

Federal Court of Appeal



Cour d'appel fédérale

Date: 20210120

Docket: A-408-19

Citation: 2021 FCA 7

**CORAM: PELLETIER J.A.
DE MONTIGNY J.A.
RIVOALEN J.A.**

BETWEEN:

CANMAR FOODS LTD.

Appellant

and

TA FOODS LTD.

Respondent

Heard by online video conference hosted by the Registry on November 3, 2020.

Judgment delivered at Ottawa, Ontario, on January 20, 2021.

REASONS FOR JUDGMENT BY:

DE MONTIGNY J.A.

CONCURRED IN BY:

**PELLETIER J.A.
RIVOALEN J.A.**

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is an appeal from a decision of the Federal Court (*per* Justice Manson) dated September 25, 2019 which granted the motion for summary judgment brought by TA Foods Ltd. (the respondent or TA Foods), thereby dismissing the patent infringement action of CanMar Foods Ltd. (the appellant or CanMar) with respect to its 2,582,376 Patent (the '376 Patent). Justice Manson considered Claim 1 of the '376 Patent, upon which all the other claims are

dependent, and found that the two essential elements at issue were absent from TA Foods' process. As a result, he came to the conclusion that the respondent did not infringe the '376 Patent, and further saw no genuine issue for trial.

[2] For the reasons that follow, I would dismiss the appeal. In my view, Justice Manson did not err in finding that TA Foods' only process for roasting oil seeds such as flax does not infringe any claim of the '376 Patent, and in granting summary judgment dismissing CanMar's patent infringement action.

I. Factual Context

[3] The appellant and the respondent, two Saskatchewan corporations, are competitors in the business of manufacturing flax seed products and more particularly, for our purposes, roasted flax seed products.

[4] The appellant has been granted the '376 Patent entitled "Methods for Roasting Oil Seed, and Roasted Oil Seed Products", which includes 23 claims. Claims 1-17 are directed at particular methods for roasting oil seed, while claims 18-23 cover the products obtained through these methods. All claims are either directly or indirectly dependent upon Claim 1, which reads as follows:

1. A method for roasting oil seed, the method consisting of the following steps:
 - (a) Heating the oil seed in a stream of air for less than 2 minutes, wherein the stream of air has a temperature of from 146 °C to 205 °C, thereby to provide heated oil seed;
 - (b) transferring the heated oil seed into an insulated or partially insulated roasting chamber or tower;

(c) maintaining the heated oil seed in said roasting chamber or tower without addition of further heat until the roasting process is complete, wherein the temperature of the heated oil seed falls during a maintaining period; thereby to produce a roasted oil seed in the roasting chamber or tower;

(d) removing the roasted oil seed from the chamber or tower, for cooling.

[5] The appellant first became aware of the respondent's roasted flax seed products on August 28, 2018. A few weeks later, by letter dated September 19, 2018, the appellant asked the respondent for an inspection of its manufacturing facility.

[6] The parties failed to reach an agreement with respect to the inspection of the respondent's manufacturing facility. As a result, the appellant issued a Statement of Claim on December 17, 2018, alleging infringement of the '376 Patent, and served it on January 17, 2019.

[7] In its Statement of Defence dated April 18, 2019, the respondent denied infringement of the '376 Patent and alleged its invalidity. In response to the Statement of Defence, the appellant served a Demand for Further and Better Particulars, with the demand that certain pleadings in the Statement of Defence be struck.

[8] Contemporaneously with the filing of the Statement of Defence, the respondent filed a Summary Judgment Motion, which was granted in the decision now under appeal.

II. The Impugned Decision

[9] Justice Manson first considered the Summary Judgment Motion, and the respondent's argument that its oil roasting process fell outside Claim 1 of the '376 Patent. The respondent was

essentially arguing that, in the course of the roasting process, the oil seeds are not heated in a “stream of air” nor are they maintained in an “insulated or partially insulated roasting chamber or tower”, within the meaning of Claim 1. The respondent also argued that these two limitations were added as part of the prosecution history of the corresponding US Application 11/576,405 (the ‘405 Application) filed before the United States Patent and Trademark Office (PTO), and were meant to overcome prior art cited by the PTO.

[10] Upon addressing the respondent’s submissions, Justice Manson first noted that prior to the coming into force of section 53.1 of the *Patent Act*, R.S.C. 1985, c. P-4 (the Patent Act), on December 13, 2018, statements made during prosecution of Canadian patent applications or corresponding foreign patent applications were neither relevant nor admissible as an extrinsic aid to construe the terms of an issued Canadian patent. This new provision creates an exception to this rule by allowing written communications between the patentee and the Patent Office during the prosecution of a Canadian patent application to be admitted into evidence, for the purpose of rebutting representations made by the patentee with respect to the construction of a claim. Justice Manson noted, however, that section 53.1 does not refer to prosecution histories from jurisdictions other than Canada. What remained to be determined, therefore, was the scope of admissibility under section 53.1 and, in particular, whether the US prosecution history and the above-mentioned limitations, could nevertheless be admitted into evidence given that the claims filed before the PTO were substantially the same as the amended claims of the ‘376 Patent. While being of the view that reference to prosecution histories from other jurisdictions should generally remain inadmissible for the purposes of claim construction, Justice Manson nevertheless opened the door in “extraordinary circumstances”. Such exceptional circumstances

would arise, as in this case, when the “prosecution of the foreign application *is made part of the prosecution history of the Canadian patent*” (Reasons at para. 77; emphasis in the original).

[11] Though recognizing that differences between the Canadian and American approaches to claim construction may subsist, even in light of the enactment of section 53.1, Justice Manson nonetheless found the case law on the doctrine of prosecution history estoppel in the United States to be instructive. He notably relied on the decision of the United States Court of Appeals (Federal Circuit) in *Abbott Labs v. Sandoz*, 566 F.3d 1282 (2009) [*Abbott Labs*], where the prosecution of a Japanese patent application was deemed part of the prosecution history of an American patent, and therefore constituted admissible evidence in construing the American patent claims. The same approach should prevail in Canada, concluded Justice Manson, to give section 53.1 its intended effect.

