

**CITATION:** Zacon Limited v. Provincial Doors Inc., 2024 ONSC 4941  
**COURT FILE NO.:** CV-19-00008265-0000  
**DATE:** 2024-09-06

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
Zacon Limited	)	Gordon S. Clarke, for the Plaintiff
	Plaintiff	)
<b>– and –</b>	)	
	)	
Provincial Doors Inc.	)	Ryan Steeves and Mackenzie Jamieson, for
	Defendant	) the Defendant, Provincial Doors Inc.
<b>– and –</b>	)	
	)	
Pretium Resources Inc.	)	Cole Meagher and Nick Morrow, for the
	Defendant	) Defendant, Pretium Resources Inc.
	)	<b>HEARD:</b> August 21, 2024

**DECISION ON MOTION FOR PRODUCTIONS**

**P.J. BOUCHER RSJ**

- [1] The plaintiff moved for the following relief:
- a. An order compelling the defendants to produce financial information and records relating to the use of mine doors, including efficiencies achieved with them, their operational importance and how much money the defendants made with them; and
  - b. An order that officers of the defendants be made available for cross-examination in the event the affidants of the affidavits of documents lack knowledge regarding the use of the mine doors.
- [2] The defendants oppose the relief sought by the plaintiff.

**Background**

- [3] The plaintiff manufactures specialty mine safety doors referred to as Opposing Swing Steel Doors (“OSDs”). The defendant Provincial Doors Inc. (“PDI”) also manufactures OSDs. PDI sold OSDs to the defendant, Pretium Resources Inc. (“Pretium”). Both defendants participated in the installation of the OSDs at Pretium’s Brucejack mine in British Columbia.

- [4] These proceedings started in 2019. The plaintiff alleges PDI manufactures, sells, installs, and maintains OSDs in violation of the plaintiff's patented technology.
- [5] The defendants were initially represented by the same law firm and filed a joint statement of defence and counterclaim. PDI commenced a third-party claim for contribution and indemnity against a former owner of PDI.
- [6] The defendants thereafter hired separate counsel. Pretium successfully moved for an order permitting them to deliver a fresh as amended statement of defence and crossclaim. Pretium discontinued its counterclaim against the plaintiff.
- [7] The parties served affidavits of documents. PDI also served a supplementary and second supplementary affidavit of documents. Examinations for discovery have not been scheduled.

### **The Law**

- [8] Every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document: r. 30.02(1) of the *Rules of Civil Procedure*.
- [9] Every document relevant to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested, as provided in rules 30.03 to 30.10, unless privilege is claimed in respect of the document: r. 30.02(2).
- [10] Lawsuits must be decided within the boundaries of the pleadings. Doing otherwise deprives defendants of both their right to know the case they must meet, and the opportunity to meet it: *Rodaro v. Royal Bank of Canada* (2002), 2002 CanLII 41834 (ON CA), 59 O.R. (3d) 74, [2002] O.J. No. 1365 (C.A.), at paras. 59-63.
- [11] The relevance of documents is determined by the pleadings: *Denault v. Alplay*, 2016 ONSC 1618 at paras. 11-13; *The Manufacturers Life Insurance Company v. ASG Technologies Group, Inc.*, 2020 ONSC 3286 at para. 13.
- [12] Rule 30.06 provides as follows:
  - Where the court is satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents, or that a claim of privilege may have been improperly made, the court may,
    - (a) order cross-examination on the affidavit of documents;
    - (b) order service of a further and better affidavit of documents;
    - (c) order the disclosure or production for inspection of the document, or a part of the document, if it is not privileged; and

(d) inspect the document for the purpose of determining its relevance or the validity of a claim of privilege.

### Positions of the Parties

- [13] Although other claims for relief were set out in the notice of motion and amended factum, in oral argument, the plaintiff limited its request to an order for further productions and the option to question officers of the defendants if necessary.
- [14] The plaintiff submits that because of the alleged patent infringements, it is entitled to seek either damages or an accounting of the defendants' profits, as plead in the statement of claim, and as provided for in the *Patent Act*, R.S.C. 1985, c. P-4.
- [15] The plaintiff argues the defendants' profits causally attributable to the infringement are therefore relevant to a material issue in the proceedings and must be disclosed and produced.
- [16] PDI submits the motion should be dismissed because the plaintiff failed to respect the order which established the timetable for the delivery of materials for this motion and because the plaintiff breached the deemed undertaking rule.
- [17] PDI acknowledges profits are a live issue in these proceedings. It disclosed and offered for production almost four-hundred documents, including:
- a. Financial documents;
  - b. Purchase requests, Brucejack mine orders, invoices for OSDs sold to Pretium, product descriptions and sale costs; and
  - c. A spreadsheet detailing the sales of their OSDs from 2006 including:
    - i. When and to whom they were sold;
    - ii. The quantities of doors sold;
    - iii. Specific invoice numbers for each sale;
    - iv. Revenues for each sale including for door frames; and
    - v. A description of the costs associated with the OSDs, including commissions, manufacturing, administrative and overhead costs.
- [18] PDI submits the plaintiff has failed to identify any other documents relevant to the issue of profits that have not already been disclosed. PDI further submits the plaintiff's evidence on this point is speculative. Finally, PDI argues this motion is premature. The parties should proceed to examinations for discovery where questioning may assist in bringing to light the possible existence of other relevant documents.
- [19] Pretium asks that the motion be dismissed because of the plaintiff's failure to follow the scheduling order. Pretium also argues the statement of claim fails to plead any claim for

profits relating to Pretium. Pretium acknowledges there is a claim for profits vis-à-vis PDI, and accordingly it has already disclosed documents that relate to their purchase and installation of PDI’s OSDs. Anything further relating to Pretium’s profits, they submit, is outside the scope of the pleadings.

