

Federal Court of Appeal



Cour d'appel fédérale

Date: 20230913

Docket: A-116-22

Citation: 2023 FCA 185

**CORAM: GLEASON J.A.
WOODS J.A.
MACTAVISH J.A.**

BETWEEN:

**DEEPROOT GREEN INFRASTRUCTURE,
LLC and DEEPROOT CANADA CORP.**

Appellants

and

GREENBLUE URBAN NORTH AMERICA INC.

Respondent

Heard at Toronto, Ontario, on May 10 and 11, 2023.

Judgment delivered at Ottawa, Ontario, on September 13, 2023.

REASONS FOR JUDGMENT BY:

MACTAVISH J.A.

CONCURRED IN BY:

**GLEASON J.A.
WOODS J.A.**

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REASONS FOR JUDGMENT

MACTAVISH J.A.

[1] The appellants and the respondent are engaged in the provision of products and services in the urban landscaping field in Canada. They each sell structural cell systems that are installed below hardscape, which enable tree root growth and allow for the infiltration of stormwater, while preventing damage to the hardscape.

[2] Following a three-week trial, the Federal Court found, in a decision reported as 2021 FC 501 (the Merits Decision), that GreenBlue Urban North America Inc.'s RootSpace system and structural cells infringed various claims of Canadian Patent Number 2,552,348 (348 Patent) and Canadian Patent Number 2,829,599 (599 Patent). These patents are owned by DeepRoot Green Infrastructure, LLC. DeepRoot Canada Corp. is the Canadian operating subsidiary of DeepRoot Green Infrastructure, LLC. The two companies will be referred to collectively as "DeepRoot" in these reasons.

[3] Amongst other forms of relief, the Federal Court permanently enjoined GreenBlue from infringing the asserted claims of the 348 and 599 Patents.

[4] After the Federal Court issued its judgment, GreenBlue began selling the RootSpace AirForm system in Canada as a purported "design-around" the terms of the 348 and 599 patents. Being of the view that GreenBlue's AirForm system violated the terms of the injunction, DeepRoot commenced contempt proceedings against GreenBlue in the Federal Court. Following a contempt hearing held before the trial judge, the Court was not satisfied beyond a reasonable doubt that GreenBlue was in contempt of the injunction, and DeepRoot's contempt motion was accordingly dismissed. The Federal Court's decision was reported as 2022 FC 709 (the Contempt Decision).

[5] DeepRoot now appeals from the dismissal of its contempt motion, alleging that the Federal Court erred in several respects in finding that contempt on the part of GreenBlue had not been proven beyond a reasonable doubt. In particular, DeepRoot asserts that the Federal Court

erred in law in failing to construe the disputed elements of the claims of the 348 and 599 Patents, leading it to find reasonable doubt that GreenBlue had infringed or induced infringement of DeepRoot's patents.

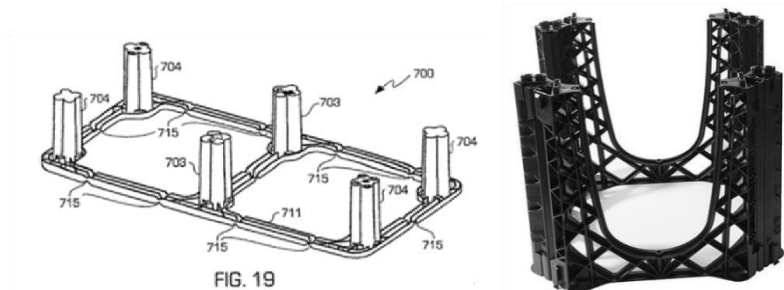
[6] DeepRoot further contends that the Federal Court failed to appreciate and consider the full scope of its monopoly rights, including the exclusive right to import, export and use the claimed structural cells as an intermediate structure. Finally, DeepRoot says that the Federal Court erred in deferring to the opinion of an expert who had not construed the patent claims, and in finding reasonable doubt when the admissible expert evidence construing the claims together with the corrected calculations established the available volume of the RootSpace AirForm structural cell was greater than 84.5%.

[7] For the reasons that follow, I have concluded the Federal Court did not err as alleged by DeepRoot. Consequently, I would dismiss the appeal.

I. Background

[8] A structural cell is a frame-like open structure (depicted below) that is installed underneath hardscape such as sidewalks and roadways. Structural cell modules can be attached or joined together as part of an integrated tree root and storm water system. Structural cell systems use a series of structural cell modules that are positioned below tree growth. The cell system supports the weight of the hardscape, including the weight of pedestrian and automotive

traffic, thus preventing the compaction of the underlying soil. This enables tree-root growth, accommodates stormwater management and prevents damage to the hardscape.



A Structural Cell of 348 Patent (left) and RootSpace Structural Cell (right)

[9] The 348 Patent discloses and claims a structural cell system for supporting hardscape that enables tree root growth and allows for stormwater management. The 599 Patent discloses and claims a structural cell that can be used in such a system.

[10] The components of a GreenBlue RootSpace structural cell that was found by the Federal Court to violate the 348 and 599 Patents are depicted below:



[11] At the trial on the merits, the parties agreed that GreenBlue's RootSpace system is an engineered structural cell soil system with modular components that provide high volumes of uncompacted soil for healthy tree root growth below hardscape surfaces. GreenBlue's RootSpace structural cell system uses a series of structural cells positioned below a hardscape to enable tree root growth and accommodate filtering, retention, storage and infiltration of storm water while preventing hardscape damage.

[12] The structural cells of the RootSpace system are designed and used by GreenBlue and/or its customers to bear substantially the entire load of both the hardscape and commercial vehicle traffic directed thereover, while maintaining the soil within the volume in a low compacted state accommodating natural growth of structural roots of a tree within the volume.

[13] Claim 1 of the 348 Patent reads:

A structural cell system for supporting hardscape areas that enables tree root growth and accommodates filtering, retention, storage and infiltration of storm water while preventing hardscape damage, comprising;

A plurality of structural cells positioned below a hardscape substantially covering the structural cells, the structural cells each comprising:

A base, a top, and structural members positioned therebetween so as to maintain the base and the top at least approximately 8 inches apart, the base, top, and structural members collectively defining a volume that includes the base, top, and structural members,

Wherein at least approximately 85% of the volume can be filled with soil;
Wherein the structural cells bears substantially the entire load of both the hardscape and commercial vehicle traffic directed thereover, while maintaining the soil within the volume in a low compacted state accommodating natural growth of structural roots of a tree within the volume;

One or more permeable barriers around the structural cells;

Water ingress into the plurality of structural cells; and

Water egress from the plurality of structural cells.

