Party Claim.

- (2) *Does this Court have jurisdiction to grant the relief sought in paragraphs 1(c)–1(f) of the Third Party Claim against Elea?*

[80] Elea claims the Court lacks the statutory jurisdiction to adjudicate the contractual indemnity claims raised by paragraphs 1(c)–(f) of the Third Party Claim. Much like McCain’s argument on the first motion, Elea’s argument relies on the three-pronged *ITO* test to say that this Court does not have jurisdiction over the contract law matters. Alternatively, Elea raises a sword-shield issue with the Third Party Claim indemnity declarations.

[81] Simplot suggests it is bringing an inducement claim against Elea after Elea provided an indemnity. Inducement allegations are routinely heard by this Court and Simplot says Elea’s conduct meets the test for inducement of patent infringement.

[82] I dealt with this issue above on the first motion, where I concluded that the Prothonotary did not err in finding that the inducement, indemnity and contractual indemnity issues were incidental to the patent infringement action. It is not plain and obvious that these claims fall outside Rules 193 and 194.

[83] Elea raises some new arguments but its arguments do not affect the analysis. For example, Simplot distinguished Elea’s relied-upon case of *Burns Foods (1985) Ltd. v Maple Lodge Farms Ltd.* (1994), 58 CPR (3d) 234 (FCTD) [*Burns Food*] which refused a third party claim seeking a straightforward indemnity from the supplier. The relief sought against Elea here is more than a supplier indemnity – it is an allegation of induced patent infringement through

commercial dealings and an indemnity flowing from that inducement. Moreover, the third party claim rules have been broadened since *Burns Foods*.

[84] I agree with Simplot's responses to Elea's motion: inducement can occur where a person actively promotes an infringing product, or where a party provides an indemnity. The Contract may simply be evidence of the inducement (see *Calgon*). There is a reasonable prospect of success for the relief sought in paragraphs 1(c) through 1(f) and it is not plain and obvious that the inducement and indemnity issues are outside the Court's statutory jurisdiction.

(3) *Should the Third Party Claim be struck for a lack of jurisdiction simpliciter?*

[85] As an alternative argument, Elea says this Court lacks jurisdiction *simpliciter* over the Third Party Claim in its entirety (i.e. paragraphs 1(a)–(f)) because there is no “real and substantial connection” between Canada and the subject-matter of this case. Elea lists several factors to show its lack of connection to Canada, including:

- Elea is not domiciled or resident in Canada;
- Elea has not, nor did it ever, carry on business in Canada; and,
- Elea has not attorned to this Court's jurisdiction.

[86] Based on these factors, Elea suggests the Third Party Claim falls below the minimum threshold for jurisdiction *simpliciter*.

[87] Simplot rejects this characterization, noting that there were several ways in which the Simplot-Elea agreement was connected to Canada. Simplot later proclaimed that these

connecting factors for the agreement are unnecessary given that Elea induced Simplot to infringe a Canadian patent “which is a claim that only a Canadian court may consider.”

[88] The test is not whether the Court has jurisdiction over the Contract, but rather whether there is a real and substantial connection between the subject-matter of the Third Party Claim and Canada. I agree with Simplot that Elea has not shown there is no real and substantial connection to Canada. The reasons the parties are before this court in Canada are because there is a Canadian patent infringement action brought by McCain against Simplot and because Simplot is relying on an indemnity from Elea. Some of the other factors supporting a real and substantial connection are:

- Simplot Canada was a party to the agreement;
- The agreement contemplated the provision of a PEF machine for use in Canada;
- There was a “final acceptance test” in the Simplot Portage Plant to be completed prior to Simplot providing Elea with a “notice of acceptance”;
- Elea engineering manager Jim Kinsella attended the Manitoba facility in relation to “installation, supervision, consulting and training”;
- The Third Party Claim deals with inducement and indemnity for Canadian patent infringement, and a real and substantial connection in the main action is not disputed; and
- No other court will address the Canadian patent infringement, as confirmed by expert evidence on this motion.

