



TROUBLE IN THE SKIES: THE FEDERAL COURT AWARDS PUNITIVE DAMAGES IN A PATENT INFRINGEMENT CASE

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When does a patent infringer's behaviour rise to the level that it should be sanctioned with punitive damages? How useful does a patent application for a mechanical invention have to be at the time of its filing? These were among some of the questions the Federal Court of Canada had to grapple with in *Eurocopter v. Bell Helicopter Textron Canada Limitée* 2012 FC 113 which was rendered on January 30, 2012.

This case is important to patent litigators because it appears to be the only case in Canada where punitive damages have been awarded for patent infringement. The case will be of interest to patent practitioners as well because it establishes that the doctrine of sound prediction can be used to invalidate relatively simple mechanical inventions or their preferred embodiments.

Facts

Eurocopter and Bell Helicopter are the main players in the helicopter manufacturing industry. In 1997, Eurocopter filed for a patent for an improved landing gear (referred to in the judgment as the "Moustache" landing gear). The novel and inventive aspect of the patent is a front cross-piece, which has curved areas that connect to the front of the two skids in contact with the ground. This front cross-piece can be angled either towards the front of the helicopter, or towards its rear. The Moustache gear is described as providing certain advantages. These advantages play a pivotal role in the Court's reasoning, as discussed below. Eurocopter's Canadian patent issued on December 31, 2002 as patent number 2,207,787.

In the early 2000s, Bell began developing a new model helicopter, the "model 429". The original landing gear of the 429 was called the "Legacy" gear. Bell used the Legacy gear for activities related to the 429 such as manufacturing, regulatory

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testing, and sales from March, 2005 until Eurocopter instituted their action before the Federal Court. Almost immediately after being served with the lawsuit, Bell began working on a new landing gear, referred to as the “Production” gear, which is the landing gear used on the 429 today.

Eurocopter alleged that the Legacy and Production landing gears infringe the claims of the ‘787 patent. They further allege that Bell wilfully and maliciously infringed their patent rights, and that Bell is liable for \$25,000,000 in punitive damages.

Bell countered that neither the Legacy or Production landing gears infringe the claims of the ‘787 patent, and that their behaviour benefits from certain legal exemptions to infringement. They further argue that the ‘787 patent is invalid for, among other reasons, lack of utility.

Judgement

Justice Martineau held that the Production gear did not infringe any of the claims of the ‘787 patent, but that the Legacy gear did infringe. The Court also found Bell liable for punitive damages.

Having come to this determination regarding the Legacy gear, the Court needed to assess the arguments raised by Bell that the ‘787 patent is invalid.

Validity of the ‘787 Patent

Among the usual allegations of anticipation and obviousness raised in most patent infringement suits, Bell also argued that the ‘787 patent was invalid because it lacked utility. Canadian patent law requires that at the filing date of the patent application, there must be either a demonstration of utility of the invention, or there must be a sound prediction of utility.

Attacks against mechanical patents for lacking utility are extremely rare in Canada, and this is likely the only mechanical patent case where such an attack was considered. The law on utility in Canada, and the doctrine of sound prediction, has been developed from cases involving patents relating to more “abstract” subject matter, such as those relating to pharmaceutical inventions or chemical compositions.

After considering the patent specification, Justice Martineau concluded that the promised utility of the ‘787 patent is to significantly reduce the drawbacks of the prior art, specifically: (a) elevated acceleration factors upon landing (load factors); (b) difficult frequency adaptation with respect to ground resonance; and (c) high landing gear weight.

In reviewing the law as to utility, Justice Martineau conceded that it is very easy in most cases to meet the utility criteria:

In Canada, a low standard for utility has been established. It is sufficient that it be new, better, cheaper, or afford a choice; it can include an advantage or a disadvantage that is avoided [...]. However, one must still ask, as the English Court of Appeal did in *Lane-Fox v Kensington* [1892], 9 RPC 413 at 417 “useful for what?”

Canadian case law has usually found that where the utility of an invention is self-evident to the skilled person in the art, and where no particular promise has been made in regard to any advantages of the invention, the self-evident utility is sufficient to meet the required standard. For most mechanical inventions, the utility inquiry ends upon determining the self-evident utility of the invention.

