

Federal Court



Cour fédérale

**Date: 20230104**

**Docket: T-1506-20**

**Citation: 2023 FC 20**

**Ottawa, Ontario, January 4, 2023**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

**MERIDIAN MANUFACTURING INC.**

**Plaintiff  
(Defendant by Counterclaim)**

**and**

**CONCEPT INDUSTRIES LTD.**

**Defendant  
(Plaintiff by Counterclaim)**

**ORDER AND REASONS**

[1] Both parties move for summary judgment. At issue are conical devices upon which grain hoppers sit. The devices are constructed so that air is forced into the grain in the hopper to aerate it.

[2] The Defendant, Concept Industries Ltd. [Concept], moves for judgment dismissing the action commenced by Meridian Manufacturing Inc. [Meridian] on the basis that its Airpro

System does not infringe any of the claims of Canadian Patent 3,036,430 [the 430 Patent].

Alternatively, Concept seeks an Order declaring the 430 Patent invalid and void on the basis that it incorporates the prior art of the JTL Force Air 360 Hopper [the JTL Hopper] that predates the 430 Patent. In the further alternative, Concept seeks an Order declaring that its Airpro System does not infringe the 430 Patent.

[3] Meridian moves for an Order dismissing Concept's motion, declaring that claims 1, 2, 4, 5, 9, 11-15 of the 430 Patent are infringed by Concept's Airpro System, and an Order declaring that claims 1-15 of the 430 Patent are not anticipated by the JTL Hopper.

## **1. The 430 Patent**

[4] The 430 Patent entitled "HOPPER BOTTOM FOR STORAGE BIN WITH INTEGRAL AERATION" generally relates to a hopper bottom for supporting a cylindrical storage bin. The 430 Patent has 15 claims. Claim 1 is the only independent claim. The remaining claims are dependant on it. The 430 Patent was filed on March 12, 2019, and claims priority to US Patent No. 62/663,666 filed on April 27, 2018. The 430 Patent was granted on August 18, 2020.

[5] Claim 1 of the 430 Patent reads as follows:

1. A hopper bottom for supporting a cylindrical side wall of a grain bin above a foundation, the hopper bottom comprising:

a hopper wall having an inverted cone shape so as to taper downwardly and inwardly from a peripheral edge at a top end of the hopper wall to a central opening at a bottom end of the hopper wall, the peripheral edge being arranged to support the cylindrical side wall of the grain bin thereabove;

a plurality of upright support members supporting the hopper wall above the foundation, each upright support member spanning between a bottom end arranged to be supported on the foundation and a top end supporting the hopper wall thereon;

a manifold duct supported above the hopper wall to define a manifold passage therein extending circumferentially about the hopper wall adjacent to the peripheral edge of the hopper wall;

