

Federal Court



Cour fédérale

Date: 20201022

Docket: T-1615-18

Citation: 2020 FC 997

Ottawa, Ontario, October 22, 2020

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

**FLATWORK TECHNOLOGIES, LLC  
(DOING BUSINESS AS POWERBLANKET)**

**Plaintiff**

and

**SUSAN BRIERLEY**

**Defendant**

**ORDER AND REASONS**

I. Introduction

[1] The Plaintiff has brought a motion for summary judgment in respect of its patent impeachment action under section 60(1) of the *Patent Act*, RSC 1985, c P-4 [the “*Act*” or “*Patent Act*”]. The Plaintiff’s position is that Canadian Patent No. 2,383,341 [the ‘341 Patent] which describes an electric heating wrap for use on articulated hydraulic booms should be declared invalid pursuant to section 62 of the *Act*.

[2] The grounds the Plaintiff relies on is that their expert evidence proves that the '341 Patent does not disclose a patentable invention. The evidence they say is that it was obvious as of the claim date so the patent is invalid pursuant to section 28(3) of the *Patent Act*. As well, the Plaintiff argues that the '341 Patent was anticipated by prior art therefore invalid pursuant to section 28(2) of the *Patent Act* and section 28.2 of the *Patent Act* due to previous disclosure of the subject-matter of the claim. The final ground the Plaintiff argued was that claim 5 of the '341 Patent was invalid because of lack of utility under section 2 of the *Patent Act*. Alternatively, the Plaintiff argues that '341 Patent's validity should be determined by way of a summary trial.

[3] This matter proceeded over the course of two days by a virtual hearing.

## II. Background

### A. *The parties*

[4] The Plaintiff Flatwork Technologies, LLC [Flatwork] is a corporation registered in Nevada with a primary office in Utah. Flatwork carries out business manufacturing heating blankets as well as other heating and cooling solutions.

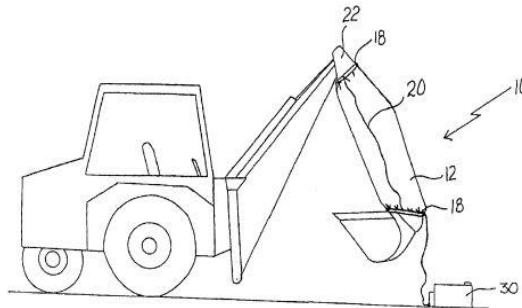
[5] The Defendant Susan Brierley [Ms. Brierley] is a businessperson living in Wetaskiwin, Alberta. She explained at the hearing that she worked operating heavy equipment in northern British Columbia including at very cold job sites and developed the '341 Patent to keep articulated hydraulic booms operating in cold temperatures. Ms. Brierley is self-represented and very ably represented herself.

[6] Each party filed an expert report with both affiants being cross-examined on their affidavits and reports.

### B. *The '341 Patent*

[7] On April 25, 2002, Ms. Brierley applied for the '341 Patent. The '341 Patent was issued to her in 2007. This patent is entitled “Method and apparatus for maintaining articulated hydraulic booms operating in freezing temperatures.” The following image from page 1(duplicated in Figure 1) of the patent depicts an image of a backhoe containing an articulated hydraulic boom with the device wrapped around it:

(54) Titre : METHODE ET DISPOSITIF DE MAINTENANCE DE FLECHES HYDRAULIQUES ARTICULEES UTILISEES DANS DES TEMPERATURES DE GEL  
 (54) Title: METHOD AND APPARATUS FOR MAINTAINING ARTICULATING HYDRAULIC BOOMS OPERATING IN FREEZING TEMPERATURES



[8] Ms. Brierley, in a previous legal proceeding [the Alberta proceeding], at paragraph 2 states that she “...named her product Inferno Tarps.” From 2007 to 2015, she investigated the market for her devices and eventually learned in 2016 that similar products were available on the market.

C. *Alberta Court of Queen's Bench proceedings*

[9] Ms. Brierley launched an Alberta Court of Queen's Bench action (Court File No. 1812-000073) on March 12, 2018. She alleged Flatwork infringed the '341 Patent by selling its products under the trade names "Powerblanket" and "Warmguard". In defence of the Alberta proceeding, Flatwork alleged the '341 Patent is invalid. This action was subsequently brought by Flatwork.

[10] By orders on April 29, 2019 and October 15, 2019, Justice Henderson stayed the Alberta proceeding until the Federal Court proceeding is concluded due to concerns that judicial resources would be wasted if the Alberta proceeding continues and the Federal Court ultimately concludes the '341 Patent is invalid.

D. *Federal Court pleadings*

[11] In its Federal Court Statement of Claim filed September 4, 2018, Flatwork claims the '341 Patent is invalid for five reasons: obviousness; lack of utility; lack of novelty; insufficiency; and ambiguity. This summary judgment application is based on three grounds of invalidity: obviousness; anticipation; and lack of utility.

[12] Ms. Brierley defenses that her patent is valid and that the Plaintiff has "not produced any Prior Art that would be conceived as evidence that would invalidate the '341 Patent."

E. *Motion for summary judgment*

[13] On January 10, 2020, Flatwork filed a Notice of Motion seeking summary judgment to invalidate the '341 Patent pursuant to section 60(1) of the *Patent Act* and for an order that a Certificate of Judgment voiding the '341 Patent be registered at the Canadian Intellectual Property Office [CIPO], pursuant to section 62 of the *Patent Act*. Alternatively, Flatwork requests an order that the validity of the '341 Patent shall be determined by way of summary trial.

[14] Ms. Brierley asks the Court to dismiss the motion to grant summary judgment in her favour and declare the '341 patent valid pursuant to sections 42 & 43(2) of the *Patent Act*, or in the alternative for an order that the validity of the '341 Patent be determined by summary trial. She also asked for an order stating that this “[i]s an abuse of the court process, court resources, vexatious and prejudice.”

III. Preliminary Issues

A. *Inadmissible evidence in Ms. Brierley's memorandum*

[15] Ms. Brierley's original motion record contained new evidence, including affidavits from Lisa Olver and Robert Anderson. These affidavits were submitted after cross-examination had concluded, so Prothonotary Ring allowed Ms. Brierley to file an amended motion record on the condition that she removed these affidavits. Flatwork objected at the hearing to Ms. Brierley's continued references to these affidavits in her memorandum. Ms. Brierley agreed not to

reference the affidavits. Ms. Brierley in her oral argument did give some *viva voce* evidence that will not be considered, nor will any reference to the above noted affidavits.

B. *Leave to amend Flatwork's Statement of Claim*

[16] Flatwork sought leave to serve and file an Amended Statement of Claim to include two pieces of additional prior art—the Termo 2000, a sleeping bag warmer, and the Gas Vapour Sleeve. Ms. Brierley argued they should not be included as neither were patented and “it is highly unlikely a detailed disclosure of how the product was constructed was produced with any purchase”, and so this documentation was “not existent to the public.” As well she said that the Termo 2000s were sold to the Israeli military and again not available to the public. For these reasons, she argued that I should not allow the amendment.

[17] Though Rule 75(2) indicates that an amendment should not be allowed during or after a hearing unless it fits in to the exceptions in section 75(2) (a) and (c). At the hearing, I allowed the Amended Statement of Claim to be accepted for filing and the hearing proceeded on the Amended Statement of Claim.

[18] Similar amendments were permitted by Justice Manson on a pre-trial motion in *Janssen Inc v Teva Canada Limited*, 2019 FC 1309 at paragraph 56 to give the Court “a complete picture of the state of the art” and because it “will not work an injustice” to the opposing party.

[19] These amendments to the appendixes simply update and reflect the prior art discussed in the expert reports and the memorandums. Nor is there any prejudice to Ms. Brierley because the

two pieces of prior art were disclosed in the June 12, 2019 expert affidavit. Ms. Brierley knew of that prior art over a year in advance of the scheduled hearing and she cross-examined the Plaintiff's expert on that prior art. Further, allowing the amendments will aid the Court in understanding the attack on the '341 Patent.

IV. Issues

[20] The issues on this summary judgment motion are:

- A. Should the '341 Patent be declared invalid because obviousness?
- B. Should the '341 Patent be declared invalid because it lacks anticipation and/or utility?

V. Summary Judgment

[21] Given that this is a motion for summary judgment, the Court must be satisfied there is no genuine issue for trial with respect to the claim of obviousness, anticipation or lack of utility.

Rule 215 of the *Federal Courts Rules*, SOR/98-106 governs summary judgment motions:

**If no genuine issue for trial**

215 (1) If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

**Genuine issue of amount or question of law**

(2) If the Court is satisfied that the only genuine issue is

(a) the amount to which the moving party is entitled, the Court may order a trial of that issue or grant summary judgment with a reference under rule 153 to determine the amount; or

(b) a question of law, the Court may determine the question and grant summary judgment accordingly.

**Powers of Court**

(3) If the Court is satisfied that there is a genuine issue of fact or law for trial with respect to a claim or a defence, the Court may

(a) nevertheless determine that issue by way of summary trial and make any order necessary for the conduct of the summary trial; or

(b) dismiss the motion in whole or in part and order that the action, or the issues in the action not disposed of by summary judgment, proceed to trial or that the action be conducted as a specially managed proceeding.

[22] Patent construction is a question of law (*Whirlpool Corporation v Camco Inc*, 2000 SCC 67 at para 76 [*Whirlpool*]). In *Canmar Foods Ltd v TA Foods Ltd*, 2019 FC 1233, a case currently under appeal, at paragraph 43 Justice Manson noted “If the only genuine issue is a question of law, the Court may also determine the question and grant summary judgment.” He went on to construct the claims of the patent – a question of law – and ultimately found there was no genuine issue concerning infringement.

[23] Justice Lafrenière confirmed patents can be constructed on summary judgment motions in *Gemak Trust v Jempak Corporation*, 2020 FC 644 at paras 89–90 [*Gemak*] and he further explained the factors to consider whether a matter can be determined by summary judgment (see also *Hryniak v Mauldin*, 2014 SCC 7 at para 5).

#### A. *Burden of Proof*

[24] In this case, Flatwork must show on a balance of probabilities, the usual burden in a civil trial, that there is no genuine trial for at least one of their invalidity arguments (obviousness,



novelty, or lack of utility) to be granted summary judgment (*Teva Canada Limited v Wyeth and Pfizer Canada Inc*, 2011 FC 1169 (rev'd on other grounds 2012 FCA 141), at para 36).

[25] Even though the onus is on Flatwork, the responding party Ms. Brierley must still provide evidence showing that there is a genuine issue for trial (*Collins v Canada*, 2015 FCA 281 at paras 70–71). The Court is entitled to assume the parties have put their best foot forward and that no additional evidence would be presented if the matter was to go to trial (*Milano Pizza Ltd. v 6034799 Canada Inc.*, 2018 FC 1112 at para 105).

B. *Conclusion: Summary Judgment*

[26] When I review whether to proceed by summary judgment, I note that there is no need to assess the credibility of the parties or of their expert witnesses. There is also no need to conduct a trial to determine that the '341 Patent is valid, as all I need to make the determination is before me. I can apply the law to the facts as well there is no disagreement regarding the underlying facts and the matter can be decided based on the discrete question of whether the '341 Patent is obvious, or lacks novelty or utility.