[14] Claim 1 of the 599 Patent reads:

A structural cell for supporting hardscape, the cell comprising:

A base; and

Periphery support members engaging the base and extending outwardly from said base, for attaching to a base of another cell or a lid and for supporting said hardscape, said support members being sized and arranged so that at least approximately eighty five percent of a volume defined by outer edge of said cell is a void space.

[15] The Federal Court found that one of the essential elements in the 348 Patent was that at least 85% of the volume in the cells in the structural cell system claimed in the patent be available to be filled with soil. The Court further found that it was an essential element of the 599 Patent that there be at least 85% void space in the structural cell claimed in that patent: Merits Decision at paras. 141, 150.

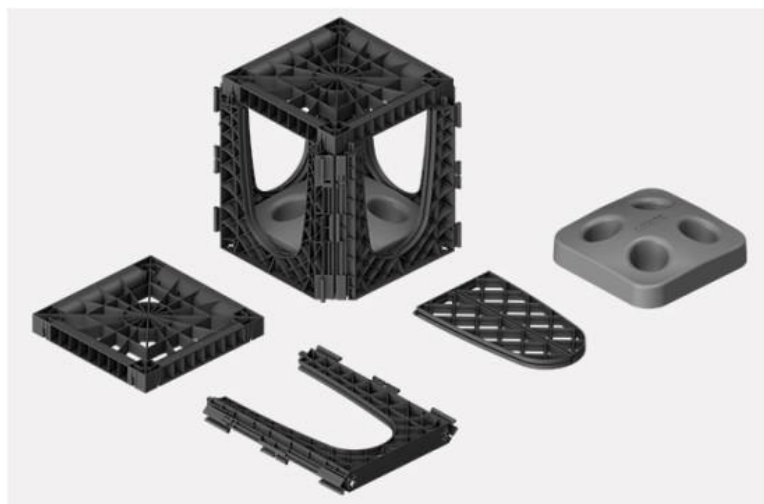
[16] In construing the claims, the trial judge accepted that “85% of the volume” was a reference to a measurement tolerance meaning 84.5% or greater: Merits Decision at para. 117.

[17] After the Federal Court determined that GreenBlue’s RootSpace product infringed the asserted claims of the 348 and 599 Patents, GreenBlue began selling the RootSpace AirForm system as a purported “design-around”. The RootSpace AirForm system includes all of the components of the infringing RootSpace structural cells, without any modification. Indeed,

GreenBlue admits that the Upright Panels and AirFlow Lids in the RootSpace AirForm system are the same as the Upright Panels and AirFlow Lids that form the RootSpace system that was found to infringe DeepRoot's patents at trial.

[18] The only difference between the original RootSpace system and the RootSpace AirForm system is the inclusion of one additional component in each cell in the new system, known as the "the AirForm insert". The AirForm insert is a domed structure, with the underside of the dome being filled with air, which reduces the space available to be filled with soil.

[19] The RootSpace AirForm product and components are depicted in the image below, with the AirForm Insert shown on the right side of the image:



[20] The AirForm Insert, and the air pocket underneath it, take up space within the cell, thereby reducing the space available for soil. GreenBlue contends that the space available for soil in the cells in its new RootSpace AirForm system is less than the 84.5% threshold that was an

essential element of the claims of both the 348 and 599 Patents. As a result, the AirForm system does not violate the terms of the injunction.

[21] GreenBlue's witnesses at the contempt hearing explained that the trial judgment drew "a line in the sand", allowing the company to know the parameters that it needed to follow in designing a new product that had less soil volume than that of the cells in its old RootSpace cell system. Consequently, the company developed the RootSpace AirForm for the express purpose of not infringing DeepRoot's patents.

[22] GreenBlue designed the AirForm Insert using a computer-assisted design program to intentionally reduce the available volume in a cell below 84.5%, specifically to 82%. GreenBlue also took the precaution of getting a non-infringement opinion from its counsel in advance of selling its new product.

[23] The RootSpace AirForm system is comprised of individual cells, each of which included an AirForm Insert, which is not an optional component. GreenBlue does not sell assembled cells, only the components needed to assemble the cells, including the AirForm Insert.

II. The Contempt Proceedings

[24] As it believed that GreenBlue's AirForm system violated the terms of the injunction, DeepRoot commenced contempt proceedings against GreenBlue in the Federal Court.

[25] DeepRoot obtained a “show cause” order pursuant to Rule 467 of the *Federal Court Rules*, SOR/98-106, requiring a representative of GreenBlue to appear and hear proof of the acts with which GreenBlue was charged, namely, breaching the Court’s injunction in 2021 FC 501, by:

- (a) Selling or offering for sale in Canada the RootSpace structural cells as part of the RootSpace AirForm package;
- (b) Importing or exporting RootSpace structural cells for commercial sale;
- (c) Stockpiling RootSpace structural cells in Canada for commercial purposes.

[26] Following an adjournment of the original date set for the contempt hearing, GreenBlue undertook not to sell the RootSpace AirForm system until the determination of the contempt motion. There was no allegation that GreenBlue did not abide by this undertaking.

[27] At the contempt hearing, the Federal Court heard from the CEO of DeepRoot, as well as two experts testifying on the company’s behalf. Testifying on behalf of GreenBlue were the company’s CEO and its former General Manager. GreenBlue also called three experts, including Dr. Jennifer Drake, an expert in hydrology, stormwater systems, and civil engineering (water resources). Dr. Drake was asked to measure the available volume for soil and storm water in the cells in the GreenBlue AirForm system.

[28] There was no material dispute between the parties or their experts at the contempt hearing that the standard formula used to calculate available volume is to use the structural cell’s bulk

volume, subtract the plastic volume of the structural cell, and to then divide that sum by the cell volume, according to the following formula:

$$\text{Available volume} = \frac{(\text{Bulk Volume} - \text{Structural Cell Volume})}{\text{Bulk Volume}} (100\%)$$

III. The Federal Court's Contempt Decision

[29] The Federal Court was not satisfied beyond a reasonable doubt that GreenBlue was in contempt of the injunction, with the result that DeepRoot's contempt motion was dismissed.

[30] In coming to the conclusion that DeepRoot's motion should be dismissed, the Federal Court applied the test for contempt established by the Supreme Court in *Carey v. Laiken*, 2015 SCC 17. There, the Supreme Court confirmed that the test for civil contempt has the following three elements that must be established beyond a reasonable doubt:

- (1) The order alleged to have been breached must state clearly and unequivocally what should and should not be done;
- (2) The alleged contemnor must have had knowledge of the order; and
- (3) The alleged contemnor must have intentionally carried out the act that the order prohibits or failed to carry out the act that the order requires (at paras. 33-35).

[31] GreenBlue has not suggested that the Federal Court's injunction order was unclear. Nor was it disputed that GreenBlue had knowledge of the injunction, and that it understood that it was enjoined from selling its RootSpace structural cell system. The issue to be determined was

thus whether the sale of the RootSpace AirForm system by GreenBlue was an act prohibited by the Court's injunction.