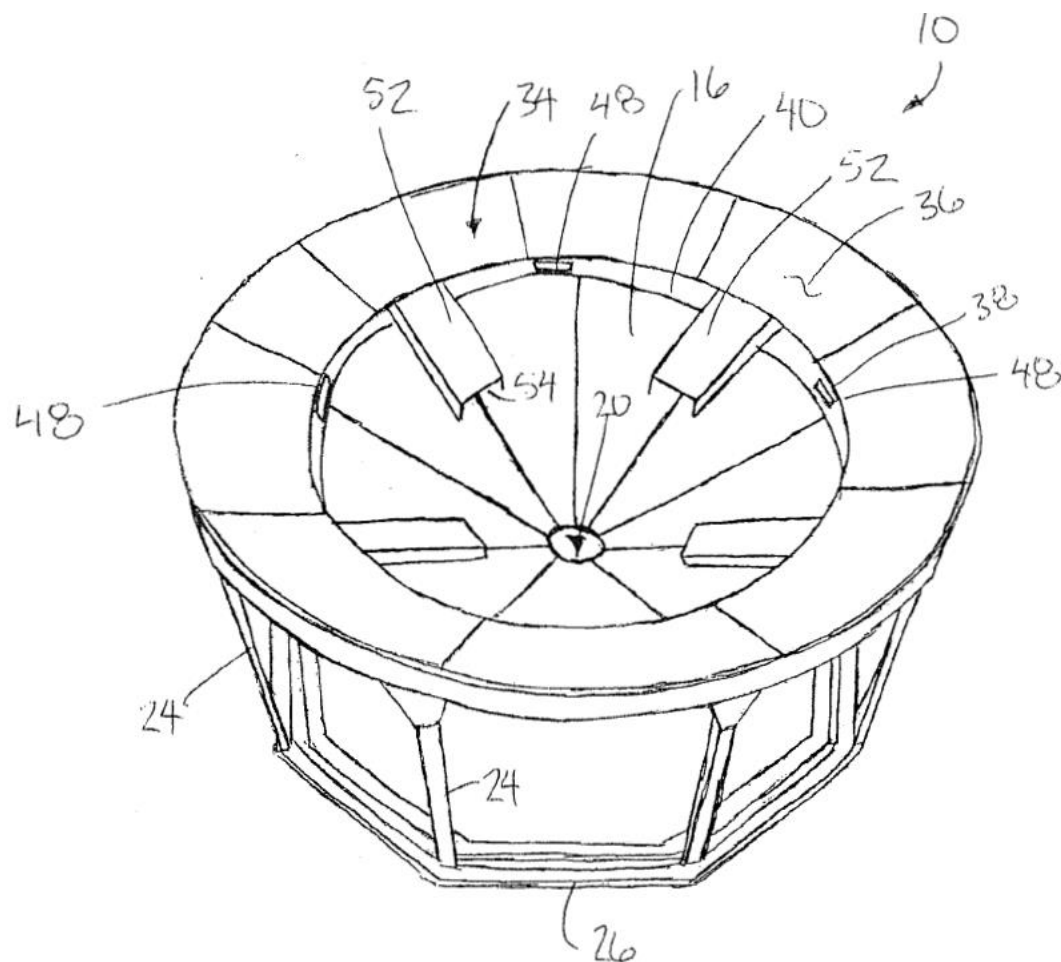
a plurality of outlet openings formed in the manifold duct in communication from the manifold passage to an interior of the hopper wall for open communication with the grain bin thereabove, the outlet openings being located at circumferentially spaced apart locations relative to one another;

an inlet opening extending through the hopper wall in communication with the manifold passage, the inlet opening being arranged for communication with a blower so as to be arranged to direct ventilation air from the blower and into the grain bin through the manifold passage.

[6] The Abstract of the 430 Patent describes the invention as follows:

A hopper bottom for supporting a cylindrical side wall of a grain bin includes a hopper wall having an inverted cone shape supported on upright support legs. A manifold duct is supported above the hopper wall to define a manifold passage therein extending circumferentially adjacent to the peripheral edge of the hopper wall. A plurality of outlet openings formed in the manifold duct in communication from the manifold passage to an interior of the hopper wall for open communication with the grain bin thereabove. An inlet opening extending through the hopper wall in alignment with the manifold duct receives ventilation air from a blower to direct the flow through the manifold duct and into the grain bin through the outlet openings of the manifold duct.

[7] Some of the key terms of the 430 Patent are worthy of early definition. A “manifold” is a pipe or chamber branching into several openings. A “duct” as used in the 430 Patent is a channel or tube conveying air. A “manifold duct” is a chamber with several openings, some of which have ducts attached. The manifold duct is the circular top chamber shown as 34 on figure 2 of the 430 Patent, as follows:



## 2. The Evidence

[8] Concept tendered the affidavit of Lonny Thiessen, its owner. Meridian offered the affidavit and report of Ian Paulson, an engineer employed by the Prairie Agricultural Machinery Institute [PAMI], who offered his expert opinion on issues relevant to the action. Meridian also offered the affidavit of Sam Plett, its Manager of Innovation and Engineering.

*Lonny Thiessen*

[9] Mr. Thiessen explained that the Airpro System is constructed so that air can flow through the Airpro System and into the hopper. The Airpro inlet is connected to a manifold that is formed by the Airpro skirt gussets, the Airpro skirt, the Airpro channels both long and short, and the Airpro inlet skirt guard.

