

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20100719**

**Docket: A-150-09**

**Citation: 2010 FCA 190**

**CORAM: EVANS J.A.  
LAYDEN-STEVENSON J.A.  
STRATAS J.A.**

**BETWEEN:**

**SHMUEL HERSHKOVITZ,  
SYSTÈMES DE SÉCURITÉ PARADOX LTÉE – PARADOX SECURITY SYSTEMS LTD.  
and PINHAS SHPATER**

**Appellants**

**and**

**TYCO SAFETY PRODUCTS CANADA LTD**

**Respondent**

Heard at Montreal, Quebec, on February 3, 2010.

Judgment delivered at Ottawa, Ontario, on July 19, 2010.

**REASONS FOR JUDGMENT BY:**

**STRATAS J.A**

**CONCURRED IN BY:**

**EVANS J.A.  
LAYDEN-STEVENSON J.A.**

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**REASONS FOR JUDGMENT**

**STRATAS J.A.**

[1] This is an appeal from the judgment of the Federal Court (*per* Justice Martineau): 2009 FC 256. The Federal Court dismissed the appellants' action for patent infringement against the respondent. It found that the appellants' patents, said to be infringed by the respondent, were actually invalid.

[2] The Federal Court identified a number of grounds for invalidity of the patents. For the purposes of this appeal, it is only necessary to concentrate on the Federal Court's consideration of certain disclaimers filed by the appellants.

[3] Disclaimers can only narrow the scope of the claims in patents, not broaden them. The Federal Court found that the appellants' disclaimers added new inventive elements to the claims in the patents, broadening them. Therefore, the disclaimers were invalid. Further, the disclaimers were not prompted by mistake, accident or inadvertence, as required by section 48 of the *Patent Act*, R.S., 1985, c. P-4 (the "Act"). When the appellants filed the disclaimers, they effectively admitted that the original claims in their patents were too broad. With the disclaimers ruled invalid, the original claims in the patents remained, claims that were too broad. So the Federal Court found that the patents were invalid on account of overbreadth.

[4] In my view, the Federal Court did not commit any reviewable error on its disposition of these issues and so I would dismiss the appeal, with costs.

**A. *Preliminary observations***

[5] In order to understand the issues in this case and to understand the decision of the Federal Court, it is necessary to deal briefly with some basic questions. What is a patent and when can it be invalid? What is a disclaimer and when can it be invalid? How does a disclaimer relate to a patent?

*The basics of the patent system*

[6] At its essence, the patent system is a bargain between the public and inventors: *Free World Trust v. Électro Santé Inc.*, [2000] 2 S.C.R. 1024, 2000 SCC 66 at paragraph 13. The Act and the common law define that bargain in detail.

[7] The generalities of the bargain can be described in the following way. An inventor can obtain a patent for any “new and useful art, process, machine, manufacture or composition of matter”: section 2 of the Act (definition of “invention”). The patent gives its holder, the patentee, a time-limited exclusive right to make, construct, use and sell the invention: section 42 of the Act. There is a *quid pro quo*. The inventor must disclose the details of the invention in enough detail so that a person skilled in the art – *i.e.* an un inventive person knowledgeable in the field of the invention – can recreate it. Others, armed with the information previously disclosed, may make, use and sell the invention when the patent expires. The information disclosed may also give rise to inventions by others. This bargain is socially useful because it encourages research and development and broader economic activity: *Free World Trust, supra* at paragraph 42.

[8] The scope of the subject-matter protected by the patent matters. It can affect this bargain drastically. If the scope is too wide, the inventor will get too much protection.

[9] The scope of the subject-matter protected by the patent is determined by the “claims” that are set out in the patent. Claims “are frequently analogized to ‘fences’ and ‘boundaries’”: *Free World Trust, supra* at paragraph 14.

[10] Courts trying to determine the scope of the subject-matter protected by the patent – *i.e.* locating the fences and boundaries – engage in what is called “claims construction.” Courts do this from the perspective of a person skilled in the art and receive evidence from such persons.

