Federal Court Cour fédérale

Date: 20240611

Docket: T-1471-21

Citation: 2024 FC 887

Ottawa, Ontario, June 11, 2024

PRESENT: Mr. Justice McHaffie

BETWEEN:

GE RENEWABLE ENERGY CANADA INC.

Plaintiff

and

CANMEC INDUSTRIAL INC.

Defendant

and

RIO TINTO ALCAN INC.

Third Party

ORDER AND REASONS

I. Overview

[1] The plaintiff, GE Renewable Energy Canada Inc [GEREC], again seeks to amend its Amended Statement of Claim in this copyright infringement action. I granted its last motion to amend in part and dismissed it in part, for reasons reported at 2024 FC 187 [*GEREC I*].

[2] The amendments GEREC now seeks to make fall into three main categories. The first would add a list of 272 works to the 33 works that constitute the "GEREC Designs" that GEREC alleges have been infringed. The second would add allegations of infringement of a new category of 306 works, the "GEREC Construction & Installation Works." The third would make the third party, Rio Tinto Alcan Inc, a defendant to the main action, adding new allegations that Rio Tinto itself infringed both the GEREC Designs and the GEREC Construction & Installation Works.

[3] GEREC also seeks an order adjourning the trial in the matter, currently scheduled to commence in October 2024, and doing so for a longer period if leave is granted to make the requested amendments.

[4] For the reasons below, I conclude that it is not in the interests of justice to permit GEREC to make the contested amendments it now seeks to make at this stage of the proceeding. The proposed amendments would necessitate further discovery, a significant adjournment of the trial, and, in the case of the GEREC Construction & Installation Works in particular, a material expansion of the scope of the action late in the proceeding. GEREC has been aware of the material facts relevant to raise the allegations it now seeks to add since at least late June or early July 2023. Since that time, the parties have brought two rounds of discovery motions, agreed to adjourn the trial, and have undertaken a second round of examinations for discovery. GEREC's reference to information received recently in the second round of examinations as justification for the delay in raising the allegations is unpersuasive. I conclude that GEREC's request to amend the Amended Statement of Claim is not timely, the proposed amendments would necessitate an adjournment of the trial that would otherwise be unnecessary, and they would not facilitate the Court's consideration of the substance of the dispute on its merits. Although the

proposed amendments would not require Canmec or Rio Tinto to materially change their position or follow a different course of action, the balance of relevant factors leads me to conclude that the amendments are not in the interests of justice at this time.

[5] While GEREC has requested an adjournment of the trial even if the amendments are not granted, it has presented no grounds sufficient to justify this request. The parties should be in a position to complete remaining pre-trial steps in advance of the current fixed trial dates.

[6] GEREC's motion is therefore dismissed except in respect of certain minor amendments the responding parties do not object to. GEREC shall pay costs to Canmec in the amount of $5,000, and to Rio Tinto in the amount of $4,500, in any event of the cause.

II. Issues

[7] GEREC's motion raises two main questions, namely:

A. Should the Court grant leave to make the further proposed amendments to the Amended Statement of Claim, in whole or in part?

B. Should the Court grant an adjournment of the trial, whether leave is granted to amend the Amended Statement of Claim or not?

[8] These questions are interrelated, as the parties agree that to the extent that significant amendments to the Amended Statement of Claim are permitted, this will necessitate an adjournment of the trial. The fact that such amendments will necessitate adjournment of the trial is also a factor for the Court to consider in assessing whether they are in the interests of justice.

III. Analysis

A. *Amendment of the Amended Statement of Claim*

(1) Legal principles

[9] The principles on a motion to amend are not in dispute. I summarized them in my decision in *GEREC I*. In the interests of efficiency, I will simply repeat that discussion here.

[10] The general rule is that an amendment pursuant to Rule 75(1) of the *Federal Courts Rules*, SOR/98-106 should be allowed at any stage of an action for the purpose of determining the "real questions in controversy," provided that allowing the amendments (i) would not result in an injustice to other parties not capable of being compensated by an award of costs; and (ii) would serve the interests of justice: *Enercorp Sand Solutions Inc v Specialized Desanders Inc*, 2018 FCA 215 at para 19, quoting *Canderel Ltd v Canada*, 1993 CanLII 2990 (FCA) at p 10; *McCain Foods Ltd v JR Simplot Company*, 2021 FCA 4 at para 20; *Janssen Inc v Abbvie Corporation*, 2014 FCA 242 at para 9. The onus lies on the amending party to show the amendments should be allowed: *Merck & Co, Inc v Apotex Inc*, 2003 FCA 488 at paras 29, 35–36.

[11] In assessing whether an amendment would serve the interests of justice, the Court may consider factors such as (i) the timeliness of the motion to amend; (ii) whether the proposed amendments would delay trial; (iii) whether the amending party's prior position has led another party to follow a course of action in the litigation that it would be difficult to alter; and (iv) whether the amendments will facilitate the Court's consideration of the substance of the

dispute on its merits: *Enercorp* at paras 20–21, quoting *Continental Bank Leasing Corp v Canada*, 1993 CanLII 17065 (TCC) at p 2310; *Federal Courts Rules*, Rule 3. These factors are considered together without any single factor being determinative.

[12] An amendment must also yield a sustainable pleading, and an amendment that is liable to be struck out under Rule 221 should not be permitted: *Enercorp* at para 22; *McCain* at paras 20–22; *Teva Canada Limited v Gilead Sciences Inc*, 2016 FCA 176 at paras 28–32. Thus, where it is plain and obvious that proposed amendments do not disclose a reasonable cause of action, or the amendments represent a "radical departure" from the party's prior positions, they should not be permitted: Rule 221(1)(a),(e); *Enercorp* at paras 22–28; *McCain* at paras 20–23; *Hospira Healthcare Corporation v The Kenny Trust for Rheumatology Research*, 2020 FCA 191 at para 5, citing *Merck* at para 47; *Atlantic Container Lines AB v Cerescorp Company*, 2017 FC 465 at para 8; *Proslide Technology, Inc v Whitewater West Industries, Ltd*, 2023 FC 1591 at paras 15–16; but see *J2 Global Communications Inc v Protus IP Solutions Inc*, 2009 FCA 41 at paras 8–10. This has been described as a "threshold issue," to be addressed before turning to other questions of justice and injustice: *Teva* at para 31.

[13] Pleadings that are inadequately particularized to allow the opposing party to plead in response are also subject to being struck under Rule 221 for failure to comply with the requirement in Rule 174 that they contain "a concise statement of the material facts on which the party relies": *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at paras 16–20; *Fox Restaurant Concepts LLC v 43 North Restaurant Group Inc*, 2022 FC 1149 at paras 4, 20–32. Amendments may similarly be refused on this ground, whether considered as a threshold issue or as a matter of the interests of justice: *McCain* at paras 22–23; *Enercorp* at paras 34–37.

However, where appropriate, a lack of particulars in a proposed amendment may be addressed by granting leave to reapply or by imposing an obligation of particulars as a condition of the amendment: *Enercorp* at paras 26–30, 34–38; *Atlantic* at para 15.

[14] I add one further note to the foregoing summary. Where a party seeks to amend a pleading after discovery and seeks to rely on discovery evidence to justify its proposed amendment, it is open to the Court to review and assess that evidence in determining whether, taking a realistic view in the context of the law and the litigation process, the proposed amendment discloses a reasonable cause of action or is "doomed to fail": *Teva* at paras 27–32, 38–42. In this regard, the Federal Court of Appeal has noted that an allegation made without any evidentiary foundation is an abuse of process, and that an unsupported allegation cannot be sustained simply in the hope that sufficient facts will be obtained on discovery that will support the allegation: *AstraZeneca Canada Inc v Novopharm Limited*, 2010 FCA 112 at paras 4–5.

