

Federal Court



Cour fédérale

**Date: 20200713**

**Docket: T-1069-14**

**Citation: 2020 FC 759**

**Ottawa, Ontario, July 13, 2020**

**PRESENT: The Honourable Mr. Justice Fothergill**

**BETWEEN:**

**JASON SWIST AND CRUDE SOLUTIONS  
LTD.**

**Plaintiffs**

**and**

**MEG ENERGY CORP**

**Defendant**

**ORDER AND REASONS**  
**(MOTIONS TO SUBMIT EXPERT REPORTS IN REPLY)**

I. Introduction

[1] The Plaintiffs Jason Swist and Crude Solutions Ltd [Swist] claim ownership of Canadian Patent No 2,800,746, titled “Pressure Assisted Oil Recovery” [746 Patent].

[2] The Defendant MEG Energy Corp [MEG] operates two methods to extract oil at its Christina Lake Regional Project in Alberta [Christina Lake]. MEG names these enhanced modified steam and gas push [eMSAGP], and enhanced modified vapour extraction [eMVAPEX].

[3] Swist alleges that MEG's use of eMSAGP and eMVAPEX to extract oil at Christina Lake infringes claims 1 to 6 and 8 of the 746 Patent [Asserted Claims].

[4] MEG denies infringement. MEG also counterclaims that the Asserted Claims, and the 746 Patent in its entirety, are invalid.

[5] In December 2019, the parties exchanged expert reports in chief:

- a) Swist tendered the expert report of Mr. Dale Walters, an engineer who modelled the development of the Christina Lake reservoir and steam chambers during its operations. Based on this modelling, Mr. Walters provides his opinion regarding the use of pressure in MEG's extraction methods [Walters In-chief].
- b) Swist also tendered the expert report of Dr. Vikram Rao, a metallurgist with expertise in oil extraction methods. Dr. Rao provides his opinion regarding the manner in which the person of ordinary skill in the art [Skilled Person] would construe the Asserted Claims. He also interprets Mr. Walters' modelling and expresses his view on whether MEG's use of eMSAGP and eMVAPEX infringes the Asserted Claims [Rao In-chief].

- c) MEG tendered the expert report of Dr. Bruce Carey, an independent technical evaluator of heavy oil recovery processes in Alberta. Dr. Carey provides his opinion about the manner in which the Skilled Person would construe the Asserted Claims, and on the numerous grounds of invalidity advanced by MEG [Carey In-chief].
- d) MEG also tendered the expert report of Dr. Ian Gates, an expert in petroleum engineering. Dr. Gates provides his opinion about the manner in which the Skilled Person would construe the Asserted Claims, and on the numerous grounds of invalidity advanced by MEG [Gates In-chief].

[6] The parties exchanged responding expert reports in February 2020:

- a) MEG tendered the responding expert report of Dr. Thomas Boone, an engineer with experience in the oil industry. In addition to responding to Rao In-chief and Walters In-chief, Dr. Boone provides his opinion about MEG's oil extraction methods at Christina Lake [Boone Response].
- b) MEG also tendered the responding expert report of Dr. Gates [Gates Response].
- c) Swist tendered the responding expert report of Dr. Rao [Rao Response].

[7] Swist and MEG now ask this Court to permit further expert reports in reply:

- a) Swist proposes to submit the expert reports in reply of Mr. Walters [Walters Reply] and Dr. Rao [Rao Reply].

- b) MEG proposes to submit the expert reports in reply of Dr. Carey [Carey Reply] and Dr. Gates [Gates Reply].

[8] Each party objects to the other party's proposed expert reports in reply. Swist objects to the entirety of the Gates Reply, but acknowledges that most of the Carey Reply is proper. MEG objects to the Walters Reply and the Rao Reply in their entirety.

