

Federal Court



Cour fédérale

Date: 20100226

Docket: T-649-08

Citation: 2010 FC 227

Ottawa, Ontario, February 26, 2010

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

SCOTT BLAIR

Applicant

and

**ATTORNEY GENERAL OF CANADA and
THE COMMISSIONER OF PATENTS**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] Scott Blair appeals from a decision of the Commissioner of Patents rejecting his application for a patent for a “SUBWAY TV MEDIA SYSTEM”. The Commissioner refused the application on the ground of obviousness.

[2] Mr. Blair alleges that the Commissioner was biased in her treatment of his application, or that, at a minimum, that there exists a reasonable apprehension that she was biased. Mr. Blair further asserts that the Commissioner erred in disregarding evidence that this Court had specifically ordered

her to consider. Finally, Mr. Blair says that the Commissioner erred in her identification of the test for obviousness and in her application of the test to the facts of his case.

[3] In support of his appeal, Mr. Blair relies on the record that was before the Commissioner. He also seeks to supplement that record with fresh expert evidence.

[4] For the reasons that follow, I have concluded that neither actual nor apprehended bias on the part of the Commissioner has been demonstrated. I am also not persuaded that the Commissioner erred in her identification of the test for obviousness. However, I am satisfied that the Commissioner's decision was unreasonable. Consequently, the appeal will be allowed.

History of the Patent Application

[5] This matter has had a long and somewhat convoluted history, and it is necessary to have an appreciation of this history in order to put some of Mr. Blair's arguments into context.

a) The First Decision of the Commissioner

[6] Mr. Blair's patent application was filed in Canada on May 6, 1998 as patent application number 2,286,794. The application claimed priority from a patent application filed in the United States on May 7, 1997. It is common ground between the parties that May 7, 1997 is the date to be used in assessing whether the invention claimed in Mr. Blair's patent application was obvious.

[7] Mr. Blair's American application was ultimately successful, and a patent was issued to him in that country on March 2, 2004. The claims in the US patent are very similar to those in issue in this case.

[8] The invention disclosed and claimed in Mr. Blair's Canadian application relates to a video display system for subway systems, and involves video display monitors mounted in a specified location on subway cars.

[9] While the Canadian patent application initially contained additional claims, the application was subsequently amended, leaving the following as the claims in issue:

1. A subway car for mass transportation including longitudinal opposed sidewalls, a ceiling adjoining the sidewalls, a video display system comprising a plurality of video display monitors each having a video screen, and a video signal source unit operatively connected to said monitors, said monitors being spaced along the length of the car on opposed sides thereof, each of said monitor being mounted at the junction of the sidewall and ceiling, with the screen of the monitor substantially flush with the adjacent wall surface structure of the car, and directed obliquely downwardly toward the car seats, so that each video screen is readily visible to passengers in the subway car.
2. The subway car of claim 1 wherein the video signal source unit comprises a video tape player, a video disc player or computer based digital video recorder.
3. The subway car of claim 1 or claim 2 wherein the video monitors include LCD screens.
4. The subway car of claim 1, claim 2 or claim 3 including a self contained wiring cabling system connected the video monitors to the video signal source unit.

5. The subway car of claim 1, claim 2, claim 3 or claim 4 including a rigid transparent unit overlying the screen of each respective monitor, and shaped to coincide with the shape of the internal wall of the subway car at the location of mounting.

6. The subway car of claim 5 wherein the rigid transparent unit is concavely curved so as to blend as a continuum with the internal walls of the subway car at the location of mounting.

[10] During the initial prosecution of the application at the Patent Office, several office actions were issued by the patent examiner which rejected all of the claims on the basis of obviousness, pursuant to section 28.3 of the *Patent Act*, R.S.C. 1985, c. P-4. The text of the relevant statutory provisions is attached as an appendix to this decision.

[11] Through a series of written responses, Mr. Blair attempted to overcome the examiner's objections to his application. In addition to amending the claims, Mr. Blair also provided the examiner with written submissions, as well as letters from Dermot P. Gillespie, Van Wilkins, and Jim Berry. Each of these individuals claimed to have expertise in various aspects of the transportation industry.

