Federal Court  Cour fédérale

Date: 20160623

Docket: T-2051-10

Citation: 2016 FC 706

Ottawa, Ontario, June 23, 2016

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

THE DOW CHEMICAL COMPANY, DOW GLOBAL TECHNOLOGIES INC., AND DOW CHEMICAL CANADA ULC

Plaintiffs/Defendants by Counterclaim

and

NOVA CHEMICALS CORPORATION

Defendant/Plaintiff by Counterclaim

ORDER AND REASONS

I. THE MOTIONS

[1] The Plaintiffs [Plaintiffs or Dow] have brought a motion seeking:

a) An order striking paragraph 2B and the amended portion of paragraph 98 of the Defendant's [Defendant or Nova] Amended Fresh As Amended Statement of Defence and Counterclaim, filed on April 22, 2016, without leave for further amendment; and

b) Costs of this motion.

[2] The Defendant has brought a cross-motion seeking:

a) An order granting the Defendant leave to withdraw its admission relating to the molecular weight distribution (Mw/Mn) of the Reactor 1 component of FPs417A, made by the Defendant in response to the Plaintiffs' motion before Justice Hughes to add products to their Second Amended Statement of Claim; and

b) Leave to amend paragraphs 2B and 98 of the Defendant's Amended Fresh As Amended Statement of Defence and Counterclaim delivered pursuant to the Order of Justice Hughes on March 30, 2016; and

c) Costs of this motion.

II. BACKGROUND

[3] The background to these motions and the context in which they take place has already been set out in considerable detail in the Order and Reasons of Justice Hughes dated March 30, 2016.

[4] Dow brought a motion on January 20, 2016 before Justice Hughes, seeking the Court's confirmation that four grades of Nova's infringing SURPASS product, namely FPs417-A, FPs016-A, EX-FPs016-A01, and EX-FPs225-A01 [Additional Grades] were included within the scope of the trial judgment of Justice O'Keefe dated May 7, 2016. By Order dated March 30, 2016, Justice Hughes ordered that Dow could amend its Statement of Claim to specifically reference these grades, which Dow did on April 1, 2016. In response, Nova served an Amended Fresh As Amended Statement of Defence and Counterclaim pleading various new defences with respect to the Additional Grades.

[5] The Plaintiffs say that one of the defences now asserted by the Defendant in its Amended Fresh As Amended Statement of Defence and Counterclaim at paragraph 98 purports to deny for

the first time that one of the Additional Grades – FPs417-A – has a Mw/Mn for Component A that is within the claims of Dow's 705 Patent, that is the subject of this case, despite the fact that this claim element has already been formally admitted by Nova, and at no time has Nova sought leave of the Court to withdraw this formal admission. The Plaintiffs ask the Court to strike the offending amendment.

[6] Nova denies that it made a formal admission and, alternatively, if a formal admission was made, seeks in its cross-motion leave of the Court to withdraw it.

III. ARGUMENTS

The Plaintiffs

[7] Rule 221(1) of the *Federal Courts Rules*, SOR/98-106 provides that, among other things, any portion of a pleading may be struck out on the ground that it: i) is scandalous, frivolous or vexatious; ii) may prejudice or delay the fair trial of the action; iii) constitutes a departure from a previous pleading; or iv) is otherwise an abuse of the process of the Court.

[8] Nova's amendments to paragraphs 98 and 2B [Contested Amendment] of its Amended Fresh As Amended Statement of Defence and Counterclaim ought to be struck on all of those grounds.

[9] Although Nova was entitled to make *some* amendments to its defence following the outcome of the Additional Grades motion, the Court has recognized limits pertaining to the manner in which amendments may be made.

[10] For example, *Saunders, Rennie and Garton* explain: "Leave to amend pleadings in a specific manner does not entitle a party to amend in a more general way." Where the amendment goes beyond that initial scope, leave of the Court is required.

[11] Here, Nova's Contested Amendment extends well beyond the permissible scope of amendments that it was entitled to make.

[12] The Order of Justice Hughes granted Nova leave to "amend its defence in response to the amendments allowed [to the Statement of Claim]." Justice Hughes' Order did not contemplate, nor can it be interpreted to encompass, amendments that are inconsistent with both Nova's previous pleadings and Nova's arguments and admissions made in the very motion before Justice Hughes that resulted in that Order. Nor can it be interpreted as providing Nova with leave to withdraw its formal admission that FPs417-A meets the Mw/Mn requirement of the claims.

[13] Formal admissions, i.e. those made for the purpose of dispensing with proof on the merits of a case "are conclusive as to the matters admitted" and cannot be withdrawn without first obtaining leave of the Court. Such admissions may be made:

a) by a statement in the pleadings;

b) in response to a request to admit;

c) in an oral statement made by counsel on the hearing of the merits (or even counsel's silence in the face of statements made to the trial judge by the opposing counsel in the intention that the judge was to rely on those statements); and

d) certain statements by counsel on discovery when "said expressly for the purpose of trial."

[14] The Additional Grades motion was brought to determine, on the merits, whether sales of FPs417-A and the other Additional Grades ought to be accounted for in the reference that will decide compensation. If the Mw/Mn of the FPs417-A R1 component was a "real question" in controversy, it ought to have been raised at that time.

[15] Instead, Nova reiterated in its evidence and submissions that there was no other infringement issue concerning the R1 component aside from SHC. As noted above, Nova's counsel instructed its own expert (and voluntarily put into the evidentiary record) that the same admissions made at trial (including in respect of the Mw/Mn) would apply to FPs417-A, and later explicitly stated to the Court:

> 85. Regarding Component (A), the infringement issue for the Rl polymer for FPs417-A would be SHC, as it was for the polymers that were in issue [at trial].

[16] At the same time as making the above admission, Nova's counsel acknowledged that infringement was a live "issue on the motion."

[17] Accordingly, Nova has made a "formal" and substantive admission concerning the Mw/Mn of the Rl component of FPs417-A.

[18] Moreover, the Contested Amendment ought to be struck since no leave to include it was sought or obtained.

[19] As discussed further below, it would be improper to allow the Contested Amendment even had Nova sought leave.

[20] The Federal Court of Appeal recently reiterated the applicable test for considering whether to grant leave to amend:

> whether it is more consonant with the interest of justice that the withdrawal or amendment be permitted or denied... Ultimately, it boils down to a consideration of simple fairness, common sense and the interest that the courts have that justice be done.

