

Federal Court



Cour fédérale

Date: 20121025

Docket: T-2051-10

Citation: 2012 FC 754

Ottawa, Ontario, October 25, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

**THE DOW CHEMICAL COMPANY,
DOW GLOBAL TECHNOLOGIES INC. and
DOW CHEMICAL CANADA ULC**

Plaintiffs

and

NOVA CHEMICALS CORPORATION

Defendant

REASONS FOR ORDER AND ORDER

[1] This is a motion by the defendant for attendance at tests and experiments that the plaintiffs propose to conduct in support of their action. The plaintiffs' action is scheduled for January 2013 and alleges that the defendant infringed their Canadian Patent No. 2,160,705 (the '705 Patent).

[2] In its amended notice of motion, the defendant sought the following:

1. An order that the plaintiffs (Dow) shall permit experts retained by the defendant (Nova) to attend the testing and experiments that Dow intends to rely on at trial;
2. An order that Dow provide Nova with samples of all fractions it obtains from its pTREF experiments to be relied on at trial in quantities sufficient for Nova's experts to conduct their own comparative analysis of the experiments performed by Dow;
3. An order that Dow provide Nova with samples of half the product made during each experiment Dow conducts at its mini-plant facilities in Terneuzen, The Netherlands, to be relied on at trial; and
4. An order granting Nova leave to file the reply affidavits of Dr. Francis M. Mirabella, Dr. Charles Stanley Speed and Gary F. Matz, all sworn on December 7, 2011, in support of this motion.
5. Nova's costs of this motion; and
6. Such further and other relief as this Honourable Court may deem just.

Background

[3] This motion concerns an action by the plaintiffs alleging that some of the defendant's SURPASS and other polyethylene products infringe the plaintiffs' '705 Patent. The defendant denies infringement and is counterclaiming for a declaration that the '705 Patent is invalid and for other relief. The statement of claim was filed on December 9, 2010 and the action is scheduled to be heard in January 2013. Since February 16, 2011, the action has proceeded under case management with Prothonotary Milczynski serving as the Case Management Judge.

[4] This particular motion pertains to the plaintiffs' testing for infringement of product samples and a sample of polymer catalyst provided to them by the defendant in September 2011. The defendant stated that it provided these samples on the condition that its independent expert witness would be permitted to attend and monitor the tests. The plaintiffs plan to conduct two separate experiments with the samples.

[5] First, to show component (B) of the patent suit claim, the plaintiffs plan to fractionate the defendant's polymers using a procedure known as preparatory temperature rising elution fractionation (referred to as pTREF or prep-TREF) and to perform tensile and other tests on the fractions produced. The plaintiffs propose to conduct these tests at their facilities in Freeport, Texas.

[6] Second, to show component (A) of the patent suit claim, the plaintiffs plan to manufacture replicas of a component of the defendant's impugned polymers using the catalyst sample. This is necessary as the defendant has advised that samples of the polymer made in its first reactor are not available. The plaintiffs plan to use the replicas in tests to prove that a similar component in the defendant's products has certain claimed properties. The plaintiffs propose to conduct this work at their facilities in Terneuzen, The Netherlands.

[7] Based on safety and privacy concerns at their facilities, the plaintiffs refuse to allow the defendant's independent expert witnesses to attend the testing and experimentation. The plaintiffs have instead proposed to provide the defendant with a video of the experiments and information such as the raw data generated during the procedure. For the reproduction work in Terneuzen, the plaintiffs have proposed to provide a protocol, process data and samples of the products made.

[8] On October 4, 2011, the parties held a case management conference with the Case Management Judge to discuss the issue of admissibility of the testing. At this conference, the Case Management Judge directed the defendant to bring this motion before a Judge.

Issues

[9] The defendant submits the following point at issue:

Whether experts retained by the defendant should be permitted to attend the tests and experiments that the plaintiffs intend to rely on at trial.

[10] I would rephrase the issues as follows:

1. Should the defendant be granted leave to file reply affidavits pursuant to Rule 312?
2. Should experts retained by the defendant be permitted to attend tests and experiments that the plaintiffs intend to rely on at trial?