[12] In the case at bar, Justice Manson saw two elements weighing in favour of considering the US prosecution history as an admissible extrinsic aid to the construction of the ‘376 Patent. First, the appellant expressly acknowledges that the claims of the ‘376 Patent have been amended to be substantially the same as the corresponding claims of the ‘405 Application in the United States. Second, the patentee admits that the amendments have limited the scope of the claims to overcome the novelty and obviousness concerns of the type raised before the PTO:

The language of section 53.1 is limited to communications between the patentee and the Canadian Patent Office, and generally should be applied in that context. However, in this case, I find that the patentee specifically referred to the corresponding US Application prosecution history and acknowledged that the amendments to the claims in the ‘376 file history were made to overcome novelty and obviousness concerns as raised in the US Application prosecution history.

Accordingly, the Court may look at the US Application prosecution history as part of a purposive construction of the claims of the '376 Patent.

Reasons at para. 70.

[13] The intent of the provision played a key part in defining the scope of admissibility under section 53.1. In this respect, Justice Manson held that the enactment of section 53.1 was intended to require consideration of the substance behind intentional amendments to the claims found in Canadian patents. Moreover, prosecution of Canadian patents is often preceded by prosecution of corresponding patent applications in other jurisdictions. Should Canadian courts refuse to consider foreign prosecution histories in the narrow set of circumstances discussed above, patent applicants in Canada would be encouraged to refrain from being transparent with the Canadian Patent Office as to why amendments were made in order to limit claims during prosecution. Such a result, in Justice Manson's view, could not have been contemplated by Parliament.

[14] Having circumscribed the exceptional use of foreign prosecution histories, Justice Manson nevertheless stated (at para. 79 of his Reasons) that he could construe Claim 1 of the '376 Patent and find no infringement without having recourse to the US Application prosecution history. In his view, expert evidence was not required either, since the claim itself, the disclosure – and the prosecution history of the '376 Patent, if considered – were sufficient to purposively construe the two elements of the claim that were at issue, namely: (1) heating oil seed “in a stream of air”, and (2) transferring the heated oil seed into an “insulated or partially insulated roasting chamber or tower” and maintaining the oil seed therein.

[15] Regarding the first element, the appellant argued that Claim 1 was not limited to any particular source of heating, thereby suggesting that the respondent's use of infrared radiation could infringe the '376 Patent. Justice Manson rejected that argument, and held that the method prescribed by Claim 1 was strictly limited to heating the oil seed in a "stream of air".

[16] When determining whether the respondent's roasting process involves the first essential element of Claim 1, Justice Manson heavily relied on the evidence contained in the affidavit of Mike Popowich (the Popowich Affidavit), the co-owner of the respondent. Such evidence essentially turned on the Micronizer, the sole equipment used by the respondent for heating oil seed via infrared radiation. As was made clear by the Popowich Affidavit, the flax seed is not subjected to a "stream of air" through the course of the respondent's roasting process, and thus no infringement could be found on this essential element. Finally, the respondent's use of various terms for describing its process (*i.e.* roasting, cooking and pasteurizing) was deemed irrelevant: not only were the terms used interchangeably to refer to the same process, but they did not inform what must remain the central focus of the analysis – the language of Claim 1.

[17] With regard to the second element, the appellant pleaded that further investigation was needed to determine whether the auger trough and cooling tower of the Micronizer, through which the seeds travel once heated, could constitute "insulated or partially insulated roasting chamber[s] or tower[s]". Justice Manson quickly disposed of that argument. The existence of an "insulated or partially insulated roasting chamber or tower" was deemed essential both from the language of Claim 1 and the disclosure, the latter of which made clear that insulated parts are needed to retain the flax seed at a suitable temperature. Referring to the Popowich Affidavit,

Justice Manson determined that the hoppers and cooling tower of the Micronizer are clearly uninsulated. Finally, regardless of whether the temperature measurements of the Micronizer had been taken in the normal course of commercial production or during an experimental test, such measurements had not been relied upon by the respondent to prove non-infringement.

[18] Given that the respondent's roasting process did not comprise the two essential elements at issue, Justice Manson held that the respondent did not infringe Claim 1 nor any claim of the '376 Patent. As there appeared to be no genuine issue for trial, summary judgment was granted in favour of the respondent. Justice Manson also held that the respondent's alternative motion, a Motion to Strike the Statement of Claim in its entirety, was moot to the extent that summary judgment was to be granted. The same could be said of the appellant's Demand for Further and Better Particulars.

III. Issues

[19] The appellant raises a number of issues which, in my view, can be reformulated as follows:

- A. Did the Judge err in granting summary judgment on the basis of non-infringement before any discovery had taken place?
- B. Did the Judge err in holding that the limitations with respect to the "stream of air" and the "insulated or partially insulated roasting chamber or tower" were essential elements of Claim 1?

C. Did the Judge err in considering, under section 53.1 of the Patent Act, the prosecution history of a foreign patent application when purposively construing the '376 Patent?

D. Did the Judge err in considering the evidence contained in the Popowich Affidavit?

IV. Analysis

[20] The parties are in agreement that the applicable standard of review in this appeal is that established in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Questions of fact and mixed fact and law are therefore subject to the palpable and overriding error standard, while questions of law are reviewable on the standard of correctness.

[21] It is now well established that the construction of a patent is a question of law, while the infringement of said patent is a question of mixed fact and law. See: *Whirlpool Corp. v. Camco Inc.*, 2000 SCC 67, [2000] 2 S.C.R. 1067 at para. 76 [*Whirlpool*]; *Cobalt Pharmaceuticals Company v. Bayer Inc.*, 2015 FCA 116, 474 N.R. 311 at paras. 12-14; *Tearlab Corporation v. I-MED Pharma Inc.*, 2019 FCA 179, 166 C.P.R. (4th) 367, at paras. 27-29.

[22] The first and fourth question will therefore be reviewed on the palpable and overriding error standard, whereas the second and third (to the extent that they raise an extricable question of law) will be subject to the correctness standard.