(*Janssen Inc. v. Abbvie Corp.*, 2014 FCA 242 at para 3, citing *Merck & Co. Inc. v. Apotex Inc.*, 2003 FCA 488, emphasis in original)

[21] Where an amendment purports to withdraw a substantial admission, as in the present case, the burden on the party seeking the amendment is even heavier.

[22] With respect to "formal" admissions, leave to withdraw should not be granted unless:

a) the admission was made clearly without authority, by mistake or under duress;

b) there exists a triable issue concerning the admitted fact; and

c) there will be no prejudice to the party in whose favour it was made.

[23] Nova fails to meet all three criteria.

[24] Any suggestion that Nova made the admission without authority, by mistake or under duress would strain credulity. Nova repeatedly and positively asserted that the only issue concerning the R1 component is SHC, and even included an express statement in its expert's affidavit that it would admit the Mw/Mn of FPs417-A is within the 705 Patent claims.

[25] Likewise, there is no triable issue concerning the Mw/Mn of the FPs417-A R1 component.

[26] Nova's Contested Amendment amounts to no more than a bald assertion. It does not state what the component's Mw/Mn is, or even whether it is above or below the claimed range, nor does it plead any facts that would otherwise justify drawing a distinction between the R1 component of this one particular grade from the more than 60 grades now identified in Dow's claim and accepted as meeting the Mw/Mn requirement of the claims.

[27] Moreover, Nova's withdrawal of its admission concerning Mw/Mn would significantly prejudice Dow. The attempt to now introduce the issue of the Mw/Mn is completely artificial and driven solely by Nova's desire to delay and further frustrate Dow from fully recovering on Nova's unlawful infringement of the 705 Patent. This is consistent with the "hostile" conduct it has adopted throughout this proceeding, as noted by Justice Hughes in his reasons.

[28] In this regard, the prior infringement testing conducted by Dow for the liability phase of this proceeding was complex and took approximately 4 months. It is worth noting that, aside from re-measuring the SHC of the samples made by Dow, Nova did no infringement testing of

its own concerning the Component A products. Indeed, and as recognized by the Trial Judge, Nova took the position that it could not supply samples of its Component A (R1) products, even though this was proven at trial to be untrue. As a result, Dow had to engage in expensive and time consuming reproduction experiments.

[29] Nova appears to have now gone back and arbitrarily selected a claim element that was not previously in dispute, in order to take the position that new testing for that claim element will be required, and thus substantial delays will be incurred such that the issue of infringement of FPs417-A will not be able to be determined at the trial set down for this December.

[30] Consistent with this approach, in Nova's reply submissions to Justice Hughes on the schedule and procedure that should be followed to address the Additional Grades, Nova suggested that significant delay and time would be required to do so, and particularly pointed to the need for "the full opportunity to conduct experiments ...[which] at least in part relate to the molecular weight distribution" issue. Again, it is worth noting that Nova did no Component A testing of its own products for the purposes of the liability phase of this proceeding.

[31] Overall, Nova's strategy and change in position is a blatant attempt to further delay the determination of its liability for FPs417-A, to the prejudice of Dow. Adopting the seemly words of Decary, J.A., "This is a case, rather, of a party attempting to derail litigation which has been pursued for several years by adding a defence which, it knows very well, does not reflect the true questions in controversy" (*Merck & Co Inc v. Apotex Inc,* 2003 FCA 488 at para 52 [*Merck & Co*]).

[32] In view of the foregoing, Nova does not meet any of the three requirements for withdrawal of an admission.

[33] Furthermore, when considering a motion either to strike or to amend a pleading, the Federal Court has described its role as a "gatekeeper... to ensure that its resources are utilized fairly, with a view towards judicial economy so that meritorious claims can be dealt with in an efficient manner."

[34] The Court of Appeal has confirmed that in the "interest of justice," consideration is given to factors related to the proper and efficient administration of justice. As a general rule, this includes consideration of the timeliness of the potential amendment, the extent of delay caused by the potential amendment and the manner in which the party seeking leave has "comported itself throughout the proceedings."

[35] For the same reasons as already described above, Dow submits that the Court ought to exercise its discretion to strike the Contested Amendment without leave to amend, as it is neither meritorious nor in the interests of justice.

The Defendant

[36] Dow's reliance in this motion on Nova's position (and admissions) made with respect to products that were in issue before Justice O'Keefe for purposes of its new action for infringement for FPs417-A is misplaced. Justice Hughes decided that FPs417-A was not included within the scope of Justice O'Keefe's judgment, and found that Dow had not raised it

before Justice O'Keefe, and consequently it is a new product for purposes of this proceeding, i.e. different from the products that were subject to the judgment.

[37] Nova's admission regarding Mw/Mn for FPs417-A was for purposes of framing its position to instruct its expert in responding to Dow's motion to add the Additional Grades to the Reference. That motion was for a declaration that FPs417-A and the other Additional Grades are within the scope of Justice O'Keefe's judgment because they were mere variants of products for which infringement was found. Dow's motion was not for a determination of infringement on the merits. It was not a summary judgment motion, nor was it considered or decided as such by Justice Hughes. Dow's motion called for a determination of what the judgment meant by "SURPASS" film-grade polymers, and whether it included FPs417-A and three other Additional Grades which Dow knew of, but did not plead or raise before Justice O'Keefe in the original action, despite knowing of them well in advance of the trial.

[38] Justice Hughes found that the Additional Grades were not within the scope of the judgment because the products in issue before Justice O'Keefe were those pleaded by Dow in Appendix A to the Statement of Claim, and Dow never included them in Appendix A as it did for other products that it had added to the original action.

[39] Justice Hughes dismissed Dow's motion and effectively constituted a new action within the existing proceeding to determine infringement of FPs417-A on the merits, by ordering Dow to amend its claim to assert infringement with respect to the Additional Grades, and giving Nova leave to amend its defence in response thereto. In doing so, Justice Hughes never limited the

defences that Nova might raise, and found that Nova should be able to raise any "...defences that it believes to be proper."

[40] Justice Hughes also noted that Nova's position was that "Whether FPs417A infringes is a matter for a trial, not summary determination on this motion, and that the defendant argues, at least with respect to ... FPs417A, that there are substantive technical arguments as to whether there is infringement or not ...." .

[41] Nova is entitled under Justice Hughes' Order to plead whatever defences it sees fit in response to Dow's new claims of infringement. Dow's claims include assertions on Mw/Mn. Nova has therefore properly pleaded in response.