Defendant's Written Submissions

[11] The defendant submits that it provided product samples and a quantity of polymer catalyst on the basis that its independent expert witnesses would be permitted to attend and monitor the tests. The defendant submits that it is the practice of this Court that both parties attend all tests and experiments that are relied on at trial. This practice is intended to ensure fairness between the parties and to ensure that the Court has evidence from both sides about the tests that are conducted. It also ensures that the evidence before the Court is complete and meaningful.

[12] The defendant submits that excluding its experts will prejudice its ability to adequately monitor the plaintiffs' experimental work and fully respond to the plaintiffs' experimental evidence at trial. The defendant has had a pTREF expert review the plaintiffs' pTREF protocol. This expert opined that a video link would not suffice to determine whether the procedure is properly carried out and he must therefore attend in person. The defendant also notes that the plaintiffs have changed their position on the video stream; rather than providing a live video stream, the plaintiffs are now proposing to only provide a recorded video of the pTREF operations. This amplifies the importance of having its expert in attendance to inspect the equipment and observe the experiments.

[13] The defendant also notes that the plaintiffs did not originally provide any protocol for the planned reproduction work in Terneuzen. In their responding and sur-reply evidence, the plaintiffs provided a list of information that they intend to provide to the defendant. The defendant therefore retained an expert, Dr. Charles Stanley Speed, to review this proposed information. In his affidavit, Dr. Speed opined that this information was inadequate and an expert observer would need to be personally present to properly understand and comment on the experiments. In addition, to obtain a truly representative sample of a reproduction made in the mini-plant, the defendant would need a sample collected at appropriate intervals from the experiments, rather than a representative sample of only a portion of each experiment. The defendant also notes that the plaintiffs have not provided detailed designs of the equipment or information on the planned operating conditions of the Terneuzen mini-plant.

[14] The defendant notes that in the previous U.S. litigation, the plaintiffs conducted private testing of the defendant's products and refused to disclose the associated test results to the defendant for reason of privilege. This heightens the need for the defendant's experts to attend here.

[15] The defendant submits that the plaintiffs' privacy concerns are unwarranted as the existing protective order covers independent experts. The defendant submits that the plaintiffs have previously given outside experts access to their pTREF facilities under the terms of a confidentiality agreement. The plaintiffs' own witnesses testified on cross-examination that the plaintiffs have policies and procedures in place for visitation of their facilities by outside people.

[16] Further, the defendant notes that only the plaintiffs have the specialized equipment with the processing capacity necessary to complete the proposed pTREF work before the trial date. It will take the plaintiffs six months to conduct the pTREF testing. On the defendant's equipment, it will take four times as long to replicate these tests. As such, the defendant would be unable to replicate the plaintiffs' tests before trial and would thereby be unable to adequately contest the plaintiffs' results.

[17] In the alternative, there are at least two independent, third-party facilities available where the plaintiffs could conduct the pTREF experiments without exposing their laboratory. Although one of these facilities has recently advised that it does not wish to be involved in the litigation, the experiments can still be carried out at the remaining facility.

[18] The defendant also submits that the plaintiffs' safety concerns are unwarranted. Any of the defendant's experts in attendance at either test will be very familiar with the necessary safety precautions that are typical of chemical plant operations. These concerns therefore do not justify excluding the defendant's experts.

[19] Finally, the defendant requests under Rule 312 of the *Federal Court Rules*, SOR/98-106, that leave be granted for it to file the reply affidavits of Dr. Francis M. Mirabella, Dr. Charles Stanley Speed and Gary F. Matz, all sworn on December 7, 2011. The defendant submits that these affidavits address new matters raised in the plaintiffs' responding evidence and are directly relevant to the issues on this motion.

[20] For example, Dr. Mirabella's evidence addresses a previously undisclosed trailer video, the plaintiffs' change in position from providing a live video link to merely providing a video recording of the pTREF operations and the recently revealed fact that there is no automated sample collection in the plaintiffs' pTREF operations. Dr. Speed's evidence addresses the information that the plaintiffs propose to provide on its planned operations at Terneuzen. Prior to filing the responding evidence, the plaintiffs had not provided any information on these operations that could be meaningfully commented on. The affidavit of Gary Matz replies to the allegation in the plaintiffs' responding evidence that the defendant had not complained about the sufficiency of information on the plaintiffs' catalyst synthesis in the U.S. proceedings.