## II. General Principles

[9] The law governing the admissibility of reply evidence is well-established (*Janssen Inc v Teva Canada Limited*, 2019 FC 1309 [*Janssen*] at paras 16-17, citing *Halford v Seed Hawk Inc*, 2003 FCT 141 (TD) at para 15):

1. Evidence which is simply confirmatory of evidence already before the court is not to be allowed.
2. Evidence which is directed to a matter raised for the first time in cross examination and which ought to have been part of the plaintiff's case in chief is not to be allowed. Any other new matter relevant to a matter in issue, and not simply for the purpose of contradicting a defence witness, may be allowed.
3. Evidence which is simply a rebuttal of evidence led as part of the defence case and which could have been led in chief is not to be admitted.
4. Evidence which is excluded because it should have been led as part of the plaintiff's case in chief will be examined to determine if it should be admitted in the exercise of trial judge's discretion.

[10] In *Rosenstein v Atlantic Engraving Ltd*, 2002 FCA 503 at paragraphs 8-9, the Federal Court of Appeal identified four requirements that must be met before the Court will permit

parties to file additional affidavits pursuant to Rules 306-307 and 312(a) of the *Federal Courts Rules*, SOR/98-106. Justice Russel Zinn described this test in *Merck-Frosst v Canada (Health)*, 2009 FC 914 [*Merck-Frosst*] at paragraph 10:

- (i) whether the further evidence serves the interests of justice;
- (ii) whether the further evidence assists the Court in making its determination on the merits;
- (iii) whether granting the motion will cause substantial or serious prejudice to the other side; and
- (iv) whether the reply evidence was available and/or could not be anticipated as being relevant at an earlier date.

[11] Other pertinent considerations include the relevance of the impugned evidence to the case (*Abbott Laboratories v Canada (Health)*, 2006 FC 823 at para 26); whether it will unduly delay the proceeding (*Janssen-Ortho Inc v Apotex Inc*, 2010 FC 81 at para 33); and the recognition that parties cannot be expected to anticipate every argument (*Takeda Canada Inc v Canada (Minister of Health)*, 2014 CarswellNat 8773 at paras 7-8). The Court retains a discretion to admit evidence and weigh the factors differently on a case-by-case basis (*Solvay Pharma Inc v Apotex Inc*, 2007 FC 913 at paras 9-12).

[12] As Justice Sébastien Grammond observed in *Bauer Hockey Ltd v Sport Masko Inc*, 2020 FC 212 [*Bauer*] at para 16:

Before applying those principles to the situation at hand, I would simply add that parties should not bring this kind of motion simply to emphasize perceived shortcomings in the other party's expert evidence. Those shortcomings may be explored during cross-examination or highlighted in argument. Unnecessary motions simply hamper the efficient resolution of the case.

[13] These motions to adduce expert reports in reply were heard seven business days before the trial is scheduled to begin. A significant challenge in determining the propriety of proposed reply expert reports in advance of trial is that the trial judge has not yet had the benefit of hearing any testimony from the expert witnesses. The trial judge has been given only the written expert reports in chief and response, and the proposed reports in reply. In a case such as this, where the expert reports are lengthy and technical, it may be difficult to assess in advance whether a proposed reply restates evidence previously given, merely expresses disagreement with an opinion proffered by another expert, or genuinely addresses a new issue that could not reasonably have been anticipated.

[14] In the words of Justice Michael Manson in *Janssen* (at para 57):

This Court cannot allow case-splitting or improper reply evidence seeking to bolster a party's evidence in chief or merely rebut an opposing party's evidence, particularly in light of the "litigation culture change prescribed by the Supreme Court of Canada in *Hryniak v Maudlin*, 2014 SCC 7" (*Amgen* at para 24).

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

[16] Given the limited time available, the formidable length of the expert reports, the technical nature of the evidence, and my gatekeeping role as described in *Hryniak*, it is possible that I have

applied an overly-broad brush. I remain open to reconsidering the scope of reply evidence as the trial unfolds, and as circumstances may warrant.

### III. Analysis

#### A. *Walters Reply (Swist)*

[17] The Walters Reply comprises 137 paragraphs and includes numerous appendices. It is anything but succinct (see Prothonotary Kevin Aalto's comments in *Allergan Inc v Canada (Health)*, 2013 FC 1165 at para 23).

[18] In Section A, paragraphs 7 to 11, the Walters Reply takes issue with the Boone Response, and Dr. Boone's "opinion regarding the threshold of mobility for Christina Lake bitumen", *i.e.*, the point at which heated bitumen in adjacent zones comes into contact. In particular, Mr. Walters takes issue with Dr. Boone's reliance on his experience at a different oil-recovery project site to draw conclusions about Christina Lake's bitumen mobility. There is no reason why this cannot be dealt with effectively in cross-examination. It is improper reply.