[10] When air from the blower enters the Airpro inlet, it passes through the entire circumference of the manifold through openings within the Airpro skirt gussets and Airpro channels. The only skirt gussets that are enclosed at the end are those that sit above the Airpro inlet. The rest of the skirt gussets are open at the end. The air exits the manifold at all openings created by skirt gussets and through the Airpro channels, thus creating a 360 degree aeration system.

[11] Mr. Thiessen explains that the Airpro System differs from the 430 Patent. He says that it “does not contain a manifold duct with a plurality of outlet openings for communication from the manifold passage to an interior of the hopper wall for open communication with the grain bin thereabove, the outlet openings being located at circumferentially spaced apart locations relative to one another, as set out in claim 1” of the 430 patent.

[12] Mr. Thiessen claims that the JTL Hopper was produced and sold as early as February 2017. In support, he provided a screenshot of the JTL Hopper on the JTL website from a webarchive dated April 21, 2017; screenshots of the JTL Hopper on the Kramer Sales website that displayed the year of manufacture and the open nature of the manifold created by the skirt

gussets and short and long channels; a YouTube video showing the inside of the JTL Hopper dated February 28, 2017; a screenshot of hopperbottomsmontana.com website showing the JTL Hopper for sale; and two video files from WhatsApp showing the inside of the JTL 1820FA bin which uses the JTL system, dated January 16, 2021.

[13] On cross-examination, Mr. Thiessen admitted that he did not take the YouTube video; admitted that someone else obtained the two WhatsApp videos for him; admitted that he did not know who posted the information and photographs regarding the Wayback Machine website evidence; admitted that he did not have any personal knowledge of the bin depicted in the photographs from a Kramer Trailer Sales website; and admitted that the Airpro System is not identical to the JTL Hopper.

*Ian Paulson*

[14] Mr. Paulson is an engineer employed with the PAMI. He was retained by Meridian to provide an expert opinion. He prepared two reports.

[15] In the first, he provided his opinion regarding the person of ordinary skill in the art [POSITA] for the 430 Patent, the common general knowledge [CGK] of the POSITA, his construction of claims 1-15 of the 430 Patent, and his opinion as to whether Concept's Airpro System has all of the essential elements of claims 1-15 of the 430 Patent.

[16] In the second, he provided his opinion as to differences between Concept's Airpro System and the JTL Hopper, whether Concept's Airpro System and the JTL Hopper "have an identical ventilation system" and whether they contain "the same manifold and aeration system."

[17] Mr. Paulson said that the POSITA would range between an engineering technologist and degreed engineer with demonstrated experience in the mechanics of airflow through both duct systems/networks and grain/granular material that offers a high resistance to airflow.

[18] He also said that on October 27, 2019, the publication date of the 430 Patent, methods and results regarding the measurement and prediction of aerating patterns in stored grain were general knowledge that was available to the POSITA. Prior art illustrating the introduction of air into multiple locations in the stored grain volume was also available on the publication date of the 430 Patent.

[19] Mr. Paulson said that the Airpro System omits an explicit inner boundary to a manifold duct around much of the circumference of the duct. However, multiple outlets from the manifold passage are present both due to the resulting interface between the stored grain volume and the air in the manifold passage, as well as the presence of Airpro channel parts that subsequently duct air from the manifold passage to introduce this air flow into the grain lower down in the hopper bottom.

[20] He says that the element of a plurality of upright support legs supporting the hopper wall above the foundation are non-essential.

[21] He concludes that the essential elements of claims 1, 2, 4, 5, 9, 11-15 of the 430 Patent are present in the pictures and drawings of Concept's Airpro System. Therefore, it is his opinion these claims are infringed.

[22] Assuming that "ventilation system" and "aeration system" have the same meaning, Mr. Paulson opines that the Airpro System and the JTL Hopper do not have an identical aeration system. The configuration of the JTL Hopper results in an aeration system that provides a different pattern of air distribution in comparison to the Airpro System. He further noted that they do not have the same manifold.

[23] On cross-examination, Mr. Paulson admitted (i) that PAMI is an organization that does third party testing of a variety of products for the agricultural industry, (ii) that it provides early phase research work including the drawing aspects of agricultural and engineering, all the way through to design drawings, documentation, and final engineering deliverables, (iii) that PAMI provides the deliverables to paying clients, and (iv) that Meridian has used PAMI's services in past projects.