[21] The defendant submits that the filing of these affidavits will not cause any prejudice to the plaintiffs who cross-examined all three individuals and provided sur-reply evidence in response.

Conversely, the defendant would be seriously prejudiced if left without a response to the plaintiffs' new evidence.

Plaintiffs' Written Submissions

[22] The plaintiffs submit that the equipment used for this trial testing and the methodologies followed are well known to those skilled in the art and are commonly used in the industry.

[23] The plaintiffs submit that they are prepared to provide the defendant with detailed protocols, samples, video, process conditions and analytical data to fully outline the trial testing and the nature of the products made by such testing. They are also willing to have technicians involved in the testing attend at trial to answer any questions on how the protocols were followed. This information is more than sufficient to understand what steps will be followed in the testing and to evaluate the results. Attendance at the experiments will not provide any additional information. The plaintiffs highlight that the video it has committed to providing will provide visual information on the specific equipment and its arrangement and the manner in which the plaintiffs handle the equipment and samples at various stages of testing.

[24] The plaintiffs submit that as the trial testing is expected to span over four and a half months, the defendant's presence at the plaintiffs' laboratories during trial testing would disrupt the regular functioning of these laboratories and require the plaintiffs to cease operation of all research and development (R&D) projects in those laboratories during this time. This would highly prejudice the plaintiffs' business.

[25] The plaintiffs submit that the trial testing procedures are standard procedures that have been used by the plaintiffs on numerous projects for several years. There is therefore no basis to suggest that contamination or errors will occur. Further, the analytical data and samples that the plaintiffs are willing to provide to the defendant will allow it to determine whether any such contamination or errors did occur. In addition, the defendant has access to its own SURPASS products and can therefore conduct its own tests to evaluate the plaintiffs' results. In support, the plaintiffs highlight the defendant's own admission that it intends to conduct its own tests.

[26] Further, the plaintiffs submit that the parties have already been involved in litigation in the U.S. regarding the same subject matter as is at issue in this action. In the U.S. action, the plaintiffs were awarded over \$61 million in damages. The same procedures and equipment were used for testing in the U.S. action. The plaintiffs highlight that although the defendant's experts critiqued the substance of the testing in the U.S. action, the defendant did not make any complaints as to the sufficiency of the information provided on the protocols and procedures followed there.

[27] The plaintiffs submit that there is no suitable alternative site for them to conduct the pTREF and polymer reproduction work. Equipment available at third party facilities is much smaller than the pTREF apparatus at the plaintiffs' Freeport facility. Similarly, the continuous solution mini-plant in Terneuzen has the capacity to produce a sufficient amount of polymer to conduct a variety of polymer analytical and physical testing.

[28] The plaintiffs submit that the defendant's request for attendance is invasive as it presents a significant security and safety concern and compromises the plaintiffs' competitive position in the

polyolefin industry. The plaintiffs highlight the non-portability of their pTREF apparatus. In addition, access to this apparatus entails walking through a significant portion of the plaintiffs' laboratory where confidential projects, unrelated to this case, are underway. The plaintiffs submit that it would entail significant mitigative efforts on their part to cease operation of equipment used in other projects, conceal them and provide an escort to the defendant or their expert representative(s) during testing. This is exacerbated by the fact that different phases of testing would be conducted in different R&D labs within the Freeport Polymer Centre. As such, any observer would require uninhibited access to several locations, further reducing the plaintiffs' R&D and analytical functions associated with other unrelated projects.

[29] The plaintiffs also highlight that the defendant's expert, Dr. Mirabella, is not truly independent. The plaintiffs note that Dr. Mirabella has consulted exclusively for the defendant since early 2009. Further, this expert admitted on cross-examination that he had not identified any deficiencies in the information provided and that he had not considered the use of the video and whether this approach would be sufficient.