A. *Did the Judge err in granting summary judgment on the basis of non-infringement before any discovery had taken place?*

[23] In recognition of the fact that summary judgment motions are an important tool for enhancing access to justice, most provinces have adopted rules of civil procedure to provide for such a mechanism with a view to ensure a fair balance between expediency and a just resolution of disputes. These rules, according to the Supreme Court, must be interpreted broadly so as to promote affordable, timely and just adjudication of civil claims: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 at para. 5 [*Hryniak*]. The rationale and goal of summary judgments have been well summarized in the following citation:

...The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and costs on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

Canada (Attorney General) v. Lameman, 2008 SCC 14, [2008] 1 S.C.R. 372 at para. 10 [*Lameman*].

[24] At the federal level, Rule 215 of the *Federal Courts Rules*, SOR/98-106 (the Rules) requires the Court to grant summary judgment if it is satisfied that there is “no genuine issue for trial” with respect to a claim or defence. A motion for summary judgment may be brought “at any time after the defendant has filed a defence”, but “before the time and place for trial have been fixed” (Rule 213). The test is not whether a party cannot possibly succeed at trial, but rather whether the case is clearly without foundation, or is so doubtful that it does not deserve consideration by the trier of fact at a future trial. There does not appear to be any definitive or

determinative formulation of the test, but the underlying rationale is clear: a case ought not to proceed to trial, with all the consequences that would follow for the parties and the costs involved for the administration of justice, unless there is a genuine issue that can only be resolved through the full apparatus of a trial. See: *Premakumaran v. Canada*, 2006 FCA 213, [2007] 2 F.C.R. 191 at para. 8; *Feoso Oil Ltd. v. Sarla (The)*, [1995] 3 F.C. 68 (C.A.) at para. 13 [*Feoso Oil*]; *Garford Pty Ltd. v. Dywidag Systems International, Canada, Ltd.*, 2010 FC 996, 375 F.T.R. 38 at para. 2 [*Garford Pty*], aff'd 2012 FCA 48. This should obviously translate into a heavy burden on the moving party.

[25] In the case at bar, there is no suggestion that Justice Manson failed to apply the correct test. The appellant rather contends that it was premature to grant summary judgment, as the Court had not been presented with the entirety of the evidence which would have been relevant to the alleged infringement of the '376 Patent. Indeed, argues the appellant, it could not possibly have lead evidence or consulted with experts to take a position on infringement without any access to the respondent's manufacturing facility and in the absence of discovery. As it states, "the Appellant should not have to establish its case by cross-examination on the selected evidence led by the Respondent as a substitute for discovery" (Appellant's Memorandum of Fact and Law at para. 19). The determination of this allegation is obviously a mixed question of fact and law, and as such it is reviewable on the standard of palpable and overriding error: *Hryniak* at para. 81.

[26] There is no doubt that the timing of the motion for summary judgment was, strictly speaking, in conformity with Rule 213 of the Rules. It was brought after the respondent's

Statement of Defence was filed, but before a time and place for trial were fixed. Whether or not discovery had taken place at this stage is not a factor contemplated by Rule 213, and ought not to be regarded as such.

[27] The legal burden to establish that there is no genuine issue for trial clearly falls on the moving party. That being said, once the moving party has discharged its burden, the evidentiary burden falls on the responding party, who cannot rest on its pleadings and must come up with specific facts showing that there is a genuine issue for trial: *Cabral v. Canada (Citizenship and Immigration)*, 2018 FCA 4, [2018] F.C.J. No. 21 at para. 23. As the Federal Court stated in *Watson v. Canada (Indian and Northern Affairs)*, 2017 FC 321 at paragraph 22, “[w]hile the burden falls on the moving party, both parties must put their best foot forward”. See also: *Lameman* at para. 11; *Feoso Oil* at paras. 13-14; *Garford Pty* at para. 6.

[28] The appellant submits that its hands were tied because it did not have access to the respondent’s manufacturing facility to inspect its roasting method. As a result, it was unable to lead evidence or consult with experts to take a position on infringement. I appreciate that a party responding to a motion for summary judgment cannot be faulted for the absence of evidence if that evidence is in the exclusive control of the moving party: *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, 108 O.R. (3d) 1 at para. 57. But this is not such a case. Once the respondent brought its motion for summary judgment and filed the affidavit of Mr. Popowich, the appellant knew that the respondent used a Micronizer to roast its flax seed and that such apparatus apparently did not use a stream of air to heat the flax seed. That was sufficient information to allow the appellant to marshal evidence, including expert evidence, as to the

operation of the Micronizer and how it could potentially be modified, to show that it fell within Claim 1 of the '376 Patent. Whether or not such evidence existed is a different issue; but it was reasonably clear what kind of evidence was required. In those circumstances, I am of the view that Justice Manson made no palpable and overriding error in concluding that there was no genuine issue for trial.

[29] Putting the matter another way, the appellant chose not to file any evidence with regard to whether the “stream of air” and the “insulated or partially insulated roasting chamber or tower” could be considered essential elements of Claim 1. Therefore, on an issue essentially centred on the claims of the '376 Patent rather than on the respondent’s roasting process, the appellant did not file any evidence while it could have done so. Whether the Judge was required to consider expert evidence before interpreting the Patent, and whether such evidence would have been found persuasive, had it been presented, is an entirely different issue which will be addressed in the next section.

[30] Finally, the fact that section 53.1 was being interpreted for the first time since its enactment is no proper basis for interfering with the Judge’s conclusion with respect to summary judgment.

B. *Did the Judge err in holding that the limitations with respect to the “stream of air” and the “insulated or partially insulated roasting chamber or tower” were essential elements of Claim 1?*

[31] The appellant’s submissions with respect to that issue are twofold. First, the appellant argues that Justice Manson erred in law upon determining that no expert evidence was needed to

purposively construe the '376 Patent. In order to give effect to the primacy of the claims themselves, the Court must first identify a person of ordinary skill in the art (POSITA), and the common general knowledge of such person, before effectively construing the claims. In the absence of any evidence which could enlighten the Court on the common general knowledge of a POSITA or the state of the art to which the '376 Patent pertains, it was therefore not open for the Judge to construe the claims. While the appellant concedes that constructions put forward by experts are not binding, expert testimony is no less required, in its view, when determining patent cases.