[15] In other words, while the general rule is that the factual allegations in a proposed amendment are to be assumed to be true, it is relevant to both the threshold issue and, at the very least, the interests of justice whether a proposed amendment is supported or contradicted by the available discovery evidence. At the same time, a motion to amend is not the occasion to weigh competing evidence where the amending party has established credible evidentiary support for its amendments: *Atlantic* at para 16. As GEREC underscores, a motion to amend is not a motion for summary judgment or summary trial.

(2) Nature and status of the action

[16] As described in *GEREC I*, this action stems from the refurbishment of Rio Tinto's hydroelectric power plant in Alma, Québec, known as the Isle-Maligne Plant, which has twelve turbine-generator units. Each unit has two water intake valves (termed "butterfly valves"), each of which is attached to a winch allowing it to be opened and closed.

[17] In 2016, GEREC and Rio Tinto entered agreements for a pilot project to refurbish Unit 1, and later Unit 2. In the context of these projects, GEREC contacted Canmec as a potential subcontractor for the butterfly valve on Unit 2. On March 9, 2018, GEREC sent Canmec 33 manufacturing drawings related to the butterfly valve. For ease of reference, I will refer to these drawings as the "33 Works." The 33 Works are dated in 2016 or 2017. They appear to have been prepared in the context of the Unit 1 project (they bear the project number of that project), but were sent to Canmec as a potential subcontractor on the Unit 2 project.

[18] Canmec was ultimately not selected as a subcontractor for the butterfly valve. However, Canmec was nonetheless involved in the refurbishment pilot projects, having contracted with Rio Tinto for the replacement of the winches for Units 1 and 2. GEREC alleges it completed the refurbishment of the two units in late 2018, although Rio Tinto alleges that work on Unit 1 ended in the second quarter of 2019 and the work on Unit 2 ended in the second quarter of 2020.

[19] In April 2019, Rio Tinto issued a request for quotation [RFQ] related to the refurbishment of the ten remaining units at the Isle-Maligne Plant, namely Units 3 to 12. GEREC

and Canmec were among the bidders who responded to the RFQ; Canmec's bid was accepted by Rio Tinto. GEREC's allegations of copyright infringement arise from Canmec's successful bid on the Rio Tinto project.

[20] GEREC commenced this action in September 2021, alleging that Canmec infringed copyright in the 33 Works, which are defined as the "GEREC Designs." Canmec defended the action and brought a third party claim against Rio Tinto, alleging that Rio Tinto should indemnify it for any infringement of copyright that might be found as a result of Canmec's actions. Rio Tinto defended the third party claim, and also defended GEREC's claim against Canmec, as permitted by Rule 197.

[21] In March 2023, a date was fixed for trial of the matter, for a duration of ten days commencing in May 2024. Examinations for discovery were conducted in April and May 2023, and the parties exchanged responses to undertakings in late June and early July 2023. A first discovery motion was heard in September 2023. That motion resulted in the production by GEREC of its project file of some 23,000 additional documents. In light of this, the parties consented to the adjournment of the May 2024 trial dates. On October 18, 2023, the trial was set down for ten days commencing October 21, 2024, about four and half months from now.

[22] The Federal Court's *Amended Consolidated General Practice Guidelines*, dated December 20, 2023 [*Guidelines*], say the following about fixed hearing dates and adjournments:

> Adjournments
>
> **48.** The Federal Court operates on a guaranteed, fixed-date system, meaning that when the Court has fixed a date for a hearing, parties are expected to proceed on that date. Adjournments of hearings

> cause inconvenience and expenses. Court resources are not used efficiently as there often is not sufficient time to schedule another matter to take the place of the adjourned hearing.
>
> **49.** Nevertheless, the Court recognizes that there may be exceptional and unforeseen circumstances, including those that are outside the control of a party or its counsel, in which it may be reasonable to request an adjournment.
>
> [Emphasis added.]

[23] These principles apply with particular force in the context of a trial where, as here, hearing dates spanning multiple days are fixed well in advance.

[24] In its earlier motion to amend, brought in late 2023 and heard earlier this year, GEREC sought to amend the definition of the "GEREC Designs" by adding language that would include in the definition a large number of unidentified works. In *GEREC I*, I concluded this proposed amendment did not meet the requirements of Rule 174 as it was inadequately particularized, failing to identify a closed and specific list of works alleged to be infringed: *GEREC I* at paras 46–53. I granted GEREC leave to reapply to amend its claim "in respect of the works constituting the GEREC Designs," stating that if it chose to do so, it should seek a case management conference to address such a motion "at the earliest opportunity": *GEREC I* at para 66.

[25] GEREC provided Canmec and Rio Tinto with a draft of further proposed amendments to its Amended Statement of Claim on February 28, 2024. Other drafts followed, with GEREC ultimately serving its notice of motion to amend in late April 2024, and amending it in late May. In the interim, the parties had conducted follow-up discoveries in January 2024, had provided

answers to undertakings in March and April 2024, and argued a second discovery motion in early May 2024.

(3) Nature of the proposed amendments

[26] As noted at the outset, GEREC's proposed amendments fall into three main categories. The first involves the definition of the "GEREC Designs." As with its earlier motion to amend, GEREC seeks to expand the definition of the GEREC Designs alleged to have been infringed from the 33 Works that have been at issue since the outset of the proceeding to a list of 305 works, set out in a new Schedule A to the claim. The 272 new documents on Schedule A are of three types: (i) other versions or revisions of the 33 Works (254 documents); (ii) two manufacturing drawings that were not part of the 33 Works, in various versions or revisions for Units 1 and 2 (17 documents); and (iii) a 3-dimensional computer-aided design [3D CAD] model presented in a computer file prepared in a program called SolidWorks [the "SolidWorks File"]. These works constitute a subset of the estimated 2,000 to 2,400 works that GEREC sought to add to the definition of the GEREC Designs on the earlier motion to amend.

[27] I note that GEREC again, and despite my observations in *GEREC I*, contends that the amendments in this first category simply seek to "clarify and particularize existing pleadings." I reject this characterization, for the same reasons I gave on the last motion: *GEREC I* at paras 30–35. Rather, the amendments in this category would significantly expand the list of works said to have been infringed, from 33 to 305.

[28] The second category of amendments also seeks to add to the list of works alleged to have been infringed, but the works are of a different nature. GEREC seeks to add allegations of infringement in respect of 306 works defined as the "GEREC Construction & Installation Works," identified in a proposed Schedule B to the claim. These works are described as construction and installation documents and drawings to be used in the refurbishment of the Isle-Maligne Plant, created or commissioned by GEREC as part of its contract with Rio Tinto in connection with the two pilot projects. GEREC seeks to allege that Rio Tinto improperly shared these works with Canmec, and that they were improperly shared, copied, and used in connection with the RFQ and the refurbishment of Units 3 to 12. The construction and installation documents and drawings identified in Schedule B are of a different type than those raised on the earlier motion and were not within the scope of the documents GEREC sought to add to the claim on that motion.

[29] The third category of amendments seeks to add Rio Tinto as a defendant to the action and to allege that it infringed GEREC's copyright in both the GEREC Designs and the GEREC Construction & Installation Works. The proposed amendments allege that Rio Tinto had copies of the works from GEREC by virtue of the pilot projects, and infringed copyright in them by (i) distributing them to Canmec; (ii) using and copying them to set out the requirements in the RFQ; and (iii) using and copying them to direct Canmec's infringing conduct, including Canmec's production of infringing drawings and documents in relation to the refurbishment of Units 3 to 12. GEREC seeks, among other remedies, damages and an accounting of Rio Tinto's profits, or statutory damages, as it may elect.