[27] It would not be in the best interests of either party to expend the time and money required to bring this proceeding to trial given my finding below that there is no genuine issue. I find that by granting summary judgment rather than proceeding to trial or a summary trial will promote expeditious, proportionate, less expensive, timely justice in this matter, because there is no genuine issue for trial.

VI. Expert Evidence

[28] The parties dispute that each other's experts are qualified as experts with respect to the subject matter of the '341 Patent.

A. *Jonathan Willner –Plaintiff's expert*

[29] Jonathan Willner's report was sworn on May 27, 2019 and he was cross-examined on this affidavit by videoconference on January 31, 2020. Mr. Willner is an independent consultant who identifies himself as an expert in the field of industrial heating wraps and blankets, and thermodynamic problem-solving. He has worked on heating systems including underfloor heating products, heated panels, and heat wraps for various companies – at first in Israel, and then for the last 30-plus years in Canada, the United States and more recently in global markets. His education is unrelated to the subject matter with degrees in education and oceanography.

[30] Mr. Willner was instructed by Plaintiff's counsel on Canadian patent law and considered the '341 Patent from the position of a person of ordinary skill in the art [POSITA]. He created a claim chart showing where the claims could be found in the prior art and concluded the '341 Patent was obvious and lacked utility.

[31] Mr. Willner stated that he worked as an independent contractor for Flatwork and in that role set up a production line as a contractor from 2016-2018. He has not done any work for them since early 2018. In the Defendant's expert's responding expert report at paragraph 15, Mr. Grace viewed this as a potential conflict of interest particularly because Mr. Willner did not

submit documentation about his work for Flatwork. Ms. Brierley did not pursue this argument at the hearing and I find it irrelevant regarding his ability to opine on this patent.

[32] Ms. Brierley argues Mr. Willner did not approach the case with an open mind and because he had worked in Israel, where it is not cold, he did not know what he was talking about. In addition, she alleges that he did not provide information about some prior art that he relied on, therefore his opinion should be dismissed, as the prior art may not even exist or certainly would not be found by a POSITA at the relevant date.

[33] I note that when reading his cross-examination transcript I must comment on how unprofessional and combative he is in dealing with Ms. Brierley. For instance he told her it was “tough” that she did not have a document in front of her, he commented “you’ve got a limited education or exposure,” he said to “have fun” when she told him she wanted to ask questions and flatly told her “you’re wrong” when he disagreed. An expert is there to assist the Court and to be impartial. This must be taken into account or factored in when assessing an expert’s testimony. In this case Mr. Willner acted like a belligerent litigant rather than as an impartial expert.

[34] I do, though, find he qualifies as an expert. I find that his earlier work in Israel does not disqualify him especially as his experience has been in the electrical heating and floor warming industry throughout North America and the global market for the last 30 years. While he has not worked in northern Alberta, Manitoba, Saskatchewan or British Columbia, I do not find this particular lack of work experience as being essential to give an expert opinion given his lengthy experience working in other parts of Canada that have freezing temperatures. Given that the

patent does not have insulation or thresholds for thermal productivity, I find his experience qualifies him to opine on the '341 Patent. Though his occasional apparent lack of impartiality leads me to be cautious, his claim charts are of great assistance to the Court.

B. *Patrick Grace- Defendant's Expert*

[35] Ms. Brierley's expert is Patrick Grace, the President of West-Pro Renewable Projects in Calgary. His expert report was sworn January 13, 2020 and he was cross-examined on the report via videoconference on January 30, 2020.

[36] Mr. Grace's experience is "as a Licensed Heavy Duty Mechanic (Alberta), working 20 years on many year-round projects in the coldest of Northern Canada, Ontario, Manitoba, Saskatchewan and Alberta." He indicated he had "lived year round in Northern Manitoba at exploration and Hydro Project sites, [and in] Northern Alberta at many construction, oil and gas projects, maintaining and servicing equipment in the harshest of winter conditions." For the next 12 years he owned a steel and equipment design and fabrication company in Alberta. He has worked on renewable energy projects for the past 10 years. Mr. Grace admitted on cross-examination that he does not have experience designing or making electric heat wraps or blankets.

[37] Though he has no educational component, an expert does not need formal education in every situation, and experience alone could qualify a person as an expert. As noted by this Court:

A properly qualified expert is someone "who is shown to have acquired special or peculiar knowledge through study or

experience in respect of the matters on which he or she undertakes to testify"

(*Rallysport Direct LLC v 2424508 Ontario Ltd*, 2020 FC 794 at para 17 citing *R v Mohan*, [1994] 2 SCR 9 at para 31 [*Mohan*], my emphasis)

[38] I find that Mr. Grace's experience working as a heavy duty mechanic for 20 years in northern Canada's freezing temperatures could render him an expert on some topics to opine on the '341 Patent. But because he has no experience in designing or making electric heat wraps or blankets which is the subject matter of this patent, he is of limited assistance.

[39] Mr. Grace admitted that he was not instructed about the concept of a POSITA when he gave his expert report or about Canadian legal principles of claims construction. He stated that Mr. Willner's analysis about what a POSITA would think about the '341 Patent is "a waste of time/money." He criticized Mr. Willner for "dwelling" too much on what the POSITA would think. He also included "Without Prejudice" opinions which are not appropriate in an expert report.

[40] Given that Mr. Grace was never properly instructed in Canadian legal patent concepts, his opinions from his expert report have no legal basis and will be given no weight with the exception being if his experience on a specific subject is useful to the Court and I specifically refer to it.

[41] In some cases expert evidence is not required to construe the claims of a patent but it is admissible to assist the Court in this exercise (*Gemak* at para 93). The Court is not required to

choose between the constructions offered by the experts, “but rather should, with the assistance of the expert evidence, reach its own conclusion as to the proper construction” (Justice Southcott in *Cascade Corporation v Kinshofer GmbH*, 2016 FC 1117 at para 72).

[42] As Justice Manson stated in *Biogen Canada Inc v Taro Pharmaceuticals Inc*, 2020 FC 621 at paragraph 77: “Where the judge can construe the patent as it would be understood by a skilled person, expert evidence is not required.”

[43] In this case the patent is straightforward. This patent as well as the prior art is not complex – it is not a pharmaceutical or mechanical invention and it can be constructed with minimal input from the experts given their inadequacies noted above. As Flatwork acknowledged this is not something that has to be reverse-engineered or is otherwise difficult to understand from looking at it, as it is a simple heating device.

[44] This is a case that with assistance that is reliable evidence from the two reports filed by the parties the Court can construct the patent.

## VII. Claims Construction

[45] Before constructing the ‘341 Patent, I find that Flatwork has standing to bring this impeachment proceeding challenging the validity. Flatwork falls within the definition of “any interested person” under section 60(1) of the *Patent Act*. Flatwork is an interested person as it is defending itself in the Alberta patent infringement proceeding commenced by Ms. Brierley with respect to the very same patent. Justice Southcott found that a plaintiff who brought

impeachment proceedings against a party who was suing them for infringement in a separate pending Alberta court action dealing with the same patent met the test of an interested person in *Aux Sable Liquid Products LP v JL Energy Transportation Inc*, 2019 FC 581 at paragraph 10 [*Aux Sable*].

[46] Claims construction is the starting point in determining questions of validity and infringement. The principles of claims construction is set out by the Supreme Court in *Free World Trust v Électro Santé Inc*, 2000 SCC 66, [2000] 2 SCR 1024 at paragraphs 31-67; *Consolboard Inc v MacMillan Bloedel (Sask) Ltd*, [1981] 1 SCR 504 at 520 [*Consolboard*]). The claims construction should be determined prior to consideration of either validity attacks or infringement. The *Patent Act* promotes fairness and predictability by adherence to the language of the claims.

[47] When engaging in the purposive construction of the patent, the Court should consider whether the particular words and phrases in the patent claims describe “essential” elements of an invention (*Whirlpool* at para 45). In *Tearlab Corporation v I-Med Pharma Inc*, 2019 FCA 179 at paragraph 31, the Court of Appeal said that:

it will be apparent that some elements of the claimed invention are essential while others are non-essential... The interpretative task of the court, in claim construction, is to separate and distinguish between the essential and non-essential elements, and to give the legal protection to which the holder of a valid patent is entitled only to the essential elements.

[48] The claims language must be read through the eyes of a POSITA with their common general knowledge to identify the elements.

[49] The disclosure and claims must be looked at as a whole when constructing the claim “to ascertain the nature of the invention and methods of its performance...being neither benevolent nor harsh, but rather seeking a construction which is reasonable and fair to both patentee and public” (*Consolboard* at 520).

[50] The patent specifications must be considered to understand what was meant but not to enlarge or narrow the scope of the claim as written (*Whirlpool* at para 52). The Supreme Court in *AztraZeneca Canada Inc v Apotex Inc*, 2017 SCC 36 at paragraph 31 was clear that the focus will be on the claims with the specifications being relevant during an ambiguity attack on validity.

A. *Person of Ordinary Skill in the Art*

[51] Flatwork’s position is that a POSITA with respect to the ‘341 Patent is a person with knowledge of thermodynamics and electronics or mechanical or electrical engineering with experience in the design, construction and different uses of industrial heating wraps and blankets. This is consistent with Mr. Willner’s understanding as set out in paragraphs 13–15 of his expert report, where he confirms that he considered himself a POSITA with respect to the ‘341 Patent. Mr. Willner clarified that a POSITA would have “several years of experience in the design, construction, and different uses of industrial heating wraps and blankets.”

[52] Ms. Brierley did not make submissions on who a POSITA is in this case or explain the concept to Mr. Grace.



[53] A POSITA can have a combination of education and experience, or just experience (*Pollard Banknote Ltd v BABN Technologies Corp*, 2016 FC 883 at para 83).

[54] In *ViiV Healthcare Company v Gilead Sciences Canada Inc*, 2020 FC 486 at paragraph 78, Justice Manson noted that the parties agreed generally on the POSITA so he did not analyze the issue in much detail. He noted where there is a disagreement about the characteristics of the skilled person, “the notional skilled person must be capable of understanding the entirety of the patent in issue.”

[55] Here, there is similarly no meaningful dispute about the POSITA. The POSITA is someone with knowledge either gained from experience or education or a combination of both in thermodynamics and electronics or mechanical or electrical engineering. The POSITA would have experience in the design, construction and different uses of electrical industrial heating wraps and blankets on different items in freezing conditions. The POSITA must have substantial experience meaning at least 15 years—a level that would be appropriate to have sufficient experience of cold weather seasonal variances.

#### B. *Common General Knowledge*

[56] The next step is to determine the common general knowledge [CGK] of such a person. CGK is “knowledge generally known by persons skilled in the relevant art at the relevant time” and “it is what the skilled person would know without doing research” (*Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 1 at para 48; *Bauer Hockey Ltd v Sport Masko Inc (CCM Hockey)*, 2020 FC 624 at para 36). To be considered as CGK it should be “generally

known and accepted without question by the bulk of those who are engaged in the particular art” (*Eli Lilly and Company v Apotex Inc*, 2009 FC 991 at para 97, *aff’d* 2010 FCA 240).