[89] While Elea points out that it “did not attorn” to Canadian jurisdiction, this is a neutral factor in this analysis as a “real and substantial connection” is often presented as an alternative ground for jurisdiction in cases where the defendant does not attorn to the court’s jurisdiction

(for e.g. *Siemens Canada Limited v J.D. Irving Limited*, 2012 FCA 225 at para 36). This seems to be acknowledged at paragraph 17 of Elea's own notice of motion. For these reasons, it is not plain and obvious that there is no real and substantial connection to Canada, and so Elea's motion to strike on this ground must fail.

(4) *Should the Third Party Claim be stayed or dismissed on the basis of forum non conveniens?*

[90] The next issue raised by Elea is a *forum non conveniens* argument. Elea says that even if the Court has jurisdiction due to a real and substantial connection, as I have found, there is another more convenient manner to adjudicate the subject-matter. In its *forum non conveniens* argument Elea argues that both Germany and Idaho would be preferable locations to conduct the litigation.

[91] Elea prefers Germany because the Contract was negotiated in Germany, Clause 29.2 says the contract will be governed by German law. Simplot also argues that because it took title to the goods in Germany, and to avoid conflicting decisions that Germany is the best forum. As an alternative, Elea suggests Idaho as a forum. Idaho is home to one of the Simplot parties, and similar contract-based issues raised in the Third Party Claim are being addressed in the Idaho litigation.

[92] Elea cites the Supreme Court of Canada's view that the *forum non conveniens* analysis can "temper any potential rigidity in the rules governing the assumption of jurisdiction" and helps "in striking a balance between order and fairness" (*Haaretz.com v Goldhar*, 2018 SCC 28

at para 32). Elea then provides lists of factors from three different Supreme Court of Canada *forum non conveniens* decisions while noting that the factors to be applied depend on the facts of the case.

[93] Simplot on the other hand indicates that the Federal Court is the most convenient forum. Germany and Idaho will not consider issues related to the infringement of the Canadian 841 Patent, including patent infringement. For instance, Simplot has attached affidavit evidence from experts who explain that the Idaho District Court will not hold Elea liable for any of the infringement issues with respect to the Canadian patent. Simplot further notes that the Idaho litigation in fact involves different Simplot entities. For these reasons, Simplot says Elea has not met the test for the exceptional application of the *forum non conveniens* doctrine. No other country is in a better position to decide the issues.

[94] I again accept Simplot's same position from its jurisdiction *simpliciter* argument above which is that the factors favouring Germany, Idaho and Canada are irrelevant when it is considered that Germany and Idaho cannot hear the Canadian patent law issues related to the 841 Patent. Furthermore, as Simplot points out Elea has ignored the convenience and expense of the North American parties by advocating that the indemnity and inducement claims be heard in Germany.

[95] If any issues arise, as the Prothonotary noted in her decision, the parties may agree to conduct all discoveries in a central location or even where the affiants reside.

[96] Additionally, the application of the *forum non conveniens* doctrine is reserved for exceptional circumstances. While allowing the Third Party Claim to be heard in Canada may result in the 2013 Elea-Simplot contract being interpreted in multiple courts, it needs to be addressed in Canada to consider inducement and indemnity in the Canadian patent law action. This is not an exceptional circumstance where it would be unfair to proceed in a Canadian court.

[97] Therefore I am satisfied that it is not plain and obvious that there is a more convenient forum to decide the issues raised in the Third Party Claim.

(5) *Should the Third Party Claim be struck or stayed until the main action is completed?*

[98] The final issue raised on Elea's motion is that Elea says the case should be dismissed or adjourned until there is a finding of patent validity or infringement that could actually give rise to Elea's liability under the indemnity. Elea characterizes the Third Party Claim as speculative and premature, noting that the determination of the indemnification claim first depends on a large number of conditions being met (i.e. patent validity, patent was infringed, Simplot owes damages and requests payment from Elea).