[42] Formal admissions are only those made in a recognized manner, as "...at trial..." as stated in *Apotex Inc v Astrazeneca Canada Inc*, 2012 FC 559 [*Astrazeneca*], citing *Sopinka et al*, and cited by Dow at paragraph 31 of its written representations. Here, the admission was made in the context of an interlocutory motion on the Reference before the new action was constituted by Justice Hughes, and not the trial on liability which is to proceed and is in substance a separate proceeding from the Reference.

[43] Thus, paragraphs 2B and 98 of Nova's Amended Fresh As Amended Statement of Defence and Counterclaim should stand, and be decided at the trial on the merits.

[44] In the alternative, if a binding formal admission was made, Nova seeks leave to withdraw it.

[45] In *Andersen Consulting v Canada*, [1997] FCJ No 1433 [*Andersen Consulting*], the Federal Court of Appeal reviewed the law regarding withdrawing admissions and preferred the flexible approach taken by the Courts in British Columbia:

> [15] ...We must ensure that the procedure to withdraw admissions is not made so complex and so stringent that virtually no admissions will be made by defendants.
>
> [16] Indeed, the desirable flexibility in matters of amendment to pleadings, including, in our view, the withdrawal of admissions, was stated by our colleague Decary J.A. in the following terms in the *Canderel* case:
>
> > "While it is impossible to enumerate all the factors that a judge must take into consideration in determining whether it is just, in a given case, to authorize an amendment, the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice"

[46] There is no prejudice to Dow. Dow has effectively just brought a new action for infringement after years of delay. The pleaded Mw/Mn issue is a triable issue and is not set up by Dow as affecting its evidence on its new claims. Nor will it affect the timing of the trial on those claims.

[47] Dow's claim of prejudice because Nova is blatantly trying to delay the remedies to which Dow is entitled presupposes that liability has been found for the additional products. No such finding has been made, and Dow can hardly point the finger on delay when it was Dow itself which never raised the additional products when it could have before Justice O'Keefe. Dow only has itself to blame.

[48] Nova's position in responding to Dow's motion to add products was that experiments would be needed to determine whether FPs417-A infringed, and that infringement could not be summarily determined, which Justice Hughes accepted in dismissing Dow's motion.

[49] Dow's case for the trial on infringement on FPs417-A will not be affected by the pleaded Mw/Mn issue. In its submissions to the Reference Judge on the setting of the trial date for determination of infringement on the additional products, Dow has confirmed it will rely on the same theory and evidence at the trial on infringement for FPs417-A as it did on the motion. Hence for purposes of the trial on the merits, Dow will be relying on its previous experiments, which include Mw/Mn as part of those on SHC. Like Dow, for purposes of determining SHC for the trial before Justice O'Keefe, Nova also incidentally determined Mw/Mn.

[50] As to experiments by Nova relating to Dow's claim of infringement on FPs417-A, including for Mw/Mn, Nova has already submitted to Justice Fothergill that the setting of the trial date on liability for the additional products should factor in time for Nova to conduct them. Nova specifically submitted to Justice Fothergill that it wishes to have full opportunity to meet

Dow's criticisms that Nova should have done experiments for the original trial, and which Dow again cites on this motion.

[51] Thus, experiments stand as part of the case on infringement for FPs417-A whether they are directed to Mw/Mn or not, and Justice Fothergill reserved on the timing of the trial on that footing. Nova has not taken the position that the trial cannot occur due to the need to do Mw/Mn experiments, and it is to take place in mid to late October on dates to be finalized.

[52] Therefore, it is in the interests of justice that Nova be permitted to fully defend on the grounds it has pleaded and to conduct experiments on the Mw/Mn issue, along with other experiments.

[53] Dow's motion should be dismissed or, in the alternative, leave granted to withdraw the admission and plead paragraphs 2B and 98 of the Amended Fresh As Amended Statement of Defence and Counterclaim.

The Plaintiffs' Response to Cross Motion

[54] The issue on the cross motion is whether the Court ought to grant Nova leave, after- the-fact, to withdraw a formal and substantive admission provided to Dow, and stated before the Court. Dow submits that it should not.

[55] There is no dispute that Nova made an admission. It explicitly acknowledges this in its written submissions, but is now trying to reframe the context in which the admission was made to diminish the impact of that admission.

[56] Nova acknowledges that its admission was made in the context of a motion seeking a declaration that FPs417-A be included within the scope of products to be accounted for in quantifying the remedies owed to Dow in light of Nova's infringement, found by Justice O'Keefe. Such a declaration could only be made if the Court was satisfied that FPs417-A was indeed an infringing grade.

[57] Indeed, both parties adduced expert affidavits in support of their respective positions concerning whether FPs417-A infringed the relevant patent. In its submissions on that motion, Nova explicitly stated that "NOVA contests infringement of FPs417-A," that "FPs417-A is a different product from FPs317-A, and there is an issue on the motion as to whether those difference would make a difference to infringement."

[58] Nova's suggestion that infringement was not actually in issue is simply false. Moreover, had Dow been wholly successful on its motion, there would be no further hearing on the infringement of FPs417-A.

[59] In that context, Nova explicitly told the Court that there was no other infringement issue concerning the R1 component aside from SHC, thereby acknowledging that infringement was in

issue and making a "formal" admission that, for the purposes of the infringement issue of Component A, the other limitations, including the Mw/Mn, were satisfied.

[60] In fact, leave to withdraw "formal" admissions should only be granted where all three of the following factors are satisfied:

a) the admission was made clearly without authority, by mistake or under duress;

b) there exists a triable issue concerning the admitted fact; and

c) there will be no prejudice to the party in whose favour it was made.

[61] Nova has failed to address the first two elements of the above tri-partite test, despite having the burden on this cross motion. As noted in Dow's moving materials, Nova repeatedly and positively asserted that the only issue concerning the Rl component of FPs417-A is SHC, defeating any suggestion that the admission was made by mistake or under duress. Likewise, Nova has not put forward any evidence, nor has it made any argument, to support a finding that a triable issue exists with respect to the Mw/Mn of one of the components of FPs417-A. This is particularly striking in light of: (i) Nova's ongoing acknowledgement that the remainder of the now 63 polymer grades at issue all satisfy this particular element; and (ii) Nova's stipulating in corresponding U.S. proceeding that FPs417-A ought to be included within the scope of products on which Dow could collect damages for patent infringement.