[11] The inventor can enforce her or his exclusive right to make and exploit the invention within the scope of the patent by suing for patent infringement. A person infringes a patent by performing all of the essential elements found within the claims of the patent. The essential elements of a claim are all the elements required for the invention in the claim to function as contemplated by the inventor. Put another way, those elements that can be substituted or omitted without having a material effect on the invention’s function are non-essential. Clearly, adding essential elements to a claim narrows it.

[12] A common defence to an infringement suit is to establish that the patent is invalid. Invalidity can be shown by establishing that a patent is not novel, not useful or not inventive: section 2 (definition of “invention”) and sections 28.2 and 28.3 of the Act. Put differently, to be valid, a patent must be novel, useful, and inventive. Case law defines these requirements with great particularity, but for this broad overview, a few general comments will suffice.

[13] To be novel the invention must not have been previously made known to the public.

Information previously made known to the public is called “prior art.”

[14] To be useful the invention must be directed toward a practical purpose. Additionally, the details published by the inventor in the disclosure must permit a person skilled in the art to recreate the invention as claimed.

[15] To be inventive, in general terms the invention must be the product of ingenuity, not obvious from prior learning.

[16] However, an inventor can only claim that which he invented. If an inventor claims more than was invented, the subject-matter of the patent will be too broad. This makes the bargain unfair – the inventor ends up with the exclusive right to exploit subject-matters not invented and not disclosed to the public. Simply put, patents cannot be overbroad.

### *The role of the Patent Office*

[17] Inventors apply to the Canadian Intellectual Property Office for a patent. An inventor’s application includes the claims and the disclosure. The Patent Office examines the inventor’s application to determine whether all the requirements under the Act are met: section 27 of the Act. In this capacity the Patent Office regulates the bargain between the public and inventors. Regulating

the bargain includes examining the invention for the three criteria of patentability: novelty, usefulness and inventiveness.

[18] An inventor may attempt to remedy deficiencies found by the Patent Office during its examination of the application. For example, the inventor may change the disclosure or the claims. If ultimately satisfied, the Patent Office will issue a patent for the invention.

*Disclaimers and reissuances*

[19] After the patent has been issued, the recipient of the patent, the patentee, can sue those who perform actions falling within the claims for patent infringement, as described above. An issued patent is presumed to be valid: subsection 43(2) of the Act.

[20] However, a patentee may later discover that part of the invention falls short on one of the three criteria for patentability.

[21] If the patentee does not address this problem, the patented invention will remain short on one of the three criteria of patentability. This endangers the patentee's ability to maintain a later patent infringement suit, should that become necessary: a defendant to that suit could allege invalidity of the claims of a patent. If that defence is successful, those claims would fall away completely. The inventor would lose the protection of those claims entirely, and not just the protection afforded by the deficient parts.

[22] Sometimes the patentee can address the deficiency upon discovering that part of the invention falls short on one of the three criteria for patentability. Where the deficiency is as a result of a mistake, accident or inadvertence, the patentee may renounce that part of the invention that falls short. In contrast, no renunciation is possible where the deficiency stems from a desire to mislead the public. Renunciation is accomplished by filing with the Patent Office a document called a “disclaimer”: section 48 of the Act. Section 48 provides as follows:

*Patentee may disclaim anything included in patent by mistake*

**48.** (1) Whenever, by any mistake, accident or inadvertence, and without any wilful intent to defraud or mislead the public, a patentee has

(a) made a specification [*i.e.* the claims and disclosure found in the patentee’s patent application] too broad, claiming more than that of which the patentee or the person through whom the patentee claims was the inventor, or

(b) in the specification, claimed that the patentee or the person through whom the patentee claims was the inventor of any material or substantial part of the invention patented of which the patentee was not the inventor, and to which the patentee had no lawful right,

the patentee may, on payment of a prescribed fee, make a disclaimer of such parts as the patentee does not claim to hold by virtue of the patent or the assignment thereof.

...

*Cas de renonciation*

**48.** (1) Le breveté peut, en acquittant la taxe réglementaire, renoncer à tel des éléments qu’il ne prétend pas retenir au titre du brevet, ou d’une cession de celui-ci, si, par erreur, accident ou inadvertance, et sans intention de frauder ou tromper le public, dans l’un ou l’autre des cas suivants:

a) il a donné trop d’étendue à son mémoire descriptif, en revendiquant plus que la chose dont lui-même, ou son mandataire, est l’inventeur;

b) il s’est représenté dans le mémoire descriptif, ou a représenté son mandataire, comme étant l’inventeur d’un élément matériel ou substantiel de l’invention brevetée, alors qu’il n’en était pas l’inventeur et qu’il n’y avait aucun droit.