[30] These three categories overlap, in that GEREC's amendments seek to allege that both Canmec and Rio Tinto have infringed copyright in both the GEREC Designs and the GEREC Construction & Installation Works.

(4) Amendments in the first category: GEREC Designs/Schedule A

[31] As indicated, the amendments GEREC seeks to make in the first category relate to the definition of the GEREC Designs. The central amendments in this category are found in paragraph 12 and a new Schedule A to the Amended Statement of Claim, with consequential amendments in paragraphs 18, 19, and 20. The proposed amendment to paragraph 12 removes reference to the 33 manufacturing drawings, instead defining the GEREC Designs with reference to Schedule A. The proposed Schedule A sets out 305 works, including the 33 Works. For each, Schedule A provides a number (A-001 to A-305); the title of the work; the project for which it was produced (*i.e.*, the pilot project for Unit 1 or Unit 2); the GEREC internal reference number of the work; the revision letter if applicable (*e.g.*, revision A or revision B); its production number in the litigation; and the author(s) of the work. Notes on the schedule state that the authors indicated are "in addition to all authors indicated on any earlier revision(s) of the same drawing/document," and that all authors are Canadian or French.

[32] The 272 works GEREC proposes to add to the definition of the GEREC Designs through Schedule A are of three different types, with different issues and context. I will therefore address each of the types in sequence.

(a) *Other versions and revisions of the 33 manufacturing drawings*

[33] Most of the new documents on Schedule A (254 of the 272 new documents) are different versions or revisions of the 33 Works that currently constitute the GEREC Designs. These include the original versions of the drawings and other revisions dated before and after the versions sent to Canmec in March 2018. For example, the first of the 33 Works sent to Canmec was "Revision E" of a manufacturing drawing of an element of the butterfly valve, prepared for the work on Unit 2. This document appears as Document A-012 in the proposed Schedule A. The original version ("Revision 0") of the drawing and Revisions A to D and F, appear in Schedule A as Documents A-007 to A-011 and A-013, respectively. Thus, Schedule A lists seven documents that are simply different versions of the drawing of the same element of the valve. In addition, Schedule A includes four more drawings of the same element, but prepared for the work on Unit 1 rather than Unit 2. GEREC confirmed, in the course of discoveries, that the valve designs between Unit 1 and Unit 2 are "mostly the same, with only small differences in design."

(i) Threshold issue

[34] Canmec argues the proposed amendments adding these documents are insufficiently particularized to meet the requirements of Rule 174. It therefore argues the amendments should be refused as they would not survive a motion to strike. In particular, Canmec argues that the identification of the authors of the works contradicts particulars GEREC provided earlier regarding authorship of the 33 Works, that GEREC has not sought leave to amend those particulars, and that Canmec should not have to guess who the authors of the works are or to conduct further discovery without such information.

[35] I am satisfied that the proposed amendments in this category are adequately particularized. Schedule A identifies a closed and specific list of these works and their authorship. Although Canmec refers to earlier drafts of GEREC's proposed Schedule A, which did not include authorship information, the version presented to the Court for determination at the hearing of the motion does. As for the asserted conflict between the current list of authors and the prior particularization, both Canmec and Rio Tinto consented to amendments pertaining to the author-related information for the 33 Works that are currently the GEREC Designs.

[36] The Amended Statement of Claim also contains sufficiently particularized allegations of how the works have been infringed: *Fox Restaurant* at paras 23, 32. As with the 33 Works, each of the listed documents appears to be a single page of manufacturing drawings.
Justice Grammond earlier found that the allegations of infringement of the 33 Works had been sufficiently particularized, since Canmec would [TRANSLATION] "certainly be able to identify the parts of the GEREC Designs of which infringement is alleged": Order of Justice Grammond, April 5, 2022 (see *GEREC I* at paras 19–22). This finding applies equally to the other revisions of the 33 Works, which are highly similar to the 33 Works.

[37] Rio Tinto argues GEREC has not adequately pleaded the chain of title in the documents, noting that a plaintiff in a copyright action must "plead the chain of title relating to the work which it owns including references to applicable assignments," and that failure to do so can be fatal to the claim: John S McKeown, *Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed (Toronto: Thomson Reuters, 2023) at §24:22, citing *NAV Canada v Adacel Technologies Ltd*, 2006 FCA 227 (at paras 8 to 12). Although this argument was raised generally in respect of

all of the amendments, it appears to relate primarily to certain documents falling into other categories, and in particular documents in Schedule B. The 254 documents that are other versions of the 33 Works all appear, both on their face and through the author's list in Schedule A, to have been prepared by employees of GE Hydro France. In the circumstances, including the discovery conducted to date, I am satisfied that the proposed amendments are sufficiently particularized as to the chain of title in these documents. In any event, I agree with GEREC that any such deficiency could have been cured by requiring particulars of the chain of title to be provided as part of any order granting leave to amend.

[38] I am therefore satisfied the amendments seeking to add these documents meet the threshold issue of a pleading that is adequately particularized to disclose a reasonable cause of action.

(ii) Interests of justice

[39] Although GEREC's proposed amendments alleging infringement of the 254 other revisions of the 33 Works raise a tenable pleading, I conclude it would not be in the interests of justice to grant GEREC leave to make them.

[40] I begin with the question of whether the amendments would assist in determining the "real questions in controversy": *Enercorp* at para 19; *McCain* at para 20. It is difficult for the Court to see how adding allegations of infringement of other revisions of the 33 Works that have been at issue since the outset of this action goes to the "real questions in controversy." The real question in controversy is whether Canmec infringed copyright in GEREC's manufacturing

drawings in its bidding and work on the refurbishment of Units 3 to 12. Adding allegations that multiple other versions of the same drawings were also infringed by the same conduct does not go to the real question in controversy and would not "facilitate the court's consideration of the true substance of the dispute on its merits": *Continental Bank* at p 2310.

[41] This is particularly so when GEREC does not allege that Canmec infringed copyright in the other versions of the drawings through different conduct or in a different manner than its allegations in respect of the 33 Works. Indeed, GEREC has presented no evidence that Canmec received or saw any other versions of the manufacturing drawings other than the versions that constitute the 33 Works. Rather, GEREC's primary allegation appears to be effectively that if Canmec is found to have infringed copyright in one or more of the 33 Works it received in March 2018, then it also infringed copyright in the other versions of that same work. When asked whether, given the similarities between the various versions, Canmec could realistically be found to have infringed copyright in one version of a drawing without being found to have infringed copyright in the others, GEREC could do no more than argue that such a finding was "conceivable" without further specifics or examples. GEREC's allegations with respect to the other versions of the 33 Works thus appear to amount to no more than a multiplication of infringement allegations with no additional substance.

[42] Nor am I persuaded by GEREC's arguments that the existence of other versions of the 33 Works might potentially affect its remedies. GEREC confirmed in oral submissions that it was not seeking to augment its claim for statutory damages by asserting infringement of multiple versions of the drawings as multiple "works" to which a separate statutory damages claim might

attach. It certainly presented no authority for the proposition that a higher statutory or actual damages award, or a different accounting of profits, should apply in circumstances where a plaintiff has a number of earlier drafts or versions of a work infringed by a defendant.