[32] The modern approach to purposive construction of patent claims is now well settled and was set out by the Supreme Court in *Whirlpool* at paragraphs 43 and 48 and *Free World Trust v. Électro Santé Inc.*, 2000 SCC 66, [2000] 2 S.C.R. 1024 at paragraph 51 [*Free World Trust*]. The scope of the monopoly must be established on the basis of the written claims, and they must be interpreted with a view to differentiate the essential features of the invention from the unessential, through the eyes of the POSITA having regard to the common general knowledge as of the date of publication. As Justice Binnie stated in *Free World Trust*, “[t]he involvement in claims construction of the skilled addressee holds out to the patentee the comfort that the claims will be read in light of the knowledge provided to the court by expert evidence on the technical meaning of the terms and concepts used in the claims” (at para. 51).

[33] Must we infer from this, as the appellant would have us do, that the Court can never dispense with the need for expert evidence and that it will be an error of law for the Court to

construe a patent in the absence of such expertise? This is the argument that was put forward before the Judge and that was, rightly in my opinion, rejected.

[34] Construction of a patent, like that of any other legal document, is always a matter of law for the Court. Of course, such an exercise will in most cases be done on the basis of the expertise and knowledge revealed by expert evidence, because the addressee of a patent is a person skilled in the art and not any ordinary person on the street. There is, however, no authority (or at least none has been provided by the appellant) to support the view that expert evidence is mandatorily required in every circumstance.

[35] The appellant takes issue with the Judge's reliance on the cases of *Pfizer Canada Inc. v. Canada (Minister of Health)*, 2007 FC 446, [2008] 1 F.C.R. 672 and *Excalibre Oil Tools Ltd. v. Advantage Products Inc.*, 2016 FC 1279, for the proposition that expert assistance may not be needed to determine the proper construction of patent claims. These cases are distinguishable, suggests the appellant, because in each of them there was expert evidence before the Court enabling it to put itself in the position of a POSITA. In other words, the determination as to whether evidence would be helpful or useful can only be made once it is received and reviewed.

[36] In my view, that argument is unconvincing. If the construction of a claim is a matter of law and the judge is entitled to adopt a construction different from that put forward by the parties and their experts, surely the judge can also construe a claim without relying on such evidence in appropriate circumstances. This is such a circumstance. The appellant did not tender any evidence to show that the words "stream of air" and "insulated", as used in Claim 1, would have

a particular meaning to a person skilled in the art. Having failed to do so, the appellant cannot now argue that the Court is precluded from construing the terms of the patent according to the ordinary and grammatical meaning of the words used.

[37] Of course, the judge who dispenses with expert evidence will do that at his or her own peril, and it is not a practice that should be lightly countenanced. Claims must always be construed in an informed and purposive way, and it is only in the clearest of cases that judges should feel confident enough to construe the claims of a patent as they would be understood by a skilled person, without the help of any expert evidence. In the case at bar, the appellant had the obligation to put its best foot forward: *Garford Pty* at para. 6. However, it made the strategic decision not to present expert evidence on the summary judgment motion, thereby foregoing the possibility to impress upon the Judge the need to rely on such expertise to construe the patent. Be that as it may, what matters at the end of the day is not so much how and on what basis the judge came to his or her interpretation of a claim, but whether such interpretation is correct or flawed.

[38] This is precisely the focus of the appellant's second argument. The appellant contends that the Judge's actual construction of Claim 1 was unfounded in law in respect of the two elements of that claim that are at issue, namely the "stream of air" and the "insulated or partially insulated roasting chamber or tower". On the first element, the appellant submits that the Court failed to consider other dependent claims that inform the proper construction of Claim 1. In particular, the appellant argues that Claim 5, which provides that the oil seed is subjected to high velocity air jets through the heating method of Claim 4, is necessarily narrower than Claim 1. Claim 1 is written in much broader terms, argues the appellant. While Claim 5 is concerned with

a particular heating method (the oil seed is heated “by means of” a stream of air), Claim 1 only provides for the circulation of heating air (the oil seed must be “in” a stream of air). It is impermissible to import limitations from dependent claims into the prior claims on which they depend.

[39] Similarly, and with regard to the second element, the appellant submits that the Judge failed to distinguish between two different considerations, namely the existence of insulation materials and the necessary insulating qualities of the equipment. Only the latter are essential to Claim 1, while the former are merely reflective of the patentee’s preferred embodiments.

[40] The same arguments pertaining to the stream of air were made before the Judge, and were categorically rejected. Focusing on the language of the claim itself, Justice Manson wrote:

Hence, on a purposive construction, heating oil seed in a “stream of air”, means that the oil seed is subjected to a stream of air to effectively achieve a suspended in air state such that the entire surface area of each flax seed is substantially uniformly exposed to the heating temperatures.

Reasons at para. 90.

[41] The appellant has not demonstrated that the Judge erred in his construction of the claim, and I fail to see how it can be argued that the scope of Claim 1 is not limited to any particular type or source of heating. In my view, the use of the word “in” a stream of air, as opposed to “by means of” a stream of air, as suggested by the appellant, is without significance. What matters is the presence of a stream of air, and I agree with the Judge that this limitation excludes heating by other processes which do not comprise a stream of air. Claim 1 is not merely concerned with the

circulation of air in the heating chamber. The “stream of air” cannot be understood as a distinct element from the roasting process itself, as the former expressly enables the latter.

[42] The disclosure makes clear that the “stream of air” is aimed at achieving a “suspended in air” state so that the entire surface area of the flax seed is uniformly exposed to the heating temperatures. The relevant portion of the disclosure, also reproduced by the Judge at paragraph 89 of his reasons, reads as follows:

[A]llowing heated air to circulate around and intersperse between the flax seed, effectively to cause the flax seed to achieve a “suspended in air” state. In this way, the entire surface area of each flax seed will be substantially uniformly exposed to the heating temperatures.