[62] Rather, Nova's request for leave is based solely on its argument that there will be no prejudice to Dow, and its reliance on a "flexible approach" taken by the courts in British Columbia, as described in *Andersen Consulting*. However, its reliance on such a "flexible approach" is misguided.

[63] As noted by the Court of Appeal in *Andersen Consulting*, under the test used by the B.C. Courts, "inadvertence, error, hastiness, lack of knowledge of the facts, discovery of new facts, and timeliness of the motion to amend become factors to be taken into consideration...." None of these factors favour Nova's position on this cross motion.

[64] Moreover, the Federal Court of Appeal subsequently opined that *Andersen Consulting* does not stand for the proposition that the ability to obtain leave "should be made so simple and so relaxed that virtually any withdrawal of admission will be allowed." As previously noted, there is a burden to be met by the amending party - which is heightened with respect to the withdrawal of substantive admissions.

[65] Nova's having made no attempt at all to address the elements required to obtain leave to withdraw an admission ought to be fatal to the cross motion. Moreover, Nova's silence on these matters implicitly acknowledges that the contested amendment is improper and without basis.

IV. REASONS

A. *Justice Hughes' Order of March 30, 2016*

[66] These motions are a consequence of Justice Hughes' Order of March 30, 2016 in which he explained what the parties could and should do to resolve their dispute over the Additional Grades:

> [32] A new action is a waste of the resources of this Court. While I agree with the Defendant in respect of its arguments as set out in paragraphs 1 and 2 above, I do not believe that a just, most expeditious and least expensive determination of the issues

> between the parties justifies forever precluding the Plaintiffs from putting before the Court the four further films as designated. Nor should it preclude the Defendant from raising defences that it believes to be proper.
>
> [33] The parties have been through extensive discoveries and a trial. There have been many facts adduced and many findings of the Trial Judge. They should not be wasted.
>
> [34] I will permit the Plaintiffs, effective the day they filed this motion, January 20, 2016, to further Amend their Statement of Claim to include, in Appendix A, films designated as FPs016, FPs117, FPs225, and FPs317 [*sic*]. The Defendant may amend its Defence in response thereto. All previous discoveries and evidence adduced at trial may continue to be used and evidence adduced on this motion before me, can be used by the parties as if it had been given on discovery. In addition they may have such further discovery as reasonably necessary. It may be that before the reference is held in December 2016, a trial of further issues may be needed or that reference may be postponed. So be it. I believe that this is the fairest way to deal with the matter.

[67] The Defendant has argued before me that Justice Hughes "effectively constituted a new action within the existing proceedings to determine infringement of FPs417-A on the merits...."

[68] In my view, this is not an appropriate characterization of what Justice Hughes ordered. He expressly rejected a new action as "a waste of the resources of this Court" and he expressly preserved "All previous discoveries and evidence adduced at trial" and "evidence adduced in this motion...as if it had been given on discovery."

[69] The Plaintiffs were allowed to "further Amend their Statement of Claim to include, in Appendix A, films designated as FPs016, FPs117, FPs225 and FPs317" and the Defendant could "amend its Defence in response thereto" and raise "defences that it believes to be proper."

[70] The Defendant reads these words to mean that Justice Hughes authorized it to raise any defences it may wish to raise, irrespective of what may have occurred during the trial process and the motion before Justice Hughes. It seems to me, however, that although Justice Hughes authorizes the Defendant to raise any defence it believes to be proper, this did not preclude a challenge to any such defence based upon what may have occurred during the trial process and the motion before him. So I don't think Justice Hughes gave the Defendant *carte blanche* to raise defences in a new action that could not be challenged by reference to what had occurred in the proceedings up to the time of his Order.

B. *Has the Defendant Made a Formal Admission?*

[71] The admission in question concerns the Mw/Mn for FPs417-A and the Defendant says it was not a formal admission made at trial, in a pleading, in an agreed statement of facts, or in response to a request to admit. Because it was not a formal admission, the Defendant argues that leave of the Court is not required to withdraw it.

[72] Nova's amendment in paragraph 98 of its Amended Fresh As Amended Statement of Defence and Counterclaim purports to deny for the first time in these proceedings that one of the Additional Grades in the Plaintiffs' Amended Statement of Claim – namely FPs417-A – has a Mw/Mn for Component A that is within the 705 Patent.

[73] Prior to the amendment of paragraph 98, this particular claim element was admitted by the Defendant. Paragraph 98 of the Defendant's Statement of Defence read as follows:

> Each of NOVA's SURPASS compositions is an *a*-octene interpolymer made from homogeneously branched components. Each such component has a Short Chain Brach Distribution Index (SCBDI) greater than 50%, a single melting point as determined by Differential Scale Calorimetry (DSC), and a molecular weight distribution in the range 1.8-2.8 (Mw/Mn).

[74] This fact was reiterated by the Defendant in paragraph 25 of a Response to Request to Admit, October 31, 2011:

> 25. The polymer made in Nova's first reactor during the process of manufacturing the products listed in Appendix A to the statement of claim, has a molecular weight distribution from 1.8 to 2.8.
>
> Admitted for all products except the off-grade XJS materials and EX-FP117-A01, FP121-B01 and FPR 121, which do not identify NOVA products.

[75] The motion that came before Justice Hughes was brought by the Plaintiffs who were seeking the Court's confirmation that the Additional Grades were included in Justice O'Keefe's Trial Judgment because they were not materially different from the other specifically pleaded 59 grades that Justice O'Keefe had held to infringe the Plaintiffs' 705 Patent.

[76] Justice Hughes denied the motion and issued the Order referred to above. However, as part of the motion before Justice Hughes, the Defendant took issue with the Plaintiffs' position that FPs417-A was not materially different from FPs317-A that had been found by Justice O'Keefe to infringe the 705 Patent. As the Plaintiffs point out in written submissions:

> 17. Nova's evidence in this regard was an expert affidavit of Dr. Charles Stanley Speed. The affidavit expressly stated that Nova would make the same admissions for FPs417-A as it did in the liability phase for all the pleaded SURPASS products:

> 22. Regarding Component (A), I am informed by NOVA's counsel that NOVA would be prepared to make admissions with respect to the R1 polymer for FPs417-A as it did for the polymers that were in issue [at trial] as summarized in paragraph 167 of Dr. Soares' Infringement Report. Thus the infringement issue for the R1 polymer [Component A polymer] for FPs417-A would be SHC, as it was for the polymers that were in issue [at trial]. [emphasis added]

18. Consistent with this, Nova argued before Justice Hughes that there was just one question at issue with respect to Component (A) of Fps417-2:

> 85. Regarding Component (A), the infringement issue for the R1 polymer for FPs417-A would be SHC, as it was for the polymers that were in issue [at trial].[emphasis added]

19. As such, Nova admitted on the motion, both through the Speed affidavit and in its submissions, that for Component A of FPs417-A, all claim elements including the molecular weight distribution range, were met, with the only exception being SHC.