[43] The nature of GEREC's allegations relating to these other versions, namely that they are also infringed if the versions constituting the 33 Works are infringed, also raises the question of the timeliness of the request to amend. GEREC has known about the other versions of the 33 Works since the date they were created, and certainly before the commencement of this litigation. To the extent that Canmec's infringement of the 33 Works also constitutes infringement of the other versions, GEREC was in a position to make that allegation from the outset of the proceedings, well over two years ago.

[44] GEREC argues that during the discovery process, it became aware of more widespread sharing of its copyrighted works between Rio Tinto and Canmec, and that this justifies its request to now add allegations in respect of the other versions. However, GEREC concedes there is no new evidence that Canmec received or had access to the various additional versions of the 33 Works. To the contrary, Canmec was asked during the second round of discovery in January 2024 to [TRANSLATION] "[c]onfirm all occasions on which Canmec received GE drawings" [Question 261]. It responded to Question 261 in March 2024 by referring to past productions and providing new documents in respect of such occasions. GEREC does not contend that any of these include other versions of the 33 Works.

[45] Although not raised in GEREC's written representations, it submitted at the hearing of this motion that it seeks to add the other versions to the definition of GEREC Designs to avoid the possibility that Canmec or Rio Tinto might limit their responses on discovery to only the particular versions of the documents that constitute the 33 Works, and might not answer, or refuse to answer, questions about other versions. However, GEREC has already conducted its examinations for discovery. It pointed to no answer or refusal given during those examinations that might give any air of reality to this purported concern. Indeed, it appears that GEREC did not ask any questions about other versions of the 33 Works that might have elicited such a refusal. As noted above, Canmec responded to Question 261 without such limitation or refusal. Nor is there any air of reality to GEREC's hypothetical concern, again identified at the hearing, that Canmec or Rio Tinto might raise a defence at trial, not raised to date, to the effect that any copying or use made of GEREC's drawings was of a different version than the version found in the 33 Works. I am therefore not persuaded that GEREC's hypothetical concerns about potential limitations on any future discovery or new trial defences presents a reason in favour of adding a significant number of new works to the claim at this stage of the proceeding.

[46] The foregoing factors speak against granting leave. So does the delay of trial that would be occasioned by the addition of these allegations, which would require additional examinations for discovery on the new versions, and would require the parties' experts to address the new allegations. In this regard, GEREC argues that adjourning the trial would not cause any prejudice or injustice to Canmec or Rio Tinto that could not be compensated in costs: *Enercorp* at para 19. However, I agree with Rio Tinto that the very adjournment of trial, particularly for a second time, may entail a degree of prejudice: see, *e.g.*, *Apotex Inc v Shire Canada Inc*, 2011 FC 436 at

para 34; *Apotex Inc v Sanofi-Aventis*, 2010 FC 182 at para 10; *Rovi Guides, Inc v Videotron GP*, 2019 FC 1220 at paras 53–54, aff'd 2019 FCA 321 at paras 18–19. This will not always be the case, and it will not always be the case that any such prejudice cannot be compensable in costs or will not be justified in the circumstances. Much, if not all, depends on the circumstances of the case.

[47] In the present case, the parties have conducted extensive documentary and examinations for discovery, and have agreed to trial dates and pre-trial schedules to prepare the matter for a two-week trial that is scheduled to proceed about three years after commencement of the action. Adjourning the trial again, necessarily for a period of multiple months, would cause further delay in the proceeding. In the circumstances, I agree there is at least an element of such further delay that could not be compensated in costs. I also reject GEREC's argument that its concession that the amendments would require adjourning the trial means allowing them will cause no non-compensable prejudice. Further, such adverse effects would be in service of amendments that would not assist the Court in determining the true substance of the dispute on its merits.

[48] I agree with GEREC that its proposed amendments will not require Canmec or Rio Tinto to change or modify a position they have already taken. However, in the circumstances, I do not believe this consideration outweighs the other issues and factors discussed above.

[49] Based on the foregoing factors, I conclude it would not be in the interests of justice to grant GEREC leave at this stage in the proceeding to amend the Amended Statement of Claim to

add the 254 works that are other versions or revisions of the 33 Works. These requested amendments are refused.

(b) *Other manufacturing drawings*

[50] GEREC's proposed Schedule A also includes two manufacturing drawings that are not represented in the 33 Works: one of the general assembly of the valve, and one of an "anti-debris plate," a component of the original hydroelectric units and a required aspect of the refurbishment project under the RFQ. Multiple versions of the two drawings are listed for each of the Unit 1 project and the Unit 2 project, for a total of 17 works alleged to have been infringed.

[51] For the same reasons given above, I am satisfied the proposed amendments adding these documents to the definition of the GEREC Designs are adequately pleaded and meet the threshold question of presenting a reasonable cause of action. Each document is again a single page of manufacturing drawings. Given the similarity between the nature of these two drawings and those contained in the 33 Works, Justice Grammond's conclusions regarding the adequacy of the particularization also applies in respect of these works.

[52] However, I again conclude the proposed addition of the 17 versions of these two drawings to GEREC's allegations of infringement, or even only one version of each, would not be in the interests of justice.

[53] GEREC presented few, if any, different arguments with respect to these works and why it was necessary or appropriate to add them to the definition of GEREC Designs at this stage in the

proceeding. It did, however, present evidence that a version of one of the drawings (Revision E of the general assembly drawing related to Unit 1, listed on Schedule A as A-005) was sent by Rio Tinto to Canmec by email in February 2019. This email was produced by Canmec in March 2024 in response to Question 261. GEREC points to this recent production as evidence that it learned only recently about the extent to which Rio Tinto shared GEREC documents with Canmec.

[54] However, as Canmec points out, Revision C of the same general assembly drawing (A-004) was attached to Rio Tinto's request for proposals in respect of the winches for the Unit 2 pilot project in March 2018. GEREC therefore knew or ought to have known that Canmec had this drawing well before the commencement of the litigation. Further, the documents Canmec produced in response to answers to undertakings after the first round of discoveries in late June 2023 included a document showing that Rio Tinto sent Revision B of the same general assembly drawing (listed on Schedule A as A-003) to Canmec in June 2017 in the context of its work on the winches for the pilot project. As a result, even in the context of this litigation, GEREC has known since at least late June 2023, well before the first discovery motion and well before its first motion to amend, that Rio Tinto had sent Canmec a copy of the general assembly drawing. It is therefore difficult to credit GEREC's assertion that the March 2024 production of the February 2019 email constituted a recent disclosure that the general assembly drawing had been shared with Canmec.

[55] As for the anti-debris plate drawing, GEREC has not identified any evidence that Canmec ever had this document, either from Rio Tinto or otherwise. While possession or access to a work

is not a requisite element of a copyright infringement allegation, GEREC's allegations that Canmec infringed its copyright in the GEREC Designs are expressly based on Canmec's possession and use of copies of those works (paragraphs 18, 23, 27–29, and 32 of the Amended Statement of Claim). GEREC's proposed allegations that Rio Tinto infringed copyright in the GEREC Designs are based on Rio Tinto having shared the GEREC Designs with Canmec (paragraphs 27, 37.1–37.11 of the proposed Second Amended Statement of Claim). GEREC has conducted examinations for discovery and has obtained disclosure from Canmec of all GEREC documents that were in Canmec's possession, but has pointed to no evidence, let alone recent evidence, showing Canmec had the anti-debris plate drawing.