This could have also been the case with the ‘787 patent. In all probability, the Court would likely have considered the Moustache landing gear to have the “self-evident” utility of being an improved landing gear which helps a helicopter to land by supporting its weight and absorbing or deflecting the impact forces of landing. However, the ‘787 patent promised that its Moustache landing gear provided the specific advantage of overcoming the previously-mentioned disadvantages associated with prior art gears. This now became the promised utility of the ‘787 patent, and the Court was thus required to address Bell’s arguments that the utility of all embodiments of the Moustache landing gear was either not established at the filing date, or could not be soundly predicted.

In his analysis, Justice Martineau concluded that the Bell had not met its burden of establishing that the invention as defined in the sole independent claim will not work. However, Bell also argued that certain preferred embodiments of the invention as defined by the dependent claims, namely the cross-piece being offset to the front (claim 15) and to the rear (claim 16) of the helicopter, lack utility.

The Court thus focused the utility inquiry on the offsetting of the cross-piece, and whether the utility of having it offset either to the front (claim 15) and to the rear (claim 16) of the helicopter was established at the filing date, or could have been soundly predicted. Regarding the front-offset cross-piece, both the description and the figures amply describe this embodiment, and it is in fact the landing gear that is used on Eurocopter’s current line of helicopters and that was tested for certification purposes. Therefore, Justice Martineau concluded that the utility of the front-offset cross-piece was established.

Regarding the rear-offset cross-piece, the Court found a lack of utility. The patent specification does not describe in detail the functionality or configuration of the rear-offset cross-piece, mentioning only that it “procures the specific advantages” mentioned elsewhere in the specification. Although this embodiment is illustrated in one of the figures, Justice Martineau still found a lack of established utility and a lack of sound prediction.

The Court concluded that the evidence on record does not support the utility of the backwardly-offset variant, and no evidence even suggests that it could work. Thus this claimed variant cannot be useful. Since independent claim 1 also covers this variant (it was drafted to protect the embodiments where the front cross-piece is offset both to the front and to the rear), it was held to be invalid, as were dependent claims 2-14, and 16. However, dependent claim 15, which covers the front cross-piece offset toward the front, was upheld and judged to be infringed by Bell's Legacy gear.

Punitive Damages

The Court condemned Bell to punitive damages for infringing claim 15 of the '787 patent, in addition to other general damages. The quantum of the damages is to be determined at a later date.

It should be noted, and no doubt the Court was aware of this fact, that no court in Canada has ever awarded punitive damages in a patent infringement case. Although such damages can never be ruled out entirely, the Court does not cite one authority awarding punitive damages for patent infringement.

As explained by Justice Martineau, "Punitive damages are awarded when a party's conduct has been malicious, oppressive and high-handed, or offends the court's sense of decency, or represents a marked departure from ordinary standards of decent behaviour." The Court held that Bell conducted themselves in such a fashion. Adjectives used by the Court to describe Bell's actions include "bad faith", "egregious", "wilfull blindness", "intentional and planned misappropriation", "no remorse", and "reprehensible". In coming to its determination, the Court cited examples of Bell's specific actions:

- Bell had, or should have had, corporate knowledge of the '787 patent and proceeded to build the Legacy gear anyway (in fact, Bell had leased a Eurocopter model outfitted with the Moustache gear to conduct testing and to train its employees during the life of the patent);
- Bell proceeded with the development of the Legacy gear despite concerns raised about the similarity between the Legacy gear and the '787 gear;
- "Bell had plans to manufacture and incorporate the Legacy gear in its Bell 429 model, as soon as it could obtain certification"; and
- Bell publicly portrayed the 429 and its "new" landing gear as a first in the field.

Conclusion

This decision raises new options and concerns that were heretofore unknown in Canadian patent law.

For litigators, the possibility of claiming punitive damages is probably the most important finding in this case. However, those lawyers defending against an action for infringement should note that the Court drew a negative inference from the fact that Bell resisted having people from its intellectual property service testify on grounds of privilege, and that the Court described as “vindictive” the fact that Bell raised the Gillette defence (i.e. it was merely practicing the prior art) and the regulatory exemption defence.

Patent agents, especially those practicing in the field of mechanical patents, should now be more hesitant before attributing specific advantages to the invention. At the very least, agents should ensure that the utility of these advantages be established or soundly predicted at the date of filing the patent application. For patent agents in the mechanical arts, the doctrine of sound prediction is no longer a mere triviality that must be learned for the purposes of the patent agent exams.

Of course, both Eurocopter and Bell are “high-flyers”, and both have reason to appeal this judgement. Thus, it came as no surprise that an appeal was filed on February 29, 2012. The parties’ pleadings, as well as any decision of the Federal Court of Appeal, will be studied carefully.



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