[12] On October 21, 2002, the patent examiner issued a final action refusing all of the claims of the application. In particular, the examiner concluded that the claims would have been obvious on the claim date to a person skilled in the art having regard to United States Patent No. 5,606,154 issued to Doigan *et al.*, French Patent No. 2,652,701 issued to Comerzan-Sorin and Canadian Patent No. 1,316,253 issued to Tagawa *et al.*, and in light of the common general knowledge in the art.

[13] Mr. Blair subsequently requested and was given an oral hearing before the Patent Appeal Board, which took place on November 24, 2004. The Board found that the claims of Mr. Blair's patent application would have been obvious as at the claim date, and recommended that the decision in the patent examiner's final action to reject the application be affirmed.

[14] This recommendation was accepted by the Commissioner of Patents in a decision dated January 13, 2006.

b) Justice Teitelbaum's Decision

[15] Mr. Blair appealed the Commissioner's decision refusing to grant him a patent to this Court: *Blair v. Attorney General of Canada et al.*, Court File No. T-1176-06.

[16] In support of his appeal, Mr. Blair filed new evidence with the Court in the form of affidavits from two experts. One affidavit was from Mr. Wilkins, who had previously provided a letter in connection with the proceedings before the patent examiner. A second affidavit was provided by Yvonne Gibson, an individual with experience in subway advertising. Both affiants stated that they were not aware of a single instance of the successful installation of a video display system on a mass transit subway system, and both offered the opinion that the design of Mr. Blair's subway TV media system would not have been obvious to them.

[17] The hearing of Mr. Blair's appeal took place before Justice Teitelbaum on June 26, 2007. Counsel appearing before me on this appeal also appeared before Justice Teitelbaum. While there

was some disagreement between them as to precisely what went on in the course of that hearing, I do not understand there to be any disagreement about the fact that the respondent took the position before Justice Teitelbaum that if the Court was satisfied that the fresh evidence was probative, the appeal should be allowed. I further understand that the matter proceeded essentially on consent.

[18] In an Order issued shortly thereafter, Justice Teitelbaum confirmed that the appeal was allowed with respect to the issue of obviousness, and the Commissioner's decision was set aside. Justice Teitelbaum then remitted the matter to the Commissioner "for review on the issue of obviousness in light of the fresh evidence filed on this appeal, any further written legal submissions that the appellant may wish to make, and the record previously before the Commissioner of Patents".

c) The Second Decision of the Commissioner

[19] In accordance with the Order of Justice Teitelbaum, Mr. Blair provided the Patent Office with submissions, including the fresh evidence that had been considered by Justice Teitelbaum.

[20] A new panel of the Patent Appeal Board concluded that claims 1 to 6 of Mr. Blair's patent application would have been obvious as of the claim date. As a consequence, the Board again recommended that the decision to reject the application pursuant to section 28.3 of the *Patent Act* be affirmed.

[21] In a decision dated October 26, 2007, the Commissioner accepted the recommendation of the Patent Appeal Board and once again refused to grant a patent to Mr. Blair on the ground of obviousness. This is an appeal from that decision.

The Bias Issue

[22] Mr. Blair contends that the Commissioner of Patents disregarded Justice Teitelbaum's July 10, 2007 Order by failing to consider the new evidence that the Court had specifically directed the Commissioner to consider, namely the Gibson and Wilkins affidavits. Mr. Blair asserts that in so doing, the Commissioner took on the role of an advocate, seeking to justify both the earlier recommendation of the Patent Appeal Board and the first decision of the Commissioner.

[23] Mr. Blair further submits that certain comments made in the second decision support his contention that there was either actual or apprehended bias on the part of the Commissioner. In particular, Mr. Blair points to the comment at paragraph 20 of the reasons that the Gibson affidavit "appears not to have been made before a person authorized by law to administer oaths. The Affidavit appears to have been made before Mr. Blair (*i.e.*, the inventor) and there is no indication that he is authorized to administer oaths".

[24] Mr. Blair submits that there are several difficulties with this finding. Firstly, Mr. Blair is an Ontario lawyer, and is thus a commissioner for taking affidavits in Ontario, in accordance with subsection 1(1) of the *Commissioner for Taking Affidavits Act*, R.S.O. 1990, c. C-17. Indeed, the jurat of the affidavit identifies him as a Commissioner. Furthermore, Mr. Blair points out that there

is no need for evidence submitted in support of an appeal to the Commissioner to be sworn.