[footnotes omitted]

The Defendant has not refuted these admissions, but now seeks to re-characterize them.

[77] Following the Plaintiffs' amendments that were made in accordance with Justice Hughes' Order to add the Additional Grades to Appendix A of the Plaintiffs' Second Amended Statement of Claim, the Defendant produced its Amended Fresh As Amended Statement of Defence and Counterclaim that specifically pleaded that Component A of FPs417-A does not have a Mw/Mn in the range specified in the 705 Patent:

> 2B. For clarification, paragraph 98 herein includes an amendment as to NOVA product FPs417-A.
>
> ...

> 98. Each of NOVA's SURPASS compositions is an *a*-octene interpolymer made from homogeneously branched components. Each such component has a Short Chain Brach Distribution Index (SCBDI) greater than 50%, a single melting point as determined by Differential Scale Calorimetry (DSC), and a molecular weight distribution in the range 1.8-2.8 (Mw/Mn) except for the latter with respect to the first reactor component of FPs417-A.

[78] The Defendant did not seek leave of the Court to withdraw its previous admission and now argues before me that the previous admission set out above was not a formal admission for the reasons set out above in the Defendant's arguments.

[79] It seems to me that the Defendant is adopting a very strict and narrow interpretation of what constitutes a formal admission that is also at odds with the letter and intent of Justice Hughes' Order.

[80] Justice Hughes did not constitute a new action. He specifically rejected that approach and preserved "All previous discoveries and evidence adduced at trial" and "evidence adduced in this motion… as if it had been given on discovery."

[81] It seems to me, then, that the terms of Justice Hughes' Order must prevail in these motions before me. The amendments by the Plaintiffs and the Defendant that were made in accordance with Justice Hughes' Order are not a new beginning. The Defendant can make any amendment it considers "proper," but any such amendment can be challenged, either because it does not comply with Justice Hughes' Order, or because it is objectionable on any of the usual legal grounds.

[82] The Defendant does not deny in these motions that it made admissions that are inconsistent with the amendments set out in paragraphs 2B and 98 of its Amended Fresh As Amended Statement of Defence and Counterclaim. The Defendant simply says that they were not formal admissions and it does not require leave of the Court to retract them by way of amendments to its pleadings.

[83] The distinction between formal and informal admissions was addressed by Justice Hughes in *Astrazeneca*, above:

> [19] To resolve the issue as to whether the "corrected" answer is admissible and whether the evidence of Dr. Sherman and Mr. Fahner, which contradicts the earlier, uncorrected, answer, is admissible, I will start with considering the distinction between "formal" and "informal" admissions. Sopinka et al, *The Law of Evidence in Canada*, 3rd ed (Markham: LexisNexis, 2009) at 1263, discusses formal admissions which are made for the purpose of dispensing with proof at trial and are conclusive as to the matters admitted. The authors illustrate the manner in which formal admissions may be made in Canadian proceedings at section 19.2 of this book, which I repeat:
>
> > *§19.2 A formal admission may be made: (1) by a statement in the pleadings or by failure to deliver pleadings, (2) by an agreed statement of facts filed at the trial, (3) by an oral statement made by counsel at trial, or even counsel's silence in the face of statements made to the trial judge by the opposing counsel with the intention that the statements be relied on by the judge, (4) by a letter written by a party's solicitor prior to trial; or (5) by a reply or failure to reply to a request to admit facts. A formal admission of fact, as distinct from an admission of law, cannot be withdrawn except with leave of the court or the consent of the party in whose favour it was made. An admission relating solely to a question of law, on the other hand, may be withdrawn at any time, even in the Court of Appeal. Leave to withdraw an admission should not be granted, however, unless: (1) the admission was made clearly without authority, by mistake or under*

> *duress; (2) there exists a triable issue concerning the admitted fact; and (3) there will be no prejudice to the party in whose favour it was made. An inadvertent statement of fact by counsel in opening may be withdrawn if retracted before it has been acted upon. The discretion of the court ought to be warily exercised and usually on terms.*

[20] It appears that this Court has extended the categories of the means by which "formal" admissions are made to certain kinds of admissions made by Counsel on discovery, as is illustrated by the decision of Justice Tremblay-Lamer in *Archambault v Ministre du Revenu National*, [1998] FCJ No 635, 189 FTR 37 (aff'd without discussion on the point: 264 NR 171). The reported reasons do not repeat what was actually said during the discovery, but what was said appears to have been said expressly for the purpose of trial if we take paragraph 6 of the reasons, which refer to another case, as being illustrative. At paragraph 5, Tremblay-Lamer J. states that, absent consent of the opposite party, a "formal" or "judicial" admission cannot be withdrawn without leave of the Court:

> *5 The case law is clear on the question of withdrawing admissions: a party may not withdraw a "formal admission" (or "judicial admission") without first obtaining leave of the Court or consent of the adverse party.*

[21] On the other hand, this Court has treated answers on discovery as "informal" admissions which can be qualified, enlarged upon or even contradicted upon notice to the opposite party. Prothonotary Lafreniere in *Apotex Inc v Wellcome Foundation Ltd*, [2009] FCJ No 177, 343 FTR 41 wrote at paragraph 37:

> *37 Although the answers provided by GSK's representative during examination for discovery are considered informal admissions, they can be qualified, enlarged upon, or even contradicted upon notice to the opposing party. The correction of inaccurate or deficient answers is specifically contemplated by Rule 245 which provides that a person who was examined for discovery and who discovers that the answer to a question in the examination is no longer correct or complete must provide the corrected or completed information in writing without delay.*

[22] The Ontario Court of Appeal in *Marchand v Public General Hospital Society of Chatham*, [2000] OJ No 4428, 51 OR (3d) 97 dealt precisely with the issue of correction of an answer given on discovery where the correction was made during the trial itself. The Court distinguished between answers given on discovery and "formal" admissions. Discovery answers could be corrected, leaving the impact of the correction to be determined by the trial judge. The entire discussion on the point in the decision written by the Court at paragraphs 70 to 86 is instructive. I repeat only paragraphs 77 and 80:

> *77 First, Dr. Asher's original discovery answer was not a formal admission. As such, it was always open to him to explain his discovery answer in his testimony. In Sopińka, Lederman and Bryant, The Law of Evidence in Canada, 3rd ed. (Toronto: Butterworths, 1999) at 1051-53, the authors distinguish between formal and informal admissions. A formal admission is conclusive as to the matter admitted, and cannot be withdrawn except by leave of the court or the consent of the party in whose favour it was made. The Law of Evidence states at 1051-52 that a formal admission may be made in the following ways:*
>
> > *1) by a statement in the pleadings or by failure to deliver pleadings;*
> >
> > *2) by an agreed statement of facts filed at the trial;*
> >
> > *3) by an oral statement made by counsel at trial, or even counsel's silence in the face of statements made to the trial judge by opposing counsel with the intention that the statements be relied on by the judge;*
> >
> > *4) by a letter written by a party's solicitor prior to trial; or*
> >
> > *5) by a reply or failure to reply to a request to admit facts.*
>
> *In contrast, an informal admission does not bind the party making it, if it is overcome by other evidence. That is, a party making an informal admission may later lead evidence to reveal the circumstances*

> *under which the admission was made in order to reduce its prejudicial effect.*
>
> ...
>
> *80 Holmested and Watson, supra, describe at 31 Subsection 25 the obligation under rule 31.09 as an ongoing duty to correct and complete the answers given. In general, parties are entitled to correct their discovery answers. The impact of corrections is a matter to be decided by the trial judge, who is entitled to examine both the original and the amended answers: See Machado v. Pratt & Whitney Canada Inc. (1993), 17 C.P.C. (3d) 340 (Ont. Master); Capital Distributing Company v. Blakey (1997), 33 O.R. (3d) 58 (Gen. Div).*

[84] Notwithstanding the above specific examples of the ways in which formal admissions can be made, it seems to me that the essence of the matter is that they are "made for the purpose of dispensing with proof at trial and are conclusive as to the matters admitted," to use the words of Justice Hughes. The discussion by *Sopinka et al* is intended to be illustrative and not exhaustive of how such admissions can be made. In the present case, it seems to me that the statements of Dr. Speed in his affidavit and the position taken by Defendant's counsel before Justice Hughes made it clear that the only infringement issue for the R1 polymer for FPs417-A would be SHC, as it was for the polymers dealt with by Justice O'Keefe at trial. In my view, this is a clear statement by the Defendant that, as far as Component A of FPs417-A was concerned, all claim elements including the Mw/Mn range, were met with the sole exception of SHC.

[85] This was an admission to the Plaintiffs and a representation to the Court that SHC would be the only infringement issue at trial, and that the Mw/Mn range of Component A of FPs417-A would not be an issue. If it would not be an issue, then it is an admission made for the purpose of

dispensing with proof at trial that is conclusive as to the matter admitted. When Justice Hughes directed that the Defendant could raise "defences that it believes to be proper," he did not dissolve the admissions and representations that had been made as part of the trial process or in the motion before him. The rejection of the Plaintiffs' position by Justice Hughes, and his rejection of a new action, were made on the basis of the whole record before him, which included the admission at issue here. It would be strange if, without specific dispensation from Justice Hughes, the Defendant could simply renege on this admission and proceed as though it had never been made without seeking leave of the Court. Consequently, I am of the view that I am here dealing with a formal admission that cannot be withdrawn without leave of the Court.

C. *Should Leave Be Granted?*

[86] The quotation from *Sopinka et al*, above, that Justice Hughes cites in *Astrazeneca*, above, says that leave to withdraw an admission should not be granted unless:

a) The admission was made clearly without authority, by mistake or under duress;
b) There exists a triable issues concerning the admitted fact; and
c) There will be no prejudice to the party in whose favour it was made.

[87] These conditions are conjunctive and, on the record before me, there is no evidence that the admission was made without authority, by mistake or under duress, or that there exists a triable issue concerning the admitted fact other than the bald assertion in the amended portion of paragraph 98 of the Amended Fresh As Amended Statement of Defence and Counterclaim. In fact, the evidence from Dr. Speed is to the contrary.

[88] Nevertheless, in deciding this issue, I must take heed of, and apply, the law regarding an amendment that purports to withdraw a substantial formal admission.

[89] The Federal Court of Appeal has provided guidance on this issue in *Andersen Consulting*, above:

> 12 Different tests of varying stringency have been applied in different jurisdictions across Canada with respect to a withdrawal of admissions. At one end of the spectrum, the case law in Ontario, with respect to the interpretation of R. 51.05 of the *Rules of Civil Procedure*, requires that the party requesting leave to withdraw an admission satisfies three conditions:
>
> (1) that the proposed amendment raise a triable issue;
>
> (2) that the admission was inadvertent or resulted from wrong instructions; and
>
> (3) that the withdrawal would not result in any prejudice that could not be compensated for in costs.
>
> 13 At the other end, the British Columbia Courts have taken a more flexible approach and have not required as a condition essential to a withdrawal of an admission that the admission in the Statement of Defence be made inadvertently or hastily. Rather, they have adopted as a test that, in all the circumstances of the case, there be a triable issue which ought to be tried in the interests of justice and not be left to an admission of fact. Under such a test, inadvertence, error, hastiness, lack of knowlede [*sic*] of the facts, discovery of new facts, and timeliness of the motion to amend become factors to be taken into consideration in deciding whether or not the circumstances show that there is a triable issue which ought to be tried in the interests of justice.
>
> 14 We prefer the approach taken by the Courts in British Columbia which gives the Court seized with a motion to amend pleadings, including an amendment withdrawing or purporting to withdraw an admission, the needed flexibility to ensure that triable issues are tried in the interests of justice without injustice to the litigants.
>
> 15 The material filed by the Respondent lies at the core of the debate between the parties and will have to be assessed by the trial

judge at trial to determine the validity of the Respondent's lawsuit. It would be most undesirable, in our view, to embark at this stage of the proceedings upon a mini trial to determine whether the evidence allegedly required to be filed with the motion to amend supports or not the new amendments. We agree with Taylor J.A. in *La v. Le* "that if the courts do not permit admissions to be withdrawn when new facts are unexpectedly brought to light thereafter, parties will inevitably be discouraged from making what seemed at the time to be proper admissions, to the considerable disadvantage of litigants and the administration of justice generally". We must ensure that the procedure to withdraw admissions is not made so complex and so stringent that virtually no admissions will be made by defendants.