[57] As of the claim date of April 25, 2002, the following knowledge would have been within the CGK of a POSITA (i.e. someone with knowledge of thermodynamics and electronics or mechanical or electrical engineering with experience in the design, construction and different uses of electrical industrial heating wraps and blankets in freezing weather). That knowledge would be that first, heating elements can be imbedded within flexible sleeves. Secondly, that various types of insulating materials can be used in these sleeves. And finally that various types of fasteners can then be used to secure the flexible sleeve around an object for heating.

[58] These three general concepts would clearly have been known by a POSITA. Flatwork described the CGK as knowing a variety of heated wraps, sleeves and blankets in a variety of shapes and sizes that can heat different objects. In his expert report, Mr. Willner cites five specific pieces of prior art together reflecting what he sees as the CGK in the industry, for example:

- a) The Termo 2000 sleeping bag warmer sold in the late 1970s in Israeli camping stores and to the Israeli military: sleeping bags could be inserted into the interior opening, fastened and heated; note that this device was not patented and Mr. Willner said on cross-examination “it couldn’t be protected by a patent. It’s like a simple heated blanket just suitable for outdoor use”;

- b) US Patent 5,049,724 issued in 1991 for the Thermal Protection Blanket for a Blow Out Preventor: a flexible insulated sleeve was wrapped around “well head control devices such as blow out preventors”, fastened, and then heated [the ‘724 Patent];
- c) A 1967 Machine Design advertisement: the advertisement shows electric heating blankets consisting of a resistance wire sandwiched between two sheets of silicone rubber have been available on the market since at least 1967;
- d) US Patent 5,827,050 issued in 1998 for the Jug Heat Pak: a heating sleeve wraps around a portable gas cylinder in a manner that facilitates the transfer of gas [the ‘050 Patent]; and
- e) A gas vaporizer sleeve for use on tanks containing propane, butane or acetylene: the heating sleeve keeps the tank warm. These have been sold since the early 1980s. Mr. Willner designed these sleeves in Israel and he says he still sells a modified version of this product today through CQ Ventures.

[59] I find that the prior art regarding the sleeping bag warmer (#1) and the silicone electric heating blanket (#3) are excluded as are Mr. Willner’s opinions related to them. I do so as they are not citable prior art (*Janssen-Ortho Inc. v. Novopharm Ltd*, 2006 FC 1234 at para 57).

Though the law is not settled whether the test is: a) the common law test of the prior art through a reasonably diligent search would have been found; or b) whether the introduction of section 28(3) updated that test to a “prior art reference which was disclosed to the public, prior to the applicable date prescribed by a section 28.3 forms part of the prior art for purposes of an obviousness analysis, regardless of whether the reference would have been locatable through a reasonably diligent search.” (*Aux Sable* at para 176).

[60] No matter which of the tests are applied neither of the purported pieces of prior art #1 and #3 the references met the tests. Both are too imprecise and not disclosed to the public by the date necessary as #1 was found in a magazine article dated Jan, 1967 and #3 was disclosed only in Mr. Willner's report with his description and two photos.

[61] I accept that the remaining three prior art references confirm it was within the CGK of a POSITA to imbed electrical heating elements within a flexible sleeve or blanket with insulating materials and then the sleeve could be fastened around an object for heating in freezing temperatures and secured by a variety of ways such as strings, straps, buckles and Velcro at the longitudinal opening.

C. *Construction*

[62] Having identified the skilled person and the common general knowledge, I will now identify how that POSITA would construct the claims.

[63] There is no dispute that the relevant date is April 25, 2002—when the '341 Patent was filed.

[64] At the hearing Ms. Brierley confirmed that she views the articulated hydraulic boom as an essential element which I note is contrary to her position in the Alberta action. As well Ms. Brierley explained that she views the essential elements of the patent as a wrapping to go around an articulated hydraulic boom with an outer shell, an electric heating element, a layer of insulating material and means to secure the longitudinal opening and securing the opposed ends.

[65] But when constructing a patent it is good to be reminded that an inventor which, Ms. Brierley is among a number of other job titles, is not a POSITA and she was articulating those views on essential elements as an advocate. Though I cannot disagree with her that is what a POSITA would know.

[66] I will construct the patent and determine the essential elements by looking at what a POSITA with CGK at the time would have known. When determining what are the essential elements, I considered that both experts view the use of the heating wrap with the articulated hydraulic boom as an essential aspect of the '341 Patent. Mr. Willner says "In my opinion the POSITA would consider the '341 Patent to be limited to use with articulated hydraulic booms... There is no suggestion in the '341 Patent that the heating wrap disclosed is adapted to be used in any other context." Mr. Grace says "this is a totally NOVEL INVENTION – specific to the operation of an Articulated Hydraulic Boom operating in sub zero weather conditions."

[67] Looking to the '341 Patent we see that it contains 8 claims (reproduced below) describing an electric heating sleeve wrapped around an articulated hydraulic boom and a method of keeping the hydraulic boom warm. Claims 1 to 6 are apparatus claims. Claims 7 and 8 are method claims:

1. An apparatus for maintaining an articulated hydraulic boom operating in freezing temperatures, comprising:

a flexible sleeve of thermal insulating material having an interior surface defining an interior cavity, opposed ends, and a longitudinal opening providing access to the interior cavity, such that the articulated hydraulic boom can be positioned within the interior cavity of the sleeve;

means for closing the longitudinal opening;

means for heating the interior cavity of the sleeve;  
and

means for constricting the opposed ends of the flexible sleeve, thereby maintaining the sleeve in position on the articulated boom and preventing heat from escaping the interior cavity.

2. The apparatus as defined in Claim 1, wherein the means for closing the longitudinal opening being fasteners positioned at spaced intervals along the sleeve on opposed sides of the longitudinal opening.
3. The apparatus as defined in Claim 1, wherein draw strings positioned at the opposed ends of the flexible sleeve serve as the means for constricting the opposed ends of the flexible sleeve.
4. The apparatus as defined in Claim 1, wherein an electric heating element imbedded in the interior surface of the sleeve serves as the means for heating the interior cavity of the sleeve.
5. The apparatus as defined in Claim 4, wherein the flexible sleeve includes a first protective polyurethane layer which forms an outer surface of the flexible sleeve, and a second protective polyurethane layer which forms the interior surface of the flexible sleeve, a heat resistant liner underlying the first protective polyurethane layer, a first layer of insulating material and a second layer of insulating material being disposed between the heat resistant liner and the second protective polyurethane layer, and the electrical heating element being positioned between the first layer of insulating material and the second layer of insulating material.
6. An apparatus for maintaining an articulating hydraulic boom operating in freezing temperatures, comprising:
  - a flexible sleeve of thermal insulating material having an interior surface defining an interior cavity, opposed ends, and a longitudinal opening providing access to the interior cavity, such that the articulated hydraulic boom can be positioned within the interior cavity of the sleeve;
  - fasteners positioned at spaced intervals along the sleeve on opposed sides of the longitudinal opening, whereby the longitudinal opening can be selectively closed;

an electric heating element imbedded in the interior surface of the sleeve, whereby the interior cavity of the sleeve is heated; and

draw strings positioned at the opposed ends of the flexible sleeve constricting the opposed ends of the flexible sleeve, thereby maintaining the sleeve in position on the articulated boom and preventing heat from escaping from the interior cavity.

7. A method for maintaining an articulated hydraulic boom operating in freezing temperatures, comprising the steps of:

positioning a flexible sleeve of thermal insulating material having an interior cavity around the articulated hydraulic boom, the sleeve being sufficiently flexible that the articulated boom can operate with the sleeve in place;

heating the interior cavity of the sleeve; and

constricting the opposed ends of the sleeve to tightly engage the articulated hydraulic boom so that the sleeve is maintained in position and heat is prevented from escaping from the interior cavity.

8. The method as defined in Claim 7, the sleeve being sufficiently flexible that the articulated boom can operate with the sleeve in place.

[68] A POSITA would understand that an articulated hydraulic boom is a mechanical arm with at least two sections but it could be more. The sections are connected by a flexible joint and the joint is controlled by the flow of hydraulic fluid that affects the movable mechanical arm.

[69] The elements in the independent Claim 1 are: a) articulated hydraulic boom b) flexible sleeve of thermal insulating material having an interior surface defining an interior cavity c) opposed ends d) longitudinal opening providing access to the interior cavity for the articulated hydraulic boom e) means for closing the longitudinal opening f) means for heating the interior

cavity of the sleeve g) means for constricting the opposed ends thereby maintaining the sleeve in position on the articulated boom and preventing heat from escaping from the interior cavity. A POSITA would consider all of these elements essential.

[70] Proceeding with the construction now that the essential elements have been determined I will adopt the construction of the claims as set out in the Plaintiff's expert report:

**“a flexible sleeve of thermal insulating material”**

24. The purpose of the "flexible sleeve" in the '341 Patent is to permit the sleeve to be wrapped around an articulated hydraulic boom. A POSA would understand "a flexible sleeve" to refer to a sleeve that is sufficiently flexible to accomplish this purpose

25. The phrase “thermal insulating material” refers to a material that is used to stop the passage of heat. The ‘341 patent does not specify the thermal insulating material to be used, but a POSA would understand what thermal insulating materials are typically used in heating wraps. These could include closed or open cell foam (polymeric, organic or mineral), sponge, bubble wrap, or any other substrate containing air as an insulator and preventing heat transfer by convection, conduction of radiation.

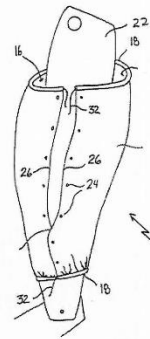
**“an interior surface defining an interior cavity”**

26. A POSA would understand that the "interior surface" is the inside surface of the sleeve. The interior cavity is the space defined by the inside of the sleeve. For example, if the sleeve is wrapped around an articulated hydraulic boom, the boom would be positioned in the “interior cavity”.

**"opposed ends"**

27. This refers to the two ends of the sleeve, as shown in the Figure 4 of the Patent (reproduced below) as reference numerals 18 (reproduced below).





**"a longitudinal opening providing access to the interior cavity, such that the articulated hydraulic boom can be positioned within the interior cavity of the sleeve"**

28. A POSA would understand "longitudinal opening" to be a lengthwise opening along the sleeve. This opening would open to allow the sleeve to be wrapped around, or removed from, the hydraulic boom. It is identified in Figure 4 of the Patent (reproduce above), as reference numeral 20.

**"means for closing the longitudinal opening"**

29. A POSA would understand this claim element to refer to any means by which the longitudinal opening could be fastened or secured around the articulated hydraulic boom. The only embodiment of this claim element provided in the patent specification is "fasteners" (reference numeral 24 in Figure 4 above), but a POSA would understand that other means could be used, such as Velcro, snaps, buttons, etc.

**"means for heating the interior cavity of the sleeve"**

30. A POSA would understand this claim element to refer to an electric heating element. An electric heating element is the only type of "means for heating" that is referred to in the specification. Although other methods of heating exist, the structure of the sleeve is specifically geared toward electric heating. For example, the patent does not provide any information as to how the claimed apparatus could be implemented with a chemical or other heating mechanism.