According to Mr. Blair, these comments suggest that the Commissioner seemed to be looking for ways to not accept his evidence.

[25] In a similar vein, Mr. Blair points to the statement at paragraph 60 of the reasons where it is observed that both the Gibson and Wilkins affidavits relate to facts and opinions that post-date the relevant date for assessing obviousness, namely May 7, 1997. Mr. Blair submits that this is not a valid reason for rejecting evidence relating to the question of obviousness. If Mr. Blair's invention was not obvious in 1998 and 1999, as attested to by Ms. Gibson and Mr. Wilkins, it follows logically that it could not have been obvious on May 7, 1997.

[26] According to Mr. Blair, these matters demonstrate actual bias on the part of the Commissioner in dealing with his patent application. In the alternative, Mr. Blair submits that, at a minimum, there exists a reasonable apprehension of bias on the part of the Commissioner.

[27] An allegation of actual or apprehended bias raises a question of procedural fairness – that is, whether Mr. Blair received a fair hearing from an unbiased decision-maker. Where an issue of procedural fairness arises, the task for the Court is to determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances: see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43.

[28] The test for determining whether actual bias or a reasonable apprehension of bias exists in relation to a particular decision-maker is well known: the question for the Court is what would an informed person, viewing the matter realistically and practically - and having thought the matter through – conclude? That is, would he or she think it more likely than not that the decision-maker, either consciously or unconsciously, would not decide fairly?: see *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at 394-5.

[29] A claim of bias, especially an allegation of actual (as opposed to apprehended) bias, is a serious allegation. Indeed, it challenges the very integrity of the adjudicator whose decision is in issue. As a consequence, the threshold for establishing bias is high: *R. v. R.D.S.*, [1997] 3 S.C.R. 484, 118 C.C.C. (3d) 353 at para. 113.

[30] In considering the issue of bias, I would start by observing that all of the members of the Patent Appeal Board reconsidering Mr. Blair's application after the matter was remitted by Justice Teitelbaum were new to the case, and none had participated in the original recommendation to the Commissioner. Moreover, the Commissioner making the second decision was not the same person as the Commissioner who made the original decision. As a consequence, none of the participants in the second hearing had any personal interest in seeing the original findings affirmed.

[31] I will return to the Commissioner's treatment of the evidence contained in the Gibson and Wilkins affidavits in assessing her obviousness analysis. At this juncture, however, I would simply note that the Commissioner *did* consider the evidence contained in the Gibson and Wilkins

affidavits, as is evident from a review of paragraphs 61 to 66 of her reasons. She also explained in some detail why she chose to give it little weight. Whether she erred in this regard is an issue that will be addressed further on in these reasons. I would simply observe at this juncture that the Commissioner's treatment of this affidavit material is not, in my view, evidence of actual bias on her part, nor would it give rise to a reasonable apprehension of bias.

[32] As the respondent acknowledged, the observation that the Gibson affidavit appeared not to have been properly commissioned is puzzling, in light of the statement in the jurat and the fact that there is no requirement that evidence provided to the Commissioner be sworn. That said, the fact is that after making this comment, the Commissioner did go on to consider the evidence in question. While she may have erred in this regard, this would not, in my view, lead an informed person, viewing the matter realistically and practically - and having thought the matter through - to conclude that there was either actual or apprehended bias on the part of the Commissioner.

The Filing of Fresh Evidence on This Appeal

[33] Mr. Blair has sought to adduce additional fresh evidence on this appeal, in the form of the affidavit of Richard Morris, who describes himself as a "railway and transit signal specialist". Mr. Morris has worked in the field of railway transit and heavy rail systems since 1974, and is familiar with subway video systems, including those installed in the Beijing, Sao Paulo, Shanghai and Seoul subway systems.

[34] The respondent argues that Mr. Blair does not have the automatic right to adduce additional evidence on an appeal such as this, and that leave of the Court should have been sought in this regard.

[35] Mr. Blair relies on the decision of this Court in *Rothbury International Inc. v. Canada (Minister of Industry)*, 2004 FC 578, 257 F.T.R. 280, as authority for the proposition that an appellant has the automatic right to file additional evidence in support of an appeal under section 41 of the *Patent Act*, and that leave of the Court is not required.