**Analysis**

*The timetable order*

- [20] Both defendants ask that the motion be dismissed because of the plaintiff’s failure to abide by the consent scheduling order regarding the materials delivered for this motion. This failure includes late delivery of the factum (and an amended factum which was not provided for in the order) as well as delivery of documents by way of a supplemental document brief, rather than through an affidavit.
- [21] Neither defendant identified any prejudice allegedly suffered. Neither defendant asked for an amendment to the scheduling order to permit them to respond to late or improperly filed documents. In my view, these minor transgressions are insufficient grounds to dismiss the motion. This argument must accordingly fail.

*The claim for an accounting of profits*

- [22] Paragraph C of the statement of claim, found under the section titled “claim” reads as follows:
 

Plaintiff Zacon, at its election, claims its damages, its lost profits and/or the Defendant's profits in amounts to be determined in excess of \$5,000,000.00, including damages determined under United States law.
- [23] Although it could have been more clearly plead, I find paragraph C contains an alternative claim for an accounting of profits as set out in the *Patent Act*. The Supreme Court of Canada recently summarized three statutory patent law remedies in *Nova Chemicals Corp. v. Dow Chemical Co.*, 2022 SCC 43 at para. 7:

Term	Definition
Reasonable Compensation	<p>Reasonable compensation can be granted for any loss caused by the infringer’s use of the invention between the patent’s publication and the grant of the patent.</p> <p>This remedy is authorized by <u>s. 55(2)</u> of the <i>Patent Act, R.S.C. 1985, c. P-4</i>.</p> <p>This remedy typically entitles a patentee to a “reasonable royalty” (S. J. Perry and T. A. Currier, <i>Canadian Patent Law</i> (4th ed. 2021), at §§17.93-17.94).</p> <p>A reasonable royalty is “that which the infringer would have had to pay if, instead of infringing the Patent, [the infringer] had come to be licensed under the Patent” (<i>AlliedSignal Inc. v. Du Pont Canada Inc.</i> (1998), 78 C.P.R. (3d)</p>

Term	Definition
	129 (F.C. (T.D.)), at para. 199, quoting <i>Unilever PLC v. Procter &amp; Gamble Inc.</i> (1993), 47 C.P.R. (3d) 479 (F.C. (T.D.)), at p. 571 (text in brackets in original)). “The test is what rate would result from negotiations between a willing licensor and a willing licensee” (para. 199).
Damages	<p>Damages compensate the <i>patentee</i> for all pecuniary losses causally attributable to infringement after the grant of the patent.</p> <p>This remedy is authorized by <u>s. 55(1)</u> of the <i>Patent Act</i>.</p> <p>Damages can include lost profits on sales or due to depression of prices, and lost income from licensing opportunities, among others (Perry and Currier, at §17.9).</p>
Accounting of Profits	<p>An accounting of profits requires that the <i>infringer</i> disgorge all profits causally attributable to infringement of the invention after the grant of the patent.</p> <p>This remedy is authorized by <u>s. 57(1)(b)</u> of the <i>Patent Act</i>.</p> <p>This remedy is an alternative to an award of damages (<i>Apotex Inc. v. ADIR</i>, 2020 FCA 60, 172 C.P.R. (4th) 1, at para. 35). It is an equitable, discretionary remedy (<i>AlliedSignal Inc. v. Du Pont Canada Inc.</i> (1995), 61 C.P.R. (3d) 417 (F.C.A.), at pp. 444-46). Judges may consider practical consequences, including expediency, misbehaviour by litigants, and whether the patentee practices the invention itself when exercising this discretion (K. Andrews and J. de Beer, “Accounting of Profits to Remedy Biotechnology Patent Infringement” (2009), 47 <i>Osgoode Hall L.J.</i> 619, at p. 641; <i>Bayer Inc. v. Cobalt Pharmaceuticals Co.</i>, 2016 FC 1192, 142 C.P.R. (4th) 374, at paras. 6 and 10; <i>Seedlings Life Science Ventures, LLC v. Pfizer Canada ULC</i>, 2021 FCA 154, at paras. 76 and 79-81 (CanLII)).</p>

- [24] PDI acknowledges profits are in issue in this proceeding. The issue to be determined is whether Pretium’s profits are as well.
- [25] Paragraph C refers to “the defendant’s profits.” The plaintiff submits this was intended to include all the defendants, and the misplaced apostrophe should not restrict this claim to PDI.
- [26] In my view, the statement of claim as currently drafted does not include a claim for an accounting of Pretium’s profits. The focus of the statement of claim is PDI’s alleged violation of the plaintiff’s patents, including that PDI “wrongfully earned profits at the Plaintiff’s expense”: para. 19 of the claim. In comparison, the claim is very brief in its treatment of allegations regarding Pretium. Paragraph 28 suggests that Pretium purchased,

installed, and stored OSDs manufactured by PDI. Paragraph 29 states that Pretium “has notice of Plaintiff Zacon’s patents and has been actively induced by Defendant PDI and others” to purchase, install, maintain, and store the OSDs. There is no suggestion that Pretium has “wrongfully earned profits at the Plaintiff’s expense.”