[43] A careful reading of pages 6-7 of the ‘376 Patent (Appeal Book, Vol. 1, pp. 167-168) makes it abundantly clear that whichever heating system is used to heat the flax seed, the oil seed must be subjected to a stream of air. It is true that the disclosure later referred to the temperature and the amount of time the flax seed is to be exposed (Appeal Book, Vol. 1, pp. 168-169). This does not detract from the requirement that the heating step must involve a stream of air to ensure that each flax seed is “substantially uniformly exposed to the heating temperatures” (Appeal Book, Vol. 1, p. 167).

[44] As for the appellant’s argument that Claim 1 (an independent claim) necessarily has a broader scope than Claim 5 (a dependent claim), and as a result the two may not be construed as having the same meaning, it must equally be rejected. This principle of claim differentiation, according to which it is impermissible to import limitations from dependent claims into the prior claims on which they depend, finds no application in the case at bar.

[45] Claim 5 specifies that the heating method of Claim 4 (which itself concerns a certain configuration of the heating method of Claim 1) is conducted using a fluidized bed apparatus that subjects the oil seed to high velocity air jets. There is nothing in the Judge’s “subjected to a stream of air” construction of Claim 1 that runs against the claim differentiation principle. If Claim 1 introduces the limitation of the “stream of air”, Claim 5 more specifically covers the apparatus needed to produce such stream (“a plurality of spaced-apart jet-tubes for directing air jets of heating air”).

[46] Turning to the “insulated or partially insulated roasting chamber or tower”, the appellant claims that the question is not whether the equipment has insulation “materials” but rather whether it has the necessary insulating “qualities”. Even assuming that such a distinction is warranted, the appellant has not even attempted to show that the roasting chamber does indeed possess insulating qualities despite the fact that it does not comprise insulation materials. At any rate, this argument was not seriously developed either in writing or at the hearing.

[47] In short, I find that the Judge did not err in his construction of Claim 1 of the ‘376 Patent and of its essential elements. He applied the correct legal principles, and his purposive interpretation of that claim was entirely warranted having regard to the language of that claim itself and to the disclosure.

C. *Did the Judge err in considering, under section 53.1 of the Patent Act, the prosecution history of a foreign patent application when purposively construing the ‘376 Patent?*

[48] While Justice Manson wrote that the Court “may” construe the patent and find no infringement without recourse to the prosecution history (Reasons at para. 79), his analysis relies in part on that evidence. At paragraphs 85-90 of his reasons, the Judge invokes the prosecution history to conclude that “[d]uring prosecution, the Plaintiff introduced both the ‘stream of air’ and ‘insulated or partially insulated roasting chamber or tower’ limitations to Claim 1”. This requires us to consider whether the judge erred in having recourse to the prosecution history, and in particular, prosecution history in another jurisdiction.

[49] Prior to the introduction of section 53.1 of the Patent Act, Canadian law was clear that the prosecution file was inadmissible for the purposes of claim construction. The doctrine of file wrapper estoppel has been aptly summarized by the Federal Court in the following terms:

...[File wrapper estoppel] is based on the principle that an inventor will not be allowed to make representations to the patent office, including amendments to a patent application, in order to avoid being refused a patent and later, in the context of an infringement action assert that the patent covers elements or aspects of the subject which were disclaimed or abandoned in discussions with the patent office.

Novartis Pharmaceuticals Canada Inc. v. Apotex Inc., 2001 FCT 1129, [2002] 1 F.C. D-25 at para. 78, aff’d 2002 FCA 440.

[50] In *Free World Trust*, the Supreme Court explicitly rejected the possibility of importing into Canadian law the American file wrapper estoppel doctrine. The Court stated that “[t]o allow such extrinsic evidence for the purpose of defining the monopoly would undermine the public notice function of the claims, and increase uncertainty as well as fuelling the already overheated engines of patent litigation” (*Free World Trust* at para. 66). The Court also noted that Canadian patent law’s emphasis on purposive construction “seems also to be inconsistent with opening the Pandora’s box of file wrapper estoppel” (*ibid.*). The concept of using file wrapper estoppel for

ascertaining the scope of patent claims in infringement cases has been subsequently discarded by the courts throughout the years.

[51] This is not to say that this blanket prohibition on the use of patent prosecution history did not occasionally create some uneasiness, as demonstrated in certain decisions from the Federal Court. In *Distrimed Inc. v. Dispill Inc.*, 2013 FC 1043, 440 F.T.R. 209 [*Distrimed*], for example, I noted that “purposive construction should [...] focus on the wording of a claim, obviously, but this is a far cry from saying that nothing else should be considered” (at para. 210). On that occasion, I drew a distinction between a representation made to the Patent Office and a change initiated by a patentee in the wording of a claim as a result of an objection from the Patent Office: while the former was strictly held inadmissible, the latter was deemed “an objective fact from which an inference may be drawn” (*Distrimed* at para. 210).

[52] Similarly, my colleague Justice Locke (then of the Federal Court) expressed his dismay at the notion that one could never look at a file prosecution history to interpret a claim, and found it “breathtaking” that the patent owner took an opposite position for claims construction during the patent’s prosecution, than the one it advanced in the course of litigation: *Pollard Banknote Limited v. BABN Technologies Corp.*, 2016 FC 883, 141 C.P.R. (4th) 329 at para. 237 [*Pollard Banknote*].

[53] Section 53.1 of the Patent Act has brought about a significant shift in the Canadian approach to file wrapper estoppel. Not only does it appear to pay heed to the disquiet expressed by some judges at the notion that a patentee’s dealings with the Patent Office should always be

out of bounds for the purpose of construing a claim, but it can also be perceived as a step to better align Canadian law with its British and American counterparts.

[54] In the United States, file wrapper estoppel has long been a feature of claim construction. In *Vitronics v. Conceptronic, Inc.*, 90 F.3d 1576 at 1582 (1996), the United States Court of Appeals (Federal Circuit) stated:

It is well-settled that, in interpreting an asserted claim, the Court should look first to the intrinsic evidence of record, i.e., the patent itself, including the claims, the specification and, if in evidence, the prosecution history. [...] Such intrinsic evidence is the most significant source of the legally operative meaning of disputed claim language.