[56] As noted above, while factual allegations in a pleading are generally taken as true for purposes of a motion to amend, I am not convinced that this principle should apply with as much force where the parties have conducted discovery and the proposed factual allegation is contrary to the evidence before the Court. I accept that a motion to amend is not the place to weigh conflicting evidence. However, this is not a case of weighing conflicting evidence but of considering whether, after two rounds of examinations, GEREC has shown its proposed allegation to have any factual foundation. In any case, GEREC's motion does not point to any new information acquired in the discovery process that would justify raising at this stage in the litigation a new allegation that Canmec infringed copyright in the anti-debris plate drawing. The mere allegation that Rio Tinto's sharing of documents with Canmec was wider than previously known (an allegation addressed further below) is insufficient justification, when that sharing did not include the drawing in question.

[57] I therefore conclude that, as with GEREC's request to add the other versions of the 33 Works, its request to add allegations of infringement of the general assembly drawing and the anti-debris plate drawing is not timely.

[58] Nor, in my view, will the proposed amendments with respect to these two drawings facilitate the Court's consideration of the substance of the dispute on its merits. Again, GEREC has not satisfied me that its proposed amendments would assist in considering the core of its copyright infringement allegations, or affect the remedies it may obtain if successful in demonstrating such infringement. At best, the general assembly drawing shows a different view of the butterfly valve depicted in the 33 Works, while the anti-debris plate shows a detail of a component. GEREC has been unable to explain why or how adding allegations with respect to these drawings would assist in facilitating the Court's consideration of the dispute or of the real questions in controversy.

[59] Conversely, adding at this stage in the process new allegations of infringement of two further drawings of the butterfly valve and its components would risk delaying the trial. While the addition of two new drawings (whether in the form of two exemplary works or of the 17 works that constitute all of the various revisions) might not in other circumstances amount to a significant expansion of the scope of the action, the parties are already under tight timelines to complete the necessary pre-trial steps before the trial scheduled in October 2024, despite the trial date having been fixed almost eight months ago. Even the addition of the single day of discovery Canmec estimates would be required to question GEREC on these documents would delay the

production of expert reports, with knock-on effects that put the trial date very much at risk, for the sake of allegations that would add little value to the claim.

[60] As a result, and despite the fact that these amendments will not require Canmec or Rio Tinto to change any position they have taken, I conclude that allowing GEREC to amend its claim to add allegations of infringement of the general assembly drawing and the anti-debris plate drawing would not be in the interests of justice.

(c) *The SolidWorks File*

[61] The SolidWorks File is a computer file that shows a 3D CAD model of GEREC's butterfly valve and its component parts, as well as other aspects of the hydropower unit such as the winches and the concrete in which they are installed. As represented in a video filed by Rio Tinto, the SolidWorks File allows a user to view these various elements in three dimensions at various levels of detail, rotate them across three axes, create and view cross-sections, hide elements the user does not want to see, and/or highlight elements they do want to see. The SolidWorks File is apparently the source from which the two-dimensional manufacturing drawings that are the 33 Works were generated.

[62] Canmec and Rio Tinto complain that GEREC has not adequately particularized its allegations with respect to the SolidWorks File. They assert the SolidWorks File consists of hundreds of SolidWorks part files that can generate an effectively limitless series of different images or views, and that GEREC has not identified which of the multitude of part files, views, or aspects of the SolidWorks File are alleged to be infringed, or the allegedly original

expressions contained in the SolidWorks File that Canmec is accused of copying. They argue this effectively amounts to an allegation of infringement of an unknown number of unidentified and unspecified works, and therefore does not meet the requirements of an adequately particularized pleading of copyright infringement: *Mancuso* at paras 16–20; *Fox Restaurant* at paras 21–23. GEREC responds that it has identified the one specific file that is the work alleged to be infringed, and that any work could theoretically be broken down into a multitude of component parts, such that Canmec and Rio Tinto's concerns are "nonsensical."

[63] I conclude I need not resolve the question of adequate particularization, as GEREC has not satisfied me that permitting it to amend its Amended Statement of Claim to allege infringement of the SolidWorks File is in the interests of justice.

[64] As with the other versions of the 33 Works and the anti-debris drawing, GEREC has presented no evidence that Rio Tinto ever shared the SolidWorks File with Canmec or that Canmec otherwise had or used the SolidWorks File. GEREC submits that it wishes to discover whether Rio Tinto shared the SolidWorks File with Canmec. However, Canmec has already disclosed, in response to Question 261, all occasions on which it received drawings from Rio Tinto. To the extent that a distinction might be drawn between "drawings" and the SolidWorks File in the context of Question 261, there is no indication that GEREC asked Canmec whether it had ever received GEREC's SolidWorks File, despite there having been numerous questions regarding Canmec's use of the SolidWorks computer program. Indeed, the record before the Court on this motion does not even establish that the SolidWorks File was in Rio Tinto's possession, let alone Canmec's.

[65] GEREC alleges that it learned during discovery that Canmec also used the SolidWorks program to generate its drawings. I cannot see how the fact that Canmec used a particular piece of software to model its work on the refurbishment of the butterfly valves in any way relates to an allegation that it did so in infringement of a particular file created by GEREC. To use an admittedly simplified analogy, if GEREC obtained information for the first time on discovery that Canmec used Microsoft Word to generate a text document, this would not alone justify the late addition of an allegation of infringement of a work that GEREC also created in Word. Yet GEREC pointed to no new information beyond Canmec's use of the SolidWorks software to justify its late addition of the SolidWorks File to the definition of the GEREC Designs.

[66] As Canmec points out, GEREC has alleged since April 2022, after its pleadings were amended in the wake of the motion before Justice Grammond, that Canmec's preparation and use of "3D CAD files" for the refurbishment of Units 3 to 12 infringed the GEREC Designs. It therefore appears to have known, or at least alleged, that Canmec prepared 3D CAD files as part of its work on the refurbishment for over two years. If GEREC believed that either those files or other drawings produced by Canmec infringed the SolidWorks File (which, as a GEREC file, it has had in its possession since the outset), it could have raised that allegation long ago. I conclude that GEREC's proposed amendments to add allegations of infringement of the SolidWorks File are not timely.

[67] It also appears that the allegations of copyright infringement of the 33 Works and of the SolidWorks File are effectively co-extensive, in that if the former are infringed, the latter is necessarily infringed, and vice versa. Counsel for GEREC conceded in submissions that it was

"hard to envision" a situation where this would not be the case, but argued that it could not be ruled out. This is insufficient to justify amending a pleading to add an allegation of infringement of a new document that could again result in the adjournment of fixed trial dates.

[68] On this latter point, the same concerns about the need for adjournment arise with respect to this work. Even accepting, without deciding, that the SolidWorks File is a single work and that GEREC's proposed amendments adding the SolidWorks File to the list of GEREC Designs are adequately particularized, it is clear that additional discovery on the SolidWorks File would have to be conducted to assess issues of originality, copyright ownership, and infringement. GEREC did not contest Canmec's estimate of needing two additional days of examination of a GEREC representative with respect to the SolidWorks File. This would again have effects on the pre-trial schedule, including notably as to expert reports, and could even require the addition of time to the trial schedule. Adding the SolidWorks File to the list of GEREC Designs would itself almost certainly require adjourning the trial.

[69] Again, considering the various relevant factors, I conclude that allowing GEREC to amend its claim to add allegations of infringement of the SolidWorks File would not be in the interests of justice.

[70] I will therefore not grant leave to GEREC to make any of the amendments in the first category.

(5) Amendments in the second category: GEREC Construction & Installation Works/Schedule B

[71] The second category of proposed amendments GEREC seeks to add to the Amended Statement of Claim consists of new allegations of copyright infringement in a series of 306 works that are not manufacturing drawings but "construction and installation documents and drawings." These documents, defined as the GEREC Construction & Installation Works and listed on a new Schedule B, relate not to the design and manufacture of the butterfly valves and embedded parts, but to aspects of their installation and commissioning. They include, for example, purchasing technical specifications, documents setting out installation procedures, "realization, inspection and test plans" (*plans de réalisation, d'inspection et d'essais* [PRIEs]), maintenance and use manuals, quality management plans, and documents covering matters such as scaffolding, environmental protection, and concrete demolition.