[24] The relationship between PAMI and Meridian is not set out in his expert report.

[25] On cross-examination regarding the 430 Patent, Mr. Paulson admitted that the 430 Patent overcomes the design issue related to ducting and multiple blowers by teaching a manifold passage above the hopper wall that provides an exterior surface on the hopper wall which is unobstructed by ducting and the communication of the manifold duct from a single inlet opening



at the periphery to a plurality of circumferentially spaced apart outlet openings to provide an even distribution of air into the hopper bottom and the resulting grain storage bin thereabove.

[26] Mr. Paulsen says that the boundaries of the manifold duct are all formed of rigid, solid, and non-perforated material that form the top plate and the inner wall.

[27] On cross-examination regarding Concept's Airpro System, Mr. Paulsen admitted that Concept's Airpro System does not contain a solid inner wall as described in the 430 Patent, nor does it have a manifold or anything that distributes air at 360 degrees below the bottom of the legs. He also agreed that if the grain forms a permeable barrier that defines the manifold passage, then there must be outlet openings formed in the grain and a permeable membrane and an outlet opening are not the same structure. It was his evidence that the physical structure of the Airpro channels are different than the outlet ducts in the 430 Patent and the Airpro channels experience a different resistance than the 430 Patent. The manifold of the Airpro System results in a system where the air pressure exiting the manifold is determined by the material contained within the Airpro System and not by a combination of the size of the outlet openings as well as the material contained within it as is taught by the 430 Patent.

[28] His opinion of the Airpro System and the JTL Hopper are based in part on the drawing contained in Exhibit I of Mr. Plett's affidavit. On cross-examination regarding the JTL Hopper, Mr. Paulson admitted that he did not know that the drawing provided to him was intended to correct the drawing made 18 months before, nor was he aware that the drawing provided to him was made 18 months after the inspection of the JTL Hopper.

*Sam Plett*

[29] Sam Plett, the Manager of Engineering and Innovation of Meridian, believes that the skirt covering the air inlet has a perforated metal sheet, and therefore, air is permitted to pass through the inlet skirt guard because of its perforated nature. He believes that air exits the manifold duct from the Airpro System through a plurality of openings in the perforated metal sheet.

[30] Mr. Plett describes how, in his view, the Airpro System infringes on the 430 Patent. He focuses on claim 1 and describes how the Airpro skirts, Airpro skirt gussets, and the Airpro channels create a manifold duct that is “supported above the hopper wall to define a manifold passage therein extending circumferentially about the hopper wall adjacent to the peripheral edge of the hopper wall”. [emphasis in original].

[31] Mr. Plett also notes that the drawing of the Airpro inlet skirt guard states that it is made of perforated steel and, in his view, these perforations in the Airpro inlet skirt guard constitute a plurality of openings. These outlet openings are in communication with the manifold passage because some of the air in the manifold passage can pass through the outlet openings to an interior of the hopper wall for open communication with the grain bin above it.

[32] On September 24, 2020, Mr. Plett reviewed the JTL Hopper and observed that air comes through the legs and that there are solid barriers installed under the 360 Air Covers and between adjacent channels. He said that this does not allow air from one inlet opening under a channel to travel 360 degrees around the circumference of the hopper wall.

[33] Mr. Plett says the Airpro System and the JTL Hopper are not identical. The Airpro System has a single opening through the hopper wall and the JTL Hopper has a number of openings. The Airpro System has a number of Airpro skirt gussets openings that allow air to pass through whereas the JTL Hopper has a number of 360 Air Braces that lack these openings and form a solid barrier. The Airpro system's legs do not have passages through them that allow air to pass, whereas the JTL Hopper's do.

[34] On cross-examination, Mr. Plett admitted that the Airpro System does not have a combined area of outlet openings that is much smaller than the total area occupied by an inner wall such that the majority of the inner boundary of the manifold passage is enclosed by the inner wall rather than being open at the outlet openings. He also agreed that the only solid sheet in the Airpro System is the sheet at the inlet, and that "formed in" refers to something being cut out or removed.