**"means for constricting the opposed ends, thereby maintaining the sleeve in position on the articulated boom preventing heat from escaping from the interior cavity"**

31. A POSA would understand this claim element to refer to any means for closing the ends of the sleeve around the hydraulic boom. The '341 Patent provides the example of drawstrings, but it would be apparent to a POSA that other means could be used, such as bungee cords or Velcro.

Claim 2

32. Claim 2 incorporates by reference all the elements of claim 1, and adds the limitation:

wherein the means for closing the longitudinal opening being fasteners positioned at spaced intervals along the sleeve on opposed sides of the longitudinal opening.

33. A POSA would understand this to mean that the longitudinal opening is closed by way of fastening elements that are spaced apart from each other, such as a series of snaps, hooks, buttons, Velcro fasteners, straps or the like. This would not include a continuous fastener such as a zipper.

Claim 3

34. Claim 3 incorporates by reference all the elements of claim 1, and adds the limitation:

wherein draw strings positioned at the opposed ends of the flexible sleeve serve as the means for constricting the opposed ends of the flexible sleeve.

35. A POSA would understand "draw strings" to refer to the well-known mechanism for constricting the end of a flexible device consisting of a string disposed within a loop at the end of the sleeve. The string can be pulled to "draw" together the material, thus forming a constriction. The ends of the draw string could be tied to hold them in place, or could be kept in place using a cordlock.

Claim 4

36. Claim 4 incorporates by reference all the elements of claim 1, and adds the limitation:

wherein an electric heating element imbedded in the interior surface of the sleeve serves as the means for heating the interior cavity of the sleeve.

37. The '341 Patent does not explain how the electric heating element is "imbedded" in the interior surface of the sleeve. A POSA would understand the limitation "imbedded" to mean that the electric heating element is inside the sleeve, sandwiched between the inner and outer layers.

#### Claim 5

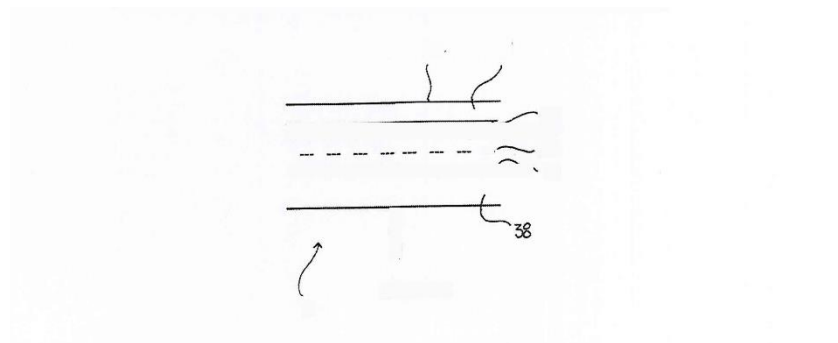
38. Claim 5 incorporates by reference all the elements of claim 4, and adds the limitation:

wherein the flexible sleeve includes a first protective polyurethane layer which forms an outer surface of the flexible sleeve, and a second protective polyurethane layer which forms the interior surface of the flexible sleeve, a heat resistant liner underlying the first protective polyurethane layer, a first layer of insulating material and a second layer of insulating material being disposed between the heat resistant liner and the second protective polyurethane layer, and the electrical heating element being positioned between first layer of insulating material and second layer of insulating material.

39. My analysis of the terms and phrases of claim 5 is as follows.

**"first protective polyurethane layer which forms an outer surface of the flexible sleeve, and a second protective layer which forms the interior surface of the flexible sleeve"**

40. This claim element is shown in Figure 5 of the '341 Patent (reproduced below), wherein the inner and outer surfaces of the sleeve are represented by reference numerals 14 and 36. Polyurethane is a specific material, which is specified in the claim as forming the inner and outer surfaces of the sleeve.



**"a heat resistant liner underlying the first protective polyurethane layer"**

41. The term "heat resistant" would be understood by a person skilled in the art as referring to a material that can withstand the intended operating temperature of the apparatus without melting or otherwise degrading in performance. The heat resistant liner is said to be "underlying" the first polyurethane layer, which is the layer that forms the outer surface of the sleeve.

**"first layer of insulating material and a second layer of insulating material being disposed between the heat resistant liner and the second protective polyurethane layer"**

42. A POSA would understand that there are two layers of insulating material between the "heat resistant liner" (which underlies the outer surface of the sleeve) and the "second protective polyurethane layer" (which comprises the inner surface of the sleeve). The skilled person would understand that "insulating material" refers to a material that has low thermal conductivity. In other words, insulating materials reduce the transfer of heat between objects of different temperatures. The patent does not provide any examples of "insulating materials" nor does it specify any thresholds for the thermal conductivity required of such materials for the purposes of the '341 Patent. That said, a skilled person would be aware of a variety of materials that might typically be characterized as "insulating," as described above.

**"and the electrical heating element being positioned between first layer of insulating material and second layer of insulating material."**

43. A POSA would understand that an electrical heating element, such as a wire, is positioned between the first and second layer of insulation. The electrical heating element is the heat source of the apparatus. According to the claim, the heating element is between the two layers of insulation. As further discussed below, in my opinion, this configuration would be highly inefficient, if not completely inoperable, because there is a layer of insulation between the heat source and the "hydraulic boom" that it is supposed to heat. This inner layer of insulation would prevent or severely limit the transfer of heat from the heating element to the hydraulic boom.

Claim 6

44. Claim 6 is an independent claim, which reads as follows:

An apparatus for maintaining an articulated hydraulic boom operating in freezing temperatures, comprising:

a flexible sleeve of thermal insulating material having an interior surface defining an interior cavity, opposed ends, and a longitudinal opening providing access to the interior cavity, such that the articulated hydraulic boom can be positioned within the interior cavity of the sleeve,

fasteners positioned at spaced intervals along the sleeve on opposed sides of the longitudinal opening, whereby the longitudinal opening can be selectively closed,

an electric heating element imbedded in the interior surface of the sleeve, whereby the interior cavity of the sleeve is heated, and

draw strings positioned at the opposed ends of the flexible sleeve constricting the opposed ends of the flexible sleeve, thereby maintaining the sleeve in position on the articulated boom and preventing heat from escaping from the interior cavity.

45. The terms used in claim 6 mostly mirror those used in claim 1 and its dependent claims. I ascribe the terms in claim 6 the same meanings referenced above with respect to claim 1 and its dependent claims.

#### Claim 7

46. The terms used in claim 7 mostly mirror those used in claim 1 and its dependent claims. I ascribe the terms in claim 7 the same meanings referenced above with respect to claim 1 and its dependent claims.

47. A substantive element added by claim 7 that is not in claim 1 is the phrase:

the sleeve being sufficiently flexible that the articulated hydraulic boom can operate with the sleeve in place.

48. A person skilled in the art would understand this to mean that the sleeve is flexible enough that the hydraulic boom can be used (i.e. can move and function) without having to remove the sleeve.

Claim 8

49. Claim 8 incorporates by reference all the elements of claim 7, and adds the limitation:

the sleeve being sufficiently flexible that the articulated hydraulic boom can operate with the sleeve in place.

50. In my opinion, this phrase has the same meaning as the same phrase as used in claim 7, as referenced above. As such, there is no substantive difference between claim 8 and claim 7.

VIII. Analysis

A. *Should the '341 Patent be declared invalid because obviousness?*

(1) Law on obviousness

[71] Under section 28.3 of the *Patent Act*, the subject matter of a claim must not have been obvious at the claim date in order to be valid. The claim date is the filing date of the application in Canada, which in this case is April 25, 2002. The four-part test for obviousness was reproduced in *Sanofi-Synthelabo Canada Inc v Apotex Inc*, 2008 SCC 61 at paragraph 67

[*Sanofi*]:

- (1) (a) Identify the notional “person skilled in the art”;  
(b) Identify the relevant common general knowledge of that person;
- (2) Identify the inventive concept of the claim in question or if that cannot readily be done, construe it;
- (3) Identify what, if any, differences exist between the matter cited as forming part of the “state of the art” and the inventive concept of the claim or the claim as construed;
- (4) Viewed without any knowledge of the alleged invention as claimed, do those differences constitute steps which would

have been obvious to the person skilled in the art or do they require any degree of invention?

(2) The Parties' Submissions on obviousness

[72] Flatwork's position is that there is no difference between the heating sleeve described by the '341 Patent and those in the prior art, with one significant exception. That exception is wrapping the heating sleeve around an articulated hydraulic boom whether it is operating or not. Flatwork says that this addition to the prior art is obvious. Flatwork's view is essentially that "there is nothing inventive in applying a standard prior art heating sleeve to an articulated hydraulic boom." A second more minor exception is an extra layer of insulation which Flatwork says makes the device less efficient and does not add anything to the patent.

[73] Flatwork suggest Ms. Brierley's expert Mr. Grace has agreed with the "essential facts" that support the obviousness argument and there is no genuine issue for trial regarding

obviousness. Flatwork says that these agreed essential facts include:

the '724 Patent discloses each and every element of Claim 1-4 and 6 of the '341 Patent, aside from use of the sleeve on articulated hydraulic boom;

flexible heating sleeves were known and used to heat a multitude of different objects and equipment for a many years before the claim date [sic]; and

the '341 Patent does not provide any information suggesting that there were unique challenges or obstacles to be overcome in applying a standard prior art heated sleeve to an articulated hydraulic boom.

[74] Ms. Brierley provided a book of authorities containing some case law on obviousness which pre-dated the Supreme Court of Canada's decision in *Sanofi*. I am, of course, obliged to follow *Sanofi* so I will not be relying on these cases, to the extent the interpretation of "obviousness" differs from *Sanofi*.

[75] Ms. Brierley argues Flatwork has the burden of proving the patent is obvious and has not done so. Even if the different elements in the '341 Patent were known, she argues the invention putting the parts together was not obvious and "required ingenuity and inventiveness."

[76] At the hearing Ms. Brierley put forward that this is a "combination patent" where existing technology was used but on an articulated hydraulic boom which she describes as an inventive and valid combination. She points out that Mr. Willner even admitted he had never seen a heating wrap for warming hydraulic booms, and she attempts to distinguish the prior art because it uses different language than her patent which she says everyone tells her "it is all about the words". She cited Justice Campbell's decision *Bourgault Industries Ltd. v Flexi-Coil Ltd.* (1998)



80 CPR (3d) 1 (FCTD), affirmed (1999), 86 CPR (3d) 221 (FCA). This decision says where it is a combination patent “it is the combination as a whole, and not the individual components that must be considered for the purposes of determining obviousness. In other words, the ultimate question to be decided is whether the combination, as a whole, is obvious or not.” She emphasizes that other people have not put heating wraps around articulated hydraulic booms so it is an inventive combination.

(3) Analysis of obviousness

[77] A review of the ‘341 Patent and the four steps of the *Sanofi* test reveals that the ‘341 Patent is obvious. As determined when dealing with whether to proceed with a summary judgment I found that there is no need to assess credibility, as the areas on which Mr. Willner and Mr. Grace agree provide a sufficient path to a finding that there is no genuine issue surrounding obviousness.