[...]



[23] The filing of a disclaimer narrows the scope of the patent. The narrowing of the scope of the patent happens automatically upon filing the disclaimer: the Patent Office does not have to assess and approve the disclaimer. As long as the disclaimer is in the prescribed form, the Patent Office registers it: *Monsanto Co. v. Canada (Commissioner of Patents)*, [1976] 2 F.C. 476 (C.A.); *Distrimed Inc. v. Richards Packaging Inc.*, 2008 FCA 4, 371 N.R. 377. The passive role of the Patent Office in this context makes sense. A disclaimer can only narrow the scope of a patent. When the patentee files a disclaimer, the scope of the patent exclusivity enjoyed by the inventor is reduced. Competitors are put on notice that they may tread in the disclaimed area of the patent. As a result, the public receives a better bargain.

[24] A patentee may change the scope of its patent in another way: reissuance of the patent under section 47 of the Act. However, in contrast to a disclaimer, reissuance may be used to broaden the scope of the patent. As one commentator puts it, “Whereas reissue is an adjustment narrower or broader to achieve what you allege you originally wanted, disclaimer is a renunciation of something you originally wanted”: R. G. McClenahan, “Thoughts on Reissue and Disclaimer” (1968), 7 C.P.R. (2d) 251 at 260. Since reissuance can result in the widening of a patent’s scope – the scope of the patentee’s exclusivity rights can be increased, thereby affecting the bargain with the public – the Patent Office must examine and approve any application for a reissuance.

[25] Disclaimers that broaden the scope of a patent are invalid. Section 48 of the Act says, among other things, that disclaimers are available for “specification[s] [that are] too broad,” not specifications that are too narrow. Again, this makes sense and is consistent with the bargain in

the Act. Were it otherwise, and patents could be broadened through disclaimer, a patentee could unilaterally add to her or his benefit under the bargain at the expense of the public, while circumventing the Patent Office's regulatory role.

***B. The Federal Court's decision***

[26] The Federal Court, among other things, considered the validity of two patents, numbers 2,169,670 and 2,273,148. The Federal Court found that both were invalid.

[27] In this Court, the appellants abandoned any appeal of that Court's ruling that the '148 patent was invalid. For that reason, and because of the narrowness of the issues that this Court needs to determine in this appeal, it is only necessary to review the facts surrounding the appellants' '670 patent.

[28] Patent '670, relates to an electronic circuit known as a telephone line coupler. A telephone line coupler is used to connect electronic equipment, such as a telephone or alarm system to a telephone line, while providing electrical isolation. The electrical isolation is necessary to protect equipment from power surges and unwanted signals. The electrical isolation is achieved by using optical-electronic components called "opto-couplers."

[29] Soon after the appellants' '670 patent issued on October 5, 1999, the appellant, Systèmes de Sécurité Paradox Ltée – Paradox Security Systems Ltd, sent a demand letter to the respondent

alleging infringement. The respondent denied all allegations of infringement. It also asserted that the appellants' '670 patent was invalid.

[30] On October 6, 2003, Paradox filed a disclaimer. The portion of that disclaimer relevant to this case disclaimed claims 1 and 2 in the '670 patent, with the exception of one matter. This was a telephone line coupler circuit as originally claimed “where said signal receive means comprises a receive opto-coupler connected in series with said transmit opto-coupler means on a telephone line side to draw a minimum of current to place a light-emitting diode of said receive opto-coupler in an operational range.”

[31] A number of the twenty-three days of trial in the Federal Court were devoted to whether this disclaimer actually added new inventive elements to the claims in the patent, and, therefore, was invalid. The Federal Court found that it did add new inventive elements, and so the disclaimer was invalid. Further, the appellants did not establish that they sought the disclaimer because of “mistake, accident or inadvertence” under subsection 48(1) of the Act and so the disclaimer was invalid on that ground too. However, when the appellants filed the disclaimer to deal with the overbreadth of the original '670 patent, they were admitting that claims in the patent were overbroad. That was a ground for invalidity of the claims. Therefore, the Federal Court dismissed the appellants' action for patent infringement and granted the respondent's counterclaim for a declaration that the disclaimers and the patents in suit are invalid.