[72] Some of the works listed in Schedule B are single page technical drawings, such as the drawings of an "anchor ear" that are listed as documents B-001 and B-002. Others are not. For example, the purchasing technical specifications put forward in Canmec's motion record are 13 and 23 pages respectively, including various text and drawings, while the commissioning procedure for the butterfly valves is a 30-page document that includes a variety of different testing procedures.

[73] GEREC seeks to add to the Amended Statement of Claim allegations that Canmec infringed copyright in the GEREC Construction & Installation Works by copying and using them in the course of the same activities that are the subject of the allegations regarding the GEREC Designs, namely preparing and submitting its bid in response to Rio Tinto's RFQ, preparing documents for the refurbishment of Units 3 to 12, and production of Canmec's butterfly valves

and embedded components. It also seeks to add allegations that Rio Tinto infringed copyright in these works by sharing them with Canmec for this purpose.

[74] The works in Schedule B include works that Canmec has confirmed it received from Rio Tinto. However, Schedule B also includes works that there is no evidence Canmec ever received. Rio Tinto estimated, based on the discovery evidence, that about 102 of the 306 documents listed on Schedule B were shared with Canmec. This leaves over 200 documents that, according to the record before the Court, Canmec never received. GEREC did not dispute this count and did not attempt to distinguish between these two classes of documents, either in Schedule B or in its submissions.

(a) *Threshold issue*

[75] GEREC contends it has provided a closed and specific list of works alleged to be infringed, including the authorship of the documents. It also says it has sufficiently particularized its allegations of infringement, again pointing to Justice Grammond's earlier conclusion on particularization. It asserts that the amendments in this category are timely, pointing to Canmec's response to Question 261 and to other answers to undertakings received in March 2024 to the effect that Canmec used certain of the documents in Schedule B (i) to understand the different stages of the project and the documentation to be produced; and (ii) to get an idea of the procedures and important steps on site, as well as the errors to avoid following the pilot projects.

[76] Canmec argues that GEREC's allegations in respect of the GEREC Construction & Installation Works should not be permitted, as they would not survive a motion to strike. It

argues the allegations are abusive since they are made without an evidentiary foundation and based on speculation, in the hope that facts may be obtained on discovery that would support the allegation in the pleadings: *AstraZeneca* at paras 4–5. It contends that while there is evidence that Rio Tinto shared some of the documents on Schedule B with Canmec, there is no evidence that Canmec infringed any of them. It says in particular that using documents for an understanding of different stages of a project, or to get an idea of the procedures and important steps, or the errors to avoid, does not constitute copyright infringement.

[77] I have some concern that GEREC has not adequately particularized its allegations of infringement of the Construction & Installation Works. Despite having conducted discovery with respect to at least some of the documents in question, GEREC's allegations do not identify which, or which parts, of the Construction & Installation Works have been reproduced in whole or substantial part; what, if any, documents that Canmec created infringe copyright in the Construction & Installation Works; or what aspects of Canmec's work in the refurbishment project constitute infringement, beyond the identified use of the documents to get an understanding or idea of the steps in the project.

[78] In this regard, Justice Grammond's earlier finding on particularization has little relevance. In addition to being significantly more numerous than the 33 Works Justice Grammond was considering, many of the Construction & Installation Works are of a different nature, being lengthier documents with multiple aspects. A simple allegation that such a document—indeed, hundreds of such documents—has been infringed gives little insight into the nature of the allegations. While I appreciate that GEREC may not be able to identify all of the

particulars of Canmec's conduct without disclosure from Canmec and the conduct of further discovery, the lack of specificity certainly raises concerns about the allegations being no more than a fishing expedition. This concern is further exacerbated with respect to the 200 documents for which there is no evidence that Canmec even received the documents.

[79] However, I need not resolve the issue with respect to whether the amended pleading discloses a reasonable cause of action with sufficient particularity as a threshold issue, as I conclude that even assuming it does, it would not be in the interests of justice to permit the amendments at this stage of the proceeding.

(b) *Interests of justice*

[80] As with the amendments in the first category, the delay of the trial, the timeliness of the motion, and whether the amendments will facilitate the Court's consideration of the substance of the dispute are the most important factors in this case in assessing whether the amendments are in the interests of justice.

[81] GEREC concedes that its proposed amendments will necessitate a further adjournment of the trial. It asks that the trial be adjourned by 11 months from the date of this decision, which amounts to an adjournment of over six months from the current trial dates. It argues that such an adjournment does not constitute non-compensable prejudice to Canmec or Rio Tinto, and that in any case, any such prejudice is outweighed by the benefit of having all of GEREC's copyright infringement allegations considered together. As noted above, there is some inherent prejudice in this case associated with a further delay of the trial in an action that has been ongoing for several

years, in which trial has already been adjourned once, and in which trial dates have been fixed for eight months. Nonetheless, I agree with GEREC that any such prejudice has to be viewed in the context of the nature of the amendments, and the timeliness of the request to amend.

[82] With respect to timeliness of the motion, the question is when GEREC knew or ought to have known of the facts giving rise to the allegation.

[83] Canmec's Third Party Claim, dated in April 2022, alleges that Rio Tinto encouraged it to take into account the "*bons et mauvais coups du passé*" (good and bad things from the past, or what the parties referred to as "lessons learned"), and provided Canmec with necessary information to achieve this goal. During the first round of examinations for discovery conducted in the spring of 2023, GEREC asked Canmec to provide any written communication in this regard. Canmec responded in late June or early July 2023 with disclosure of an email (CAN-225) showing that Rio Tinto had shared with Canmec a number of documents that had been requested and discussed during a sharing of "lessons learned" on the Unit 2 pilot project. The document shows the sharing of a folder entitled [TRANSLATION] "Documents transferred to Canmec," and sets out folders of drawings, photos, procedures, PRIEs, civil drawings, and contacts. The approximately 100 documents in that folder were also produced, as documents CAN-226 to CAN-326. These documents include numerous GE drawings and other documents, many of which now appear on Schedule B. Canmec's responses in late June or early July 2023 also included production of other documents showing Rio Tinto shared documents now appearing on Schedule B with Canmec (CAN-101 to CAN-104).

[84] GEREC has therefore known since late June or early July of 2023 that Rio Tinto shared with Canmec a large number of the documents now identified as the GEREC Construction & Installation Works. These documents were disclosed expressly in response to a question seeking details of Canmec's pleading that Rio Tinto had encouraged it to take into account the "lessons learned," and had provided Canmec with necessary information to achieve this goal.

[85] GEREC argues its request to amend is nonetheless timely since it learned information during the second round of discovery, including in answers to undertakings received in March 2024, that confirmed infringement of the GEREC Construction & Installation Works. It submits that prior to this, it did not have sufficient information to allege infringement, and contends that if it had raised infringement allegations upon receipt of the productions in June/July 2023, it would have faced arguments that its request to amend was premature and/or unsubstantiated. It also submits that it was unaware until recently of the extent to which Rio Tinto had shared documents with Canmec.

[86] GEREC points in particular to five Canmec productions received in March 2024 that show Rio Tinto shared GEREC documents with Canmec. The first of these involves the general assembly drawing discussed above. Of the remainder, the Court is only able to identify one document listed on Schedule B that was not already known in June/July 2023 to have been shared with Canmec. Indeed, the second email GEREC points to (CAN-3893) appears to have been previously disclosed as CAN-104. I am therefore unable to conclude that these productions from Canmec provide any material evidence of a wider degree of sharing than was known in June/July 2023.