[99] Simplot says it need not wait and see if there is a finding of infringement before bringing a third party claim under Rules 193 and 194. Third party claims are not barred until liability in the main action has been found. Simplot also argues it would be prejudiced by the postponement of the claim, as it would not have discovery of Elea and it would have to wait for years to sort out Elea's contribution/indemnity obligations to Simplot despite the existence of the Contract.

[100] Elea's argument about waiting until later to bring the Third Party Claim goes against the very purpose of third party claims. When Rule 194 was enacted in 1998, the rule was seen as "substantially broader than its predecessor" and it increased the availability of the third party claim mechanism (*Merck*, cited above at para 20). Third party claims can bind additional parties in a way that can "avoid duplication or re-litigation" in respect of the issues (*Alberta v Canada*, 2018 FCA 83 at para 66). Elea advanced an argument that duplication of litigation is a negative thing in its Idaho *forum non conveniens* argument at paragraph 79, but then here it advocates duplication at paragraphs 82–85 in its prematurity argument.

[101] Elea's argument cannot succeed. I do not accept Elea's position that just because there are "conditions precedent" to the indemnification claim, the indemnification claim should be stayed or dismissed. A third party claim for indemnity will often rely on a liability finding in the main action. Further, some of the alleged "conditions precedent" are rather artificial, including that (e) Simplot requests payment and (f) Elea refuses to pay Simplot. The interactions between Simplot and Elea demonstrate these are near-certainties, and the best way to address the liability issue is a third party claim for indemnity. This is consistent with the broad availability of third party claims under Rules 193 and 194 as well as the decision in *de Korompay*, cited above, which allowed a similarly conditional third party claim for indemnity to proceed.

[102] I do note that after the matter was taken under reserve Elea did indicate that they were prepared to make further submissions. These submissions they suggest were concerning the litigation in the United States District Court for the District of Idaho. Elea indicated that on November 1, 2019 a motion to sever and stay the indemnity claims was filed until the main

Idaho patent litigation was concluded. I did not ask for further submissions from the parties but thank counsel for apprising the court of the change of circumstances. This change was not considered by this Court when giving these reasons.

IX. Conclusion for Motion #2 (Elea's Motion to Strike or Stay the Third Party Claim)

[103] I am therefore dismissing Elea's motion to strike or stay the Third Party Claim.

X. Costs

[104] The parties were able to agree that costs for the first motion (McCain's appeal of the Prothonotary's order) would be awarded in a lump sum amount of \$5,000.00. Costs will be awarded in the inclusive amount of \$5,000.00 to Simplot who was generally successful on the appeal except for the two minor areas where I allowed the appeal as noted above.

[105] Regarding an award of costs for the motion to strike the Third Party Claim the parties informed the court that they arrived at a partial resolution that the successful party (or parties) will be award a lump sum payment of \$4,400.00 for fees. The parties did not agree concerning the disbursements or applicability of HST on disbursements.

[106] Written submissions were provided by Elea and the Simplot regarding the remaining issue. The disagreement concerns the two foreign experts hired by Elea regarding foreign law that gave opinions regarding *forum non conveniens* as well as German law. In addition there was an issue regarding the claim for HST.

[107] Given that Elea was not successful, I do not need to make that determination as I am awarding that Elea pay Simplot a lump sum of \$4,400.00 for fees and disbursements are awarded as per the bill of costs filed by Simplot.

ORDER in T-1624-17

THIS COURT ORDERS that:

1. McCain's appeal is allowed in part;
 - a) The wording of "explicitly and/or" is struck from paragraph 17(b) of the Amended Statement of Defence and Counterclaim with leave to amend the Amended Statement of Defence and Counterclaim;
 - b) Paragraphs 1(a) and 1(b) of the Third Party Claim are struck with leave to amend.
2. Costs in a lump sum inclusive of fees, taxes and disbursements in the amount of \$5,000.00 are to be paid forthwith by McCain to Simplot;
3. Elea's motion is dismissed; and
4. Costs in a lump sum for fees in the amount of \$4,400.00 as well as disbursements per the Bill of Costs are to be paid forthwith by Elea to Simplot.