[30] The plaintiffs submit that the *Federal Court Rules* do not require that a party give notice of testing or experiments it intends to rely on at trial, nor that an opposing party must be permitted to attend such testing or experimentation. Rather, the Court has mandated notice and attendance at testing simply as a way to ensure that each party has sufficient knowledge to allow cross-examination of the results.

[31] The plaintiffs submit that for the defendant to be entitled to attend their premises, it would have to satisfy Rule 249 of the *Federal Court Rules*, which provides that an inspection may only be ordered where “the Court is satisfied that it is necessary or expedient for the purpose of obtaining information or evidence in full”. The plaintiffs cite *PJ Wallbank Manufacturing Co v Kuhlman Corp*, (FCA) [1981] 1 FC 645, [1980] FCJ No 190, a decision on the predecessor of Rule 249, where they submitted a request to inspect a party’s premises which was rejected because it involved a serious intrusion on the opposing party’s premises, posed a danger of irreparable harm from the discovery of the opposing party’s know-how to a business competitor and was not the only means by which it could be ascertained whether there was actual infringement. These are similar to the plaintiffs’ concerns in this case.

[32] The plaintiffs also highlight that the defendant filed no evidence on the testing at the Terneuzen facility with its motion. This issue should therefore fail outright for lack of evidence. The two affidavits that the defendant has since filed (from Gary Matz and Dr. Speed) were filed contrary to the general principles of reply evidence and should thus be excluded.

[33] Finally, the plaintiffs submit that the position taken by the defendant on this motion is more about delaying the proceeding than based on any necessity for further information. The plaintiffs highlight that the defendant has not established any necessity for its attendance at the plaintiffs’ premises during testing. Attendance of the defendant’s experts would be highly invasive and disruptive to the plaintiffs. It is also not proportional to the concerns raised and would be more extensive than the attendance of the plaintiffs’ own experts directing the experiments. As such, the plaintiffs request that this motion be dismissed.

Analysis and Decision

[34] Issue 1

Should the defendant be granted leave to file reply affidavits pursuant to Rule 312?

Rule 312 of the *Federal Court Rules* governs whether leave should be granted to file additional affidavits. In this case, the defendant seeks leave to file affidavits from Gary F. Matz, Dr. Francis M. Mirabella and Dr. Charles Stanley Speed, all sworn on December 7, 2011.

[35] The test for determining whether reply evidence may be filed has four components (see *Merck-Frosst - Schering Pharma GP v Canada (Minister of Health)*, 2009 FC 914, [2009] FCJ No 1092 at paragraph 10; and *Pfizer Canada Inc v Canada (Minister of Health)*, 2007 FC 506, [2007] FCJ No 681 at paragraph 7):

1. whether the reply evidence serves the interests of justice;
2. whether the reply evidence assists the Court in making its determination on the merits;
3. whether granting the motion will cause substantial or serious prejudice to the other side; and
4. whether the reply evidence was available and/or could not be anticipated as being relevant at an earlier date.

[36] The fourth component has two parts. First, the proposed evidence must be properly responsive to the other party's evidence. As Mr. Justice Russel Zinn explained in *Merck-Frosst - Schering Pharma* above, at paragraph 23:

[...] It is responsive if it is not a mere statement of counter-opinion but provides evidence that critiques, rebuts, challenges, refutes, or disproves the opposite party's evidence. It is not responsive if it merely repeats or reinforces evidence that the party initially filed.
[...]

[37] Second, evidence that could earlier have been anticipated as relevant is not proper reply evidence as the party proposing to file it is splitting his case (see *Merck-Frosst - Schering Pharma* above, at paragraph 25).

[38] More recently, Mr. Justice David Near summarized the case law on Rule 312 as follows (see *Canada (Attorney General) v United States Steel Corp*, 2011 FC 742, [2011] FCJ No 930 at paragraph 16):

[...]A party must always put its best case forward at the first opportunity. A party will be granted leave pursuant to Rule 312 where the evidence to be adduced will serve the interests of justice, assist the Court, not cause substantial or serious prejudice to the other side, and was not available prior to the cross-examination of the opponent's affidavits (*Atlantic Engraving Ltd v Lapointe Rosenstein*, 2002 FCA 503, 299 NR 244 at paras 8 and 9). Additionally, the party seeking to introduce new evidence must show that its introduction will not unduly delay the proceeding (*Janssen-Ortho Inc v Apotex Inc*, 2010 FC 81 at para 33).