16 Indeed, the desirable flexibility in matters of amendment to pleadings, including, in our view, the withdrawal of admissions, was stated by our colleague Décary J.A. in the following terms in the *Canderel* case:

> While it is impossible to enumerate all the factors that a judge must take into consideration in determining whether it is just, in a given case, to authorize an amendment, the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice7.

17 Applying this test to the present case, there is, in our view, no doubt that the proposed amendments relate to a triable issue that should be decided at trial and that, for the purpose of determining the real questions in controversy between the parties, it is in the interest of justice that the amendments be authorized.

18 Furthermore, it is still early in the process and the discoveries are not yet completed, the Respondent having amended substantially its statement of claim. Consequently, we see no prejudice or injustice resulting to the Respondent in allowing the amendments. Indeed, no evidence of prejudice has been put before the motions judge or before us. The fact that the proposed amendments might make the case more difficult for a party to win is not the kind of prejudice that is in issue on motions to amend the pleadings.

[footnotes omitted]

[90] Further guidance was provided by the Federal Court of Appeal in *Merck & Co*, above:

> [29] As I understand the arguments put forward by counsel for Apotex, there is a *prima facie* right to an amendment as long as the new cause of action or defence is a triable one, the onus then being transferred to the opposing party. I do not agree.
>
> [30] The general principles with respect to amendments of pleadings were summarized as follows *in Minister of National Revenue v. Canderel Ltd.*, [1994] 1 F.C. 3 (F.C.A.):
>
> > [...] while it is impossible to enumerate all the factors that a judge must take into consideration in determining whether it is just, in a given case, to authorize an amendment, the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice.
>
> Among the numerous authorities relied upon in Canderel are those statements of Lord Griffiths in *Ketteman v. Hansel Properties Ltd.*, [1988] 1 All E.R. 38 (H.L.) at 62:
>
> > Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. Furthermore, to allow an amendment before a trial begins is quite

> different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.
>
> Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of the proceedings.

and Bowman T.C.J. in *Continental Bank Leasing Corporation et al v. The Queen* (1993), 93 D.T.C. 298 (T.C.C.), at p. 302:

> [...] I prefer to put the matter on a broader basis: whether it is more consonant with the interests of justice that the withdrawal or amendment be permitted or that it be denied. The tests mentioned in cases in other courts are of course helpful but other factors should also be emphasized, including the timeliness of the motion to amend or withdraw, the extent to which the proposed amendments would delay the expeditious trial of the matter, the extent to which a position taken originally by one party has led another party to follow a course of action in the litigation which it would be difficult or impossible to alter and whether the amendments sought will facilitate the court's consideration of the true substance of the dispute on its merits. No single factor predominates nor is its presence or absence necessarily determinative. All must be assigned their proper weight in the context of the particular case. Ultimately it boils down to a consideration of simple fairness, common sense and the interest that the courts have that justice be done.

[31] With respect, more specifically, to amendments purporting to withdraw admissions, this Court, in *Andersen Consulting v.*

Canada, [1998] 1 F.C. 605 (F.C.A.), refined the *Canderel* test as follows:

> [13] At the other end, the British Columbia courts have taken a more flexible approach and have not required as a condition essential to a withdrawal of an admission that the admission in the statement of defence be made inadvertently or hastily. Rather, they have adopted as a test that, in all the circumstances of the case, there be a triable issue which ought to be tried in the interests of justice and not be left to an admission of fact. Under such a test, inadvertence, error, hastiness, lack of knowledge of the facts, discovery of new facts, and timeliness of the motion to amend become factors to be taken into consideration in deciding whether or not the circumstances show that there is a triable issue which ought to be tried in the interests of justice.
>
> [14] We prefer the approach taken by the courts in British Columbia which gives the Court seized with a motion to amend pleadings, including an amendment withdrawing or purporting to withdraw an admission, the needed flexibility to ensure that triable issues are tried in the interests of justice without injustice to the litigants.

[32] I fully agree with the proposition set out in para. 15, in *Andersen*, that

> We must ensure that the procedure to withdraw admissions is not made so complex and so stringent that virtually no admission will be made by the defendants.

But I do not read these words to say that the procedure should be made so simple and so relaxed that virtually any withdrawal of admissions will be allowed. There is a burden to be met by the amending party and, while the factors to be considered are essentially the same for all amendments, the burden should be heavier when the amendments at issue purport to withdraw substantial admissions and would result in a radical change in the nature of the questions in controversy.

[33] The nature, timing and circumstances vary from one amendment to the other and from one type of amendment to the

other, and one must be careful not to generalize judicial pronouncements made in a given context. The prothonotary or judge seized with the motion to amend has the duty to consider all relevant factors. There is, for example, as noted by Lord Griffiths in *Ketteman* (*supra*, para. 31), "a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time". There is also a clear difference between allowing amendments at trial and allowing amendments before trial (see *Glisic v. Canada*, [1988] 1 F.C. 731 (C.A.), at p. 740; *Ketteman*, *supra*, para. 31). There is also a clear difference, I suggest, between allowing amendments that amount to the withdrawal of an admission and amendments that do not, and a clear difference between allowing amendments that amount to withdrawal of a substantial admission the result of which is to alter the cause of action and one that relates to a mere admission of fact.

[34] All this to say, to use the words of Bowman T.C.J. in *Continental Bank Leasing* (*supra*, para. 31),

> All [amendments] must be assigned their proper weight in the context of the particular case. Ultimately it boils down to a consideration of simple fairness, common sense and the interest that the courts have that justice be done.
>
> Flexibility and openness, which is the rule in motions to amend, should not be confused with complacency. The sooner an unwarranted amendment is out, the better it is for the judicial system.

...

[42] Finally, contrary to what is argued by counsel, the absence of a specific allegation of prejudice by the opposing party is not decisive. As noted by Strayer J.A. in *Scottish & York Insurance Co. v. Canada* (1999), 239 N.R. 131 (F.C.A.), there is a "principle that, in the absence of prejudice to any opposing party, an amendment to pleadings should be allowed, if otherwise proper" (at p. 133) [my emphasis]. Other factors, including that of the interests of justice, may well militate against allowing an amendment even where no prejudice is expressly alleged. Furthermore, some prejudice may appear on the face of the record without there being any need for the opposing party to expressly rely on it.

[91] The onus on a motion for leave to amend remains on the moving party. See *Merck & Co*, above, at para 32.