*1. Obviousness step #1: POSITA and their common general knowledge*

[78] As stated above at paragraph 55 in the expert evidence section, the POSITA is someone with: knowledge of thermodynamics and electronics or mechanical or electrical engineering; with experience in the design construction and different uses of industrial heating wraps and blankets; and at least 15 years of experience including working in freezing temperatures. I have summarized the CGK of such a person above at paragraph 56 as knowing about heated flexible sleeves that can be fastened around an object using a variety of fasteners and which use insulating materials.

2. *Obviousness step #2: Inventive concept or construction of claims*

[79] In *Ciba Specialty Chemicals Water Treatments Limited v SNF Inc.*, 2017 FCA 225 at paragraph 77, the Federal Court of Appeal [FCA] said:

There may be cases in which the inventive concept can be grasped without difficulty but it appears to me that because "inventive concept" remains undefined, the search for it has brought considerable confusion into the law of obviousness. That uncertainty can be reduced by simply avoiding the inventive concept altogether and pursuing the alternate course of construing the claim.

[80] So even though I find there is no inventive concept as it is an easy leap from having a heated blanket wrapping around numerous things to keep them warm in freezing temperatures to wrapping the blanket around an articulating boom I will do as directed in by the FCA and construe the claim.

[81] The abstract of the '341 Patent itself describes the patent as "A method for maintaining an articulated hydraulic boom operating in freezing temperatures." Claim 1 refers to "an apparatus for maintaining an articulated hydraulic boom operating in freezing temperatures..." and the subsequent claims are dependent on claim 1. When the agreement between the experts and the text of the claims are reviewed along with the title of the '341 Patent which refers to the articulated hydraulic boom, it is quite clear the articulated hydraulic boom is an essential element of the '341 Patent. As I found above, the '341 Patent describes a flexible heating sleeve as an essential element of the claim that is wrapped around an articulated hydraulic boom which also is an essential element.

[82] As seem in paragraph 73 the Plaintiff's expert agrees to the essential facts.

[83] The patent is otherwise straightforward. Claims 1 through 6 explain the electric heating sleeve and then claims 7 and 8 discuss the method for keeping the heat in the device while it is operating.

[84] An executive summary of the construction of the claims follow:

- a) Claim 1 describes that the apparatus consists of four parts: a flexible sleeve of thermal insulating material with a longitudinal opening, means for closing the longitudinal opening, means for heating the interior cavity of the sleeve, and means for constricting the ends of the sleeve to keep it in position.
- b) Claim 2 then clarifies the means for closing the longitudinal opening are "fasteners positioned at spaced intervals along the sleeve on opposed sides of the longitudinal opening."
- c) Claim 3 clarifies that draw strings are the means for constricting the opposed ends of the sleeve.
- d) Claim 4 indicates an electric heating element inside the sleeve will be the means for heating the interior cavity of the sleeve.
- e) Claim 5 describes the flexible sleeve as consisting of two layers of insulation with the electric heating element positioned between the two layers.
- f) Claim 6 is an independent claim saying the sleeve is to be fastened to the articulated boom in a way that prevents heat from escaping.
- g) Together, claims 7 and 8 describe the sleeve being flexible enough for the boom to operate while maintaining the sleeve in position so heat does not escape.

3. *Obviousness step #3: Differences between prior art and '341 Patent*

[85] While I noted above that CGK may not necessarily include the Israel references put forward by Mr. Willner, it is important to remember CGK is "merely a subset of the state of the art" (*Hospira Healthcare Corporation v Kennedy Trust for Rheumatology Research*, 2020 FCA 30 at para 84 [*Hospira*]). Even if prior art references are not necessarily "CGK", they can still be considered later in the obviousness test. This is because excluding difficult-to-find prior art

would result in the possibility that an existing invention already disclosed to the public could be patented in Canada with a non-inventive tweak (*Hospira* at paras 83–87). Therefore the two prior art references from Israel can be included in this analysis, though they add little if anything to the analysis.

[86] I accept Mr. Willner’s expert evidence that identifies three differences between the prior art including the ‘050 Patent for propane tanks and the ‘724 Patent for blowout preventors [BOP] and the ‘341 Patent. First, the wrapping of the heating sleeve around an articulated hydraulic boom is the primary difference between the ‘341 Patent and the prior art, as the prior art does *not* involve an articulated hydraulic boom. A second difference is that the prior art does not disclose a layer of insulation between the heating element and the inner surface of the sleeve (see claim 5 discussed above). A third difference is that the heating wrap can be used while the boom is in operation (see claims 7 and 8).

[87] Mr. Grace’s responding evidence calls it a “stretch” to compare the ‘050 Patent for propane tanks to the ‘341 Patent as the requirements for heating articulated hydraulic booms and propane tanks are different. He further suggests the blowout preventors and sleeping bag covers are not appropriate comparisons for the ‘341 Patent as they are different objects. He advances that the sleeve is designed to keep the cold out of the boom, while the inner side keeps the hydraulic oil in the boom warm, and as such the sleeve is not just heating the boom but rather keeping the cold “out.”

[88] Mr. Grace does acknowledge similar materials are used in the prior art including the Jug Heat Pak described by the '050 Patent and the blowout preventor described by the '724 Patent. He has not explained why the heat wrapping around the devices would be different and when this issue was raised on cross-examination he acknowledged a heating wrap being fastened around an object was not a new idea. He further acknowledged that the prior art such as the Jug Heat Pak in the '050 Patent discloses two layers of thermal insulating material fastened to an object with opposing ends.

[89] When the actual differences between the '341 Patent and the prior art are considered, I find Mr. Willner's characterization of the differences and Mr. Grace's statements on cross-examination line up. Both essentially agree that while blowout preventors, propane tank heaters, electric blankets and sleeping bag covers are indeed different devices, the technology is the same. They do not disagree that the general idea of heating an item by fastening with a type of fastener, an electric wrap around it is the same across all the devices.

[90] The difference is that the boom being heated according to the '341 Patent is a boom described in claims 7 and 8 as being either stationary or in operation and there is an additional insulation layer between the heating element and the inner surface of the sleeve. This is described as being different by Ms. Brierley in the sense that it is thermal insulation and the prior art only refers to "insulation." Mr. Willner in cross-examination found this to be a distinction without a difference and I agree.

[91] Ms. Brierley argued that the '050 Patent (Jug Heat Pak) did not define interior cavity or disclose top and bottom ends. In cross she sought to confirm this with Mr. Willner to distinguish her patent:

Q Ms. Brierley: Where in the claims and specifications of the '659 patent does it claim or define interior cavity?

A It doesn't because the interior cavity is something that's created on the site when it's wrapped, just like your product the interior cavity is when it's wrapped around the piston.

Q Yeah, but it is not stated in the patent.

A. Because you can use it on the path. You're confusing the path.

...

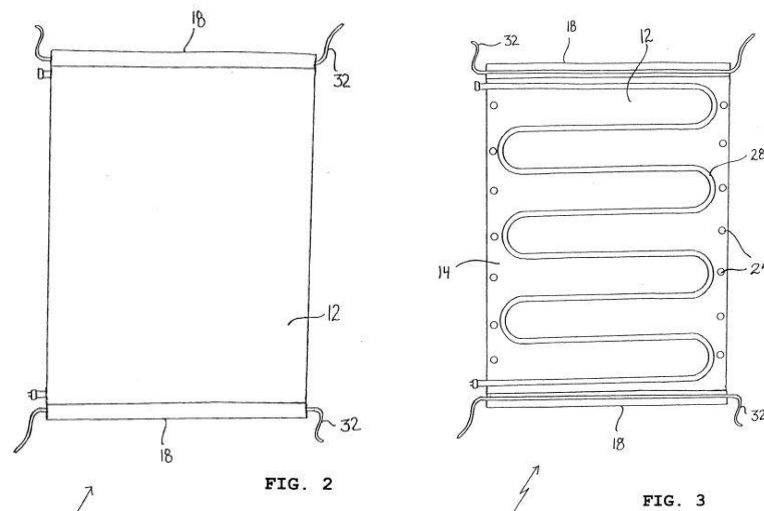
Q Ms. Brierley: Okay. Also does the '050 patent claim disclose top and bottom ends, or is that an assumption?

...

A It's irrelevant. It doesn't – you can use it either or. You can use it upside down or straight. It's not mentioned because it's irrelevant.

[92] This discussion about other similar wrapping devices needing to have top and bottom ends is irrelevant. The '341 Patent claims including claims 1, 2, 3 and 6 simply refer to “opposed ends” or “opposed sides.” The parties agree for the '341 Patent there does not need to be a certain top and a certain bottom. Ms. Brierley says that this fact makes her patent very different than the prior art. She indicates that the '724 Patent has many openings besides the two on the side and that patent says top and bottom unlike her patent which is “opposing ends.” All of the other patents or devices in the prior art have a top and bottom whereas when the boom is operating her patent does not have a top and bottom as it could be horizontal. This she argued makes her patent not obvious.

[93] I am rejecting this argument as clearly as illustrated by the figures 2 and 3 (below) from her patent there is no difference in those terms. At times in her patent the heating wrap has a top and bottom and at other times it has two sides or opposing ends. These are not described terms and in the prior art; when a propane tank is upright, the heating blanket has a top and bottom. When, however, a propane tank is used laying on its side and then it does not have a top or bottom. The orientation of the opening does not make the patent different from the prior art or less obvious. The '341 Patent contains these figures which supports my finding:



[94] The actual differences between the '341 Patent and the prior art are therefore just that in her patent the sleeve is wrapped around an articulated hydraulic boom and the boom can be operated with the sleeve on, as well as there is an added layer of insulation.

4. *Obviousness step #4: Are these differences obvious?*

[95] Ms. Brierley has not indicated any challenges or obstacles with applying a typical heating sleeve from the prior art to heat an articulated hydraulic boom. This is significant given the prior art that was in existence at the time the '341 Patent was filed which was April 25, 2002.

[96] Again both Mr. Grace and Mr. Willner agreed there were no notable obstacles to using a heated sleeve from any of the prior art on an articulating boom. Mr. Willner's view is "there is nothing inventive about using a well-known heating wrap on an articulated hydraulic boom". Mr. Grace even confirmed this during his cross-examination:

Q. Do you agree that that statement is also correct in that a description of any of those challenges or obstacles, if there were any, is not contained in the '341 patent?

A. There is – there is no unique challenges to closing the ends. It could have been drawstrings or could have been straps.

Q. But in terms of applying a standard prior art heated sleeve that was, you know, of the same type that was used to heat a multitude of different objects, the '341 patent doesn't describe any specific challenges or obstacles to applying that technology to an articulated hydraulic boom; is that correct?

A. That's correct.

[97] Mr. Willner and Mr. Grace both confirm it is not inventive to apply a standard prior art heating sleeve to an object – in this case, articulated hydraulic boom. The expert evidence is consistent on this point.