### **3. General Principles Governing Summary Judgment**

[35] Summary judgment allows the Court to dispense summarily with cases that ought not to proceed to trial because there is no genuine issue to be tried. There is no genuine issue for trial if there is no legal basis to the claim, or if the judge has the evidence required to fairly and justly adjudicate the dispute: see *Hryniak v Mauldin*, 2014 SCC 7. If the only genuine issue is a question of law, the Court may determine the question and grant summary judgment: see Rule 215(2)(b) of *Federal Courts Rules*, SOR/98-106. Where there is a genuine issue of fact or law, the Court may dismiss the motion in whole or in part and order that the action or the issues

not disposed of by summary judgment proceed to trial or that the action be conducted as a specially managed proceeding: see Rule 215(3)(b).

[36] The test on a motion for summary judgment “is not whether a party cannot possibly succeed at trial; rather, it is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial:” see *Canada (Citizenship and Immigration) v Campbell*, 2014 FC 40 at para 14.

[37] The onus is on the party seeking summary judgment to establish that there is no genuine issue for trial. However, the responding party must put its best foot forward: see *Canmar Foods Ltd v TA Foods Ltd*, 2021 FCA 7. This is because the Court is entitled to assume that if the case goes to trial, no additional evidence would be presented: see *Rude Native Inc v Tyrone T Resto Lounge*, 2010 FC 1278.

[38] The requirement of Rule 81 that affidavits be confined to the personal knowledge of the deponent has been interpreted to permit exceptions on a principled basis: see *Society of Composers, Authors and Music Publishers of Canada v Maple Leaf Sports & Entertainments*, 2010 FC 731. It would be contrary to the intent of the summary judgment rules to preclude all hearsay evidence, particularly where that evidence may be admissible at trial.

[39] Issues of credibility are not to be decided on motions for summary judgment. Generally, a judge who hears and observes witnesses giving evidence orally in chief and under cross-examination is better positioned to assess the witnesses’ credibility than a judge who only relies

on affidavits and documentary evidence: see *TPG Technology Consulting Ltd v Canada*, 2013 FCA 183 at para 3. Consequently, cases with serious issues of credibility should go to trial: see *Newman v Canada*, 2016 FCA 213 at para 57.

[40] Courts are reluctant to base summary judgment on expert opinion that may or may not be accepted depending upon the Court's assessment of the credibility of such expert witnesses: see *Johnson & Johnson Inc v Boston Scientific Ltd*, 2004 FC 1672. That said, the mere existence of apparent conflict in the evidence does not preclude summary judgment. Judges have to take a hard look at the merits and decide if there are issues of credibility that need to be resolved: see *Milano Pizza Ltd v 6034799 Canada Inc*, 2018 FC 1112 at para 39.

#### **4. Assessment of the Evidence**

[41] Concept submits that the 430 Patent is "straightforward and does not require expert evidence for the Court to construe the claims." Meridian submits that having the evidence of only one expert, the Court would err if it did not accept his opinion on construction and infringement.

[42] Concept further submits that Mr. Paulson's evidence should be given less weight than that of a properly qualified expert because he failed to disclose the relationship between PAMI and Meridian. As such, it says that his expert opinion is not independent, an issue that goes to Mr. Paulson being qualified as an expert. In response, Meridian submits that Mr. Paulson was last employed by PAMI in 2017, he has never been retained by Meridian until now, and he has made no prior statements in relation to the subject matter of this proceeding.

[43] I am not persuaded that Mr. Paulson's evidence ought to be ignored or discounted. He was never previously personally retained by Meridian and his employment with PAMI ended many years ago. To the extent that the Court requires expert evidence on this motion, it accepts that Mr. Paulson is an expert.

## 5. Claims Construction

[44] The general principles of claims constructions were recently discussed in *Tearlab Corporation v I-MED Pharma Inc*, 2019 FCA 179 at paras 31-34, which may be summarized as the following:

The *Patent Act* promotes adherence to the language of the claims, which in turn promotes fairness and predictability. The words of the claims must, however, be read in an informed and purposive way, with a mind willing to understand. On a purposive construction, it will be apparent that some elements of the claimed invention are essential while others are non-essential. The interpretative task of the court, in claim construction, is to separate and distinguish between the essential and the non-essential elements, and to give the legal protection to which the holder of a valid patent is entitled only to the essential elements.