[87] GEREC also points to other answers to undertakings given in March and April 2024. Many of these I consider irrelevant, and some include reference to documents no longer on GEREC's Schedule B. The contention that these responses indicated for the first time that Canmec used the GEREC Construction & Installation Works in its work on refurbishment is directly contrary to Canmec's own pleading in its Third Party Claim that Rio Tinto had encouraged it to do so. In any case, these responses do not add material information regarding copyright infringement that would justify a nine-month delay in asserting the allegations. Still less do they justify a delay in asserting that Rio Tinto infringed copyright in the GEREC Construction & Installation Works by sharing them with Canmec, a fact that was clearly known to GEREC in June/July 2023.

[88] I also note that the majority of the allegations—that is, the allegations relating to over 200 of the 306 documents on Schedule B—are unsupported by any evidence, recent or otherwise, that Rio Tinto shared the documents with Canmec or that Canmec ever saw them. As discussed above, the evidence before the Court is to the contrary.

[89] I therefore conclude that GEREC's request to add the allegations in respect of the GEREC Construction & Installation Works is not timely. As GEREC notes, lateness alone may not be fatal to a proposed amendment: *Apotex Inc v Pfizer Canada*, 2017 FC 951 at para 63. However, it is a relevant consideration when assessing whether proposed amendments are in the interests of justice. This is particularly so in this case, where the parties have in the interim gone through two discovery motions, extensive further productions, a second round of examinations,

and an earlier motion to amend during which the GEREC Construction & Installation Works were not raised.

[90] It is also relevant that, contrary to GEREC's submissions, the proposed amendments will materially expand the nature of its infringement allegations. At present, the action is effectively directed to Canmec's design of its butterfly valves and embedded parts. GEREC alleges that Canmec infringed copyright in the 33 Works that show GEREC's butterfly valves when it bid on Rio Tinto's RFQ and when it engaged in the refurbishment work that resulted. GEREC's proposed allegations would significantly increase the scope of Canmec's conduct at issue, going to not just the design of its valves, but potentially every aspect of the process of their installation and of the refurbishment project. In addition to massively expanding the potential scope of discovery, this could materially increase the length of trial. I agree with Rio Tinto that GEREC's suggestion that the trial might need to expand from 10 days to 12 days underestimates the potential impact on trial length. While the expansion of a claim, and the resulting lengthening of the trial, is not alone a basis to decline amendments, it is also a relevant factor.

[91] GEREC argues that it could simply commence a separate action in respect of the GEREC Construction & Installation Works, and that it would be more efficient to pursue such claims in the context of this action. Without commenting on GEREC's ability to commence separate proceedings, I cannot accept that this is sufficient to justify derailing the trial of this proceeding at this stage, after the action has focused for over two and a half years on the butterfly valve and the 33 Works.

[92] Considering the circumstances of the case, GEREC has not satisfied me that it is in the interests of justice to allow its proposed amendments in the second category.

(6) Amendments in the third category: Rio Tinto as a defendant

[93] The third category of GEREC's proposed amendments relates to the addition of a direct allegation of infringement against Rio Tinto, adding it as a defendant to the main action. Canmec takes no position on these amendments; Rio Tinto opposes them.

[94] As noted above, the proposed allegations against Rio Tinto include allegations in respect of both the GEREC Designs and the GEREC Construction & Installation Works. My conclusions with respect to the amendments to the definition of the GEREC Designs and the amendments to add allegations of infringement of the GEREC Construction & Installation Works apply to both the allegations against Canmec and those against Rio Tinto. I reiterate that for the majority of documents in both categories, including the vast majority on Schedule A and about two-thirds of those on Schedule B, there is no evidence that Rio Tinto shared the documents with Canmec.

[95] Having concluded that it is not in the interests of justice to permit GEREC to expand the definition of the GEREC Designs, or to add allegations of infringement of the GEREC Construction & Installation Works (as against any party), the remaining amendments in the third category relate to allegations that Rio Tinto itself infringed copyright in the 33 Works by sharing them with Canmec. GEREC alleges, either with specific reference to the GEREC Designs or through reference to the "GEREC Works" (a term that covers both the GEREC Designs and the GEREC Construction & Installation Works), that Rio Tinto infringed copyright in the 33 Works

by providing them to Canmec, using and copying them to set out the requirements in its RFQ, and directing Canmec in relation to its production of infringing drawings and documents.

(a) *Threshold issue*

[96] Rio Tinto alleges that GEREC's proposed claims relating to the RFQ should not be permitted as they are prescribed by the three-year limitation period for civil remedies in subsection 43.1(1) of the *Copyright Act*, RSC 1985, c C-42. I conclude that I need not address this issue given my conclusions regarding the interests of justice.

[97] I also conclude that it is preferable not to address the merits of Rio Tinto's limitation arguments, for two reasons. First, GEREC has indicated that it may bring separate proceedings against Rio Tinto. As the limitation period issue may be relevant in such proceedings if brought, it is better that they be addressed in that context.

[98] Second, the limitation period arguments implicate Rules 76, 77, and 201 of the *Federal Courts Rules*. The parties on this motion did not refer to or make submissions regarding the impact of these rules, beyond Rio Tinto's bare citation of them as rules it relied on. These rules have been considered in a number of cases of this Court, raising nuances regarding their application: see, *e.g.*, *Shell Canada Energy v General MPP Carriers*, 2011 FC 217 at paras 29, 35–38, citing *Canadian Red Cross Society v Air Canada*, 2001 FCT 1012 at paras 8–16; *Biomarin Pharmaceutical Inc v Dr Reddy's Laboratories Ltd*, 2021 FC 402 at paras 18, 43, citing, among others, *Seanix Technologies Inc v Synnes Information Technologies, Inc*, 2005 FC 243 (at para 17) and *Houle v Canada*, 2000 CanLII 17151 (FC), [2000] FCJ No 1197

(at paras 36–37). In the absence of argument on the applicable rules and the cases that have considered them, and given my conclusions on the interests of justice, I will not address these issues further.

(b) *Interests of justice*

[99] Regardless of any limitations issue, GEREC's arguments are not timely. As Rio Tinto notes, its RFQ for the work on Units 3 to 12 attaches as reference drawings four of the 33 Works (plus, as noted above, the general assembly drawing). GEREC has therefore been aware since the issuance of the RFQ in 2019 that Rio Tinto used at least these works in developing the RFQ and disclosed them to others including Canmec. An allegation that Rio Tinto infringed copyright in doing so could have been raised at the outset of this proceeding or, at the very least, much earlier than April 11, 2024, the first occasion on which GEREC proposed adding Rio Tinto as a defendant to the main action.

[100] While GEREC alleges that it learned recently of details that "confirmed further infringement by Rio Tinto," none of the illustrations it gives relate to the copying, sharing or use of the 33 Works. GEREC has not satisfied me that any additional facts have arisen during discovery that either provide new substantiation for its allegations that Rio Tinto infringed the 33 Works or justify its delay in making this allegation.

[101] There is no question that even leaving aside allegations of infringement of the other documents on Schedule A and those on Schedule B, the proposed amendments seeking to add Rio Tinto as a defendant and allege that it infringed the 33 Works would necessitate an

adjournment of the trial. While the parties have conducted discovery on the 33 Works already, this has not included discovery pertaining to allegations that Rio Tinto itself infringed the works. Nor has it included any discovery with respect to Rio Tinto's profits arising from such alleged infringement. As Rio Tinto notes, this latter element would also require it to retain a new expert on financial issues and would also likely add time to the trial.