"Glennys L. McVeigh"

Judge

Annex A – Relevant legislation

Patent Act RSC 1985 c P-4

Loi sur les brevets RSC 1985 c P-4

Liability for patent infringement

55 (1) A person who infringes a patent is liable to the patentee and to all persons claiming under the patentee for all damage sustained by the patentee or by any such person, after the grant of the patent, by reason of the infringement.

Contrefaçon et recours

55 (1) Quiconque contrefait un brevet est responsable envers le breveté et toute personne se réclamant de celui-ci du dommage que cette contrefaçon leur a fait subir après l'octroi du brevet.

Liability damage before patent is granted

55(2) A person is liable to pay reasonable compensation to a patentee and to all persons claiming under the patentee for any damage sustained by the patentee or by any of those persons by reason of any act on the part of that person, after the application for the patent became open to public inspection under section 10 and before the grant of the patent, that would have constituted an infringement of the patent if the patent had been granted on the day the application became open to public inspection under that section.

Indemnité raisonnable

55(2) Est responsable envers le breveté et toute personne se réclamant de celui-ci, à concurrence d'une indemnité raisonnable, quiconque accomplit un acte leur faisant subir un dommage entre la date à laquelle la demande de brevet est devenue accessible au public sous le régime de l'article 10 et l'octroi du brevet, dans le cas où cet acte aurait constitué une contrefaçon si le brevet avait été octroyé à la date où cette demande est ainsi devenue accessible.

Patentee to be a party

55(3) Unless otherwise expressly provided, the patentee shall be or be made a party to any proceeding under subsection (1) or (2).

Partie à l'action

55(3) Sauf disposition expresse contraire, le breveté est, ou est constitué, partie à tout recours fondé sur les paragraphes (1) ou (2).

Deemed action for infringement

55(4) For the purposes of this section and sections 54 and 55.01 to 59, any proceeding under subsection (2) is deemed to be an action for the infringement of a patent and the act on which that proceeding is based is deemed to be an act of infringement of the patent.

Assimilation à une action en contrefaçon

55(4) Pour l'application des autres dispositions du présent article et des articles 54 et 55.01 à 59, le recours visé au paragraphe (2) est réputé être une action en contrefaçon et l'acte sur lequel il se fonde est réputé être un acte de contrefaçon.

Federal Courts Act RSC 1985 c F-7

Loi sur les Cours fédérales LRC (1985), ch F-7

Industrial property, exclusive jurisdiction

Propriété industrielle : compétence exclusive

20 (1) The Federal Court has exclusive original jurisdiction, between subject and subject as well as otherwise,

20 (1) La Cour fédérale a compétence exclusive, en première instance, dans les cas suivants opposant notamment des administrés :

(a) in all cases of conflicting applications for any patent of invention or for any certificate of supplementary protection under the Patent Act, or for the registration of any copyright, trademark, industrial design or topography within the meaning of the Integrated Circuit Topography Act; and

a) conflit des demandes de brevet d'invention ou de certificat de protection supplémentaire sous le régime de la Loi sur les brevets, ou d'enregistrement d'un droit d'auteur, d'une marque de commerce, d'un dessin industriel ou d'une topographie au sens de la Loi sur les topographies de circuits intégrés;

(b) in all cases in which it is sought to impeach or annul any patent of invention or any certificate of supplementary protection issued under the Patent Act, or to have any entry in any register of copyrights, trademarks, industrial designs or topographies referred to in paragraph (a) made, expunged, varied or rectified.

b) tentative d'invalidation ou d'annulation d'un brevet d'invention ou d'un certificat de protection supplémentaire délivré sous le régime de la Loi sur les brevets, ou tentative d'inscription, de radiation ou de modification dans un registre de droits d'auteur, de marques de commerce, de dessins industriels ou de topographies visées à l'alinéa a).