[39] Further, judges should exercise their discretion under Rule 312 in a flexible manner (see *United States Steel Corp* above, at paragraph 33).

[40] In this case, there are three contentious affidavits. It is notable that all three witnesses were cross-examined by the plaintiffs between December 15, 2011 and January 10, 2012.

[41] The first affidavit was sworn by Gary F. Matz, the defendant's senior intellectual property counsel. Mr. Matz briefly replied to the comment made by one of the plaintiffs' experts that in the U.S. proceedings, the defendant had not complained about the sufficiency of information provided to it on the plaintiffs' catalyst synthesis. This evidence essentially expands on the defendant's submission in their original written representations (filed on November 18, 2011) that the plaintiffs had conducted testing without the defendant having an opportunity to monitor them and without seeing the results. I find that this affidavit both serves the interests of justice and assists the Court in making a determination on the merits. As it merely rebuts the plaintiffs' evidence, I do not find that it will cause substantial or serious prejudice to them.

[42] The second affidavit was sworn by Dr. Francis M. Mirabella, the defendant's independent expert. Dr. Mirabella commented on: the trailer video and description of equipment included in one of the affidavits filed by the plaintiffs; the plaintiffs' change in position from providing a live video link to a video recording of portions of the experiments; the sample collection mechanism of the pTREF apparatus; and the plaintiffs' assertion that the attendance of the defendant's witnesses would be invasive.

[43] Similar to Mr. Matz's comments, I find that these comments critique, rebut and challenge the plaintiffs' evidence. They differ from those comments made by Dr. Mirabella in his earlier affidavit and pertain to matters that could not have been anticipated as being relevant before the plaintiffs filed their evidence. This is particularly true with respect to the trailer video, proposed video link and sample collection mechanism; information that was not provided until the plaintiffs

filed their evidence. I find that Dr. Mirabella's comments serve the interests of justice and assist this Court in making its determination on the merits.

[44] The third affidavit was sworn by Dr. Charles Stanley Speed, a retired ExxonMobil scientist retained by the defendant. Dr. Speed responded to matters raised in the plaintiffs' affidavits on the planned Terneuzen experiments. The defendant submits that prior to filing their affidavits, the plaintiffs had not provided any details on the information they proposed to provide for this work that the defendant could meaningfully comment on. In his affidavit, Dr. Speed rebutted the assertions made by the plaintiffs' experts that the information they planned to provide was sufficient to properly understand and comment on the experiments. Dr. Speed highlighted various observations that would not be captured in the information that the plaintiffs proposed to provide, thereby necessitating first hand observation. I find that as the plaintiffs had not previously provided this information, these comments could not have been made at an earlier date.

[45] In summary, I find that leave should be granted to file the defendant's three reply affidavits. This evidence will assist the Court in making its determination on the merits. As the affidavits all comment on evidence filed by the plaintiffs and as the plaintiffs have had the opportunity to cross-examine all three individuals, I do not find that granting leave will cause substantial or serious prejudice to the plaintiffs. Rather, the filing of this evidence will serve the interests of justice and should therefore be allowed.

[46] **Issue 2**

Should experts retained by the defendant be permitted to attend the tests and experiments that the plaintiffs intend to rely on at trial?

The defendant submits that it is the practice of this Court not to accept a party's evidence of tests and experiments where notice and an opportunity to attend have not been granted to the opposing party. In support, the defendant cites *Halford v Seed Hawk Inc*, 2001 FCT 1154, [2001] FCJ No 1631. In *Halford* above, one of the issues raised by the defendants pertained to an affidavit filed by the plaintiff that included paragraphs regarding an experiment conducted in the absence of the defendants' representatives (at paragraphs 8 and 10). Mr. Justice Denis Pelletier cited the older case of *Omark Industries (1960) Ltd v Gouger Saw Chain Co* [1965] 1 ExCR 457, 45 CPR 169, which states at paragraph 204:

There is no question that the practice in this Court seems to have been that evidence of tests and experiments conducted *pendente lite* without notice being given to the other side and an opportunity to attend should not be considered and I believe that this is a salutary rule. I might also add that in any event tests and experiments conducted even before the trial in the presence of the other party are much more probative than if conducted *ex parte*.