[36] In particular, Mr. Blair points to paragraph 17 of *Rothbury International*, where the Court stated that:

The defendants maintained that an appeal under section 22 of the [*Industrial Design Act*] must be dealt with in a manner similar to an appeal under section 56 of the *Trade-marks Act*, R.S.C. 1985, c. T-13, and an appeal covered by section 41 of the *Patent Act*, R.S.C. 1985, c. P-4. I feel that they are right, since in the same way in the latter actions the record prepared by the Commissioner was the basis for the evidence in the Federal Court, *to which additional evidence could be added*. [emphasis added]

[37] I would start by observing that *Rothbury International* involved an appeal under the *Industrial Design Act*. Thus, to the extent that comments were made by the Court in relation to appeals under section 41 of the *Patent Act*, those comments were made in *obiter*.

[38] More fundamentally, there are important differences in the wording of section 56 of the *Trade-marks Act* and provisions of section 41 of the *Patent Act*, insofar as the issue of adducing fresh evidence on an appeal is concerned.

[39] Section 56 of the *Trade-marks Act* provides that:

56. (1) An appeal lies to the Federal Court from any decision of the Registrar under this Act within two months from the date on which notice of the decision was dispatched by the Registrar or within such further time as the Court may allow, either before or after the expiration of the two months.

[...]

(5) On an appeal under subsection (1), *evidence in addition to that adduced before the Registrar may be adduced* and the Federal Court may exercise any discretion vested in the Registrar. [my emphasis]

56. (1) Appel de toute décision rendue par le registraire, sous le régime de la présente loi, peut être interjeté à la Cour fédérale dans les deux mois qui suivent la date où le registraire a expédié l'avis de la décision ou dans tel délai supplémentaire accordé par le tribunal, soit avant, soit après l'expiration des deux mois.

[...]

(5) Lors de l'appel, il peut être apporté une *preuve en plus de celle qui a été fournie devant le registraire*, et le tribunal peut exercer toute discrétion dont le registraire est investi. [Je souligne]

[40] That is, section 56(5) of the *Trade-marks Act* specifically provides that new evidence may be adduced on an appeal to this Court from a decision of the Registrar of Trademarks.

[41] In contrast, subsection 41 of the *Patent Act* provides that:

41. Every person who has failed to obtain a patent by reason of a 41. Dans les six mois suivant la mise à la poste de l'avis,

<p>refusal of the Commissioner to grant it may, at any time within six months after notice as provided for in section 40 has been mailed, appeal from the decision of the Commissioner to the Federal Court and that Court has exclusive jurisdiction to hear and determine the appeal.</p>	<p>celui qui n'a pas réussi à obtenir un brevet en raison du refus ou de l'opposition du commissaire peut interjeter appel de la décision du commissaire à la Cour fédérale qui, à l'exclusion de toute autre juridiction, peut s'en saisir et en décider.</p>
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[42] Given that section 41 of the *Patent Act* is silent with respect to the ability of a party to adduce new evidence on an appeal, I am of the view that an appellant such as Mr. Blair does not have an automatic right to lead fresh evidence on an appeal such as this. Rather, the ordinary rules governing the introduction of fresh evidence on appeals should apply to appeals from decisions of the Commissioner of Patents.

[43] That is, an appeal under section 41 of the *Patent Act* should ordinarily be conducted on the basis of the record that was before the Commissioner. The Court does, however, have the discretion to admit fresh evidence on an appeal in “special circumstances”, in accordance with the provisions of Rule 351 of the *Federal Courts Rules*, SOR/98-106, and the jurisprudence that has developed in this regard.

[44] Relying upon the decision in *Rothbury International*, Mr. Blair did not understand that leave to file fresh evidence on this appeal would be necessary. Moreover, not only did the respondent not object to the filing of Mr. Morris' affidavit by Mr. Blair, the respondent actually consented to the

inclusion of the affidavit in the appeal book. At the hearing of the appeal, the respondent took no position as to whether Mr. Morris' affidavit should be admitted into evidence.

