



## Avoid Crash Landing New Products – Early Freedom to Operate Assessment Can Deflect Risk of Canadian Patent Infringement

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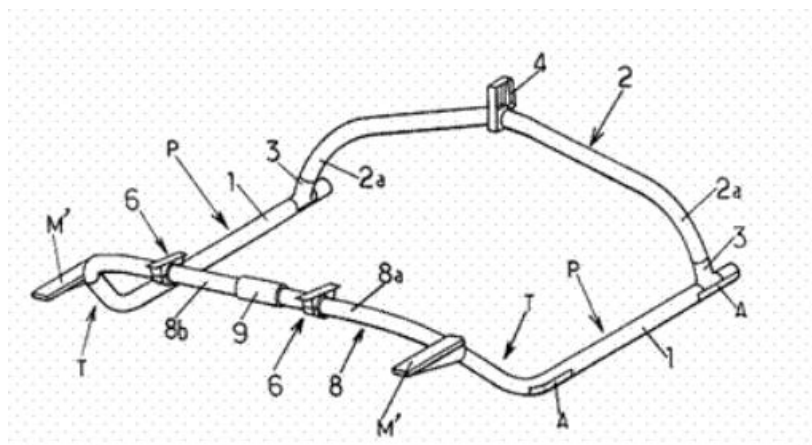
Conducting freedom-to-operate (“FTO”) searches and obtaining a reasonable non-infringement opinion from a patent attorney may reduce the risk of liability and damages in Canada. FTO assessment is a good practice before launching products in Canada or the [United States](#).

In a recent case, Bell Helicopter company was accused of using patent-infringing helicopter gear in its prototypes and production models<sup>1</sup>. After a patent trial, the production models were found non-infringing, while the prototypes were infringing. If Bell had done early, proactive freedom-to-operate due diligence before undertaking R&D, it would have had the relevant competitor patent in front of it - Bell could have worked with a patent attorney to identify potentially invalid patent claims and determine how to design around the patent from the outset. Instead, the Canadian Federal Court determined that Bell effectively took the invention for its own commercial testing, these prototypes infringed the patent, and the patent owner, Eurocopter, received an award of punitive damages.

### The Helicopter Gear

The patented gear was called a “Moustache” landing gear because it had an integrated front cross piece that bends to absorb forces generated during rough and running landings. The advantage of the gear was that it reduced [helicopter resonance with the ground](#), which creates a risk of bucking or flipping.

A view of an embodiment of the patented gear:



### The Lawsuit

Bell Helicopter constructed and tested Eurocopter's patented sleigh-type helicopter landing gear during development of its own helicopter. Bell did not conduct prior art patent searches to help it assess freedom-to-operate. Eurocopter sued for patent infringement. Upon learning of Eurocopter's lawsuit, Bell rapidly modified the landing gear for its commercial gear so that it was non-infringing. The difference between infringing and non-infringing devices is subtle, but enough to make a difference from patent claims so that there was non-infringement.

Infringing prototype:



The court called it, "...nothing more than a simple copy of the patented Moustache landing gear" (par. 27)

Non-infringing production gear:



Bell asserted that it was unaware of the Eurocopter patent until sued, and provided evidence that no patent searches had been conducted. The trial court awarded Eurocopter compensatory damages for 21 infringing prototype landing gears that were never sold. The trial judge also found “clear evidence of bad faith and egregious conduct on the part of Bell” as well as “willful blindness or intentional and planned misappropriation of the claimed invention.” The court was not impressed by Bell’s lack of due diligence, stating, “It simply defies belief that a large and sophisticated corporation such as Bell Helicopter would not verify intellectual property rights prior to embarking on its research program.” For this reason, punitive damages were awarded, with the specific quantum to be determined.

Had Bell done patent searching and obtained a freedom-to-operate analysis, it could have revised its design before the prototype stage. Then none of its landing gear would have infringed valid claims. Bell would have defended against the patent infringement case across the board. Instead, the failure to take these basic precautions opened the door for a court to find that the invention was appropriated and wrongly used in prototypes, and to award compensatory and punitive damages. This shows the need to do IP due diligence early on in R&D.

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<sup>1</sup> *Eurocopter v. Bell Helicopter Textron Canada Ltee.*, 2012 FC 113; aff’d 2013 FCA 219.