[47] Based on this jurisprudence, Justice Pelletier held that the tests conducted in the absence of the defendants' representatives were inadmissible (see *Halford* above, at paragraph 37).

[48] Similarly, again relying on *Omark* above, Mr. Justice W. Andrew MacKay ruled in *Merck & Co v Apotex Inc*, 88 FTR 260, [1994] FCJ No 1898 that testing conducted solely by one party should not be admitted. Justice MacKay explained (at paragraph 127):

I did so on the general principles evolved in the practice of this Court in relation to testing, whether before or during trial, which are

intended to ensure fairness as between the parties and to ensure that the Court has evidence from both sides about tests conducted.

[49] Conversely, the plaintiffs submit that *Merck & Co v Canada (Minister of Health)*, 2003 FC 1242, [2003] FCJ No 1565, stands for the proposition that notice and attendance at testing is simply mandated as a way to ensure that each party has sufficient knowledge to allow cross-examination of the results. However, this characterization is not fully representative of the ruling in *Merck* (2003) above. In *Merck* (2003) above, Prothonotary Mireille Tabib first noted that the finding of inadmissibility of experiments conducted by a party who did not invite the other side to attend and observe is a matter of the practice of the Court, not a rule of evidence (at paragraph 8). Prothonotary Tabib explained that this practice was (at paragraph 8):

[...] designed to ensure both fairness between the parties and that the evidence before the Court be complete and meaningful by avoiding the introduction of test results which the opposing party cannot reasonably attack by way of cross-examination because of insufficient knowledge as to the manner and circumstances in which the experimentation was conducted.

[50] Prothonotary Tabib then explained that there is a fundamental difference between actions, where full discovery is available and the summary procedure contemplated in the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133. Prothonotary Tabib rejected the application of this practice of the Court to the summary procedures (see *Merck* (2003) above, at paragraph 12). Conversely, for actions, Prothonotary Tabib explained as follows (see *Merck* (2003) above, at paragraph 10):

Where full discovery is available, it is designed to allow the parties to fully explore each other's case, to ensure that neither is taken by surprise at trial and that they have an opportunity to present complete evidence at trial. A practice of conducting tests in camera for

presentation at trial is indeed to be discouraged as defeating the purposes of discovery. [...]

[51] As such, I find it is the practice of this Court to allow attendance of the opposing party at testing conducted in support of the action, the results of which are planned to be used at trial.

[52] The plaintiffs also raise other arguments to support their position, based on: use of standard equipment and methodology; no alternative facility; provision of extensive information to the defendant; safety concerns; and privacy concerns.

[53] The first two arguments conflict because if the equipment and methodology are indeed standard, there would arguably be an alternative facility. Further, although the defendant submits that there is one possible alternative facility, the capacity of the plaintiffs' facility coupled with the trial scheduling suggests that it remains the most appropriate testing location.

[54] As to the provision of information, the defendant has filed extensive affidavit evidence that speaks to the inadequacy of this information to fully understand the testing and experimentation. I find this evidence persuasive.

[55] With regards to the safety concerns raised by the plaintiffs, I also agree with the defendant that these concerns will be well understood by experts appointed to oversee the testing and experimentation that have extensive experience working in laboratory settings. Further, assuming that the plaintiffs operate their facilities with appropriate due diligence, they will require any visitors to participate in health and safety training before being permitted to enter their premises. Any safety

concerns unique to the plaintiffs' facility would likely be discussed at that time. I therefore do not find that the plaintiffs' safety concerns are warranted.