[45] Moreover, the evidence is probative, insofar as it demonstrates that no one else has thought to install video screens in subway cars in the location identified by Mr. Blair. The evidence also directly contradicts the finding in the Commissioner's first decision that the junction of the ceiling and sidewall of a subway car is the "logical location, indeed perhaps the only available location" in which to install a video screen. This finding is specifically referred to in the Commissioner's second decision, although it is not entirely clear the extent to which the Commissioner adopted the finding in her own analysis.

[46] I would also note that at least part of Mr. Morris' affidavit deals with matters taking place on the other side of the world just a few weeks before the Commissioner made her 2007 decision: that is, the installation of the video systems in the Beijing and Sao Paulo subway systems. Indeed, the respondent has not suggested that Mr. Blair could have put these matters into evidence before the Commissioner with the exercise of reasonable diligence.

[47] In my view, the events described in the previous paragraph amount to "special circumstances" justifying the admission of Mr. Morris' affidavit as fresh evidence on this appeal.

The Test for Obviousness Used by the Commissioner

[48] Mr. Blair contends that the Commissioner erred in law by identifying an incorrect test for obviousness. He submits that the Commissioner's choice of legal test is reviewable on the standard of correctness and the respondent does not take issue with that position. I agree with the parties that the identification of the legal test for obviousness is reviewable on the standard of correctness: see *Halford v. Seed Hawk Inc.*, 2006 FCA 275, 353 N.R. 60 at para. 39; *CertainTeed Corp. v. Canada (Attorney General)*, 2006 FC 436, 289 F.T.R. 312, at paras. 23-27.

[49] The decision under appeal was made in 2007: that is, prior to the decision of the Supreme Court of Canada in *Apotex Inc. v. Sanofi-Synthelabo Canada Inc.*, 2008 SCC 61, [2008] 3 S.C.R. 265. The test identified by the Commissioner is that set out in section 28.3 of the *Patent Act*, as elaborated upon in *Beloit Canada Ltd. v. Valmet Oy* (1986), 64 N.R. 287, 8 C.P.R. (3d) 289 at 294 (F.C.A.). *Beloit* was the leading decision on obviousness prior to *Sanofi*. Reference was also made by the Commissioner to the decision of the Federal Court of Appeal in *Janssen-Ortho Inc. v. Novopharm Ltd.*, 2007 FCA 217, 366 N.R. 290.

[50] I am therefore satisfied that the Commissioner correctly identified the test for obviousness as it stood in 2007. Moreover, Mr. Blair has acknowledged that the refinements to that test introduced by the Supreme Court of Canada in *Sanofi* would not have had any impact on the analysis in his case. As a consequence, I am satisfied that the Commissioner did not err in this regard.

[51] Indeed, it appears that what Mr. Blair really takes issue with is the way in which the Commissioner applied the legal test for obviousness to the facts of this case. This involves a question of mixed fact and law. In light of both the factual component of the inquiry and the expertise of the Commissioner, this aspect of the Commissioner's decision is entitled to deference. While recognizing that this case involves an appeal, as opposed to an application for judicial review, I nevertheless find the standard of review to be applied to the Commissioner's finding of obviousness to be that of reasonableness: see *Scott Paper Ltd v. Canada (Attorney General)*, 2008 FCA 129, 65 C.P.R. (4th) 303 at para. 11.

Was the Commissioner's Obviousness Finding Unreasonable?

[52] There are several difficulties with the Commissioner's obviousness analysis in this case which, in my view, render the decision unreasonable. The first of these is the Commissioner's treatment of the evidence contained in the Gibson and Wilkins affidavits.

[53] As was noted earlier, the Commissioner addressed the evidence contained in the Gibson and Wilkins affidavits at paragraphs 61 to 66 of her reasons. After examining this evidence, the Commissioner went on to conclude that the subject matter of the claimed invention was not overly technical. As a result, she ultimately found the expert evidence of Ms. Gibson and Mr. Wilkins to be unnecessary to her analysis.

[54] Having admitted the Gibson and Wilkins affidavits as fresh evidence on Mr. Blair's first appeal, Justice Teitelbaum implicitly found this evidence to be probative. In the circumstances,

although it was open to the Commissioner to assess the persuasive effect of the evidence, it was not open to her to find the expert evidence adduced by Mr. Blair to be unnecessary.

