

Federal Court



Cour fédérale

Date: 20260625

Docket: T-2620-25

St. John's, Newfoundland and Labrador, June 25, 2026

PRESENT: Associate Judge Trent Horne

BETWEEN:

**SOLUCORE INC., SOLUCORE ATLANTIC INC.,
SOLUCORE OTTAWA AND REGION INC.,
SOLUCORE® QUÉBEC INC. AND XICORE INC.**

Plaintiffs

and

**KJA CONSULTANTS INC., ATIS ELEVATOR
INSPECTIONS, LLC AND ATIS ASCENDA
PARTNERS, LLC**

Defendants

REASONS AND ORDER

I. Background

[1] This is an action for infringement of Canadian patent 2,921,460 [the 460 Patent]. In very general terms, the 460 Patent relates to systems and methods for monitoring escalators and elevators, also called lift devices.

[2] The fresh as amended statement of claim asserts that the defendants infringe each of the 76 claims of the 460 Patent.

[3] In their statement of defence and counterclaim, the defendants deny that any claim has been infringed. The defence includes reliance on the prior use exemption in section 56 of the *Patent Act*, RSC 1985, c P-4. The defendants also assert that the claims are invalid, including on the basis that they are anticipated and obvious. Schedule “B” to the statement of defence and counterclaim sets out a list of 74 prior art references in support of both anticipation and obviousness. The defendants further rely on the *Gillette* defence, which is broadly based on the same 74 prior art references.

[4] In the plaintiffs’ view, the *Gillette* and prior use defences, and the allegations of anticipation and obviousness based on what is described as “Prior Art Products and Systems”, were inadequately particularized. A demand for particulars was served.

[5] In response to the demand for particulars, the defendants stated that the entirety of each of the references in Schedule “B,” and all combinations, were relevant to the *Gillette* defence. No particulars were provided for the prior use defence. The defendants also objected to providing facts or particulars relating to how the Prior Art Products and Systems were disclosed.

[6] Dissatisfied with the response, the plaintiffs have brought this motion.

[7] In their responding materials, the defendants have agreed to particularize the prior use defence. Paragraph 12 of the statement of defence and counterclaim is therefore struck, with leave to amend.

II. Law on Particulars

[8] There is no dispute on the legal principles applying to motions to strike or for particulars; the disagreement is on the outcome when the law is applied to the facts.

[9] The Federal Court of Appeal said the following about particulars in *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227:

[16] It is fundamental to the trial process that a plaintiff plead material facts in sufficient detail to support the claim and relief sought. As the judge noted “pleadings play an important role in providing notice and defining the issues to be tried and that the Court and opposing parties cannot be left to speculate as to how the facts might be variously arranged to support various causes of action.”

[17] The latter part of this requirement – sufficient material facts – is the foundation of a proper pleading. If a court allowed parties to plead bald allegations of fact, or mere conclusory statements of law, the pleadings would fail to perform their role in identifying the issues. The proper pleading of a statement of claim is necessary for a defendant to prepare a statement of defence. Material facts frame the discovery process and allow counsel to advise their clients, to prepare their case and to map a trial strategy. Importantly, the pleadings establish the parameters of relevancy of evidence at discovery and trial.

[18] There is no bright line between material facts and bald allegations, nor between pleadings of material facts and the prohibition on pleading of evidence. They are points on a continuum, and it is the responsibility of a motions judge, looking at the pleadings as a whole, to ensure that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair.

[19] What constitutes a material fact is determined in light of the cause of action and the damages sought to be recovered. The plaintiff must plead, in summary form but with sufficient detail, the constituent elements of each cause of action or legal ground raised. The pleading must tell the defendant who, when, where, how and what gave rise to its liability.

[10] Vague or poorly drafted pleadings need not be struck or re-drafted if they can be comprehended by a mind willing to understand. A mind willing to understand is one informed by the full context of the proceedings, including the parties named, the claims pleaded, the remedies sought, and any prior judgment or order (*Bayer Inc v Cobalt Pharmaceuticals Company*, 2017 FC 775 at para 8).