[98] Ms. Brierley argued that her patent was not obvious because the blowout preventor (the '724 Patent) and the Jug Heat Pak ('050 Patent) were not to be used for something in operation—unlike claim 8 of her patent. But the fact is that there is nothing unique or nothing problematic that needed to be solved for a heated sleeve in the prior art to be adapted for an articulated boom. Especially when you consider the amount of pressure and vibration on the '724 Patent which is worn when in operation, and that only claims 7 and 8 even mention that the heated sleeve could be used when operating. Both sleeves are flexible heating devices and are



attached by straps, Velcro, buckles or strings just wrapped around a different item. Though the '724 Patent has a number of subsidiary openings to accommodate other fittings this seems obvious if you were to close those you would have a heated apparatus that could be fitted on an articulated boom that could be operated.

[99] An invention is obvious when the distance between the prior art and the inventive concept can be bridged by the skilled person using only the common general knowledge available to a POSITA (*Packers Plus Energy Services Inc. v Essential Energy Services Ltd.*, 2019 FCA 96 at para 32). Flexible electric heating devices were available on the market at the 2002 claim date. There were no stated obstacles to using the identical device on a hydraulic boom. It would have been within the common general knowledge of a POSITA that a heating element similar to those in the prior art devices could be wrapped around other objects and fastened for operation in freezing conditions.

[100] As Mr. Willner notes at paragraph 87 of his expert report, the '724 Patent and '050 Patent both disclose flexible and insulated sleeves defining interior cavities, and each disclose apparatuses with top and bottom ends that can be closed by a number of methods including straps, buckles, strings and Velcro. Both of these prior art references were for freezing temperatures. Neither the '724 or '050 patents indicate that the blankets cannot remain on when being operated while the '724 is not portable (unlike '050 Patent) it can accommodate at least two different models of BOPs. These are very similar devices to the '341 Patent setting aside the fact that it is being wrapped around an articulated hydraulic boom.

[101] Ms. Brierley further explained that her patent contains “thermal insulation” and some patents including the ‘050 Patent do not refer to thermal insulation. Again this is a matter of word choice and does not illustrate an inventive concept.

[102] As for claim 5 involving two layers of insulation between the heating element and the interior surface of the sleeve, this was not covered by the prior art. Ms. Brierley argues this makes her device not obvious and she insisted her invention could still work without the second layer of insulation. Both parties’ experts agreed that placing the insulation in this position would trap heat between the heat wrap and the pad which would actually cause heat to be trapped in the insulating layer. Mr. Willner called this “simply a poor design that would render the heating sleeve highly inefficient if not completely inoperative”. Mr. Grace thought it would still allow the apparatus to function.

[103] In any event, this second distinction between the ‘341 Patent does not reveal an inventive difference, as an insulating layer has been placed in a position that arguably makes the device less effective and there were no stated advantages of putting an insulating layer in this position. It is not an inventive change from the prior art.

[104] As for the fact that the boom would be operated while heated, the ‘341 Patent does not explain how this is inventive or what obstacles were overcome to achieve this.

[105] It is telling that Ms. Brierley does not identify challenges or ingenuity to wrapping the prior art around the hydraulic boom. She argues “it is possible to identify what would have to be

done to get from the Prior Art to the '341 Patent...but identifying the steps does not mean that a skilled workman lacking in inventiveness would think to do those things.” This is not helpful. The way that she contrasts her patent with the prior art has not shown any specific inventive concept other than taking a product akin to the prior art and wrapping it around articulated hydraulic booms.

[106] As I discussed above, the language of “opposed ends” would include a top and bottom end. I do not find the wording of “opposed ends” rather than top and bottom makes the '341 Patent inventive and it is mostly a matter of semantics.

[107] She added that her patent is inventive as it provides a solution for extremely cold temperatures where articulated hydraulic booms would not work because of the increasing viscosity of hydraulic fluids which can lead to seal failures. She explains that she has worked in minus 67 degree worksites and has seen equipment failures and that her patent has been tested in cold temperatures and works. However there is no disclosure of these features in the text of the '341 Patent, there is no indication of what temperature this heat wrap works for other than “freezing temperatures” as set out in the claims and disclosure.

[108] So although freezing temperatures clearly are relevant, there is no specificity of the temperatures it is to operate in and that it is unique to the prior art that also operate in cold weather. The '724 Patent says:

BOPs often operate in extremely cold environments where temperatures reach below -40 degree....Extreme cold can affect the sealing function for the rubber parts and this can lead to failure of the seal, resulting in a dangerous environment. In addition,

normal cold weather operation of the BOP can lead to a buildup of frost or rime in the bore of the BOP which impairs its safety.

[109] Unlike the prior art, the '724 Patent does speak to problems incurred in the past and Ms. Brierley has not shown an inventive concept in the '341 Patent that allows the wrap on an articulated boom to operate specifically in cold temperatures. The patent involving a flexible warming wrap to be portable and go around a propane tank (Jug Heat Pak, '050 Patent) that is either horizontal or vertical (from figure 2 959 Patent) that is then fastened. The patent indicates the purpose to is to warm the gas to a temperature where it will transfer from a portable cylinder to a compressor during mild to cold temperature conditions. In this patent they indicate some difficulties that had to be overcome to invent this.

[110] To a POSITA with the CGK of the time the patent's claim date, it would be obvious given the patents for the BOP ('724 Patent) and the Jug Heat Pak ('050 Patent) that heated blankets with embedded heating coils that operate in freezing conditions can also be wrapped around an item and then fastened by straps to keep the item warm. The fact that this patent wraps around an articulating boom is not inventive.

[111] All of the elements save the articulated hydraulic boom were used by Mr. Willner to compare the '724 Patent with the '341 Patent. It is attached as Annex A and I adopt it:

**Claim 1 of the '341 Patent**

An apparatus for maintaining an articulated hydraulic boom operating in freezing temperatures, comprising:

**'724 Patent**

This element is not present in the '724 Patent, which disclosed an apparatus for heating a BOP.

a flexible sleeve of thermal insulating material having an interior surface defining an interior cavity

The '724 Patent discloses a flexible sleeve designed to wrap around a BOP, such that the BOP is positioned within the interior cavity of the apparatus (e.g. col. 2, lines 19-20). The sleeve has a layer of insulation (e.g. col. 2, lines 5-15).

opposed ends

The apparatus of the '724 Patent has top and bottom ends.

a longitudinal opening providing access to the interior cavity, such that the articulated hydraulic boom can be positioned within the interior cavity of the sleeve

The apparatus of the '724 Patent has a longitudinal opening to allow the BOP to be positioned within the interior cavity (See Fig. 3 at 22).

means for closing the longitudinal opening;

The '724 Patent describes a means of fastening the cover around the BOP. Descriptions of the preferred embodiment of the '724 Patent include two different means for fastening the cover of the longitudinal opening:

the use of VELCRO along in the longitudinal opening (e.g. col 2, lines 25-29); and

the use of buckles as fasteners on opposed sides of the longitudinal opening and placed at spaced intervals (See Fig. 3 at 26 and 28).

means for heating the interior cavity of the sleeve; and

The '724 Patent discloses an electrical heating element to heat the interior cavity (e.g. col 2, lns 55-57).

Means for constricting the opposed ends of the flexible sleeve, thereby maintaining the sleeve in position on the articulated boom and preventing heat from the escaping from the interior cavity.

Descriptions of the preferred embodiment of the '724 Patent include the use of drawstrings on the sleeve to seal the cover against the external connections (See Fig. 3 at 20).

[112] Finally, I do not accept Ms. Brierley's argument that this is a "combination patent" making it not obvious. But even if I did considering all the claims together, I find the "combination" of the articulated hydraulic boom and the other essential elements (which are reflected in existing prior art) is not inventive.

(4) Conclusion: Obviousness

[113] There is no genuine issue for trial concerning the determination of the '341 Patent being obvious, because all of the claims were obvious at the claim date. The differences constitute steps which would have been obvious to the person skilled in the art and would not have required any degree of invention. I therefore accept that the '341 Patent was obvious at the claim date. Flatwork has shown that there is no genuine issue for trial given the finding that the patent is obvious. I find that all of the claims are invalid for obviousness.

B. *Should the '341 Patent be declared invalid because it lacks anticipation and/or utility?*

[114] Because I have found all of the claims to be invalid for obviousness it is not necessary for me to consider the issues of anticipation or utility. I do not need to address the other grounds of invalidity because in an impeachment proceeding only one ground of invalidity needs to be proven for a plaintiff to be successful. I will therefore grant summary judgment to Flatwork and invalidate the '341 Patent.

IX. Costs

[115] Cost are discretionary and the rules respecting them are found starting at Rule 400 of the *Federal Courts Rules*. The discretionary factors and criteria that are to be considered are set out in the *Federal Courts Rules*.

[116] The FCA has found that lump-sum costs in the range of 25 to 50 percent of the legal fees as well as reasonable disbursements are appropriate but higher or lower percentages may be awarded (*Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 at para 17 [Nova]). Justice Rennie indicated that a judge giving a lump sum award has a wide discretion but it is not unfettered (*Nova* at para 19). I find that an award of lump sum costs is appropriate in this case. With that in mind, I will review the submissions of the parties.

[117] In their written materials, Flatwork requested costs on this motion and this action on a solicitor and client basis. Ms. Brierley asked for costs “in any event of the cause.”

[118] At the hearing, the parties were given 10 days to make submissions on costs including providing the court a Bill of Costs. I had indicated that I would like to have a lump sum position. Flatwork requested a lump sum amount of \$120,306.12. This would consist of 50% of actual legal fees (half of \$212,678.79 is \$106,339.40) plus disbursements (\$13,996.72). They submit the Court should award covering a lump sum of 25% to 50% of their legal fees and that it should be on the higher end of this range due to Ms. Brierley’s conduct. They say Tariff B would not adequately cover their costs because the amount would be \$15,671.25 plus disbursements under Column V, reflecting only 7.4% of actual legal fees.

[119] Flatwork argued the overall litigation picture should be considered as Ms. Brierley brought the Alberta action which led to this proceeding. In this action she made a number of strategic decisions that added unnecessary cost to these proceedings including bringing a counterclaim, a motion to strike that was abandoned, and assigning a patent to a Belize company

then assigning it back to herself when the prospect of default judgment was raised. More on this below. As well, she took contrary positions on the essential elements of her patent in the two proceedings.

A. *Procedural history*

[120] This file has been case managed by Prothonotary Ring with many obstacles having to be determined before the trial could proceed.

[121] In February 2019, Ms. Brierley planned to sell the '341 Patent to a Belize corporation called Angeni Holdings LLC. However, due to the ongoing litigation the conditions of the Patent Purchase Agreement were not fulfilled and so the '341 Patent remains under Ms. Brierley's ownership. At the hearing some of the procedural "wrangling" was discussed concerning ownership and who could defend the '341 Patent. This caused the Plaintiff considerable strife, but was resolved with the Defendant agreeing in June 2019 that she was the proper representative after the Plaintiff sought default judgment against the Belize corporation in reliance on its claims that it would not be defending the patent in Canadian courts and would not accept Canadian jurisdiction.

[122] Ms. Brierley initially pursued a counterclaim attempting to have Flatwork's various patents invalidated. There were problems with this counterclaim as she never posted security for costs as required by section 60(3) of the *Patent Act* and made allegations in the counterclaim that were against a different corporation: Greenheat IP Holdings, LLC. After Ms. Brierley's litigation



options were explained by Prothonotary Ring, in May 2019 Angeni Holdings LLC (the assignee of the '341 Patent at the time) filed a notice of discontinuance of the counterclaim.

