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July 20, 2026

Spotless Testimony: Another Cycle of the Gemak Detergent Dispute Fails to Get Out the Stains

Patent trials are rarely just about the hard science of an underlying claim. They are human dramas with two competing storylines, where the Court must decide not only what the science shows, but whether the people explaining that science can be trusted.

The *Gemak* case illustrates the point. The enduring detergent-patent dispute has a history of expert credibility findings and again, most recently in Gemak Trust v Jempak ULC (*Gemak*), the litigation turned as much on credibility as on the chemistry.

In complex patent disputes, counsel often devote enormous energy to the science and the claims, as they should. But *Gemak* highlights a harder truth: if the experimental record looks engineered, or if the expert appears to have entered the witness box already committed to the answer, the case may not survive the spin cycle.

Background

In Canada, the *Gemak* dispute dates back to 2018, when the plaintiff, GEMAK, first commenced an action for patent infringement against the defendant, Jempak Corporation (Jempak).

Jempak develops, manufactures, and sells dishwashing detergent pod products. GEMAK owns now-expired patents claiming dishwasher and laundry detergent compositions capable of incorporation into a single-compartment, water-soluble film sachet, commonly referred to as a monodose detergent pod.

The claims relate to an encapsulated percarbonate granule, or to a dishwashing detergent composition containing encapsulated percarbonate granules. Percarbonate is a bleaching agent that oxidizes in water. Two independent asserted claims required that the percarbonate be “encapsulated” by a “blend” comprising carboxymethyl cellulose, or CMC, and two other ingredients. The location and composition of that blend became central to the infringement dispute.

Initial Motion for Summary Judgment

Once litigation was commenced, Jempak moved for summary judgment seeking dismissal of GEMAK's action based on non-infringement. Jempak argued its products did not contain CMC in the blend that encapsulated the percarbonate granules, as claimed in the patents. GEMAK responded with expert evidence, including evidence from Drs. Gayle Frankenbach and Colin Nuckolls. Dr. Frankenbach addressed claim construction, the characteristics of the skilled person, and the common general knowledge. Dr. Nuckolls provided testing evidence concerning Jempak's product.

On a summary judgment motion, the Court ordinarily proceeds on affidavits, transcripts, and documentary evidence. It does not hear the witness give live testimony. The motion judge nevertheless made serious adverse findings about GEMAK's expert, Dr. Frankenbach, concluding that she had not maintained the appropriate independence of an expert witness and gave little or no weight to her testimony. The Court was also unpersuaded by Dr. Nuckolls' testing evidence, including whether he detected CMC on the percarbonate granules rather than elsewhere in the sample.

The Federal Court granted summary judgment in 2020 and dismissed the action. The decision turned, in material part, on the Court's treatment of GEMAK's expert credibility and on the limits of its testing evidence offered (see our previous blog post here).

Summary Judgment Overturned on Appeal

GEMAK appealed the Federal Court's decision on summary judgment and was ultimately successful in having the decision overturned.

The Federal Court of Appeal (FCA) focused on the lower Court's error in making material credibility findings on a paper record in a motion for summary judgment. The FCA discussed the difficulties with inferring credibility from a bare transcript without seeing and hearing the live testimony. It concluded that the motion judge committed a palpable and overriding error in making negative credibility findings about Dr. Frankenbach. The FCA set aside the summary judgment and directed that the matter go to trial (see our previous blog post here).

The *Gemak* Trial Decision

The trial proceeded over several days in April and May 2025. By that time, the case had narrowed. GEMAK advanced only one of the two patents that had featured at the summary judgment stage and limited its case to three asserted claims. Infringement

remained a central issue. Jempak also alleged invalidity on several grounds, including anticipation, obviousness, insufficiency, overbreadth, and inutility, and relied on the *Gillette* defence.

The parties largely agreed on claim construction. As a result, the dispute focused less on what the claims meant and more on whether those claims were valid and infringed on the evidence.

a) Infringement

The central infringement question was whether Jempak's accused products contained granules comprising percarbonate and a blend encapsulating the percarbonate, where that blend comprised sulfate, CMC, and a nonionic surfactant.

GEMAK bore the burden of proving infringement on a balance of probabilities. In practical terms, GEMAK had to prove not only that the relevant ingredients were present, but that they were present in the claimed arrangement.

As at the summary judgment stage, GEMAK relied again on testing conducted by Dr. Nuckolls. As with the motions judge before, the trial Court was not satisfied that Dr. Nuckolls' evidence established infringement. The Court identified several concerns with Dr. Nuckolls' evidence:

- His evidence included unsupported and unreliable statements about his testing methods.
- His conclusions went beyond what the results could properly support.
- His assessment of the evidence was uneven and appeared results-oriented.
- He resisted reasonable concessions.
- He did not give direct answers to straightforward questions.
- He was argumentative.