III. Analysis

A. *The Gillette Defence*

[11] The entirety of the defendants' pleading in respect of the *Gillette* defence is as follows:

Gillette Defence

11. The defendants plead and rely on the *Gillette* defence. The defendants' systems and services consist of methods, systems, or technology that were publicly available and disclosed or that were obvious to persons skilled in the art to which the 460 Patent pertains prior to February 22, 2016. Without limiting the generality of the foregoing, all of the defendants' allegedly infringing activities were disclosed and enabled, or were rendered obvious, by each of the prior art documents, methods, uses, activities, services, and systems listed at Schedule "B" and/or common general knowledge. If the defendants' activities fall within any asserted claim, then such claim is necessarily invalid for anticipation, obviousness, or both.

[12] In their response to the demand for particulars directed to this paragraph, the defendants stated "in the spirit of cooperation and expressly subject to expert opinion, the defendants allege the entirety of each of the entries listed at Schedule "B" to the statement of defence and counterclaim and all combinations in respect of their *Gillette* defence. The defendants expressly reserve the right to update these positions as necessary."

[13] The nature and application of the *Gillette* defence was addressed in *Western Oilfield Equipment Rentals Ltd v M-I LLC*, 2021 FCA 24 [*Western Oilfield*]:

[73] The appellants argue that the Federal Court erred because it failed to consider their *Gillette* defence, based principally on the Derrick patent application (see discussion in the Anticipation section below). The respondent counters that the Federal Court determined that Derrick did not anticipate the infringed claims, and “[t]he *Gillette* defence was thus dealt with in substance, if not name.”

[74] Though I see no error in the Federal Court’s consideration (or non-consideration) of the *Gillette* defence, the respondent’s submission suggests a common misunderstanding about the nature of this issue, which prompts me to say a few words on the subject.

[75] The *Gillette* defence gets its name from the U.K. House of Lords decision in *Gillette Safety Razor Company v. Anglo-American Trading Company Ltd.* (1913), 30 R.P.C. 465 (*Gillette*). This case gave rise to the principle that if a defendant is accused of infringing a patent with a product that is the same as, or not patentably distinct from, the prior art, the patentee finds itself on the horns of a dilemma in pursuing its claim; in the words of Lord Moulton in *Gillette*, at page 480:

.... If the claims of such a Patent were so wide as to include [the Defendants’ product], the Patent would be bad, because it would include something which differed by no patentable difference from that which was already in possession of the public. Such a Patent would be bad for want of novelty. If the Claims were not sufficiently wide to include the Defendants’ [product], the patentee could not complain of the public making it. In other words, the Defendants must succeed either on invalidity or on non-infringement.

[76] A similar approach was taken by the Supreme Court of Canada in *J. K. Smit & Sons, Inc. v. McClintock*, 1939 CanLII 50 (SCC), [1940] S.C.R. 279, [1940] 1 D.L.R. 507, where the appellant sought a declaration of non-infringement on the basis that it was using a method known in the prior art. At page 286 [of S.C.R.], the Court asked itself “could the respondent at the time he applied for his patent have got a patent for the process which the appellants employ”? Answering the question in the negative, the Court concluded that there could be no infringement of any valid patent claim.

[77] The *Gillette* defence permits a defendant (or a court) a shortcut around the often difficult and time-consuming process of construing the claims of a patent, and then determining whether those claims are valid and whether they have been infringed.

[78] However, the application of the *Gillette* defence has proved less simple in practice, and this has led to some misunderstanding and misapplication of the defence. Though the *Gillette* defence is frequently asserted by parties accused of patent infringement, it is rare for such parties to rely exclusively on this defence and actually omit analysis of claim construction, validity and infringement. Typically, a court will be faced with arguments on all of these issues. Likewise, courts dealing with a *Gillette* defence as well as issues of claim construction, validity and infringement rarely skip the other issues and limit themselves to the *Gillette* defence.