[55] In *Free World Trust*, the Supreme Court referenced the United States Supreme Court decision in *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*, 520 U.S. 17, 117 S. Ct. 1040 (1997) [*Warner-Jenkinson*], where the doctrine of equivalents in US patent law was reaffirmed. This doctrine prevents unscrupulous infringers from substituting immaterial variants to avoid infringement. In that case, the United States highest Court noted that during the patent claim construction process, the burden should be placed on the patent-holder to establish the reason for their amendments to their claim. In the absence of an explanation sufficient to overcome prosecution history estoppel, the Court was entitled to presume that the PTO had a substantial reason related to patentability for including the limiting element added by the amendment. In such circumstances, the patent owner would be barred from claiming the application of the doctrine of equivalents, thereby being prevented from recapturing ground conceded by limiting amendments during negotiations with the PTO.

[56] Following the 1997 decision in *Warner-Jenkinson*, the US Supreme Court again considered file wrapper estoppel in *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 122 S. Ct. 1831 (2002). In that case, the Court found that file wrapper estoppel applies to all types of amendments made during prosecution, and not just to those intended to narrow the patented invention's subject matter (to avoid prior art, for example). It made clear that when an applicant purposefully chose to forego a subject matter from its claims by narrowing them, it would be unfair to allow the patentee to reclaim this subject matter by virtue of the doctrine of equivalents. As the Court stated (at 733) :

Prosecution history estoppel requires that the claims of a patent be interpreted in light of the proceedings in the PTO during the application process. Estoppel is a "rule of patent construction" that ensures that claims are interpreted by reference to those "that have been cancelled or rejected." [...] The doctrine of equivalents allows the patentee to claim those insubstantial alterations that were not captured in drafting the original patent claim but which could be created through trivial changes. When, however, the patentee originally claimed the subject matter alleged to infringe but then narrowed the claim in response to a rejection, he may not argue that the surrendered territory comprised unforeseen subject matter that should be deemed equivalent to the literal claims of the issued patent. On the contrary, "[b]y the amendment [the patentee] recognized and emphasized the difference between the two phrases [,] ... and [t]he difference which [the patentee] thus disclaimed must be regarded as material."

[References omitted.]

[57] In the United Kingdom, a more cautious approach has traditionally been followed with respect to patent prosecution evidence. Historically, just like in Canada, the focus of the enquiry has been to determine the essential elements of an invention so that any variant would fall outside the scope of the claims of a patent: see *Catnic Components Ltd. v. Hill & Smith Ltd.*, [1982] R.P.C. 183 at 242-243 [*Catnic*]; *Improver Corp. v. Remington Consumer Products Ltd.*, [1990] F.S.R. 181 (Pat. Ct.).

[58] Such insistence on the objective manifestation of the inventor's intention in the patent claims has nevertheless been relaxed in recent years. In the case of *Rohm and Haas Co. v. Collag Ltd.*, [2001] EWCA Civ 1589, [2002] F.S.R. 28, the England and Wales Court of Appeal noted that the court below would have been entitled to take account of the prosecution process had it been necessary for the judge to resolve an issue of construction (at para. 42).

[59] Shortly thereafter, in *Kirin-Amgen Inc. v. Hoechst Marion Roussel Ltd.*, [2004] UKHL 46 [*Kirin-Amgen*], the House of Lords cautioned about the extent to which prosecution history should be used in assessing patent claims. Relying on section 69 of the European Patent Convention, pursuant to which the extent of protections "shall be determined by the terms of the claims", and on *Catnic*, the Court stated emphatically that the door for any doctrine extending protection outside the claims is "firmly shut[]" (*Kirin-Amgen* at para. 44). And the Court added: "I cannot say that I am sorry because the *Festo* litigation suggests, with all respect to the courts of the United States, that American patent litigants pay dearly for results which are no more just or predictable than could be achieved by simply reading the claims" (*ibid.*).

[60] This last remark from the Court must be understood against the backdrop of its previous analysis of American law. Starting from the premise that literalism must be avoided to ensure that patent claims are constructed so as to give fair protection to the patentee, the Court reasoned, based on its review of both the United Kingdom and American jurisprudence, that there are two ways to achieve that objective.

[61] The first is to adhere to literalism in construing the claims, and to evolve a doctrine which supplements the claims by extending protection to equivalents. This strategy is fraught with difficulties, because the doctrine of equivalents can take a life of its own, unbounded by the patent claims, such that it is difficult to know where the limits of the monopoly should be drawn. This is why the American courts have come up with the doctrine of file wrapper estoppel, which is itself not free from difficulties. The investigation of the patent file, however thorough and expensive it may be, does not always decisively inform what part of the claim should be taken to have been withdrawn. The second, privileged by the House of Lords, is to abandon literalism and to adopt a principle of construction which actually gives effect to what the person skilled in the art would have understood the patentee to be claiming.

[62] Despite these concerns about the use of patent prosecution history, the UK Supreme Court recently revisited the issue and came to a more nuanced approach to that doctrine in *Actavis UK Ltd. v. Eli Lilly & Co.*, [2017] UKSC 48, [2017] R.P.C. 21. There, after reviewing the UK and European jurisprudence on the subject, the Court stated the following:

[87] In my judgment, it is appropriate for the UK courts to adopt a sceptical, but not absolutist, attitude to a suggestion that the contents of the prosecution file of a patent should be referred to when considering a question of interpretation or infringement, along substantially the same lines as the German and Dutch courts. It is tempting to exclude the file on the basis that anyone concerned about, or affected by, a patent should be entitled to rely on its contents without searching other records such as the prosecution file, as a matter of both principle and practicality. However, given that the contents of the file are publicly available (by virtue of article 128 EPC 2000) and (at least according to what we were told) are unlikely to be extensive, there will be occasions when justice may fairly be said to require reference to be made to the contents of the file. However, not least in the light of the wording of article 69 EPC 2000, which is discussed above, the circumstances in which a court can rely on the prosecution history to determine the extent of protection or scope of a patent must be limited.

[88] While it would be arrogant to exclude the existence of any other circumstances, my current view is that reference to the file would only be

appropriate where (i) the point at issue is truly unclear if one confines oneself to the specification and claims of the patent, and the contents of the file unambiguously resolve the point, or (ii) it would be contrary to the public interest for the contents of the file to be ignored. The first type of circumstance is, I hope, self-explanatory; the second would be exemplified by a case where the patentee had made it clear to the EPO that he was not seeking to contend that his patent, if granted, would extend its scope to the sort of variant which he now claims infringes.