[55] Moreover, while there are references in the reasons adopted by the Commissioner to “the person of ordinary skill in the art”, nowhere in the decision is there any clear identification of who that “person skilled in the art” is for the purposes of the obviousness analysis. This is one of the key elements in assessing whether a claimed invention was obvious. Indeed as the Canadian Intellectual Property Office’s own “Practice Note on Obviousness” (November 2, 2009) observes, the identification of the person skilled in the art helps to establish the context in which the obviousness determination is to be made.

[56] Mr. Blair submits that the person skilled in the art in this case is “a person familiar with the installation of video systems”. The respondent does not take issue with this characterization, and I accept that this description is appropriate.

[57] The Commissioner also erred in her application of the obviousness test by separately considering each element of the first claim, on its own, in order to determine whether that element was obvious, rather than considering the claim as a whole.

[58] Claim 1 is the primary claim, with the remaining claims being dependant upon it. Claim 1 states:

1. A subway car for mass transportation including longitudinal opposed sidewalls, a ceiling adjoining the sidewalls, a video display

system comprising a plurality of video display monitors each having a video screen, and a video signal source unit operatively connected to said monitors, said monitors being spaced along the length of the car on opposed sides thereof, each of said monitor being mounted at the junction of the sidewall and ceiling, with the screen of the monitor substantially flush with the adjacent wall surface structure of the car, and directed obliquely downwardly toward the car seats, so that each video screen is readily visible to passengers in the subway car.

[59] Mr. Blair submits that there are seven essential elements to the claim, which are:

- (1) a subway car for mass transportation including longitudinal opposed sidewalls, a ceiling adjoining the sidewalls (“subway car”);
- (2) a video display system comprising a plurality of video display monitors each having a video screen (“multiple monitors”);
- (3) a video signal source unit operatively connected to said monitors (“video source”);
- (4) said monitors being spaced along the length of the car on opposed sides thereof (“spaced monitors”);
- (5) each of said monitor being mounted at the junction of the sidewall and ceiling (“wall-ceiling junction placement”);
- (6) with the screen of the monitor substantially flush with the adjacent wall surface structure of the car (“flush mounted”); and,
- (7) and directed obliquely downwardly toward the car seats, so that each video screen is readily visible to passengers in the subway car. (“angled for viewership”)

[60] The respondent does not take issue with this characterization of the claim, and I accept this as a correct construction of claim 1.

[61] It is evident from the above that the invention claimed by Mr. Blair involves a combination of constituent elements, some of which were already known. As the Exchequer Court observed in *Omark Industries (1960) Ltd. v. Gouger Saw Chain Co.*, [1965] 1 Ex.C.R. 457, 45 C.P.R. 169, where a claimed invention lies in the combination of elements, “it is not permissible to characterize the invention as a series of parts because the invention lies in the fact that they were put together”: see para. 165.

[62] The effect of these errors is to render the Commissioner’s decision unreasonable.

[63] In addition to the above errors, there is now also probative fresh evidence in the form of Mr. Morris’ affidavit that was not before the Commissioner, which may have a bearing on the question of obviousness and which should be considered.

[64] As a consequence, the appeal is allowed, and the decision of the Commissioner of Patents dated October 26, 2007 is set aside.

[65] Mr. Blair submits that if the appeal is allowed, the issue of obviousness should be decided by the Court, and that the matter should not be remitted to the Commissioner for re-determination in light of the bias demonstrated by the Commissioner in her earlier decision. As explained earlier in these reasons, I am satisfied that neither actual bias nor a reasonable apprehension of bias has been demonstrated in this case.

[66] In my view, the appropriate remedy is to return this matter to the Commissioner of Patents for the re-determination of the question of obviousness in accordance with these reasons and in light of the fresh evidence filed on this appeal, any further written legal submissions that the appellant may wish to make, and the record previously before the Commissioner of Patents.

[67] In accordance with section 25 of the *Patent Act*, there will be no order as to costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this appeal is allowed, without costs.

The decision of the Commissioner of Patents dated October 26, 2007 is set aside, and the matter is returned to the Commissioner of Patents for the re-determination of the question of obviousness in accordance with these reasons, and in light of the fresh evidence on this appeal, together with any further written legal submissions that Mr. Blair may wish to make, and the record previously before the Commissioner of Patents.