[56] I also do not find that the plaintiffs' privacy concerns are warranted. As stated by the defendant, all of its experts are covered under the protective order issued by this Court. In addition, visitors to the plaintiffs' facilities will likely only be granted access under the terms of a confidentiality agreement.

[57] Finally, I do not agree with the plaintiffs that the defendant would have to satisfy Rule 249 of the *Federal Court Rules* in order to be entitled to attend their premises. In support of their position, the plaintiffs relied on *PJ Wallbank* above. However, that case is distinguishable from the one at bar. In *PJ Wallbank* above, the respondent sought to conduct an inspection of the appellant's premises and its methods and machines to ascertain if infringement was being committed. This intention differs from the case at bar where the defendant seeks to have its experts in attendance to oversee the testing and experimentation that the plaintiffs plan to rely on at trial. I do not find this falls within the scope of an "inspection" being made of the facilities, as provided under Rule 249.

[58] In summary, I find that it is a practice of this Court not to accept a party's evidence of tests and experiments where notice and an opportunity to attend have not been given to the opposing party. I do not find that the plaintiffs have raised sufficient arguments to counter this general practice. Therefore, the relief sought by the defendant in paragraphs 1 and 4 of its amended notice of motion should be granted.

[59] In paragraphs 2 and 3 of its amended notice of motion, the defendant also requests samples of all fractions obtained by Dow and samples of half the product made by Dow at its mini-plant in Terneuzen, The Netherlands. I see no reason why Dow should not provide these samples mentioned in paragraph 3. However, I would note the claim made in oral argument by Dow's counsel that the samples sought in paragraph 2 of the relief in the amended notice of motion cannot be provided as it is impossible to provide these samples. This issue was not addressed in any great detail before me. Consequently, I will not make a decision on this relief at this time, but will retain jurisdiction to deal with it if either of the parties believe that it needs be dealt with. In such a case, I would also entertain further submissions from the parties.

[60] The relief sought by the defendant in paragraph 3 is granted. The relief sought by paragraph 2 will be dealt with as outlined in paragraph 59.

[61] The defendant shall have its costs of this motion.

ORDER

THIS COURT’S ORDER is that:

1. The relief sought by the defendant in paragraphs 1, 3 and 4 of its amended motion is granted.
2. The relief sought by the defendant in paragraph 2 of the amended motion is to be dealt with as outlined in paragraph 59 of these reasons.
3. The defendant shall have the costs of this motion.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions*Federal Courts Rules, SOR/98-106*

249. (1) On motion, where the Court is satisfied that it is necessary or expedient for the purpose of obtaining information or evidence in full, the Court may order, in respect of any property that is the subject-matter of an action or as to which a question may arise therein, that

- (a) a sample be taken of the property;
- (b) an inspection be made of the property; or
- (c) an experiment be tried on or with the property.

...

312. With leave of the Court, a party may

- (a) file affidavits additional to those provided for in rules 306 and 307;
- (b) conduct cross-examinations on affidavits additional to those provided for in rule 308; or
- (c) file a supplementary record.

249. (1) La Cour peut, sur requête, si elle l'estime nécessaire ou opportun pour obtenir des renseignements complets ou une preuve complète, ordonner à l'égard des biens qui font l'objet de l'action ou au sujet desquels une question peut y être soulevée :

- a) que des échantillons de ces biens soient prélevés;
- b) que l'examen de ces biens soit effectué;
- c) que des expériences soient effectuées sur ces biens ou à l'aide de ceux-ci.

...

312. Une partie peut, avec l'autorisation de la Cour :

- a) déposer des affidavits complémentaires en plus de ceux visés aux règles 306 et 307;
- b) effectuer des contre-interrogatoires au sujet des affidavits en plus de ceux visés à la règle 308;
- c) déposer un dossier complémentaire.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-2051-10

STYLE OF CAUSE: THE DOW CHEMICAL COMPANY,
DOW GLOBAL TECHNOLOGIES INC. and
DOW CHEMICAL CANADA ULC

- and -

NOVA CHEMICALS CORPORATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 24, 2012

**REASONS FOR ORDER
AND ORDER OF:** O'KEEFE J.

DATED: October 25, 2012

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