[Emphasis added.]

[63] Section 53.1 of the Patent Act echoes, it seems, the type of circumstance underlined above, and thus similarly circumscribes the evidentiary use that can be made of the file prosecution history. As the Judge correctly pointed out, “[t]o the extent that the [respondent] wishes to introduce communications made in the course of prosecution of the ‘376 Patent, these communications are only admissible for the limited purpose of rebutting a representation made by the patentee as to the construction of a claim in that patent” (Reasons at para. 63). Moreover, this newly enacted provision only allows written communications made between the patentee and the Patent Office during the prosecution of the Canadian patent application to be admitted into evidence.

[64] The appellant seems to downplay the consequences of the recent enactment of this provision, and to sever prosecution history from the analytical framework of patent construction. Admittedly, a strict reading of section 53.1 does not sanction the use of the prosecution file as an independent, stand-alone aid to construction of a patent claim. The prosecution file nonetheless does play a role in construing claims, along with the claims themselves and disclosure, to the extent that it may rebut a patentee’s representation. In the case at bar, the appellant has made numerous representations to the effect that Claim 1 was not restricted to a particular type of

heating, and that the cooling towers' insulation was optional. Subject to the discussion that follows, these are precisely the kind of representations, as the Judge noted, that are contemplated by section 53.1. That much, it seems to me, is uncontroversial.

[65] In light of these considerations, there is no need for me to weigh in on the apparent controversy that seems to have emerged in the Federal Court as to the extent and purpose for which prosecution communications can be introduced. In both the decision under appeal and *Eli Lilly Canada Inc. v. Apotex Inc.*, 2020 FC 814 [*Eli Lilly*], the Federal Court insisted on the limited purpose of introducing prosecution communications, that is the rebuttal of a representation made by the patentee as to the construction of the claim. Such an interpretation would confine section 53.1 to an evidentiary rule not dissimilar to the US notion of estoppel.

[66] In *Bauer Hockey Ltd. v. Sport Maska Inc. (CCM Hockey)*, 2020 FC 624 [*Bauer Hockey*], however, the Federal Court put forward a somewhat different approach to section 53.1. While the decision under appeal and *Eli Lilly* seem to suggest that the use of prosecution history is limited to the rebuttal of identifiable representations, the Court in *Bauer Hockey* departs from that approach in holding that prosecution history is admissible whenever the issue is one of claims construction. The emphasis, therefore, is not so much on the rebuttal of a particular representation, but rather on the interpretive process itself. As the Court stated in *Bauer Hockey*, “there is no need to identify a particular representation and rebuttal every time a reference is made to the prosecution history. It is simply integrated in the interpretive process” (at para. 65).

[67] The resolution of this dispute is best left for another day, as the facts of this case clearly meet the more restricted interpretation of section 53.1 and do not require a broader reading of that section. More germane to the resolution of the case at bar is whether this new provision allows for the consideration of foreign prosecution files.

[68] It will be remembered that Justice Manson, though acknowledging that section 53.1 limits the communications that can be admitted into evidence to those between the patentee and the Canadian Patent Office, nevertheless accepted that the Court is allowed to look at foreign prosecution history in “extraordinary circumstances”. This will be the case, as in the case at bar, when the patentee “specifically referred to the corresponding US Application prosecution history and acknowledged that the amendments to the claims in the ‘376 file history were made to overcome novelty and obviousness concerns as raised in the US Application prosecution history” (Reasons at para. 70).

[69] The appellant objects to that finding, emphasizing that the wording of section 53.1 only makes admissible communications between an applicant or patentee and the Commissioner, an officer or employee of the Patent Office of Canada. As such, argues the appellant, Justice Manson erred in interpreting section 53.1 so as to permit the use of the US prosecution history in a related application for the purposes of claim construction. In the appellant’s view, Justice Manson further compounded his error by introducing the American doctrine of incorporation by reference, whereby external documents are cited in such a manner that they effectively become part of the host document. Not only does Canadian law prohibit the incorporation by reference of documents into patent specifications (*Patent Rules*, SOR/2019-251, para. 57(1)), but the

prosecution file of the '376 Patent does not clearly incorporate the '405 Application. In the appellant's view, therefore, the mention of "a related United States application" in the '376 Patent is no more than a general reference from which no inference should have been drawn.

[70] I agree with the appellant that courts should be wary to extend the detailed language of section 53.1, which is specific about the communications being limited to those with the Canadian Patent Office. The legislation is carefully tailored, and it would go against statutory interpretation principles to try to go beyond its original intent.

[71] There are also public policy reasons for treading carefully in allowing extrinsic evidence. Opening the door to allowing foreign patent prosecution history into the analysis might lead to overly contentious and expensive litigation. Moreover, different countries have different patent registration processes. While the global system has become more interconnected, a party may disclaim an element in one country that they need not disclaim in another. For instance, in this case, the patent application in the United States was eventually dropped, while registration in Canada was completed. Along with differences in patent processes between countries, there also lies differences in the language of patent claims; allowing for foreign prosecution evidence can lead to potential issues of translation, and given that language is such an important part of claim construction, this could lead to major problems in the interpretation of the claims.

[72] That being said, one should not underplay the public interest in keeping those who have previously disclaimed elements from their patent from re-claiming them in future infringement cases. This was clearly an important policy consideration for Justice Manson, in the case at bar,

in order to extend the admissibility of prosecution history to foreign applications. As he stated, at paragraph 72 of his reasons:

[...] if the Court were to ignore consideration of the prosecution history of the corresponding US Application in circumstances such as are present here, patent applicants in Canada would be incentivized to intentionally refrain from being transparent with the Canadian Patent Office as to why amendments were made to limit claims during prosecution. If section 53.1 were interpreted to never allow consideration of foreign prosecution histories where limitations were specifically added to overcome novelty and obviousness objections and those limitations were subsequently adopted in the prosecution of the corresponding Canadian claims, applicants could rely on co-pending foreign applications to effectively avoid any application of section 53.1.

