

Federal Court



Cour fédérale

**Date: 20091109**

**Docket: T-737-08**

**Citation: 2009 FC 1142**

**Montreal, Quebec, November 9, 2009**

**In the presence of Madam Justice Tremblay-Lamer**

**BETWEEN:**

**EUROCOPTER,  
simplified joint stock company**

**Plaintiff/  
Defendant by counterclaim**

**and**

**BELL HELICOPTER TEXTRON  
CANADA LIMITED**

**Defendant/  
Plaintiff by counterclaim**

**REASONS FOR ORDER AND ORDER**

[1] Before the Court is a motion for appeal from an order issued on October 8, 2009 by Prothonotary Richard Morneau, ruling on objections raised during the continuation of the examination of the representative of Bell Helicopter Textron Canada Limited (“Bell”), held on August 25, 2009, submitted under subsection 51(1) of the *Federal Courts Rules*, SOR/98-106 (the “*Rules*”). The Prothonotary sustained a good many objections, and Eurocopter is appealing his decision on them before this Court.

## THE FACTS

[2] The relevant facts in this appeal are set out in the reasons for decision of both motions for appeal heard on October 26, 2009 (2009 FC 1141).

1) *Questions 5 to 14 and 17 to 19, regarding the characteristics of the landing gear assemblies manufactured by Bell*

[3] According to Eurocopter, the questions concerning the components of the landing gear assemblies under dispute are factual and relevant and should therefore be allowed. Eurocopter maintains that the answers to those questions would make it possible to understand the operation of the supposedly infringing landing gear assemblies and therefore determine whether there was indeed any infringement. Also, contrary to what the Prothonotary found, these questions do not require interpretation of the patent under dispute, and therefore expert evidence, even though they use expressions similar to those in the patent. Those expressions would be industry terms, and Bell's representative, an engineer, knows them. As for questions 17 to 19, they allegedly seek to establish the usefulness that Bell derives from using a landing gear assembly similar to the one by Eurocopter and would therefore be relevant to the infringement issue. Lastly, Bell apparently answered similar questions during the first examination for discovery (held in June), thereby implicitly not objecting to those questions.

[4] Bell maintains that questions 5 to 10 and 12 to 14 are superfluous because its defence and counterclaim are a satisfactory answer to them. In any case, responding to them would require interpretation of the terms of the patent under dispute, and they would therefore be inappropriate at the examination for discovery stage. The expressions used are apparently not industry terms, and the fact that Bell is represented by an engineer does not establish which questions are appropriate. As for question 11, it apparently seeks to obtain an opinion, and would therefore be inappropriate. Lastly, questions 17 to 19 apparently have no connection with the alleged infringement in this case and would therefore not be relevant. Moreover, Bell rejects Eurocopter's argument that its representative answered similar questions, thus failing to object to the questions at issue in this appeal. An addition, even though Mr. Gardner had answered similar questions, that could not be an admission of their relevance.

[5] I first note that the Prothonotary had not accepted Bell's argument that questions 5 to 10 and 12 to 14 are superfluous, but had instead found that those questions require interpretation of patent '787 and therefore expert evidence. These questions concern the various features and structures of the landing gear modified by Bell. Even though the terminology is similar to what is used in the claims, these questions concern components that the witness has direct knowledge of (*James River Corp. of Virginia v. Hallmark Cards Inc.* (1997), 72 C.P.R. (3d) 157, at page 163). Moreover, Bell's argument is undermined by the fact that, during the examination for discovery on June 11, 2009, Mr. Gardner provided similar information about the original gear, which confirms that he is capable of understanding the meaning of these questions.

[6] Therefore, the Prothonotary committed a glaring error in ascertaining that it was expert evidence.

[7] Lastly, it seems to me that questions 17 to 19, pertaining to the presence of “dampers” and “shock absorbers”, are relevant because their purpose is to confirm that, by adopting the configuration of the gear claimed in patent ‘787, Bell managed to eliminate those devices. These questions therefore enable Eurocopter to confirm the usefulness of the invention described in patent ‘787 and the benefit that Bell derives from that usefulness. The Prothonotary therefore committed a glaring error by sustaining Bell’s objections regarding these questions.

[8] As for question 11, I agree with Bell that it seeks to obtain an opinion and that it is inappropriate.

2) *Questions 24 and 25, regarding the correspondence between Bell and Transport Canada*

[9] Like in the first appeal, Eurocopter maintains that the documents submitted to Transport Canada by Bell are relevant for establishing that the different landing gears produced by Bell operate identically.

[10] Bell also reiterates the arguments it had presented during the first appeal. As such, the documents that it submitted to Transport Canada are allegedly not relevant and these questions too broad and burdensome.

[11] Since the arguments presented are essentially the same as during the first appeal, my finding is as well. The documents sought by Eurocopter are relevant, but given their commercially sensitive nature, they will be provided for consultation by lawyers only.