[123] In a letter dated December 19, 2019, Ms. Brierley indicated that she will now be pursuing a separate action against Greenheat instead of trying to reinstate the counterclaim.

[124] Ms. Brierley brought a separate motion to strike Flatwork's Statement of Claim which she later abandoned. Flatwork also attempted to strike Ms. Brierley's Amended Amended Statement of Defence by motion dated June 12, 2019 but that motion was adjourned *sine die* on February 7, 2020 after Flatwork moved for summary judgment.

[125] Ms. Brierley filed a statement of expenditures and receipts showing she spent \$27,588.47, although Flatwork disputed at the hearing that Ms. Brierley would be including \$50.00 per hour for her time.

B. *Conclusion: Costs*

[126] Considering these submissions and the relevant factors under Rule 400(3) I will be awarding Flatwork a lump sum of \$40,000.00 in costs payable forthwith by Ms. Brierley. This award is more than the Tariff B amount but slightly below the lower end range because Ms. Brierley is self-represented and though worldly she is not a sophisticated litigant as envisioned in most commercial patent litigation where parties are typically represented by counsel.

[127] I do not accept that Ms. Brierley's contrary positions in the Federal Court and Alberta actions were malicious, and at the hearing Ms. Brierley acknowledged the articulated hydraulic boom is an essential element of her patent. Some of the issues about unnecessary litigation steps are a result of Ms. Brierley being self-represented. The patent itself and the litigation was not complex and it was determined on a summary basis. However, other steps such as assigning the patent to the Belize corporation then assigning it back to herself and bringing motions that she later abandoned did add unnecessary costs. Ms. Brierley in her submissions provided a letter dated January 16, 2019 where the Flatwork agreed not to pursue her for costs of a Motion to Strike if she abandoned it, which she did, and Flatwork did not seek costs of defending this abandoned motion. It should be remembered that Ms. Brierley began the dispute between the parties by suing Flatwork in Alberta for infringing her patent and certainly represented herself in a forceful competent manner. I find \$40,000.00 inclusive of taxes to be an appropriate lump sum for fees for these reasons. This does not include disbursements which are dealt with below.

[128] I have also reviewed the Plaintiff's disbursements including for expert fees and photocopying and I find the disbursements of \$13,996.72 put forward by the Plaintiff are reasonable. Adding these total disbursements to the costs discussed above, I will be awarding a lump sum costs award of \$53,996.72 inclusive of taxes and disbursements.

X. Conclusion

[129] I therefore grant Flatwork's motion for summary judgment because the '341 Patent is obvious and there is no genuine issue for trial. The '341 Patent is of no force and effect, and CIPO is to void the '341 Patent pursuant to sections 60(1) and 62 of the *Patent Act*.

**ORDER IN T-1615-18**

**THIS COURT'S ORDER is that**

1. The Plaintiff's motion for summary judgment is granted;
2. The Canadian Patent No. 2,383,341 [the '341 Patent] is invalid and void pursuant to section 60(1) of the *Patent Act*;
3. The Commissioner of Patents is directed to register a certificate of judgment voiding the '341 Patent pursuant to section 62 of the *Patent Act*; and
4. The Defendant shall pay the lump sum for fees and disbursements of \$53,996.72 in costs inclusive of taxes and disbursements.

"Glennys L. McVeigh"

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Judge

## ANNEX A

CHART showing all elements except Articulated hydraulic boom and prior art within the CGK

### '341 PATENT

### PRIOR ART

#### Claim 1

An apparatus for maintaining an articulated hydraulic boom operating in freezing temperatures, comprising:

This element is not present in the prior art, but flexible heating sleeves were well known and long within the public domain with respect to the heating of a variety of objects, and it would have been obvious to a POSA that a flexible heating sleeve could also be used to wrap around an articulated hydraulic boom.

a flexible sleeve of thermal insulating material having an interior surface defining an interior cavity

The Termo 2000 Sleeping Bag Warmer and the Gas Vaporizer both have the flexible and insulated sleeves defining interior cavities.

The '724 Patent and '050 Patent both disclose flexible and insulated sleeves defining interior cavities.

opposed ends

The Sleeping Bag Warmer and Gas Vaporizer have top and bottom ends.

The '724 Patent and '050 Patents both disclose apparatuses with top and bottom ends.

a longitudinal opening providing access to the interior cavity, such that the articulated hydraulic boom can be positioned within the interior cavity of the sleeve

All of the Sleeping Bag Warmer, Gas Vaporizer and inventions disclosed by the '724 Patent and '050 Patent have longitudinal openings to provide access to the interior cavity of the respective apparatus.

With the exception of the gas vaporizer, which has one closed end, it would be obvious to the POSA that an articulated hydraulic boom could be positioned within the interior cavity of a similarly constructed sleeve.

means for closing the longitudinal opening;

The Sleeping Bag Warmer and Gas Vaporizer have Velcro fasteners to close their respective longitudinal openings.

The '724 Patent describes a means of fastening the cover around a BOP, including through the use of Velcro along the longitudinal opening and the use of buckles as fasteners on opposed sides of the longitudinal opening and placed at spaced intervals.

The '050 Patent describes a means of fastening the sleeve around a cylinder with adjustable holders utilizing springs, eyelets, lacing hooks, hooks-and-loops (Velcro), straps, clips, snaps, buckles and the like and combinations thereof.

means for heating the interior cavity of the sleeve; and

The Sleeping Bag Warmer and Gas Vaporizer have electrical heating elements to heat interior cavities.

The '724 Patent and '050 Patent also disclose electrical heating elements to heat the interior cavities of their respective apparatuses.

means for constricting the opposed ends of the flexible sleeve, thereby maintaining the sleeve in position on the articulated boom and preventing heat from the escaping from the interior cavity.

There are strips of Velcro at the top and bottom ends of the Sleeping Bag Warmer, which allow the ends to be constricted.

Descriptions of the preferred embodiment of the '724 Patent include the use of drawstrings on the sleeve to seal the BOP cover against the external connections.

The Gas Vaporizer includes a drawstring to constrict the bottom end of the device. The top end of the device is already closed but it would be obvious to the POSA that if the top end were open to accommodate a differently shaped object, it could similarly be constricted with drawstring.

## Claim 2

The apparatus as defined in Claim 1, wherein the means for closing the longitudinal

The '724 Patent describes a means of fastening the cover around a BOP, including

opening being fasteners positioned at spaced intervals along the sleeve on opposed sides of the longitudinal opening.

through the use of buckles as fasteners on opposed the sides of the longitudinal opening and placed at spaced intervals.

### Claim 3

The apparatus as defined in Claim 1, wherein draw strings positioned at the opposed ends of the flexible sleeve serve as the means for constricting the opposed ends of the flexible sleeve.

Descriptions of the preferred embodiment of the '724 Patent include the use of drawstrings on the sleeve to seal the BOP cover against the external connections

The GAS Vaporizer includes a drawstring to constrict the bottom end of the device. The top end of the device is already closed but it would be obvious to the POSA that if the top end were open, it could similarly be constricted with drawstring.

### Claim 4

The apparatus as defined in Claim 1, wherein an electric heating element imbedded in the interior surface of the sleeve serves as the means for heating the interior cavity of the sleeve.

The Sleeping Bag Warmer is heated by a resistive wire imbedded between the outer and inner layers of device.

The '724 Patent discloses the use of self-regulating heating cables fastened by stitching between detachable pads and internal pads and fastened to the inner shell.

The '050 Patent discloses the use of heating elements (which may be etched foil or wire elements) sandwiched between suitable composites that allow the heat to be conducted from the heating jacket to the cylinder.

The Gas Vaporizer includes an electric heating element sandwiched between the inner polymeric layer of the sleeve and the insulation, and held in place by a removable polymeric substrate in which it is embedded.

## ANNEX B

### Relevant legislation

*Patent Act, RSC, 1985, c P-4*

*Loi sur les brevets, LRC (1985), ch P-4*

#### Claim date

28.1 (1) The date of a claim in an application for a patent in Canada (the “pending application”) is the filing date of the application, unless

(a) the pending application is filed by (i) a person who has, or whose agent, legal representative or predecessor in title has, previously regularly filed in or for Canada an application for a patent disclosing the subject-matter defined by the claim, or (ii) a person who is entitled to protection under the terms of any treaty or convention relating to patents to which Canada is a party and who has, or whose agent, legal representative or predecessor in title has, previously regularly filed in or for any other country that by treaty, convention or law affords similar protection to citizens of Canada an application for a patent disclosing the subject-matter defined by the claim;

(b) the filing date of the pending application is within twelve months after the filing date of the previously regularly filed application; and

(c) the applicant has made a request for priority on the basis of the previously regularly filed application.

#### Claims based on previously regularly filed applications

28.1(2) In the circumstances described in paragraphs (1)(a) to (c), the claim date is the

#### Date de la revendication

28.1 (1) La date de la revendication d’une demande de brevet est la date de dépôt de celle-ci, sauf si :

a) la demande est déposée, selon le cas: (i) par une personne qui a antérieurement déposé de façon régulière, au Canada ou pour le Canada, ou dont l’agent, le représentant légal ou le prédécesseur en droit l’a fait, une demande de brevet divulguant l’objet que définit la revendication, (ii) par une personne qui a antérieurement déposé de façon régulière, dans un autre pays ou pour un autre pays, ou dont l’agent, le représentant légal ou le prédécesseur en droit l’a fait, une demande de brevet divulguant l’objet que définit la revendication, dans le cas où ce pays protège les droits de cette personne par traité ou convention, relatif aux brevets, auquel le Canada est partie, et accorde par traité, convention ou loi une protection similaire aux citoyens du Canada;

b) à cette date, il s’est écoulé, depuis la date de dépôt de la demande déposée antérieurement, au plus douze mois;

c) le demandeur a présenté, à l’égard de sa demande, une demande de priorité fondée sur la demande déposée antérieurement.

#### Date de dépôt de la demande antérieure

28.1(2) Dans le cas où les alinéas (1)a) à c) s’appliquent, la date de la revendication est la

filing date of the previously regularly filed application.

### **Subject-matter of claim must not be previously disclosed**

28.2 (1) The subject-matter defined by a claim in an application for a patent in Canada (the “pending application”) must not have been disclosed

(a) before the one-year period immediately preceding the filing date or, if the claim date is before that period, before the claim date by the applicant, or by a person who obtained knowledge, directly or indirectly, from the applicant, in such a manner that the subject-matter became available to the public in Canada or elsewhere;

(b) before the claim date by a person not mentioned in paragraph (a) in such a manner that the subject-matter became available to the public in Canada or elsewhere;

(c) in an application for a patent that is filed in Canada by a person other than the applicant, and has a filing date that is before the claim date; or

(d) in an application (the “co-pending application”) for a patent that is filed in Canada by a person other than the applicant and has a filing date that is on or after the claim date if (i) the co-pending application is filed by (A) a person who has, or whose agent, legal representative or predecessor in title has, previously regularly filed in or for Canada an application for a patent disclosing the subject-matter defined by the claim, or (B) a person who is entitled to protection under the terms of any treaty or convention relating to patents to which Canada is a party and who has, or whose agent, legal representative or predecessor in title has, previously regularly filed in or for any other country that by treaty, convention or law

date de dépôt de la demande antérieurement déposée de façon régulière.