[19] Sections B to D of the Walters Reply, at paragraphs 12 to 44, take issue with Dr. Boone's analysis of the term "communication", and his division of communication into three distinct types: "thermal", "pressure", and "fluid". Mr. Walters also takes issue with Dr. Boone's reliance on "4D seismic" data as it relates to thermal communication. The division of communication into these different types is clearly presented in MEG's expert reports in chief (see Carey In-chief at

paras 18(e), and 43, and Gates In-chief at paras 15(e) and 119). Furthermore, MEG produced the seismic data it relied on to Swist before Swist delivered its expert reports in chief. This could therefore have been anticipated and addressed in chief or—once it appeared in MEG’s in-chief reports—in response. To the extent that Sections B to D of the Walters Reply address responding evidence that could not have been anticipated, they amount to mere rebuttal or disagreement with Dr. Boone’s analysis, and are improper reply.

[20] Sections E to M of the Walters Reply, at paragraphs 45 to 137, again amount to mere disagreement with MEG’s responding reports, or seek to augment and clarify Swist’s reports in-chief. These remaining nine sections address “errors in the formulas” and “errors in the analysis” (Section E); “... MEG’s lack of detailed characterization of its own reservoir” (Section F); and “response to”, “criticisms” and “incorrect variables”, and other general disagreements with Dr. Boone’s and Dr. Gates’ critiques of the Walters In-chief (Sections G-M). As MEG points out, these are “critiques of critiques” beyond the acceptable bounds of reply evidence, and constitute “mere rebuttal or disagreement” (see, *e.g.*, *Janssen* at paras 28, 32-33, 42, 46-47 and 51.) They, too, are improper reply.

[21] Swist’s motion to adduce the Walters Reply is therefore refused in its entirety.

B. *Rao Reply (Swist)*



[22] In Section A of the Rao Reply, at paragraphs 3 to 10, Dr. Rao expresses disagreement with the Gates Response's position on the construction of the claim term "zone of increased mobility". This is mere disagreement and improper reply.

[23] Section B, at paragraphs 11 to 17, takes issue with MEG's "estimate of steam chamber merger" recovery levels, and particularly the accuracy of the submissions MEG made to the Alberta Energy Regulator. MEG produced these submissions to Swist, together with all of its other process data. Dr. Rao relied on MEG's submission data in Rao In-chief. MEG did not rely on any new documents. Swist could have anticipated the need to consider and assess the accuracy of MEG's data in chief or in response. Beyond this, these sections constitute mere rebuttal or disagreement, or attempts to bolster Rao In-chief by re-emphasizing the recovery level estimates advanced by Dr. Rao in his first report. Any concerns about the accuracy of MEG's documents, if in issue, are best addressed in cross-examination.

[24] Section C of the Rao Reply, at paragraphs 18 to 23, attempts to clarify a misapprehension. Dr. Rao states (at para 20): "In my view, both experts have misstated my opinion on the interpretation of 'influence'". This is best addressed in cross-examination.

[25] Sections D to F, at paragraphs 24 to 31, address the meaning of "communication" in a similar manner to the Walters Reply in Sections B to D. For the reasons explained above, this should have been anticipated, and is improper reply.

[26] Section G, at paragraphs 32 to 36, expresses mere rebuttal or attempts to clarify misapprehensions. It also seeks to bolster the Rao In-chief, stating: “Nothing in Dr. Gates’ criticisms ... changes the conclusion set out in my Original Report”. This is improper reply.

[27] Swist’s motion to adduce the Rao Reply is therefore refused in its entirety.

C. *Carey Reply (MEG)*

[28] Section C(a) at paragraph 5 (also summarized in Section B at paragraph 3(a)), of the Carey Reply expresses mere disagreement with the Rao Response. There is no suggestion that the Rao Response raises a new issue. This is improper reply.

[29] Swist does not object to Section C(b) of the Carey Reply (at paras 6-7), except for the sentence “for the reasons I previously explained ...” on the ground that this is confirmatory evidence. This is a fair observation, but the pinpoint reference to the Carey In-chief is useful and not prejudicial in this context.