- [27] Even a large and liberal interpretation of the claim does not connect these allegations to a claim for Pretium’s profits. The claim does not contain any allegations or material facts to suggest that some of Pretium’s profits are causally attributable to PDI’s alleged infringement of the patents.
- [28] Relevance of documents is determined by the pleadings. Pretium has appropriately disclosed its documents that relate to PDI’s alleged profits in relation to its purchase and installation of the OSDs from PDI. There being no claim for an accounting of Pretium’s profits, the request for additional disclosure cannot succeed as against Pretium.

*The documents sought by the plaintiff*

- [29] Determining whether documents should be disclosed and produced involves the following. To start, the moving party identifies the type of document or class of documents sought. This allows the court to then assess relevancy. Finally, the moving party must present non-speculative evidence that the relevant documents sought are in the possession, control, or power of the other party: *Ceballos v. Aviva Insurance et al.*, 2021 ONSC 4695 at para. 8 citing *Titanium Logistics Inc. v. BSD Linehaul Inc. et al.*, 2019 ONSC 4955 at para. 10.
- [30] In this motion the plaintiff frames its request for additional documents as being necessary to properly determine whether it should elect to pursue damages and losses or an accounting of the defendant’s profits. It broadly seeks “documents, records and information” from PDI in relation to “profits, its sales and other general allegations in its Statement of Defence and Counterclaim.”
- [31] Without identifying the type or class of document sought the court cannot assess whether they are relevant to the issue of PDI’s profits causally attributable to PDI’s alleged infringement of the patents. In short, the motion is premature. PDI has already disclosed and produced documents relating to its profits with respect to the OSDs. The plaintiff has not identified what documents are missing. Examination for discovery will allow the plaintiff to question PDI about whether specific documents or a class of documents exist. If they do, and if they are not produced, then a motion can be brought at that time: *Titanium Logistics*, at para 12.
- [32] The plaintiff has also failed to provide more than speculative evidence that PDI possesses relevant documents that have not been disclosed. In this regard the plaintiff relies on Ronald Gilbeau’s affidavit sworn April 27, 2021.
- [33] Gilbeau is a former sales manager at PDI. He was involved in the sale of OSDs to Pretium as well as in their installation at the Brucejack mine. Gilbeau reviewed PDI’s affidavit of documents and supplementary affidavit of documents. His evidence is that documents

relating to his sales activities regarding OSDs (“emails, notes and internal exchanges”), costs incurred in respect of sales and financial information are missing.

- [34] This position is problematic for several reasons. First, there is no way to assess how Gilbeau’s assertions that “emails, notes and internal exchanges” are missing make any such documents relevant to the issue of PDI’s profits. More significantly, Gilbeau did not review the actual documents listed in PDI’s affidavit of documents and supplemental affidavit of documents. E-copies of these documents were provided to the plaintiff on January 7, 2022. While this production post-dates Gilbeau’s affidavit, there is no explanation regarding why he did not review documents the plaintiff has had for well over two years. In addition, Gilbeau did not review PDI’s second supplementary affidavit of documents (served February 18, 2022) which contains financial documents, including invoices sent to Pretium.
- [35] Gilbeau’s conclusions regarding PDI’s withholding of relevant documents are therefore speculative. The plaintiff has accordingly not met its onus of establishing PDI is withholding relevant documents.

*Examination of officers of the defendants*

- [36] Rule 31.03(2)(a) permits an examining party to choose “any officer, director or employee” for examination on behalf of the corporation. In oral argument the plaintiff conceded it is prepared to examine the affiants of the affidavits of documents but may want to question other officers who are more knowledgeable regarding the use of the OSDs. If such a request is made and is opposed by one or more of the defendants, they may bring a motion at that time to compel the plaintiff to examine someone else: r. 31.03(2)(a).

*The deemed undertaking rule*

- [37] Given my findings on these issues, I need not consider PDI’s argument considering the deemed undertaking rule.

**Conclusion**

- [38] For these reasons, the plaintiff’s motion is dismissed.
- [39] If the parties cannot agree on costs, the defendants may deliver submissions on costs of no more than two pages, not including any offers to settle and bills of costs, within fifteen days of the date of these reasons. The plaintiff will have thirty days from the date of these reasons to deliver its written submissions. There will be no reply.

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Regional Senior Justice Patrick J. Boucher

**Released:** September 6, 2024



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