[73] In this specific instance, if one looks to the US Application, it is clear that CanMar's patent was amended specifically to avoid infringing on the patent claim of the Micronizer patent-holder: see Permann Affidavit, Appeal Book, Vol. 1, pp. 148-152. Given that the respondent is using a Micronizer as the sole method for roasting flax, the evidence from the US patent prosecution may appear, from the outset, as useful in disposing of the claim. In the *Pollard Banknote* case cited above, a similar circumstance happened where the Federal Court likely would have changed its decision if it had been allowed to consider the patent prosecution history (at paras. 238-239). Justice Locke noted that "[he] would expect that [the patent-owner]'s argument would never have made it to a trial in the US where the principle of file wrapper estoppel applies. There, [the patent-owner] would likely not have been allowed to argue a claim construction that attempts to recapture ground conceded during prosecution of the patent application to avoid prior art" (*Pollard Banknote* at para. 238).

[74] Yet, whether the doctrine of incorporation by reference should formally be treated as an exception to the general prohibition on foreign prosecution files, is a question best left for

another day. Not only should courts refrain from deciding beyond what is strictly necessary for the resolution of the case of which they are seized, but the facts of this case, in my view, do not lend themselves to a proper finding of incorporation by reference.

[75] There is nothing in the prosecution file of the '376 Patent that identifies with any detailed particularity what specific "written communication" from the US prosecution history is incorporated and where that written communication can be found. The only mention of that written communication is found in the following paragraph of a response dated August 24, 2012 to the February 27, 2012 Examiner's Report:

At the outset, the Examiner is advised that the claims on file have been replaced with a new set of claims fully supported by the description as filed and believed to more accurately and appropriately define the scope of protection sought for the invention. New claims 1-19 correspond substantially to those submitted during prosecution of a related United States application. Former claims 22-27 have been renumbered as new claims 20-25 flowing from new claims 1-19.

Appeal Book, Vol. 1, p. 253; emphasis added.

[76] It is a stretch to say that the prosecution of the US Application is incorporated by reference when the specific application is not even cited within the document. Justice Manson heavily relies on the case of *Abbott Labs* for the proposition that exceptional circumstances may be found when prosecution of the foreign application is made part of the prosecution history of the Canadian patent. But in that case, the US patent claimed priority from the application of the foreign patent (*Abbott Labs* at 1290), which necessarily entails that express reference to the foreign patent was made. Such is not the case here. More relevant is the case of *Paice LLC, The Abell Foundation, Inc. v. Ford Motor Company*, 881 F.3d. 894 (2018) [*Paice LLC*], where the United States Court of Appeals (Federal Circuit) quoted with approval a prior decision to the

effect that “[t]o incorporate material by reference, the host document must identify with detailed particularity what specific material it incorporates and clearly indicate where that material is found in the various documents” (*Paice LLC* at 906-907, citing *Advanced Display Sys., Inc. v. Kent State Univ.*, 212 F.3d 1272 (2000) at 1282).

[77] For all of the above reasons, I am of the view that the Judge should have refrained from taking into consideration the prosecution history of the corresponding US Application in the circumstances of this case. With respect to the broader issue of whether the prosecution history of a foreign application can ever be considered pursuant to section 53.1 of the Patent Act, as a result of incorporation by reference or otherwise, I wish to express no firm views on the matter.

D. *Did the Judge err in considering the evidence contained in the Popowich Affidavit?*

[78] The thrust of the appellant’s argument on this issue is that the appellant was not invited to the respondent’s experimental testing of the Micronizer, from which the evidence of the Popowich Affidavit was impermissibly obtained. The appellant was left unable to respond with its own evidence, and was therefore inexcusably prejudiced.

[79] The appellant also briefly questions the witness’ credibility. In his testimony in chief, Mr. Popowich distinguished the terms “roasting” and “pasteurizing” while on cross-examination he did not. Such contradiction further highlights the lack of evidence on the respondent’s roasting process.

[80] Finally, in the course of the respondent's experimental testing, no measurements were taken with regard to air circulation in the heating chamber, and heat transfer in the auger trough and cooling tower. Specifically with regard to air circulation, the appellant argues that the Judge equates heating the flax seed by means of infrared radiation to a finding that the flax seed is not subjected to a stream of air. Such inference is illogical, says the appellant, and unsupported by the respondent's evidence.

[81] Having carefully reviewed the evidence that was before the Judge, I am of the view that his findings of fact were entirely supported by the evidentiary record. The appellant has failed to convince me that he made any palpable and overriding error in this regard.

[82] In particular, I find that there is no basis for interfering with the Judge's conclusion that the respondent did not run an experimental test, but rather conducted a demonstration run in the normal course of commercial production. The witness was merely measuring the temperature during production runs, and there was therefore no need for *inter partes* experimentation.

[83] The same can be said of the Judge's dismissal of the appellant's attempt at distinguishing the terms "roasting" and "pasteurizing". The evidence is to the effect that the same machine and the same process are used for pasteurizing, roasting and cooking, and the appellant has not explained the difference between these three terms, let alone its potential impact on claim construction or infringement. The respondent uses only one type of machine (the Micronizer), and it is used in the way it was intended to be used. Moreover, there is no issue that this machine was manufactured in 1994, 10 years before the priority date of the '376 Patent. It seems highly

unlikely, to say the least, that a device created prior to the issuance of a patent claim can infringe that claim, especially if it is being used as per the manufacturer's specifications.

[84] As for the lack of measurements of the air circulation and the heat transfer, I find that the appellant's submissions are simply a reiteration of its prior arguments concerning the essential elements of Claim 1, which I have already disposed of. I agree with the Judge that the issue of infringement does not turn on these measurements, but rather on whether the two essential elements of heating oil seed "in a stream of air" and an "insulated or partially insulated roasting chamber or tower" have been breached.

V. Conclusion

[85] For all of the aforementioned reasons, I would dismiss the appeal, with costs to the respondent.

"Yves de Montigny"

J.A.

"I agree.

J.D. Denis Pelletier J.A."

"I agree.

Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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