3) *Questions 26 to 32 and 36, related to the scope of the infringement*

[12] According to Eurocopter, these questions, which seek to determine which landing gear were installed on Bell's helicopters presented at various air shows, are relevant because they seek to establish the scope of the infringement, rather than the profits that Bell would allegedly have derived from them.

[13] According to Bell, these questions do indeed pertain to those profits, and are therefore not relevant at this stage, following the splitting of the proceeding. Scope of infringement is relevant only at the assessment of damages stage.

[14] Both parties are relying on this Court's decision in *Wellcome Foundation Ltd. v. Novopharm Ltd.*, 177 F.T.R. 182, [1999] F.C.J. no. 1743 (Q.L.), in which Justice Lemieux had ruled, at para. 30, that the [translation] "overlap [among the questions asked for determining the scope of the infringement in the context of the liability action and in the context of the reference] is not irregular because Novopharm is currently attempting to obtain the information for a purpose other than the one underlying the reference. [My underlining.]

[15] The difference between the objectives that may be sought by questions regarding scope of infringement at the various stages of the proceedings was explained by Justice Reed, whose words Justice Lemieux adopted in *Geo Vann Inc. v. N.L. Industries, Inc.*, 4 C.P.R. (3d) 19, [1985] F.C.J. no. 247 (Q.L.). Justice Reed had noted that:

the phrase “scope of infringement” can serve to refer to two different aspects of an alleged infringement (one that I will call the quantitative scope and, the other, the qualitative scope). Scope of infringement in the quantitative sense is part of the assessment of damages, but scope of infringement in the qualitative sense (i.e. that which is an infringement in substance and not literally, the question of whether one or more but not all applications are violated) does indeed fit completely into determining the infringement in this case.

[16] I am of the opinion that the questions at issue pertain to the substance of the infringement because Bell alleges that the original gear was only experimental. Thus, these questions seek to show that the landing gear was used for many other things than just experimentation and, therefore, are relevant to the scope of the infringement.

[17] The Prothonotary committed a glaring error in accepting Bell’s argument that these questions were seeking to calculate the profits made by Bell.

4) *Questions 40 to 60 and 67, related to the invalidity of patent ‘787*

[18] Like with the first appeal, I am of the opinion that Eurocopter is entitled to obtain clarifications on the aspects of prior art on which Bell is basing its allegations of invalidity. It is

exactly the type of information that one party is entitled to obtain: see *Dek-Block Ontario Ltd. v. Béton Bolduc (1982) Inc.*, (1998), 81 C.P.R. (3d) 232, [1998] F.C.J. no. 680 (Q.L.).

[19] As for question 67, Bell cannot plead irrelevance of information about the retractable landing gear assemblies for objecting to this question because it specifically seeks to determine whether or not a landing gear assembly is retractable. I find that the Prothonotary's decision to sustain the objections to these questions is glaringly flawed.

## **CONCLUSION**

[20] For these reasons, the appeal is allowed except for question 11, with costs, before this Court and before the Prothonotary.

**ORDER**

**THE COURT ORDERS that:**

1. The motion for appeal of October 8, 2009 from Eurocopter be granted except for question 11;
2. Bell will provide, within five (5) days,
  - i. The answers and undertakings referred to in questions 5 to 10, 12 to 14, 17 to 19, 26 to 32, 36, 40 to 60 and 67;
  - ii. The answers and undertakings referred to in questions 24 and 25 for consultation by lawyers only;
3. Bell will provide Eurocopter with all the answers to the questions and undertakings made during the examination of its representative, Mr. Robert Gardner, on June 10, 11 and 12, 2009, and on August 25, 2009, within five days of the order;
4. The costs of this motion and of the motion before the Prothonotary are awarded to the Plaintiff Eurocopter.

“Danièle Tremblay-Lamer”

---

Judge



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

**DOCKET:** T-737-08

**STYLE OF CAUSE:** EUROCOPTER v. BELL HELICOPTER TEXTRON  
CANADA LIMITED

**PLACE OF HEARING:** Montreal, Quebec

**DATE OF HEARING:** November 4, 2009

**REASONS FOR ORDER  
AND ORDER:** JUSTICE TREMBLAY-LAMER

**DATE OF REASONS:** November 9, 2009

**APPEARANCES:**

Marek Nitoslawski  
Chloé Latulippe

FOR THE PLAINTIFF/  
DEFENDANT BY COUNTERCLAIM

Daniel Artola  
Louis Gratton

FOR THE DEFENDANT/  
PLAINTIFF BY COUNTERCLAIM

**SOLICITORS OF RECORD:**

Fasken Martineau DuMoulin LLP  
Montreal, Quebec

FOR THE PLAINTIFF/  
DEFENDANT BY COUNTERCLAIM

Ogilvy Renault  
Montreal, Quebec

FOR THE DEFENDANT/  
PLAINTIFF BY COUNTERCLAIM