[92] With these principles in mind, I regard the relevant factors in the present case to be as follows:

a) This is not an amendment that clarifies an issue in dispute. It amounts to the withdrawal of a substantial omission that will affect the course of the action and will require the Defendant to deal with a new defence that has not been raised before in the dispute between the parties;

b) The amendment repudiates admissions made by the Defendant in the course of this dispute as well as the representations of counsel before the Court;

c) The Defendant has provided no evidence or explanation as to why it has changed its position and its admission that for the Component A of FPs417-A all claim elements including the Mw/Mn range, were met, except for the SHC;

d) There is no evidence before me that the admission was made without authority, by mistake, or under duress;

e) There is evidence before me in the form of the affidavit of the Defendant's expert, Dr. Speed, which is dated May 16, 2016 that the Defendant did make the admission recently and completely voluntarily;

f) The admission was made before Justice Hughes, who based his decision for not ordering a new action upon the evidence and advice of counsel available to him during the motion. The Defendant told Justice Hughes that the SHC was the only infringement issue for the R1 polymer for FPs417-A. It isn't clear whether Justice Hughes would have ordered differently if this admission had not been made or whether the Defendant gained an advantage as a result of the admission. However, the admission is so clear and recent that the Defendant and the Court require an explanation for the change to ensure that it is based upon acceptable considerations and serves a just purpose. This explanation has not been provided. And there is no explanation as to why an explanation has not been provided. As *Sopinka et al*, above, point out, and Justice Hughes demonstrated in *Astrazeneca*, above, the discretion of the Court ought to be warily exercised in these circumstances;

g) Ostensibly, the Mw/Mn of Component A of FPs417-A is a triable issue, but the contested amendment is no more than a bald assertion that is completely at odds with the admission and the recent former position of the Defendant. The Defendant has produced no evidence before me, and has provided no explanation, to support a finding that a triable issue exists with respect to the Mw/Mn of Component A of FPs417-A. Without evidence

and an explanation for such a *volte-face*, the Court cannot determine if there really is a triable issue, or whether the change has been made for an unacceptable purpose. Hostile conduct has occurred in these proceedings before and was referred to by Justice Hughes in his reasons of March 30, 2016. Justice Hughes pointed out (at para 15), that this was particularly so with regard to the Defendant, and that Justice O'Keefe had dealt with this matter in his costs order. This makes the Defendant's failure to explain and substantiate the reasons for its *volte-face* all the more problematic for the Court;

h) In addition to the admission itself, and again as pointed out by Justice Hughes at para 16 of his reasons, the Defendant has reached an agreement for supplemental damages with the Plaintiffs in parallel U.S. proceedings, that includes additional grades including FPs417-A;

i) Whether the amendment in dispute will prejudice the Plaintiffs is difficult to determine on the record before me. The timing for the trial and the Reference has been set and the evidence before me suggests that the amendment would require further scientific testing by the Plaintiffs. Any additional testing and legal process required by the disputed amendment can be addressed when costs are considered and it is not clear on the record before me that it could not be done before the time set for the trial and Reference or, if it cannot, that the Reference cannot be postponed. However, as the Federal Court of Appeal pointed out in *Merck & Co*, above, at para 42, "other factors, including that of the interest of justice, may well militate against allowing an amendment even where no prejudice is expressly alleged." On the other hand, without an explanation from the Defendant for the complete change of position represented by the disputed amendment, it is difficult to say if any real prejudice to the Defendant will result from a refusal;

j) There is a public interest here, and an obligation upon me embodied in Rule 3 of the *Federal Courts Rules*, to secure the just, most expeditious and least expensive determination of every proceeding on its merits. When the Plaintiffs brought their Additional Grades motion before Justice Hughes, they provided an explanation as to why the four new grades needed to be dealt with. In the present motion by the Defendant, I have not been provided with an explanation for the recent *volte-face* that is found in the Contested Amendment. I am being asked to authorize a withdrawal of that amendment in the dark.

V. CONCLUSIONS

[93] The central issue for the Court in deciding whether to exercise its discretion in favour of allowing the Contested Amendment is whether, in accordance with *Andersen Consulting*, above, and *Merck & Co*, above, it is more consonant with the interests of justice that the amendment be permitted or denied and that this boils down to a consideration of simple fairness, common sense

and the interests that the Court has to see that justice be done. However, on a motion for leave to amend the onus is upon the moving party. In the present case, the Defendant has relied upon an assumed authorization in the reasons of Justice Hughes dated March 30, 2016 that it has *carte blanche* to plead any defence it deems appropriate without challenge and, in addition that the amendment should be allowed because there is no likelihood of prejudice to the Plaintiffs. What the Defendant has tellingly failed to do is to explain the complete *volte-face* from its recently asserted admission that the only infringement issue with Component A of FPs417-A in SHC. In other words, the Defendant has deliberately chosen to keep from the Court information the Court requires to decide whether allowing the amendment is in the interest of justice, and has provided no argument as to why it does not need to provide this information. As a consequence, I have to conclude that the Defendant has not satisfied the onus upon it that it is more consonant with the interest of justice to allow the amendment. Without such information, the Court cannot know whether there is a genuine triable issue or whether the Defendant is engaging in yet further "hostile" activity.

VI. RULE 221

[94] Under Rule 221(1) of the *Federal Courts Rules*, the Court may strike any portion of a pleading that is, *inter alia*, scandalous, frivolous or vexatious, may prejudice or delay the fair trial of the action, constitutes a departure from a previous pleading, or is otherwise an abuse of the process of the Court.

[95] In the present case, the Defendant's Contested Amendment, constituting as it does the withdrawal of a formal admission without leave of the Court, is in my view scandalous and vexatious, a departure from a previous pleading, and an abuse of the process of the Court.

[96] The Defendant has not asked for leave to amend and has not suggested any amendment that would cure the problem identified by the Court. Consequently, the Court can grant no leave to amend.

ORDER

THIS COURT ORDERS that

1. The Plaintiffs' motion is allowed;
2. Paragraph 2B and the amended portion of paragraph 98 of the Defendant's Amended Fresh As Amended Statement of Defence and Counterclaim, filed April 22, 2016, are struck without leave for further amendment;
3. The Defendant's cross motion is denied;
4. The Plaintiffs shall have their costs of both motions in any event of the cause.

"James Russell"
Judge

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 v NOVA CHEMICALS CORPORATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 14, 2016
ORDER AND REASONS:	RUSSELL J.
DATED:	JUNE 23, 2016

APPEARANCES:

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