Industrial property, concurrent jurisdiction

Propriété industrielle : compétence concurrente

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

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

Federal Courts Rules SOR/98-106

Amendments with leave

75 (1) Subject to subsection (2) and rule 76, the Court may, on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties.

Limitation

(2) No amendment shall be allowed under subsection (1) during or after a hearing unless

- (a) the purpose is to make the document accord with the issues at the hearing;
- (b) a new hearing is ordered; or
- (c) the other parties are given an opportunity for any preparation necessary to meet any new or amended allegations.

Leave to amend

76 With leave of the Court, an amendment may be made

- (a) to correct the name of a party, if the Court is satisfied that the mistake sought to be corrected was not such as to cause a reasonable doubt as to the identity of the party, or
- (b) to alter the capacity in which a party is bringing a proceeding, if the party could have commenced the proceeding in its altered capacity at the date of commencement of the proceeding,

unless to do so would result in prejudice to a party that would not be compensable by costs or an adjournment.

Third Party Claims

Availability as of right

193 A defendant may commence a third party

Règles des Cours fédérales SOR/98-106

Modifications avec autorisation

75 (1) Sous réserve du paragraphe (2) et de la règle 76, la Cour peut à tout moment, sur requête, autoriser une partie à modifier un document, aux conditions qui permettent de protéger les droits de toutes les parties.

Conditions

75(2) L'autorisation visée au paragraphe (1) ne peut être accordée pendant ou après une audience que si, selon le cas :

- a) l'objet de la modification est de faire concorder le document avec les questions en litige à l'audience;
- b) une nouvelle audience est ordonnée;
- c) les autres parties se voient accorder l'occasion de prendre les mesures préparatoires nécessaires pour donner suite aux prétentions nouvelles ou révisées.

Autorisation de modifier

76 Un document peut être modifié pour l'un des motifs suivants avec l'autorisation de la Cour, sauf lorsqu'il en résulterait un préjudice à une partie qui ne pourrait être réparé au moyen de dépens ou par un ajournement :

- a) corriger le nom d'une partie, si la Cour est convaincue qu'il s'agit d'une erreur qui ne jette pas un doute raisonnable sur l'identité de la partie;
- b) changer la qualité en laquelle la partie introduit l'instance, dans le cas où elle aurait pu introduire l'instance en cette nouvelle qualité à la date du début de celle-ci.

Réclamation contre une tierce partie

Tierces parties

193 Un défendeur peut mettre en cause un codéfendeur ou toute personne qui n'est pas partie à l'action et dont il prétend qu'ils ont ou peuvent avoir

claim against a co-defendant, or against a person who is not a party to the action, who the defendant claims is or may be liable to the defendant for all or part of the plaintiff's claim.

Where leave of Court required

194 With leave of the Court, a defendant may commence a third party claim against a co-defendant, or against another person who is not a defendant to the action, who the defendant claims

(a) is or may be liable to the defendant for relief, other than that referred to in rule 193, relating to the subject-matter of the action; or

(b) should be bound by the determination of an issue between the plaintiff and the defendant.

une obligation envers lui à l'égard de tout ou partie de la réclamation du demandeur.

Autorisation de la Cour

194 Un défendeur peut, avec l'autorisation de la Cour, mettre en cause une personne — qu'elle soit ou non un codéfendeur dans l'action — dont il prétend :

a) soit qu'elle lui est ou peut lui être redevable d'une réparation, autre que celle visée à la règle 193, liée à l'objet de l'action;

b) soit qu'elle devrait être liée par la décision sur toute question en litige entre lui et le demandeur.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1624-17

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

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 9, 2019

ORDER AND REASONS: MCVEIGH J.

DATED: DECEMBER 18, 2019

APPEARANCES:

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Ms. Chelsea Nimmo

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