[32] A primary focus of the Federal Court's contempt decision was on GreenBlue's claim that the available soil volume in the cells in the RootSpace AirForm system was less than 84.5%, as a result of the inclusion of the AirForm Insert in each cell. According to GreenBlue, this took their new product outside the scope of the 348 and 599 Patents and the terms of the Federal Court's injunction.

[33] There was also an issue as to whether the AirForm forms part of the RootSpace AirForm system structural cell. The Federal Court found that the evidence with respect to this question was unclear, with the result that it was not possible for the Court to make a definitive finding in this regard, and that GreenBlue should get the benefit of the doubt with respect to this issue.

[34] The Federal Court thus concluded that DeepRoot had not established beyond a reasonable doubt that the volume of the cells in the RootSpace AirForm system was greater than that alleged by GreenBlue.

[35] The Federal Court was also not persuaded that photographs taken at a construction site in Ottawa constituted direct evidence of the use of the RootSpace structural cell product without the AirForm insert, in breach of the Court's injunction.

[36] Finally, the Federal Court was not satisfied that there was evidence of the sale or assembly of the original RootSpace structural cells in Canada since the Court's Judgment, nor was there evidence that GreenBlue had marketed or promoted the original RootSpace product since the permanent injunction was granted.

[37] Contempt not having been established beyond a reasonable doubt, DeepRoot's contempt motion was dismissed.

IV. The Issues

[38] DeepRoot alleges that the Federal Court erred in:

- a) "failing to construe the disputed elements of the claims of the 348 Patent and 599 Patent and, as a result, finding reasonable doubt that GreenBlue had infringed or induced infringement";
- b) "failing to appreciate and consider the full scope of monopoly rights granted to DeepRoot, including the exclusive right to import, export and use the claimed structural cells as an intermediate structure"; and
- c) "deferring to the opinion of an expert who had not construed the claims and had made an error in finding reasonable doubt, when the admissible expert evidence construing the claims together with the corrected calculations established the available volume of the RootSpace AirForm structural cell was greater than 84.5%".

V. The Standard of Review

[39] I understand the parties to agree that the standards of review applicable to the issues raised in this appeal are those prescribed by the Supreme Court in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. That is, the standard of review to be applied to questions of law is that of correctness. Findings of fact and inferences of fact are to be reviewed on the basis of palpable and overriding error. Findings of mixed fact and law are to be reviewed on the same deferential standard unless an extricable legal error can be demonstrated, in which case the error is subject to review on the correctness standard.

VI. Analysis

[40] Before addressing the issues raised by this appeal, I would note that the Merits Decision is under appeal, and that the appeal of that decision was heard at the same time as the appeal from the dismissal of DeepRoot's contempt motion.

[41] Regardless of the outcome of the appeal with respect to the Merits Decision, however, the injunction rendered by the Federal Court must be considered to be valid until such time as it may be set aside by this Court: *Warner Bros. Entertainment Inc. v. White (c.o.b. Beast IPTV)*, 2021 FC 53, aff'd 2022 FCA 34. Indeed, GreenBlue does not suggest otherwise.

[42] I would also note that GreenBlue is not to be faulted for intentionally setting out to "design-around" the 348 and 599 Patents. One can deliberately attempt to avoid infringing a

patent of which one has knowledge by “designing around” the patent. Whether or not that effort succeeds will depend on the construction of the claims of the patent at issue and not on one’s intention: *Illinois Tool Works v. Cobra Fixations Cie*, 2002 FCT 829, 221 F.T.R. 161 at paras. 14-17, varied on other grounds 2003 FCA 358. A defendant’s intention is irrelevant to a finding of infringement: *Monsanto Canada Inc. v. Schmeiser*, 2004 SCC 34 at para. 49.

[43] With these points in mind, I turn next to consider the issues raised by this appeal.

A. *The 85% Issue*

[44] The Federal Court found as a fact that that there was no evidence of the sale or assembly of the original RootSpace structural cell product in Canada after the Court issued the permanent injunction against GreenBlue. The question was whether the sale of the RootSpace AirForm system infringed the 348 and 599 Patents and thus the Court’s injunction.

[45] As the Federal Court observed, direct infringement occurs when a product has all essential elements of a claim, and the absence or substitution of non-essential features is irrelevant to infringement: Merits Decision at para. 153, citing *Whirlpool Corp. v. Camco Inc.*, 2000 SCC 67 at para. 46. There will be no infringement if an essential element is missing or substituted with something else: *ViiV Healthcare Company v. Gilead Sciences Canada, Inc.*, 2020 FC 486 at para. 175, aff’d 2021 FCA 122, leave to appeal denied [2021] S.C.C.A. No. 306. This is so even if the allegedly infringing device performs substantially the same function as the

patented device: *Cascade Corporation v. Kinshofer GmbH*, 2016 FC 1117 at paras. 82, 86-87; *Valeant Canada LP v. Ranbaxy Pharmaceuticals Canada Inc.*, 2018 FC 847 at paras. 102-109.

[46] Consequently, for the Federal Court to find infringement by GreenBlue on the contempt motion, DeepRoot had to prove, beyond a reasonable doubt, that the new RootSpace AirForm system had all essential elements of Claim 1 of each of the 348 and/or 599 Patents: *Free World Trust v. Électro Santé Inc.*, 2000 SCC 66 at para. 68(4); *Bauer Hockey Corp. v. Easton Sports Canada Inc.*, 2010 FC 361 at para. 169, aff'd 2011 FCA 83.

[47] As was noted earlier, the Federal Court found that one of the essential elements in the 348 Patent was that at least 85% of the volume of the cells in the structural cell system claimed in the patent be available to be filled with soil. The Court further found that it was an essential element of the 599 Patent that there be at least 85% void space in the structural cell claimed in that patent: Merits Decision at paras. 141, 150.

[48] DeepRoot disputes GreenBlue's claim that the volume taken up by the AirForm Insert should be included in calculating the volume available in its RootSpace AirForm system, arguing that there is no principled reason why the volume of the AirForm should be deducted from the bulk volume when assessing available volume in the cell.

[49] DeepRoot submits that a purposive construction requires that only the volume of the base, top, and structural members should be deducted from the overall bulk volume in calculating the available volume in each cell. The base, top, and structural members are defined

by the RootSpace upright panels. Since the upright panels were not physically modified following the finding of infringement in the Merits Decision, this Court should conclude that the available volume remains unchanged as well.

[50] Even if this Court were to find that it was appropriate to include the volume of the AirForm Insert in the calculation of the available volume, DeepRoot says that GreenBlue's calculations showing the available volume in the cells in the RootSpace AirForm system to be less than 84.5% were in error.