**C. Analysis**

*Was the disclaimer invalid because it added new inventive elements to the invention?*

[32] The Federal Court found that the appellant's disclaimer broadened the scope of the patent by adding new inventive elements to it and, therefore, the disclaimer was invalid. It reached this conclusion by construing the claims in the patent, construing the claims in the patent as modified by the disclaimer, and then comparing the two. This was the correct approach.

[33] Following this approach, the Federal Court found (at paragraph 81) that the original claims in the patent specified no connection between the opto-couplers. However, in the view of the Federal Court, the disclaimer added a new inventive element: "a minimum of current to place a light emitting diode of said receive opto-coupler in an operational range." In fact, the Federal Court found that there were nine new inventive elements in the disclaimer (at paragraph 82):

The additional inventive elements are: (1) a receive opto-coupler (2) connected (3) in series (4) with the transmit opto-coupler [means] (5) on the line side (6) to draw a minimum of current (7) to place a light-emitting diode (8) of the receive opto-coupler (9) in an operational range. The Court notes that these newly added elements are considered by the inventor himself as being (1) inventive elements and (2) resulting in new combinations...

In the view of the Federal Court, this was an invalid broadening of the scope of the patent through disclaimer.

[34] In this Court, the appellants cast their challenge to the Federal Court's ruling on this point very narrowly. They challenged the Federal Court's finding that the disclaimer introduced, as a new inventive element, a connection between the receive opto-coupler and the transmit opto-coupler. However, even if the Federal Court were wrong on that, its finding that the disclaimer improperly introduced a number of other new inventive elements would remain. For example, in this Court, the appellants did not challenge the finding that "a minimum of current to place a light emitting diode of said receive opto-coupler in an operational range" broadened the scope of the patent. They failed to challenge any of the other elements that the Federal Court described in the above passage, which, in its view, broadened the scope of the patent. Whether or not the appellants' narrow submission is correct, it does not matter in the end result: the Federal Court has found that the disclaimer, by broadening the original claims in the patent, is invalid. Were it otherwise, parties could use disclaimers to broaden their patents and obtain increased rights of exclusivity over those elements, thereby changing the overall bargain and circumventing the oversight of the Patent Office.

[35] Because of the rather narrow focus of the appellants' arguments concerning the above passage, it is not necessary for this Court to examine each of the nine inventive elements identified by the Federal Court and assess whether they are indeed inventive elements. In some cases, this might be necessary. There is a distinction between inventive elements and essential elements. In a disclaimer, one cannot add inventive elements, as that will broaden the scope of the patent. But adding essential elements can narrow the scope of the patent; as mentioned in paragraph 11, above, the more essential elements there are in the patent's claims, the narrower they get.

*Was the disclaimer invalid because the appellants failed to demonstrate mistake, accident or inadvertence under subsection 48(1) of the Act?*

[36] As mentioned above, subsection 48(1) of the Act provides that a disclaimer may be made only where there has been a “mistake, accident or inadvertence...without any wilful intent to defraud or mislead the public.” The Federal Court found that the appellants’ disclaimer was not prompted by “mistake, accident or inadvertence.”

[37] The Federal Court began by summarizing the law relating to “mistake, accident or inadvertence” (paragraph 79):

Finally, when the validity of a disclaimer is contested, the onus of showing that there was mistake, accident or inadvertence is on the patentee, and the propriety or validity of such disclaimer may be reviewed by the Court if the patent is litigated. Moreover, according to the case law, the validity of the disclaimer depends on the state of mind of the patentee at the time he made his specification. The patentee must be able to demonstrate to the Court that the disclaimer is made in good faith and not for an improper purpose. Where the patentee does not discharge this burden, the disclaimer will be held to be invalid. The fact that the Patent Office had accepted a disclaimer is not determinative. See *Pfizer Canada Inc. v. Apotex*, 2007 FC 971, 61 C.P.R. (4th) 305, at paras. 37 nd 38; *Trubenizing Process Corp. v. John Forsyth Ltd.* (1941), 1 C.P.R. 89, 2 Fox Pat. C. 11 (Ont. H.C.J.), affirmed (1942), 2 C.P.R. 89, [1942] 2 D.L.R. 539 (Ont. C.A.), rev.d on other grounds (1943), 3 C.P.R. 1, [1943] 4 D.L.R. 577 (S.C.C.).