### **Objet non divulgué**

28.2 (1) L’objet que définit la revendication d’une demande de brevet ne doit pas :

a) soit plus d’un an avant la date de dépôt de celle-ci, soit, si la date de la revendication est antérieure au début de cet an, avant la date de la revendication, avoir fait, de la part du demandeur ou d’un tiers ayant obtenu de lui l’information à cet égard de façon directe ou autrement, l’objet d’une communication qui l’a rendu accessible au public au Canada ou ailleurs;

b) avant la date de la revendication, avoir fait, de la part d’une autre personne, l’objet d’une communication qui l’a rendu accessible au public au Canada ou ailleurs;

c) avoir été divulgué dans une demande de brevet qui a été déposée au Canada par une personne autre que le demandeur et dont la date de dépôt est antérieure à la date de la revendication de la demande visée à l’alinéa (1)a);

d) avoir été divulgué dans une demande de brevet qui a été déposée au Canada par une personne autre que le demandeur et dont la date de dépôt correspond ou est postérieure à la date de la revendication de la demande visée à l’alinéa (1)a) si :(i) cette personne, son agent, son représentant légal ou son prédécesseur en droit, selon le cas :(A) a antérieurement déposé de façon régulière, au Canada ou pour le Canada, une demande de brevet divulguant l’objet que définit la revendication de la demande visée à l’alinéa (1)a),(B) a antérieurement déposé de façon régulière, dans un autre pays ou pour un autre pays, une demande de brevet divulguant l’objet que définit la revendication de la



affords similar protection to citizens of Canada an application for a patent disclosing the subject-matter defined by the claim, (ii) the filing date of the previously regularly filed application is before the claim date of the pending application, (iii) the filing date of the co-pending application is within twelve months after the filing date of the previously regularly filed application, and (iv) the applicant has, in respect of the co-pending application, made a request for priority on the basis of the previously regularly filed application.

### **Invention must not be obvious**

28.3 The subject-matter defined by a claim in an application for a patent in Canada must be subject-matter that would not have been obvious on the claim date to a person skilled in the art or science to which it pertains, having regard to

(a) information disclosed before the one-year period immediately preceding the filing date or, if the claim date is before that period, before the claim date by the applicant, or by a person who obtained knowledge, directly or indirectly, from the applicant in such a manner that the information became available to the public in Canada or elsewhere; and

(b) information disclosed before the claim date by a person not mentioned in paragraph (a) in such a manner that the information became available to the public in Canada or elsewhere.

### **Impeachment of patents or claims**

60 (1) A patent or any claim in a patent may be declared invalid or void by the Federal Court at the instance of the Attorney General

demande visée à l'alinéa (1)a), dans le cas où ce pays protège les droits de cette personne par traité ou convention, relatif aux brevets, auquel le Canada est partie, et accorde par traité, convention ou loi une protection similaire aux citoyens du Canada, (ii) la date de dépôt de la demande déposée antérieurement est antérieure à la date de la revendication de la demande visée à l'alinéa a), (iii) à la date de dépôt de la demande, il s'est écoulé, depuis la date de dépôt de la demande déposée antérieurement, au plus douze mois, (iv) cette personne a présenté, à l'égard de sa demande, une demande de priorité fondée sur la demande déposée antérieurement.

### **Objet non évident**

28.3 L'objet que définit la revendication d'une demande de brevet ne doit pas, à la date de la revendication, être évident pour une personne versée dans l'art ou la science dont relève l'objet, eu égard à toute communication :

a) qui a été faite, soit plus d'un an avant la date de dépôt de la demande, soit, si la date de la revendication est antérieure au début de cet an, avant la date de la revendication, par le demandeur ou un tiers ayant obtenu de lui l'information à cet égard de façon directe ou autrement, de manière telle qu'elle est devenue accessible au public au Canada ou ailleurs;

b) qui a été faite par toute autre personne avant la date de la revendication de manière telle qu'elle est devenue accessible au public au Canada ou ailleurs.

### **Invalidation de brevets ou de revendications**

60 (1) Un brevet ou une revendication se rapportant à un brevet peut être déclaré invalide ou nul par la Cour fédérale, à la

of Canada or at the instance of any interested person.

### **Declaration as to infringement**

60 (2) Where any person has reasonable cause to believe that any process used or proposed to be used or any article made, used or sold or proposed to be made, used or sold by him might be alleged by any patentee to constitute an infringement of an exclusive property or privilege granted thereby, he may bring an action in the Federal Court against the patentee for a declaration that the process or article does not or would not constitute an infringement of the exclusive property or privilege.

### **Security for costs**

60(3) With the exception of the Attorney General of Canada or the attorney general of a province, the plaintiff in any action under this section shall, before proceeding therein, give security for the costs of the patentee in such sum as the Federal Court may direct, but a defendant in any action for the infringement of a patent is entitled to obtain a declaration under this section without being required to furnish any security.

### **Judgment voiding patent**

62 A patent, or part of a patent, that is voided by a judgment shall be and be held to have been void and of no effect, unless the judgment is reversed on appeal as provided in section 63.

*Federal Courts Rules, SOR/98-106*

### **Amendments with leave**

75 (1) Subject to subsection (2) and rule 76, the Court may, on motion, at any time, allow

diligence du procureur général du Canada ou à la diligence d'un intéressé.

### **Déclaration relative à la violation**

60(2) Si une personne a un motif raisonnable de croire qu'un procédé employé ou dont l'emploi est projeté, ou qu'un article fabriqué, employé ou vendu ou dont sont projetés la fabrication, l'emploi ou la vente par elle, pourrait, d'après l'allégation d'un breveté, constituer une violation d'un droit de propriété ou privilège exclusif accordé de ce chef, elle peut intenter une action devant la Cour fédérale contre le breveté afin d'obtenir une déclaration que ce procédé ou cet article ne constitue pas ou ne constituerait pas une violation de ce droit de propriété ou de ce privilège exclusif.

### **Cautionnement pour frais**

60(3) À l'exception du procureur général du Canada ou du procureur général d'une province, le plaignant dans une action exercée sous l'autorité du présent article fournit, avant de s'y engager, un cautionnement pour les frais du breveté au montant que le tribunal peut déterminer. Toutefois, le défendeur dans toute action en contrefaçon de brevet a le droit d'obtenir une déclaration en vertu du présent article sans être tenu de fournir un cautionnement.

### **Jugement annulant un brevet**

62 Le brevet ou la partie du brevet qui a été annulé par un jugement est nul et de nul effet et est tenu pour tel, à moins que le jugement ne soit infirmé en appel en vertu de l'article 63.

*Règles des Cours fédérales, DORS/98-106*

### **Modifications avec autorisation**

75 (1) Sous réserve du paragraphe (2) et de la règle 76, la Cour peut à tout moment, sur

a party to amend a document, on such terms as will protect the rights of all parties.

### **Limitation**

75(2) No amendment shall be allowed under subsection (1) during or after a hearing unless

(a) the purpose is to make the document accord with the issues at the hearing;

(b) a new hearing is ordered; or

(c) the other parties are given an opportunity for any preparation necessary to meet any new or amended allegations.

### **Summary Judgment**

#### **Facts and evidence required**

214 A response to a motion for summary judgment shall not rely on what might be adduced as evidence at a later stage in the proceedings. It must set out specific facts and adduce the evidence showing that there is a genuine issue for trial.

#### **If no genuine issue for trial**

215 (1) If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

#### **Genuine issue of amount or question of law**

215(2) If the Court is satisfied that the only genuine issue is

requête, autoriser une partie à modifier un document, aux conditions qui permettent de protéger les droits de toutes les parties.

### **Conditions**

75 (2) L'autorisation visée au paragraphe (1) ne peut être accordée pendant ou après une audience que si, selon le cas :

a) l'objet de la modification est de faire concorder le document avec les questions en litige à l'audience;

b) une nouvelle audience est ordonnée;

c) les autres parties se voient accorder l'occasion de prendre les mesures préparatoires nécessaires pour donner suite aux prétentions nouvelles ou révisées.

### **Jugement sommaire**

#### **Faits et éléments de preuve nécessaires**

214 La réponse à une requête en jugement sommaire ne peut être fondée sur un élément qui pourrait être produit ultérieurement en preuve dans l'instance. Elle doit énoncer les faits précis et produire les éléments de preuve démontrant l'existence d'une véritable question litigieuse.

#### **Absence de véritable question litigieuse**

215 (1) Si, par suite d'une requête en jugement sommaire, la Cour est convaincue qu'il n'existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.

#### **Somme d'argent ou point de droit**

215(2) Si la Cour est convaincue que la seule véritable question litigieuse est :

(a) the amount to which the moving party is entitled, the Court may order a trial of that issue or grant summary judgment with a reference under rule 153 to determine the amount; or

(b) a question of law, the Court may determine the question and grant summary judgment accordingly.

### **Powers of Court**

215(3) If the Court is satisfied that there is a genuine issue of fact or law for trial with respect to a claim or a defence, the Court may

(a) nevertheless determine that issue by way of summary trial and make any order necessary for the conduct of the summary trial; or

(b) dismiss the motion in whole or in part and order that the action, or the issues in the action not disposed of by summary judgment, proceed to trial or that the action be conducted as a specially managed proceeding.

a) la somme à laquelle le requérant a droit, elle peut ordonner l'instruction de cette question ou rendre un jugement sommaire assorti d'un renvoi pour détermination de la somme conformément à la règle 153;

b) un point de droit, elle peut statuer sur celui-ci et rendre un jugement sommaire en conséquence.

### **Pouvoirs de la Cour**

215(3) Si la Cour est convaincue qu'il existe une véritable question de fait ou de droit litigieuse à l'égard d'une déclaration ou d'une défense, elle peut :

a) néanmoins trancher cette question par voie de procès sommaire et rendre toute ordonnance nécessaire pour le déroulement de ce procès;

b) rejeter la requête en tout ou en partie et ordonner que l'action ou toute question litigieuse non tranchée par jugement sommaire soit instruite ou que l'action se poursuive à titre d'instance à gestion spéciale.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1615-18

**STYLE OF CAUSE:** FLATWORK TECHNOLOGIES, LLC  
(DOING BUSINESS AS POWERBLANKET) V SUSAN  
BRIERLEY

**HEARING HELD BY VIDEOCONFERENCE ON JUNE 23, 2020, FROM CALGARY,  
ALBERTA (COURT), OTTAWA, ONTARIO (PARTIES) AND WETASKIWIN,  
ALBERTA (PARTIES)**

**DATE OF HEARING:** JUNE 23, 2020

**ORDER AND JUDGMENT:** MCVEIGH J.

**DATED:** OCTOBER 22, 2020

**APPEARANCES:**

Mr. Daniel Davies	FOR THE PLAINTIFF
Mr. Matthew Norton	
Ms. Susan Brierley	FOR THE DEFENDANT, ON HER OWN BEHALF

**SOLICITORS OF RECORD:**

SMART & BIGGAR LLP	FOR THE PLAINTIFF
Ottawa, Ontario	