[51] There are thus two questions for determination. The first is whether it is appropriate to include the volume of the AirForm Insert in the calculation of the available volume in the cells in the RootSpace AirForm system. The second is whether DeepRoot has established beyond a reasonable doubt that the cells in the RootSpace AirForm system have available volume space of at least 84.5%.

i. Does the AirForm Insert Form Part of the Structure of the RootSpace Cells?

[52] In assessing whether the space taken up by the AirForm Insert should be included in calculating the volume available in GreenBlue's RootSpace AirForm system, DeepRoot had to establish that the AirForm Insert did not form part of the structural cell itself. If the AirForm Insert did not constitute part of the structure of the cell, DeepRoot contends that it could be ignored in calculating the available volume in the RootSpace AirForm cells in order to determine whether the RootSpace AirForm system infringed the 348 and 599 Patents.

[53] DeepRoot submits that the four Upright Panels define the volume, and that other material put into structural cells, once assembled, whether it be an AirForm Insert or a concrete block, is not part of the structural cell itself, but merely reduces the volume otherwise available for other material such as soil.

[54] In support of this contention, DeepRoot relies on the evidence of Dr. Richard LeBrasseur, an expert in landscape architecture and green infrastructure, who testified at both the original trial and the contempt hearing. Dr. LeBrasseur described the AirForm Insert as a lightweight product that slides down into the structural cell. He stated that the AirForm Insert is not attached to the base or the uprights, and if the structural cell were turned over, the AirForm Insert would fall out.

[55] Dr. LeBrasseur was of the opinion that it was necessary to fully assemble the structural cell before adding the AirForm Insert. He was also of the view that the AirForm Insert would not provide any structural assistance in keeping the RootSpace Upright Panels square and rigid during installation and use. Consequently, Dr. LeBrasseur opined that the AirForm Insert did not form part of the structural cell, and should not be included in calculating the available volume in the cells in the RootSpace AirForm system.

[56] Marc Crans also testified with respect to this issue. Mr. Crans was the Technical Manager at Infinity Testing Solutions. He carried out load testing on the AirForm Insert, concluding that “it does not appear that the AirForm materially contributes to the structural integrity of the RootSpace AirForm system”.

[57] GreenBlue led evidence from Dean Bowie, the Chief Executive Officer of GreenBlue Urban Limited, United Kingdom, and President of the Defendant, GreenBlue Urban North America, Inc. Mr. Bowie testified that the AirForm Insert helps with installation of the cells, and that the grooves on the sides of the AirForm Insert interlock with the uprights, making the AirForm part of the structure of the cells in GreenBlue's RootSpace AirForm system.

[58] Michael Hoffman, a professional engineer called by GreenBlue, stated in his report that the AirForm Insert is a structural component of the RootSpace AirForm system. He explained that the AirForm Insert should be considered to be part of the RootSpace AirForm system as it "contributes to lateral and vertical loads in the overall system". He further stated that AirForm Inserts "aid in keeping the vertical panels square, and provide rigidity contribution laterally". In his opinion, the AirForm Insert provided support perpendicularly and provided horizontal diaphragm assistance to the RootSpace AirForm system.

[59] Mr. Hoffman disagreed with the testing done by Mr. Crans, asserting that his testing did not replicate the use of the product in the field. Mr. Hoffman also stated that although the AirForm Insert is not attached to the cell frame in the sense of being fastened to it, it becomes attached when it is loaded with soil because of the interconnection between the AirForm Insert and the other components of the cell.

[60] Dr. Barrett L. Kays also gave evidence on behalf of GreenBlue as an expert in landscape architecture, urban stormwater, horticulture, and soil science. Like Dr. LeBrasseur, Dr. Kays testified at both the original trial and the contempt hearing.

[61] Dr. Kays acknowledged that the claims in the 348 and 599 Patents teach the skilled person how to assess the available volume provided by the structural cell of the invention. He further acknowledged that the claims do not tell the skilled reader to take other materials — whether it be soil, water or the AirForm Insert — into consideration when assessing whether a structural cell has the elements of the claim. That said, Dr. Kays also testified that the AirForm Insert is designed to interlock or connect with the structural cell in the RootSpace AirForm system.

[62] The Federal Court found that the evidence as to whether the AirForm Insert added a structural element to cells in the RootSpace AirForm system “remain[ed] unclear”. As it was not possible to make a definitive finding in this regard, the Federal Court stated that it was “left with doubts” on this question, and that GreenBlue should get the benefit of that doubt.

[63] A review of the Contempt Decision reveals that the Federal Court was well aware of the conflicting evidence with respect to this issue, including the evidence of the expert witnesses. The Court also understood that the onus was on DeepRoot to establish beyond a reasonable doubt that GreenBlue was in contempt of the injunction that the Court had issued.

[64] After weighing the conflicting evidence before it, the Court found as a fact that that evidence was insufficient to establish beyond a reasonable doubt that the AirForm Insert did not add a structural element to cells in the RootSpace AirForm system. This was a finding of fact that was available to the Federal Court on the record before it, and DeepRoot has not established that the finding was tainted by either a legal or palpable and overriding error.

- ii. Do the Cells in the RootSpace AirForm System have Available Volume Space of at Least 84.5%?

[65] Even if it was appropriate to include the AirForm Insert in calculating the available volume in the cells in the RootSpace AirForm system, DeepRoot says that the Federal Court nevertheless erred in finding that it had not established beyond a reasonable doubt that the available volume in RootSpace AirForm cells in fact exceeded the 84.5% threshold.

[66] Consequently, DeepRoot says that the Federal Court erred in concluding that it had not established beyond a reasonable doubt that GreenBlue had directly infringed DeepRoot's patents by selling RootSpace AirForm systems in Canada.

[67] Dr. LeBrasseur stated that the available volume in the RootSpace AirForm is likely over 85% when the void space both above and below the AirForm insert is considered. DeepRoot says that this demonstrates that the GreenBlue AirForm cell system directly infringes at least Claim 1 of the 348 patent and Claim 1 of the 599 patent.

[68] Dr. LeBrasseur further stated that the AirForm Insert would be likely to deform if exposed to the weight of soil, thereby increasing the volume available above the AirForm Insert beyond the claimed 82%. However, Dr. LeBrasseur did not himself perform any volume measurements, and he agreed that when the AirForm Insert was used with the soil system, the available volume would be somewhat reduced.

[69] In Dr. Kays' opinion, the AirForm system is missing the essential element of the 348 and 599 patents that the available cell volume be "at least approximately 85%". According to Dr. Kays, the AirForm Insert reduces the available cell volume below 84.5% with the result that the RootSpace AirForm system is, therefore, outside the 348 and 599 patents.