“Anne Mactavish”

Judge

APPENDIX

PATENT ACT, R.S.C. 1985, c. P-4

Commissioner may grant patents

27. (1) The Commissioner shall grant a patent for an invention to the inventor or the inventor's legal representative if an application for the patent in Canada is filed in accordance with this Act and all other requirements for the issuance of a patent under this Act are met.

Filing date

28. (1) The filing date of an application for a patent in Canada is the date on which the Commissioner receives the documents, information and fees prescribed for the purposes of this section or, if they are received on different dates, the last date.

Deemed date of receipt of fees

(2) The Commissioner may, for the purposes of this section, deem prescribed fees to have been received on a date earlier than the date of their receipt if the Commissioner considers it just to do so.

Claim date

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

(a) the pending application is filed by

(i) a person who has, or whose agent, legal representative or predecessor in title has, previously regularly filed in or for Canada an application for a patent disclosing the subject-matter defined by the claim, or

Délivrance de brevet

27. (1) Le commissaire accorde un brevet d'invention à l'inventeur ou à son représentant légal si la demande de brevet est déposée conformément à la présente loi et si les autres conditions de celle-ci sont remplies.

Date de dépôt

28. (1) La date de dépôt d'une demande de brevet est la date à laquelle le commissaire reçoit les documents, renseignements et taxes réglementaires prévus pour l'application du présent article. S'ils sont reçus à des dates différentes, il s'agit de la dernière d'entre elles.

Taxes réglementaires

(2) Pour l'application du paragraphe (1), le commissaire peut, s'il estime que cela est équitable, fixer une date de réception des taxes antérieure à celle à laquelle elles ont été reçues.

L.R. (1985), ch. P-4, art. 28; L.R. (1985), ch. 33 (3^e suppl.), art. 10; 1993, ch. 15, art. 33.

Date de la revendication

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

a) la demande est déposée, selon le cas :

(i) par une personne qui a antérieurement déposé de façon régulière, au Canada ou pour le Canada, ou dont l'agent, le représentant légal ou le prédécesseur en droit l'a fait, une demande de brevet divulguant l'objet que définit la revendication,

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

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

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

Claims based on previously regularly filed applications

(2) In the circumstances described in paragraphs (1)(a) to (c), the claim date is the filing date of the previously regularly filed application.

Invention must not be obvious

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

(a) information disclosed more than one year before the filing date by the applicant, or by a person who obtained knowledge, directly or indirectly, from the applicant in such a manner that the information became available to the public in Canada or elsewhere; and

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

b) elle est déposée dans les douze mois de la date de dépôt de la demande déposée antérieurement;

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

Date de dépôt de la demande antérieure

(2) Dans le cas où les alinéas (1)a) à c) s'appliquent, la date de la revendication est la date de dépôt de la demande antérieurement déposée de façon régulière.

Objet non évident

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

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

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

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

Refusal by Commissioner

40. Whenever the Commissioner is satisfied that an applicant is not by law entitled to be granted a patent, he shall refuse the application and, by registered letter addressed to the applicant or his registered agent, notify the applicant of the refusal and of the ground or reason therefor.

Le commissaire peut refuser le brevet

40. Chaque fois que le commissaire s'est assuré que le demandeur n'est pas fondé en droit à obtenir la concession d'un brevet, il rejette la demande et, par courrier recommandé adressé au demandeur ou à son agent enregistré, notifie à ce demandeur le rejet de la demande, ainsi que les motifs ou raisons du rejet.

Appeal to Federal Court

41. Every person who has failed to obtain a patent by reason of a refusal of the Commissioner to grant it may, at any time within six months after notice as provided for in section 40 has been mailed, appeal from the decision of the Commissioner to the Federal Court and that Court has exclusive jurisdiction to hear and determine the appeal.

Appel à la Cour fédérale

41. Dans les six mois suivant la mise à la poste de l'avis, celui qui n'a pas réussi à obtenir un brevet en raison du refus ou de l'opposition du commissaire peut interjeter appel de la décision du commissaire à la Cour fédérale qui, à l'exclusion de toute autre juridiction, peut s'en saisir et en décider.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-649-08

STYLE OF CAUSE: SCOTT BLAIR v. ATTORNEY GENERAL OF
CANADA ET AL

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 18, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** Mactavish J.

DATED: February 26, 2010

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