Ultimately, the Court held that GEMAK had not satisfied its burden and dismissed the infringement claim.

b) Invalidity Allegations: Anticipation & Obviousness

The Court also addressed Jempak's counterclaim for invalidity. Jempak's allegations of anticipation and obviousness failed for want of sufficient expert evidence. This aspect of the decision is notable because Jempak attempted in closing to distance itself from its own expert. Expert credibility again became central.

Jempak submitted that its expert had been confused on the stand and had agreed with propositions on cross-examination

that Jempak said were plainly wrong. That position was difficult to maintain. Jempak did not withdraw the expert's evidence or seek to have it struck. It instead asked the Court to give its own expert evidence less weight while still advancing invalidity allegations that required expert support.

The Court held that Jempak could not meet its burden to prove anticipation or obviousness without the necessary expert evidence.

Jempak's approach raises a practical point. A party that elects to advance a technical invalidity case through expert evidence must live with the consequences of that choice. If the expert loses credibility during cross-examination, the party cannot simply ask the Court to disregard the problematic parts of the testimony while moving ahead with the allegation that depended on that very expert's evidence. By distancing itself from its expert, Jempak left itself without a sufficient evidentiary foundation for anticipation and obviousness. The Court dismissed those allegations.

c) Insufficiency: The Perils of Inventor Evidence

Nevertheless, Jempak ultimately succeeded in establishing its allegation of insufficiency. For insufficiency, overbreadth, and lack of utility, Jempak relied in part on the inventor's trial testimony.

The inventor, Mr. Hinton, testified that, in developing the invention, he made multiple formulations that began with the four claimed ingredients: percarbonate, sulfate, CMC, and a nonionic surfactant. Some formulations worked and others did not, but, as the Court stated, "Mr. Hinton withheld information about the formulations that worked and did not work, and he did not put the skilled person in a position to make the same successful use of the invention as he could."

Referring to the FCA's decision in *Seedlings*, the Court stated that the patent disclosure must teach the skilled person how to put all embodiments of the invention into practice without inventive ingenuity or undue experimentation.

The Court's insufficiency analysis was concise – two paragraphs – and the decision does not contain an extended analysis of whether the asserted claims themselves encompassed formulations that in fact did not work. That distinction may be important in future cases, especially because the Court rejected the allegations of overbreadth and inutility, despite noting the overlap between those grounds and insufficiency.

The Court also did not grapple with the lack of evidence on whether the effort needed to figure out which formulations worked rose to the level of inventive ingenuity or undue experimentation. Some work is acceptable; lots of work is not. The decision does not identify any expert (or factual) evidence on this point. Since the defendant bears the burden of proving insufficiency, that lack of evidence and analysis is concerning.

Key Takeaways: The Importance of Credible Evidence

Gemak is not merely a case about detergent pods. It is a lesson about proof, persuasion, and the perils of expert evidence.

On the motion for summary judgment, GEMAK's expert witness testimony was rejected in its entirety, including for failing to provide fair, objective, and non-partisan opinions. At trial, GEMAK failed to establish infringement because the Court was not persuaded by its expert testing evidence. Jempak failed on anticipation and obviousness because it could not sustain those allegations after distancing itself from its own expert. Jempak ultimately succeeded on insufficiency, not because of expert evidence, but because inventor testimony suggested the patent did not disclose material information needed to make successful use of the invention. In making the insufficiency finding, the Court failed to consider the need for expert evidence to prove that this missing information was indeed necessary.

The *Gemak* dispute also offers several lessons for patent litigators and business stakeholders involved in complex technical disputes:

- **Expert credibility is paramount.** An expert's evidence must be seen as independent and balanced. A technically impressive record will not suffice if the Court concludes the expert has overstated what testing proves or has approached the evidence unevenly.
- **Parties should be cautious before distancing themselves from their own experts.** Patent invalidity allegations often require expert support. Once that support is compromised, the allegation may be compromised with it.
- **Approach inventor evidence with care.** Inventor testimony may provide useful context, but it may also reveal that the patent disclosure did not communicate all that the inventor knew about practicing the invention. That risk is especially high where the invention concerns a range of formulations, some successful and some not, and where the disclosure does not fully guide the skilled person through that terrain.

In an era when patent disputes increasingly depend on sophisticated technical records, *Gemak* reinforces a more traditional point: trials remain human exercises in persuasion. The science matters. So does the credibility of the people who explain it.