[70] Dr. Jennifer Drake also testified at the contempt hearing on behalf of GreenBlue. She was the only witness called by either party to actually try to measure or estimate the volume available for soil in the cells in the RootSpace AirForm system, as DeepRoot led no evidence in this regard.

[71] Dr. Drake testified that her understanding of "the available volume" in a structural cell was the space left available for soil or storm water once the space occupied by the structural cell itself, including the AirForm Insert and the space under the AirForm Insert was omitted. Dr. Drake was not challenged on this understanding, nor was it put to her that she was required to construe the patent claims to determine the void space or available volume within the new RootSpace AirForm cells.

[72] After attempts to measure the bulk volume of a RootSpace structural cell using the displacement method proved unsuccessful, Dr. Drake then measured the bulk volume of a cell module by measuring its unit height, width and depth. In measuring the width and depth of the cell, she relied on the dimensions of the lid, opposed to the outer edges of the cell unit. Dr. Drake stated in her report that using her bulk volume figure, and "based on the laboratory work that we

completed [...] the available volume for the AirForm System modules that we tested ranged from 82% - 83%, even if the lid was omitted”.

[73] Counsel for DeepRoot challenged Dr. Drake’s calculations in cross-examination. In particular, he submitted that her reliance on the dimensions of the lid in calculating her bulk volume figure resulted in an underestimation of the available volume as the lid was not flush with the outer edges of the cell unit. This meant that 50% of volume of the upright panels had not been included in Dr. Drake’s bulk volume estimate, thereby skewing the available volume figure.

[74] Counsel then took Dr. Drake through a series of calculations suggesting that her measurements with respect to the available volume in the RootSpace AirForm system underestimated that volume, and that the volume available for soil and stormwater actually exceeded 84.5%.

[75] Dr. Drake acknowledged in cross-examination that the lids used in the GreenBlue RootSpace AirForm system only covered 50% of each of the four uprights that they sit on. She maintained, however, that the approach counsel advocated for during cross-examination also did not result in a perfect calculation of the bulk volume. In particular, she stated that measuring the width and depth based of the cell’s outer edges would result in an inflated bulk volume because of the irregular shape of the upright panels.

[76] While acknowledging that her calculations might underestimate the available volume in an individual cell, Dr. Drake’s opinion remained firm that her measurements were closer to the

true available volume of cells in the RootSpace AirForm system than were those of counsel for DeepRoot. She further maintained that her calculations were reasonable.

[77] The Federal Court acknowledged the challenge to Dr. Drake's measurements in its Contempt Decision. It observed, however, that she was the only expert who had endeavoured to measure the available volume in the RootSpace AirForm cells, and that Dr. Drake's evidence was that the available volume of the RootSpace AirForm cells would be somewhat reduced by the presence of the AirForm Insert in the cell (something that appears to this Court to be self-evident).

[78] While finding that the precise percentage amount of that reduction had not been clearly established, the Federal Court nevertheless accepted Dr. Drake's opinion that the available volume was less than that available in the original RootSpace structural cells.

[79] From this, the Federal Court concluded that the evidence with respect to the available volume in the RootSpace AirForm cells was sufficient to raise a doubt as to whether it was an infringing product, and that GreenBlue should get the benefit of that doubt. The Court thus found that DeepRoot had not proven beyond a reasonable doubt that the cells in the RootSpace AirForm system had available volume space of at least 84.5%, resulting in the dismissal of DeepRoot's contempt motion.

[80] DeepRoot challenges the Federal Court's findings in this regard, asserting that it had established that Dr. Drake's evidence with respect to the available volume was fatally flawed.

According to DeepRoot, Dr. Drake's inclusion of just 50% of the volume occupied by the upright panels in her estimation of the bulk volume resulted in her artificially lowering the available volume.

[81] DeepRoot submits that when what it calls Dr. Drake's "mathematical errors" were corrected, the available volume percentage in the RootSpace AirForm cells was actually shown to be closer to 86 or 87%, thereby infringing at least Claim 1 of the 348 patent and Claim 1 of the 599 patent.

[82] Whether a party's activities fall within the scope of a monopoly is a question of fact: *Whirlpool*, above at para. 76, citing *Western Electric Co. v. Baldwin International Radio of Canada*, [1934] SCR 570. As DeepRoot is challenging a finding of fact made by the Federal Court, such a finding is subject to review on the palpable and overriding error standard.

[83] It appears that the root of the disagreement between Dr. Drake and counsel for DeepRoot related to whether the whole of each upright should be included in the calculation of the bulk volume (as counsel would have it), or whether half that volume should be attributed to the adjoining cell (as Dr. Drake maintained).

[84] Insofar as the appropriate approach to the calculation of the available volume in the RootSpace AirForm cells was concerned, GreenBlue led evidence from Dr. Kays, who, it will be recalled, was an expert in landscape architecture, urban stormwater, horticulture, and soil science.

[85] Dr. Kays had provided evidence on behalf of GreenBlue at the original trial, with respect to the construction of the 348 and 599 Patents. He reviewed Dr. Drake's expert report and attended some of the testing that she conducted. Dr. Kays found Dr. Drake's measurements and calculations to be reasonable, and concurred with her findings that the RootSpace AirForm had a maximum void space or soil volume of 82-83%, and that the RootSpace AirForm was missing an essential element of both the 348 and 599 Patents, namely a void space of at least 84.5%.

[86] A review of the transcript of Dr. Drake's evidence at the contempt hearing shows that she was prepared to acknowledge that she had taken a different approach to counsel for DeepRoot in her calculations regarding the available volume in the cells in the RootSpace AirForm system. However, at the end of the day, she was not willing to accept counsel's contention that the appropriate calculations revealed an available volume in individual RootSpace AirForm cells in excess of the 84.5% threshold.

[87] Dr. Drake remained of the opinion that her calculations amounted to a reasonable estimate of the available volume, using the figures that a designer would have available to them from the product specification. She further maintained that her underestimate of the available volume was still "closer to the truth" than what she said was counsel's overestimate.

[88] The Federal Court was clearly aware of the fact that there was a disagreement between counsel and Dr. Drake with respect to the appropriate methodology to be used in calculating the available volume in the RootSpace AirForm cells. The Court was also aware that Dr. Drake had

acknowledged that her calculations may have resulted in an underestimate of the available volume in those cells: see Contempt Decision at para. 36.

[89] That said, the Court also understood that the onus was on DeepRoot to prove contemptuous infringement beyond a reasonable doubt. Amongst other things, this required DeepRoot to establish, beyond a reasonable doubt, that the available volume in the RootSpace AirForm cells exceeded 84.5%.