[38] In this Court, the appellants again cast their arguments narrowly. They do not take issue with the Federal Court’s summary of the law. Instead, the appellants submit that they adduced sufficient evidence at trial to discharge the onus upon them to prove “mistake, accident or inadvertence” under subsection 48(1) of the Act.

[39] This determination by the Federal Court was one of mixed fact and law. The proper appellate standard of review for this claim is “palpable and overriding error”: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 at paragraph 10. The appellants essentially ask this Court to reweigh the evidence that was before the Federal Court and come to a different conclusion. However, under the “palpable and overriding error” standard of review, this Court cannot reweigh the evidence and come to a conclusion that the Federal Court did not reach. If the Federal Court had evidence in support of its finding and if its finding is not otherwise vitiated by some fundamental error, there is no ground for this Court to intervene.

[40] The Federal Court did not make a “palpable and overriding error” on this issue. It found that the appellants had not established that their disclaimer was prompted by “mistake, accident or inadvertence.” The Federal Court had multiple reasons in support of its finding:

- (a) Mr. Shmuel HersHKovitz, one of the founders of Paradox, could not indicate what the mistake, accident or inadvertence was.
- (b) Mr. Pinhas Shpater, the other founder of Paradox, a person with substantial technical expertise relating to the invention, remained silent on the topic of mistake, accident or inadvertence.
- (c) At the time of the trial, Mr. Shpater persisted in a belief, which the trial judge found not credible, that certain prior art was not relevant to the '670 patent.

- (d) Explanations provided by Mr. James Anglehart, a patent agent, were entitled to little weight because they were laborious and showed a lack of memory.

[41] In this Court, the appellants tried to overcome these findings by directing this Court to portions of testimony given at trial by Mr. Shpater and Mr. Anglehart. In my view, this testimony actually supports the Federal Court's overall conclusion that the appellants had not met the onus of demonstrating mistake, accident or inadvertence. The proffered portions of Mr. Shpater's testimony do not demonstrate mistake, accident or inadvertence. Mr Anglehart's testimony was sufficiently vague and general to permit the Federal Court to give it low weight.

[42] The appellants urged this Court to accept that the threshold for finding that a disclaimer was prompted by mistake, accident or inadvertence is low. In their submission, this threshold can be met by pointing to any evidence whatsoever in the record showing mistake, accident or inadvertence. In support of this position they cite the Federal Court's decision in *Pfizer Canada Inc. v. Apotex Inc.*, 2007 FC 971, 61 C.P.R. (4th) 305 *per* Justice Mosley for the proposition that "[t]he threshold for supporting a disclaimer is not high".

[43] I do not read *Pfizer* this way. It is true that the Federal Court found mistake, accident or inadvertence in that case on the basis of what it called "minimal" evidence. However, it applied the usual balance of probabilities standard (at paragraph 43). That is the correct standard. As the Supreme Court of Canada has observed, there is only one standard of proof in civil cases, the



balance of probabilities standard, and “[i]n all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred”: *F.H. v. McDougall*, [2008] 3 S.C.R. 41, 2008 SCC 53 at paragraph 49.

[44] For the foregoing reasons, I conclude that the Federal Court’s conclusion that the disclaimer was invalid must remain undisturbed.