[79] It is perhaps because the *Gillette* defence is typically asserted along with other defences that its nature as an alternative to claim construction and analysis of validity and infringement is sometimes misunderstood or misapplied, by counsel and by courts. For example, contrary to some of the jurisprudence of the Federal Court, the success of a *Gillette* defence does not depend on a conclusion that the claim in question is invalid for anticipation or obviousness. Quite the contrary, the principal benefit of a *Gillette* defence is to avoid the need to construe the claims and reach a conclusion on validity and infringement issues. Where a court has (i) construed the claims in issue, (ii) determined which claims are valid and which are not, and (iii) found certain valid claims to be infringed (as did the Federal Court in the present case), consideration of the *Gillette* defence is superfluous and unnecessary. It may also create confusion. In fact, it is arguably preferable in some cases for the court not to take the shortcut offered by the *Gillette* defence because the more laborious claim construction process may lead to a conclusion that the claims in question are invalid. Such a conclusion would be of interest not just to the parties, but also to the broader public.

[80] It is notable that the Federal Court of Appeal in *Eurocopter*, at paragraph 115, found that the respondent's *Gillette* defence in that case failed "[a]s a logical consequence" of the failure of its anticipation argument. I do not take this as a statement that a *Gillette* defence will always fail where anticipation has not been established. In *Eurocopter*, the Federal Court of Appeal noted at paragraph 37 that the respondent had promoted its allegedly infringing product as innovative, and that the trial judge had considered this fact in dismissing the *Gillette* defence. In this

context, dismissal of the *Gillette* defence makes sense: an assertion that a product is innovative would seem to be inconsistent with an assertion that one is practising the prior art.

[Certain citations omitted.]

[14] At the risk of oversimplifying the analysis in *Western Oilfield*, and as I said in *Janssen Inc v Pharmascience Inc*, 2025 FC 718 at paragraph 8, a defendant relying on a *Gillette* defence states that its product is the same as what is disclosed in the prior art.

[15] The decision in *Gillette Safety Razor Company* permits some variance between a defendant's product and the prior art – a *Gillette* defence can be successful if the defendant's product is the same as, or not patentably distinct from, the prior art. I do not read this, however, as opening the door to a defendant broadly and generally relying on scores of prior art references to support a *Gillette* defence.

[16] I cannot agree with the defendant's submissions that a *Gillette* defence is somehow contingent on the allegations of infringement in the statement of claim. A defendant relying on the *Gillette* defence is making a positive assertion that its product or service - what it is actually manufacturing, using, or selling - is the same as or not patentably distinct from a prior art reference that was available before the priority date. This necessarily requires a defendant to plead both what it is doing, and how those activities are the same as or not patentably distinct from a specific prior art reference. Here, the defendants have not pleaded what they are doing, other than to say it can be found in a combination of one or more of 74 prior art references.

[17] I agree with the defendants that a *Gillette* defence can be based on more than one piece of prior art. I cannot agree, however, that generally referring to scores of prior art references as a matrix, using the language “without limiting the generality of the foregoing,” and further adding reliance on the common general knowledge, meets the minimum level of particulars that the jurisprudence requires.

[18] Contrary to the defendants’ argument, I do not find support in *Arctic Cat Inc v Bombardier Recreational Products Inc*, 2016 FC 1047 aff’d 2018 FCA 125 for the proposition that a *Gillette* defence can be based on a broad mosaic of prior art references. While principles of obviousness may be relevant to determine if a defendant’s activities are not patentably distinct from the prior art, I cannot accept that this opens the door at the pleadings stage to mount a *Gillette* defence based on 74 prior art references in a single paragraph with open-ended allegations.

[19] In *Regents of the University of California v I-MED Pharma Inc*, 2018 FC 164 at paragraph 180, Justice Manson stated that the *Gillette* defence is arguably only available if a prior art reference is found to anticipate a claim or claims in issue. He acknowledged the decision in *Arctic Cat* but did not comment on the approach.

[20] *Western Oilfield*, a decision of the Federal Court of Appeal, was released after *Arctic Cat*, and I do not find support in it to permit a *Gillette* defence that is based on a broad matrix of prior art.