[90] The Federal Court accepted Dr. Drake's evidence that the presence of the AirForm Insert reduced the available volume in the RootSpace AirForm cells, although the precise percentage of that reduction had not been clearly established. This led the Court to conclude that DeepRoot had not established that the available volume in RootSpace AirForm cells exceeded the 84.5% threshold. As a result, the Federal Court found that DeepRoot had not established beyond a reasonable doubt that GreenBlue had directly infringed DeepRoot's patents by selling RootSpace AirForm systems in Canada.

[91] It was the role of the Federal Court to weigh the evidence before it and to decide the weight to be accorded to that evidence. It chose to accept Dr. Drake's evidence in this regard - a finding that was reasonably open to the Court on the record before it. This was especially so, given that DeepRoot had elected not to lead any direct evidence as to the volume of the void space available in RootSpace AirForm cells.

[92] DeepRoot has thus not established that the Federal Court's finding in this regard was tainted by an error of law or a palpable and overriding error.

B. *The Failure to Construe the Patents*

[93] DeepRoot also submits that the Federal Court erred in law in deferring to Dr. Drake's opinion with respect to the available volume in the RootSpace AirForm system when she had not given evidence as to the construction of the relevant claims of the 348 and 599 Patents and how the available volume of the structural cells was to be calculated. The Federal Court further erred, DeepRoot says, in failing to construe the disputed elements of the asserted claims in the 348 and 599 Patents in order to determine how the claims required that the available volume be calculated.

[94] Citing *Paula Lishman Ltd. v. Erom Roche Inc.*, [1994] F.C.J. No. 332, GreenBlue argues that a contempt proceeding is not the proper forum for the determination of issues of patent construction, and that such issues should be resolved at trial.

[95] DeepRoot asserted only Claim 1 of each of the 348 and 599 Patents at the contempt proceeding. These were some of the claims that had already been construed by the Federal Court at the original trial. DeepRoot did not identify any additional construction issues as being in dispute in the contempt proceeding in the Statement of Issues that it filed in advance of the contempt hearing: Appeal Book at p. 133. Indeed, DeepRoot's Statement of Issues asks whether the addition of the AirForm Insert changes the volume "[a]s construed in the Trial Judgment and

Reasons”. Nor did DeepRoot put any issues of construction to Dr. Drake in cross-examination. GreenBlue can thus not be faulted for failing to lead any evidence with respect to this question, nor can the Federal Court be faulted for failing to address the issue in its Contempt Decision.

[96] Consequently, DeepRoot has not established an error of law or a palpable and overriding error committed by the Federal Court in this regard.

C. *Did the Federal Court Fail to Appreciate and Consider the Full Scope of DeepRoot’s Monopoly Rights?*

[97] DeepRoot contends that the Federal Court also erred by failing to appreciate and consider the full scope of the monopoly rights granted by the 348 and 599 Patents, including the exclusive right to import, export and use the claimed structural cells as an intermediate structure.

[98] DeepRoot alleged at the contempt proceeding that a RootSpace cell could be made as an “infringing intermediate” if an old RootSpace cell was assembled before adding the AirForm Insert to complete the new RootSpace AirForm cell. DeepRoot further argues that photographs introduced into evidence at the contempt hearing show partial installation of the RootSpace AirForm system that constitutes direct evidence of the use of the original RootSpace product in Canada, without the AirForm Insert, and thus direct proof of contempt of the Federal Court’s injunction.

[99] DeepRoot further submits that GreenBlue is also infringing at least Claim 1 of the 599 patent through importation into Canada and exportation out of Canada of the RootSpace upright panels and lids.

i. The Photographic Evidence of Installations of the Original RootSpace System

[100] DeepRoot adduced photographs of three construction sites at which RootSpace AirForm systems were being installed. DeepRoot submits that these photographs show assembled RootSpace structural cells *without* the AirForm Insert, resulting in direct infringement of DeepRoot's patents, in contempt of the Federal Court's injunction.

[101] The Federal Court found that while some of the pictures depicted structural cells that did not contain AirForm inserts, the AirForm Inserts were clearly shown in the pictures, and that GreenBlue's installation instructions tell installers to use the AirForm Inserts, and to install them before filling the structures with soil.

[102] As a result, the Federal Court concluded that it could not find that the photographic evidence depicted the use of the original RootSpace cell system in contravention of the Court's injunction. The Court went on to observe that "[i]n any event, photographs depicting that the installation 'could' possibly infringe the Court's injunction if the AirForm [Insert] is not installed does not constitute evidence, beyond a reasonable doubt, of infringement".

[103] DeepRoot contends that while the installation photographs depict partial installations of a structural cell system, they also depict fully assembled structural cells, each of which constitutes an act of infringement of claim 1 of the 599 Patent, which claims a single structural cell. Citing paragraph 48 of *Pfizer Canada Inc. v. Apotex Inc.*, 2009 FC 671, DeepRoot observes that a party is liable for patent infringement if any intermediates made during the process to make its end product are found to infringe the patent in question: see also *Bayer Inc. v. Fresenius Kabi Canada Ltd.*, 2016 FC 581 at para. 164.

[104] DeepRoot argues that the creation of infringing RootSpace structural cells during the assembly of GreenBlue's RootSpace AirForm structural cell systems constitutes direct infringement by GreenBlue and/or inducement of direct infringement by GreenBlue's customers. Even if the structural cell was subsequently rendered non-infringing by installation of the AirForm Insert, DeepRoot says that this does not excuse GreenBlue's earlier infringement.

[105] Some of the photographs, were taken by Jeremy Bailey, and they depict a Minto construction project in Ottawa. Mr. Bailey was a consultant and former General Manager for GreenBlue. He was evidently on-site in August of 2021 to provide support to the contractor for the installation of the GreenBlue system. DeepRoot submits that his presence at the site renders this a direct act of infringement that is attributable to GreenBlue.

[106] According to DeepRoot, the photographs from the remaining installations depict infringement at least by GreenBlue's customers, which acts of infringement were induced by the

training and installation instructions provided by GreenBlue, and GreenBlue's knowledge that the installations would take place.

[107] It was an error of mixed fact and law, DeepRoot says, for the Federal Court to require anything more than the existence of a single assembled cell without the AirForm Insert for there to be infringement of its patents. All of the essential elements of claim 1 of the 599 Patent are satisfied as shown in the installation photographs.

[108] GreenBlue says that it does not sell assembled RootSpace AirForm systems cells in Canada. It sells component parts which, when assembled, become cells. GreenBlue does not install RootSpace AirForm systems. Rather, it is contractors who are responsible for installing the product.

[109] GreenBlue says that there was no evidence before the Federal Court to show that it had induced or procured installers to make the original RootSpace structural cells without the AirForm Insert. Nor was there evidence that GreenBlue promotes, advertises, or otherwise instructs the assembly of the new RootSpace AirForm system without an AirForm Insert, or to insert the AirForm Insert other than as the upright panels are joined together, in accordance with GreenBlue's instructions.