*Was the appellants’ patent invalid?*

[45] The appellants submit that when a disclaimer is adjudged invalid, it does not follow that the patent is invalid. The appellants submit that *Pfizer, supra*, supports this submission. In particular, they rely upon the following passage (at paragraph 38):

I agree with the findings of the Ontario High Court of Justice in *Trubenizing Process Corp. v. John Forsyth, Ltd.*, [1942] O.R. 271-300, 2 C.P.R. 89, rev’d on other grounds [1943] S.C.R. 422, [1943] S.C.J. No. 35, wherein Chevrier J. held that the validity of the disclaimer depends solely upon the state of mind of the patentee at the time he made his specification. Chevrier J. further made it clear that the onus rests on the party who files a disclaimer to justify the need for the disclaimer at the time it was filed by reason of mistake, accident or inadvertence and that there was an absence of intent to defraud or mislead the public. *Where the filing party does not discharge this burden, the disclaimer will be held to be invalid and the patent will remain in its original form.* [emphasis added]

To me, this does not advance the appellants’ case. A statement that an invalid disclaimer allows the patent to remain in its original form says nothing about whether the patent, in its original form, was valid or invalid.

[46] What is relevant in this case is the appellants' filing of the disclaimer. By filing the disclaimer in the Patent Office – a significant, formal, public act – the appellants conceded that their original patent was too broad in scope: *Patent Rules* (1996), S.O.R./96-423, Sched. I, Form 2.

[47] Justice Hughes of the Federal Court expressed this point succinctly and well in *Bristol-Myers Squibb Canada Co. v. Apotex Inc.*, 2009 FC 137, 74 C.P.R. (4th) 85 at paragraph 47:

...The Applicants filed a document [the disclaimer] with the Patent Office, intending it to be acted upon by that Office and knowing that it would be seen and relied upon by the public. That document clearly and unequivocally says that the patentee made the original claims too broad. Private reservations of in-house counsel or litigation tactics cannot allow the Applicants to resile from those public statements.

In my view, having asserted that the claims in the pre-disclaimer patent were too broad, the patentees may not now return to them as a basis for their infringement suit. They are overbroad and thus void: Harold G. Fox, *The Canadian Law and Practice Relating to Letters Patent for Inventions*, 4<sup>th</sup> ed. (Toronto; Carswell, 1969) at page 199; *Minerals Separation North American Corp. v. Noranda Mines, Ltd.*, [1947] Ex. C.R. 306, 12 C.P.R. 99 at page 111.

[48] Some observations can be made based on the discussion at the outset of these reasons regarding our system of patents and the bargain between inventor and the public. If we were to allow the appellants to return to the original claims in the patent, and if we were to regard those claims as valid, despite the appellants' disclaimer based on overbreadth, we would create a situation inconsistent with the bargain that lies at the heart of the scheme of the Act. The public notice function of disclaimed patents would be undermined and competitors would find it difficult to

determine the areas that remain open for innovation: *Free World Trust, supra* at paragraphs 41 and 42.

[49] A hypothetical example will serve to illustrate the problem. Suppose that a patentee filed a disclaimer some time ago, notifying the world that its patent was not as broad as it thought. In effect, the patentee told the world that it was moving the fences in, giving up territory that was previously inside the fences. Suppose others start to work in that newly unfenced territory. If the appellants' submissions were accepted, upon invalidation of the disclaimer the fences would suddenly move to their original positions. Such a result does not seem fair, consistent with the orderly functioning of the Act, nor compatible with the bargain that lies at the heart of our patent system.

*Other issues in the Federal Court*

[50] The lengthy reasons for judgment of the Federal Court also examined whether the claims of the patents in issue were invalid on the grounds of anticipation, obviousness and mere aggregation or unpatentable combination of known art. The Federal Court also made a number of other observations. These findings and observations were the focus of detailed submissions, written and oral, made in this Court. In my view, it is unnecessary to consider these findings and observations. They do not change the outcome of this appeal.

*D. Proposed disposition*

[51] For the foregoing reasons, I would dismiss the appeal with costs.

"David Stratas"

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J.A.

"I agree  
John M. Evans J.A."

"I agree  
Carolyn Layden-Stevenson J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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Layden-Stevenson J.A.

**DATED:** July 19, 2010

**APPEARANCES:**

George R. Locke  
Daniel A. Artola

FOR THE APPELLANTS

Marek Nitoslowski  
David Turgeon

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Ogilvy Renault LLP  
Montreal, Quebec

FOR THE APPELLANTS

Fasken Martineau DuMoulin LLP  
Montreal, Quebec

FOR THE RESPONDENT