[21] I expect there is more to be said by trial judges on the *Gillette* defence, particularly in circumstances when the prior art reference is not identical to, but is also not patentably distinct from, a defendant's product. On a pleadings motion, the issue is not to fully resolve the metes and bounds of the defence, rather to determine whether the existing pleading adequately frames the issues for discovery and trial. Paragraph 11 of the statement of defence and counterclaim, as broadened by the response to demand for particulars, does not. The defendants must be much more specific as to what their products and services are, and how their products or services are the same as, or not patentably distinct from, the specific prior art relied on.

[22] Paragraph 11 of the statement of defence and counterclaim is therefore struck, with leave to amend.

B. *Certain Schedule "B" References*

[23] Of the 74 references in Schedule "B", 17 of them are what is described in the materials as "Prior Art Products and Systems." These are not single publications, rather products or systems in the field of lift devices. Examples are:

56. Solucore "e-volve", and documents that describe said product and system, including:
 - YouTube, Solucore Inc., "e-volve™ - The Elevator Portfolio Management Tool", November 27, 2014, online: <<https://www.youtube.com/watch?v=vU3kH6LAgx8>>
 - Solucore Elevator Solutions, "e-volve™", January 6, 2007, online: <<https://web.archive.org/web/20070106073813/www.solucore.com/evolve/evolveHome.aspx>>
67. Hitachi Elevator RMS (1987), and documents that describe said product and system

[24] The fundamental problem with some of these references is the use of the word “including.” For others, the problem is that documents are referred to but not identified.

[25] This is the second pleadings motion in this proceeding. In the first, the defendants moved to strike the statement of claim on the basis that it inadequately defined the allegations of infringement. The motion was granted (*Solucore Inc v KJA Consultants Inc*, 2026 CanLII 1147).

[26] At paragraph 21 of that decision, I reiterated my observations in *Samsung Bioepis Co, Ltd v Janssen Biotech, Inc*, 2024 FC 1715 at paragraph 27, that words like “including without limitation” are magnets for a demand for particulars. The use of “including” implies that there may be other documents that describe the products and systems the defendants are relying on. If other documents are contemplated, the plaintiffs are entitled to know what they are (see also *International Water-Guard Industries Inc v Bombardier Inc*, 2007 FC 285 at para 13).

[27] In the first pleadings motion, I concluded that the plaintiffs may be unaware of everything the defendants are doing, but they must plant a flag and clearly state what they do know. The same standard applies to the defendants. If the defendants are relying on documents or videos that describe the features of earlier lift device products or systems, then they must provide a closed list of what documents are relied on in this respect. For references like number 67 reproduced above, if the defendants are relying on documents, they need to state what they are.

[28] In their notice of motion, the plaintiffs request, as alternative relief, an order that the defendants particularize who, when, where, and how each “schema and system” or “product and system” in items 55-61 and 65-74 in Schedule “B” were disclosed. A party is entitled to enough information to understand the other party's position and prepare a responsive answer, not every fact on which the action is based (*Océan Navigation Inc v Abitibi Consolidated Inc*, 2007 FC 413 at para 6). This information is not necessary for the purposes of preparing an informed defence.

IV. Costs

[29] After the hearing of the motion, the parties wrote to the Court and advised that they had agreed on costs - \$3,500 in the cause, subject to the Court's discretion. The plaintiffs were substantially successful on the motion, and this amount is awarded.

ORDER in T-2620-25

THIS COURT ORDERS that:

1. Paragraph 11 of the statement of defence and counterclaim is struck, with leave to amend.
2. Paragraph 12 of the statement of defence and counterclaim is struck, with leave to amend.
3. Items 55-61 and 65-74 of Schedule “B” to the statement of defence and counterclaim are struck, with leave to amend.
4. The plaintiff’s motion is otherwise dismissed.
5. An amended statement of defence and counterclaim shall be served and filed within 30 days of the date of this order.
6. Costs of the motion are fixed at \$3,500.00, payable by the defendant to the plaintiff in the cause.

“Trent Horne”
Associate Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2620-25

STYLE OF CAUSE: SOLUCORE INC. ET AL v. KJA CONSULTANTS
INC. ET AL

PLACE OF HEARING: TORONTO, ONTARIO

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REASONS AND ORDER: HORNE A.J.

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