[110] GreenBlue provides installation instructions to contractors responsible for installing RootSpace AirForm systems in Canada, which indicate the recommended installation procedure for GreenBlue's modified product. In the section entitled "Joining two Upright Panels", the

instructions direct installers to join upright panels together. “As the upright panels are joined together”, the instructions then direct installers to “ensure AirForm panel perimeter is inserted and connected to each module to hold the matrix in 90-degree alignment”.

[111] This step in the assembly is illustrated further on in the instructions. There, under the heading “Joining two Upright and the AirForm Panel”, the instructions state “[a]s the Upright Panels are joined together, ensure AirForm perimeter connects with the Upright panels internal flange”.

[112] In contrast to the use of side panels (which are identified as optional), there is nothing in the installation instructions for the RootSpace AirForm system that suggests that the use of the AirForm Insert is optional. Nor do the instructions direct the assembly of a complete original RootSpace structural cell before adding the AirForm Insert.

[113] It thus cannot be said that any acts of infringement that may have been carried out by third parties were influenced by the acts of GreenBlue insofar as the installation instructions are concerned. The instructions thus do not induce infringement of DeepRoot’s patents through the creation of an infringing intermediate: *Weatherford Canada Ltd. v. Corlac Inc.*, 2011 FCA 228 at para. 162.

[114] There was also no evidence before the Federal Court suggesting that GreenBlue promotes, advertises, or otherwise instructs the assembly of the new RootSpace AirForm without an AirForm Insert.

[115] GreenBlue notes that DeepRoot's photographic evidence related to the installation of RootSpace AirForm systems at three construction sites: the Minto site in Ottawa, the Eglinton Crosstown site in Toronto, and the Louis Street site in Peterborough.

[116] There was no evidence suggesting that a representative of GreenBlue was present at either the Eglinton Crosstown site or the Louis Street site. Nor was there evidence suggesting that GreenBlue was aware of the manner in which the RootSpace AirForm system was being assembled at those locations, or that any such assembly may have been contrary to the instructions it provides to purchasers of RootSpace AirForm systems. Consequently, any acts of infringement that may be depicted in those photographs cannot be attributed to GreenBlue.

[117] Mr. Bailey testified that contractors assemble RootSpace AirForm systems, not GreenBlue. GreenBlue does not typically assist with installation, other than perhaps to hand over pieces or guide contractors if a company representative is present at a jobsite.

[118] Mr. Bailey further stated that the AirForm Insert is normally inserted after two or three upright panels are joined together. A cell module is typically assembled by building out from a corner made with two upright panels, adding the AirForm Insert, and then building out from there.

[119] Mr. Bailey was present at the Minto site in Ottawa in August of 2021. He says that he attended at the jobsite to educate the contractors on the assembly of the RootSpace AirForm

system, and to train them on the sequence of the installation. He testified that he took the photographs as the installation progressed.

[120] When asked about the photographs of the Minto site depicting upright panels lacking AirForm Inserts, Mr. Bailey stated that the cells were not yet complete, as they had only three panels in place. He confirmed that when he left the jobsite, the RootSpace AirForm system had been installed correctly, in accordance with GreenBlue's instructions.

[121] There was thus evidence to support the Federal Court's finding that the photographic evidence did not establish beyond a reasonable doubt that GreenBlue had infringed or induced infringement of DeepRoot's patents with the sale of the RootSpace AirForm system in Canada.

ii. The Import/Export Issue

[122] DeepRoot submits that GreenBlue is also infringing at least Claim 1 of the 599 patent by importing the upright panels and AirFlow lids for RootSpace structural cells into Canada, and then exporting such panels and lids to customers in the United States after the Federal Court issued its injunction.

[123] DeepRoot argues that the importation of all of the component parts of a patented invention for simple assembly constitutes patent infringement. As GreenBlue is importing all of the components of Claim 1 of the 599 patent, it is therefore infringing the 599 patent, thereby violating the terms of the Federal Court's injunction.

[124] DeepRoot further contends that it can be inferred that GreenBlue possesses the infringing RootSpace structural cell systems in Woodstock, Ontario prior to exporting them to the United States. The purchase or possession of infringing articles in Canada, for the purpose of export, constitutes infringement of at least Claim 1 of the 599 patent. Citing paragraph 264 of *Varco Canada Limited v. Pason Systems Corp.*, 2013 FC 750, DeepRoot says that the shipment of parts outside of Canada, along with the relatively simple later assembly, constitutes the shipment of the assembled product from Canada.

[125] It bears noting that while the import/export issue was argued vigorously before us, it was very much a secondary issue at the contempt hearing in the Federal Court, with counsel for DeepRoot's arguments with respect to these matters taking up slightly over one page of transcript in a 65-page argument. Perhaps reflecting the lack of importance attributed to this issue in the Federal Court, there was little evidence before the Court with respect to the importation and exportation issues. The limited information that was before the Court was primarily obtained through GreenBlue's response to a Request to Admit served by DeepRoot in advance of the contempt hearing.

[126] The lack of importance attributed to the import/export issue in the Federal Court and the limited evidence adduced with respect to the issue may also explain why the Federal Court did not deem it necessary to deal with this issue in its decision.

[127] GreenBlue admits that it manufactures AirForm Inserts in Ontario, but states that the upright panels and AirFlow Lids are manufactured in the United Kingdom. GreenBlue further

admits that it has “received” RootSpace upright panels and AirFlow lids sent to it in Canada after the issuance of the injunction by the Federal Court. It further admits that these items “were then transhipped to US customers of GreenBlue Urban Limited”. GreenBlue denies that the manner in which such products were sent to American customers constitutes “exporting” at law by GreenBlue. GreenBlue says that it does not sell or offer for sale in Canada, or import, export or stockpile the infringing RootSpace structural cells.

[128] The exclusive rights conferred under the *Patent Act*, R.S.C., 1985, c. P-4 are territorially confined to Canada: *Dole Refrigerating Products Ltd. v. Can. Ice Machine Co. & Amerio Contact Plate Freezers Inc.* (1957), 28 C.P.R. 32 at p. 36 (Ex. Ct.). In accordance with section 42 of the Act, the grant of a patent prohibits others in Canada from making, constructing, using the invention and selling it to others to be used.

[129] The jurisprudence does establish that the purchase or possession of infringing articles in Canada, with a view to sale or trade, or for the purpose of export, constitutes infringement: *Laboratoires Servier v. Apotex Inc.*, 2008 FC 825 at para. 143, aff’d 2009 FCA 222, leave to appeal dismissed, [2009] S.C.C.A. No. 403.