[102] None of the foregoing would assist the Court in its consideration of the substance of the dispute on its merits, particularly in respect of the central issues related to copyright infringement of the 33 Works in the context of Canmec's work on the refurbishment.

[103] GEREC again asserts that it could commence a new action asserting its infringement claims against Rio Tinto, and that it would be more efficient to allow such allegations to be heard and determined in this proceeding. Even if this were so, I am not convinced that the ability to commence an independent action is itself sufficient to permit amendments to a pleading that will necessitate adjournment of the trial. If that were the case, then any amendment would have to be allowed at any time, regardless of the various factors that have been set out by the Court of Appeal as relevant to the interests of justice.

[104] For over two and a half years, GEREC's claim has alleged that Canmec infringed copyright in the 33 Works. While Canmec has alleged that Rio Tinto is responsible for any such infringement, GEREC has chosen not to assert copyright infringement allegations directly against Rio Tinto. While GEREC may now wish to do so, this is an insufficient basis to justify late amendments that will require the further adjournment of the trial in this matter.

[105] I conclude that in all the circumstances and on balance of the factors, it is not in the interests of justice to allow GEREC to amend its claim to name Rio Tinto has a direct defendant.

(7) Uncontested amendments

[106] GEREC's proposed Second Amended Statement of Claim includes a few amendments of a clarifying nature, namely (i) adding reference to provincial sales tax in paragraph 1(h); (ii) adding the words "or about" to allegations regarding dates in paragraphs 9, 11, and 27; (iii) streamlining paragraphs 31, 34, and 35 through reference to the defined term "Canmec's Infringing Activities"; and (iv) removing the word "likely" from paragraph 36. GEREC is granted leave to make these amendments together with the amendments that were permitted in *GEREC I*, but have not yet been made.

[107] Canmec also consents to certain amendments to paragraph 12, removing the words "at least thirty-three (33)" and adding the words "as set out in Schedule A" to the definition of the GEREC Designs, as well as to the inclusion of Schedule A, provided it only includes the 33 Works. Although these amendments may be unnecessary in light of my conclusions on the contested amendments in the first category, GEREC is granted leave to make them.

[108] There are other amendments that, while uncontested, would only have been worthwhile if leave had been granted to make other amendments. These include specifying Canmec as the party against whom a claim for punitive damages is made in paragraph 1(e); moving the location of the definition of Rio Tinto and the Isle-Maligne Plant in paragraphs 10 and 11. I see no value in making these amendments given my conclusions on the other issues.

B. *Adjournment*

[109] Rule 36 of the *Federal Courts Rules* permits the Court to adjourn a hearing "on such terms as the Court considers just." In considering whether to do so, the Court will assess whether, in all the circumstances, the interests of justice support the hearing being delayed: *Dr Reddy's Laboratories Ltd v Janssen Inc*, 2023 FC 448 [*Dr Reddy's*] at paras 14–15. The Court will consider factors that include the public interest in having proceedings move fairly and with due dispatch; the general principle in Rule 3 of the *Federal Courts Rules*; the length of the proposed adjournment and the reasons for it; the potential for wasting resources; and issues of prejudice or inconvenience to the parties: *Dr Reddy's* at para 16. It also considers the context of fixed-date trial hearings and the importance of maintaining such dates: *Dr Reddy's* at para 17, citing, among others, the Court's *Guidelines*, at paras 48–50.

[110] GEREC asks that, if leave to amend is dismissed, the trial of this matter be adjourned for a date five months from this decision, *i.e.*, to mid-November, 2024. That would effectively amount to an adjournment of approximately three weeks of the current trial dates. It argues that discovery is not yet complete and the parties have not exchanged expert reports, such that the current trial dates will be difficult to achieve.

[111] Even if such a short-term adjournment were possible from the Court's perspective—which is not the case—GEREC's submissions provide an insufficient basis justify it. The October 21, 2024, trial date has been fixed since last October, and scheduling orders have been put in place to ensure the parties can be ready for trial. As noted in the Court's *Guidelines*,

parties are expected to proceed on fixed hearing dates. GEREC has identified no exceptional or unforeseen circumstances that would justify moving the trial dates. I see no reason that the parties should not be in a position to complete remaining pre-trial steps, including notably the preparation of expert reports, in the time between now and trial.

[112] In this regard, the parties at the hearing suggested that the next step in the proceeding, namely the service of initial expert reports as set out in paragraph 7 of the Scheduling Order dated November 14, 2023, could be set for a date in late June, with dates for service of subsequent reports to follow accordingly. The parties are to consult with each other on an expedited basis and are to propose, preferably on consent, a schedule for the remaining steps to trial on or before June 14, 2024.

IV. Conclusion and Costs

[113] For the foregoing reasons, GEREC is not granted leave to make its proposed amendments to the Amended Statement of Claim, save for the minor uncontested amendments referred to above.

[114] The parties agreed that the successful party or parties should have their costs. GEREC suggested that such costs should be fixed at $2,500. Canmec and Rio Tinto suggested that a fixed award of $5,000 was more appropriate given the amount of work involved in these motions, particularly in respect of the various proposed versions of the amendments and the assessment of the lengthy lists of new documents. Canmec and Rio Tinto also submitted that costs should be

made payable forthwith, as GEREC's motion should not have been brought: *Federal Courts Rules*, Rule 401(2).

[115] Considering the nature of the motion, the extent of the records and the various factors set out in Rule 400(3) including, in particular, factors (a), (c), (g), (i), (l), and (o), I conclude that an award of costs of $5,000 is appropriate in the circumstances. GEREC shall pay Canmec its costs fixed in this amount.

[116] With respect to Rio Tinto, I take into consideration that Rio Tinto put forward an affidavit from a lawyer with counsel for Rio Tinto that included some evidence in respect of the SolidWorks File that was unduly argumentative and constituted opinion. Counsel for Rio Tinto fairly conceded that this was so at the hearing and withdrew the paragraphs in question. However, GEREC was nonetheless called upon to conduct a brief cross-examination and make arguments on the issue. In consideration of these factors, I will reduce the award of costs in favour of Rio Tinto to $4,500. In both cases, I conclude that while GEREC was unsuccessful, this is not a case in which the motion "should not have been brought." Costs will be payable by GEREC to Canmec and Rio Tinto, respectively, in any event of the cause.

ORDER IN T-1471-21

THIS COURT ORDERS that

1. The plaintiff is granted leave to make the proposed amendments to paragraphs 1(h), 9, 11 ("or about"), 12 (deleting "at least thirty-three (33)" and adding "as set out in Schedule A"), 27 (first three lines), 31, 34, 35, 36, and Schedule A (including only the 33 Works, as defined herein), together with those amendments permitted by the Court's order of February 7, 2024, but not yet made.
2. The plaintiff's motion is otherwise dismissed.
3. The parties are to consult with each other on an expedited basis and are to propose, preferably on consent, a schedule for the remaining steps to trial on or before **June 14, 2024**.
4. Costs are payable by GEREC to Canmec in the fixed amount of $5,000 and to Rio Tinto in the fixed amount of $4,500, in any event of the cause.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1471-21
STYLE OF CAUSE:	GE RENEWABLE ENERGY CANADA INC v CANMEC INDUSTRIAL INC ET AL
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 4, 2024
ORDER AND REASONS:	MCHAFFIE J.
DATED:	JUNE 11, 2024

APPEARANCES:

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David Turgeon Joanie Lapalme Bianca Pietracupa	FOR THE THIRD PARTY

SOLICITORS OF RECORD:

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