[30] Swist does not object to Section C(c), paragraphs 8 to 28, of the Carey Reply, with the exception of paragraphs 15 and 16 and one sentence in paragraph 28. I agree that the excerpts to which Swist objects restate opinions previously expressed in Carey In-chief, and are mere disagreement with Dr. Rao. Otherwise, this section of the Carey Reply is admissible insofar as it addresses prior art that was introduced for the first time in Swist’s responding expert reports.

[31] Section C(d) of the Carey Reply, at paragraphs 29 to 32 (also summarized in Section B at paragraph 3(c)), amounts to mere disagreement or an attempt to clarify misapprehensions. This is improper reply.

[32] Sections C(b) and (c) of the Carey Reply may therefore be admitted as reply evidence, with the exception of paragraphs 15 and 16 and the one identified sentence in paragraph 28. The motion to adduce the remainder of the Carey Reply is refused.

D. *Gates Reply (MEG)*

[33] Section C(a), at paragraphs 5 to 22, of the Gates Reply addresses what are said to be shortcomings in Dr. Rao's analysis of the prior art. This is mere disagreement, not proper reply.

[34] Sections D and E, at paragraphs 23 to 32, are attempts to clarify misapprehensions. In paragraph 24, Dr. Gates expresses disagreement "with Dr. Rao's statement and characterization of my statement". Dr. Gates also disagrees with the manner in which Dr. Rao characterizes his illustration of the "staged procedure" in a piece of prior art referred to by the parties as "Cyr".

Dr. Gates discusses Cyr at length in his in-chief report. None of this is proper reply.

[35] Section F, at paragraphs 33 to 37, may be proper reply. The Gates In-chief addresses the inventive concepts of the 746 Patent's claims (at paras 328-331 & 371-380). In the Rao Response, Dr. Rao takes issue with Dr. Gates' opinion. MEG maintains that the Rao Response is inconsistent with Rao In-chief. It is difficult to fully comprehend this argument in a summary

motion brought in advance of trial, but to the extent that Dr. Rao is advancing inconsistent views, I accept that MEG could not anticipate this.

[36] Section F, paragraphs 33 to 37, may be adduced as reply evidence. The motion to adduce the remainder of the Gates Reply is refused.

IV. Conclusion

[37] Swist's motion to adduce the Walters Reply is refused in its entirety.

[38] Swist's motion to adduce the Rao Reply is refused in its entirety.

[39] Sections C(b) and (c) of the Carey Reply, with the exception of paragraphs 15 and 16 and the one identified sentence in paragraph 28, may be adduced as reply evidence. MEG's motion to adduce the remainder of the Carey Reply is refused.

[40] Section F, paragraphs 33 to 37, of the Gates Reply may be adduced as reply evidence. MEG's motion to adduce the remainder of the Gates Reply is refused.

[41] The scope of permissible expert evidence in reply may be revisited as the trial unfolds, and as circumstances may warrant.

[42] No costs are awarded.

**ORDER IN T-1069-14**

**THIS COURT ORDERS that**

1. Swist's motion to adduce the Walters Reply is refused in its entirety.
2. Swist's motion to adduce the Rao Reply is refused in its entirety.
3. Sections C(b) and (c) of the Carey Reply, with the exception of paragraphs 15 and 16 and the one identified sentence in paragraph 28, may be adduced as reply evidence. MEG's motion to adduce the remainder of the Carey Reply is refused.
4. Section F, paragraphs 33 to 37, of the Gates Reply may be adduced as reply evidence. MEG's motion to adduce the remainder of the Gates Reply is refused.
5. The scope of permissible expert evidence in reply may be revisited as the trial unfolds, and as circumstances may warrant.
6. No costs are awarded.

"Simon Fothergill"  
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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1069-14

**STYLE OF CAUSE:** JASON SWIST AND CRUDE SOLUTIONS LTD. v MEG ENERGY CORP

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**DATE OF HEARING:** JULY 8, 2020

**ORDER AND REASONS (MOTIONS TO SUBMIT EXPERT REPORTS IN REPLY):** FOTHERGILL J.

**DATED:** JULY 13, 2020

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