[130] While GreenBlue admits that it has “received” RootSpace upright panels and AirFlow lids in Canada, it notes that what it received were unassembled components of the infringing RootSpace structural cell product.

[131] It is true that the importation of the component parts of a patented invention for simple assembly constitutes patent infringement: *Dominion Chain Co. v. McKinnon Chain Co.* (1919) 58 S.C.R. 121 at para 53. However, in this case the Federal Court found as a fact that there was no evidence of the sale or assembly of the original RootSpace product in Canada after the Court issued its permanent injunction against GreenBlue.

[132] Insofar as the exportation of the component parts of the original RootSpace product is concerned, the Federal Court held in *J.M. Voith GmbH v. Beloit Corp.*, [1993] 2 F.C. 515 (*Voith*) that contracts for the sale of component parts to be assembled abroad did not constitute infringement of a Canadian patent. In coming to this conclusion, the Federal Court held that when the defendants shipped unassembled components out of the country, “they cannot be said to have made, constructed, used or sold to others, in Canada, the plaintiff’s invention”: *Voith*, above at para. 74.

[133] The Federal Court went on to observe that in order to infringe the patent in issue, the defendants “must have sold the components of the invention for use and assembly in Canada”. Alternatively, “they must themselves have assembled those parts in the manner described within the claims of the patent, within the boundaries of this country, and later exported the finished product ...”: *Voith*, above at para. 74.

[134] In coming to this conclusion, the Federal Court distinguished the Federal Court of Appeal’s decision in *Windsurfing International Inc. v. Bic Sports Inc.*, [1985] F.C.J. No. 1147. There, this Court found that the defendant had induced purchasers to infringe the plaintiff’s

patent through the sale of unassembled components of an invention that were sold for use and assembly in Canada: *Voith*, above at para. 75.

[135] The Federal Court of Appeal allowed the appeal from the Federal Court's decision in *Voith* in part: *Beloit Canada Ltd. v. Valmet-Dominion Inc. (C.A.)*, [1997] 3 F.C. 497 (*Beloit*).

There, this Court started its analysis by observing that the focus of its inquiry must be on whether the domestic actions of the respondents constituted infringement of the patent in issue. That is, whether the respondent made, constructed, used or sold the patented invention in Canada by manufacturing and selling component parts of the invention: *Beloit*, above at para. 34.

[136] This Court held that where the elements of an invention are sold in a substantially unified and combined form for the purpose of later assembly, infringement may not be avoided by a separation or division of parts which leaves to the purchaser a simple task of integration and assembly: *Beloit*, above at para. 41.

[137] The Court went on in *Beloit* to observe that the Federal Court had failed to consider that the respondent had in fact sold the patented invention in Canada when it signed contracts in Canada for the complete invention, and not simply for its components: *Beloit*, above at para. 43.

[138] After observing that the invention had in fact been assembled in Canada, this Court went on to state that "a manufacturer cannot avoid liability for infringement by disassembling the [invention] after the completed assembly has occurred". The manufacture of components that are

later sufficiently assembled in Canada to test the fitting of the parts constitutes the “making” of a patented invention for the purposes of section 44 of the Act: *Beloit*, above at para. 47.

[139] The fact that the invention was disassembled after testing for the purpose of shipping and delivery could not shield the respondent from liability for having made the invention in Canada.

In coming to this conclusion, the Court held that this did not constitute an extraterritorial application of the *Patent Act*, but rather made the respondent liable for its domestic actions:

Beloit, above at para. 48.

[140] This Court concluded by observing that to find otherwise would unduly reward the respondent for evading the responsibilities of the Canadian patent system. The monopoly granted by the Act should not be construed so narrowly as to allow a competitor to manufacture components and assemble the components into the patented invention in Canada, before shipment, on the basis that the infringer delivered the product in a disassembled form: *Beloit*, above at para. 49.

[141] As was noted earlier, in this case the Federal Court found as a fact that there was no evidence of the assembly of the original RootSpace structural cell product by GreenBlue in Canada after the Court issued the permanent injunction against the company. This distinguishes this case from this Court’s decision in *Beloit*. There was also no evidence that revenue from the sales to American customers accrued to GreenBlue’s benefit. This distinguishes this case from the Federal Court’s decision in *Varco*.

[142] Indeed, the evidence before the Federal Court with respect to sales of the original RootSpace structural cell product to customers in the United States was very limited. DeepRoot has not directed us to any evidence in the record indicating whether title to the upright panels and AirFlow lids was conveyed to GreenBlue from GreenBlue Urban Limited (“GreenBlue UK”), (which is not a party to this action), prior to the items’ receipt in Canada or their “transshipment” to the United States.

[143] The evidence also does not clearly establish whether the customers in the United States were customers of GreenBlue or GreenBlue UK. That said, in its response to DeepRoot’s Request to Admit, GreenBlue states that “[s]ince the Trial Judgment, Upright Panels and AirFlow lids have been sent from UK to Woodstock, Ontario, and were then transhipped to *US customers of [GreenBlue UK]*”. [my emphasis] GreenBlue goes on to deny that the manner in which such products were sent to American customers constituted “exporting” at law by GreenBlue.

[144] While the relationship between the Canadian and British GreenBlue companies is not clear, GreenBlue maintains that GreenBlue and GreenBlue U.K. are separate entities. Notably, GreenBlue also stated in its response to DeepRoot’s Request to Admit that GreenBlue U.K. is not the parent of the Canadian company.

[145] DeepRoot has also not directed us to any evidence in the record as to where the contracts for the sale of the original RootSpace structural cell products were made after the Federal Court issued its injunction. Thus, we do not know whether it was in Canada, the United Kingdom or the United States, or whether GreenBlue was a party to those contracts. While there were various

documents referenced in the Request to Admit that may have assisted in shedding some light on these issues, they do not appear to have been included in the record before us.

[146] This lack of evidence poses a significant obstacle to finding infringement based on the shipment of the Upright Panels and AirFlow Lid into Canada and their subsequent delivery into the United States. It is difficult to conclude that the goods were “stockpiled”, “held”, or underwent any other treatment in Canada that might constitute “making”, “selling”, or “using” for the purposes of establishing infringement, let alone make a finding in this regard beyond a reasonable doubt. The Federal Court thus did not err in declining to find infringement of DeepRoot’s patents through sales of the original RootSpace structural cell products to customers in the United States.

VII. Conclusion

[147] Having found that DeepRoot has not demonstrated that the Federal Court erred in finding that it had not established beyond a reasonable doubt that GreenBlue was in contempt of the injunction issued by the Court, it follows that I would dismiss this appeal, with costs.

“Anne L. Mactavish”

J.A.

“I agree
Mary J.L. Gleason J.A.”

“I agree
Judith Woods J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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AMERICA INC.

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WOODS J.A.

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