

Federal Court



Cour fédérale

**Date: 20201204**

**Docket: T-311-12**

**Citation: 2020 FC 1123**

**Ottawa, Ontario, December 4, 2020**

**PRESENT: Mr. Justice Grammond**

**BETWEEN:**

**BAUER HOCKEY LTD.**

**Plaintiff  
Defendant by counterclaim**

**and**

**SPORT MASKA INC. DBA CCM HOCKEY**

**Defendant  
Plaintiff by counterclaim**

**ORDER AND REASONS**

[1] The defendant, Sport Maska Inc. dba CCM Hockey [CCM] brings a motion for leave to file the supplemental report of its expert, Mr. Scott Davidson, in the trademark infringement trial that began yesterday. Even though it is brought at the very last minute, I am granting this motion, as the report will assist the Court in the resolution of the matter and admitting it will not cause significant prejudice to the plaintiff, Bauer Hockey Ltd. [Bauer].

[2] In this action, Bauer is seeking, among other remedies, an accounting of CCM's profits made by selling skates that are alleged to infringe Bauer's trademark. Both parties retained experts to calculate CCM's profits. Both experts proceeded on the assumption that, in calculating CCM's profits, only CCM's incremental costs could be deducted.

[3] This assumption, although widely shared, proved to be mistaken. On September 15, 2020, the Federal Court of Appeal issued its judgment in *Nova Chemicals Corporation v Dow Chemicals Company*, 2020 FCA 141 [*Nova v Dow*]. In that case, the Court offered a detailed analysis of the guiding principles that underlie the law regarding accounting of profits. More specifically, it held that "absent some exceptional or compelling circumstance or persuasive expert evidence to the contrary in a particular case, the full cost method is the appropriate approach to deducting costs in an accounting of profits" (at paragraph 164). Thus, not only incremental costs, but also fixed costs, are deductible.

[4] Upon learning of this aspect of *Nova v Dow*, CCM asked its expert, Mr. Davidson, to produce a supplemental report calculating CCM's profits on a full cost basis. Mr. Davidson produced a five-page report on December 1, 2020, providing a new calculation of CCM's profits where certain fixed costs are deducted. CCM now seeks leave to file this report.

[5] Bauer objects to the filing of this report. It says that the report is flawed in many respects; that CCM waited until the last minute to seek leave to file it; and that its admission would prejudice Bauer by depriving it of the possibility of conducting discovery on the issues covered by the report.

[6] CCM argues that its motion should be decided based on principles similar to those governing motions under rules 84(2) or 312 for the admission of new evidence. I agree. The Court has a broad discretion in this regard: *Campbell v Canada (Chief Electoral Officer)*, 2008 FC 1080 at paragraph 26. My colleague Justice Roger Lafrenière recently summarized the main factors to be considered in *Gemak Trust v Jempak Corp*, 2020 FC 644 at paragraph 75:

The moving party must establish that the proposed evidence could not have been adduced at an earlier date, the relevance of the proposed evidence, the absence of prejudice to the opposing party, and how the proposed evidence would be of assistance to the Court in disposing of the motion.

[7] I am satisfied that, given the understanding of the law prevailing among intellectual property lawyers prior to *Nova v Dow*, CCM could not have been expected to file evidence regarding total costs earlier. Nevertheless, CCM could have raised the issue more quickly after learning of that decision, instead of waiting until a few days before the beginning of the trial. *Nova v Dow* is a significant decision that must have spread quickly in the intellectual property community. There is no satisfactory explanation for this two-month delay. This factor weighs negatively in the balance.

[8] The report contains relevant evidence. Given *Nova v Dow*, fixed costs are relevant to the calculation of CCM's profits. The report helps the Court understand what these fixed costs are. Bauer, however, asserts that the report will not be helpful because it is flawed. I decline to give effect to this argument. The flaws invoked by Bauer are issues for the merits.

[9] Because of the specific role of financial experts in intellectual property disputes, the report will also assist the Court. One must bear in mind that what costs were incurred and

whether they are causally related to infringing products are essentially factual issues. In theory, they could be decided without expert testimony. Financial experts, however, are extremely useful in amalgamating raw financial data and presenting it in a manner that helps the Court focus on the issues it needs to decide. I have alluded to this reality in separate proceedings between the same parties: *Bauer Hockey Ltd v Sport Masko Inc*, 2020 FC 212 at paragraph 29. If I do not grant leave to file the report, CCM will nevertheless be entitled to make arguments regarding fixed costs based on the existing evidence. It will be much easier for the Court if this information is amalgamated in the proposed expert report.

[10] Bauer argues that it would be procedurally unfair to admit the report at this late stage of the proceedings. Doing so would deprive it of the opportunity of questioning CCM witnesses on discovery or requiring the production of documents regarding these fixed costs.

[11] CCM, however, bears the burden of proving its costs. It does not seek to produce new documentary evidence regarding its fixed costs. Mr. Davidson's report is based exclusively on documents that are already in the record. I would have had serious concerns if CCM had sought to file a new set of financial records on the eve of the trial. But this is not what it seeks to do. It simply wishes to make new calculations based on existing data. Thus, as CCM does not introduce new factual information, there is no need for additional discovery. Whether, in adopting this strategy, CCM succeeds in discharging its burden of proof will be an issue for the merits.

[12] I would also point out that discovery usually takes place well before the filing of expert reports. The fact that an expert puts forward a theory not anticipated by the other party is not grounds to reopen discovery. Thus, admitting the report will not cause prejudice to Bauer or give rise to procedural unfairness. Bauer will be able to cross-examine CCM witnesses regarding fixed costs. Moreover, CCM stated that it would not object to Bauer filing a responding report by its own financial expert.

[13] Thus, even if CCM should have brought this motion earlier, I am of the view that the other factors favour granting leave to file Mr. Davidson's supplemental report.

**ORDER in T-311-12**

**THIS COURT ORDERS that:**

1. The defendant's motion for leave to file the supplemental expert report of Mr. Scott Davidson, dated December 1, 2020, is granted.
2. No order is made as to costs.

"Sébastien Grammond"

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Judge

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

**DOCKET:** T-311-12

**STYLE OF CAUSE:** BAUER HOCKEY LTD. v SPORT MASKA INC. DBA  
CCM HOCKEY

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE BETWEEN  
OTTAWA, ONTARIO AND MONTRÉAL, QUEBEC

**DATE OF HEARING:** DECEMBER 3, 2020

**ORDER AND REASONS:** GRAMMOND J.

**DATED:** DECEMBER 4, 2020

**APPEARANCES:**

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