To identify these elements, the claim language must be read through the eyes of a POSITA, in light of the latter's common general knowledge. As noted in *Free World Trust*:

[51] ...The words chosen by the inventor will be read in the sense the inventor is presumed to have intended, and in a way that is sympathetic to accomplishment of the inventor's purpose expressed or implicit in the text of the claims. However, if the inventor has misspoken or otherwise created an unnecessary or troublesome limitation in the claims, it is a self-inflicted wound. The public is entitled to rely on the words used *provided* the words used are interpreted fairly and knowledgeably. [Emphasis in the original.]

Claim construction requires that the disclosure and the claims be looked at as a whole “to ascertain the nature of the invention and methods of its performance, ... being neither benevolent nor harsh, but rather seeking a construction which is reasonable and fair to both patentee and public”. Consideration can thus be given to the patent specifications to understand what was meant by the words in the claims. One must be wary, however, not to use these so as “to enlarge or contract the scope of the claim as written and ... understood.” The Supreme Court recently emphasized that the focus of the validity analysis will be on the claims; specifications will be relevant where there is ambiguity in the claims.

Finally, it is important to stress that claim construction must be the same for the purpose of validity and for the purpose of infringement.

[references and citations omitted]

## **6. Infringement**

[45] I have concluded that the question of infringement cannot be determined without a trial, for the following reasons.

[46] There is a fundamental disagreement between the parties regarding the essential elements of the claims. Specifically, they disagree on whether claims 3 and 7 are essential. They read as follows:

3. The hopper bottom according to either one of claims 1 or 2 wherein the outlet openings are the only openings in the manifold duct and the outlet openings are located within an upright boundary wall of the manifold duct.

7. The hopper bottom according to any one of claims 1 through 6 wherein an inner boundary of the manifold duct is defined by an inner wall which is cylindrical in shape.

[47] Meridian submits that these are non-essential based on a POSITA’s understanding that other methods can be used to create a “solid inner wall.” Concept submits that a solid inner wall

is essential to the functioning of the aerating system of the 430 Patent and that using grain to create this solid wall does not have the same aeration effect as a solid inner wall.

[48] Whether the “solid inner wall” is an essential component is crucial to determining whether infringement has occurred. This factual dispute cannot be decided on the evidence currently before the Court on the motion. The matter requires a trial so that the differences between the parties’ witnesses can be fully explored. This may well turn on a determination of credibility. There is a genuine issue for trial and therefore, the motion for summary judgment on the issue of infringement must be dismissed.

[49] The parties also disagree as to the meaning of “formed in” in claim 1 in relation to “a plurality of outlet openings formed in the manifold duct.” On cross-examination, Mr. Plett, Meridian’s witness, stated that “formed in” refers to something being cut out or removed. If so, then this might indicate that the Airpro System does not infringe on the 430 Patent because there is no opening created in the Airpro System by cutting out or removing. This view is to be contrasted with the 430 Patent wherein the outlet openings are cut out from the solid inner wall. Meridian submits that “formed in” should be construed in a more general meaning of the word based on the word “formed” being used a number of times in the 430 Patent where it is illogical to conclude that “formed” means “cut out from” or “removed”. Meridian focuses on the word “formed” to support its submission; however, “formed in” can be interpreted differently from the ordinary meaning of “formed.” This is another factual dispute that is best suited for a trial.



## 7. Validity

[50] Meridian submits that the 430 Patent is valid because the JTL Hopper is not prior art. It says that the purported evidence regarding the JTL Hopper is limited and there is no corroborating evidence from someone with direct knowledge of the JTL Hopper. It says the evidence is unreliable, unclear and does not establish what the company made prior to the April 27, 2018 priority date of the 430 Patent.

[51] Concept submits that JTL Hopper came before the 430 Patent and it is prior art such that the patent is invalid. Concept relies on Mr. Thiessen's affidavit detailing the manner in which the JTL Hopper and the Airpro System have an identical ventilation system. It says that if its Airpro System infringes the 430 Patent, then the 430 Patent is anticipated by the JTL Hopper and is invalid.

[52] Contrary to the statement in Mr. Thiessen's affidavit, Meridian says that the Airpro System and the JTL Hopper do not have "an identical ventilation system." Mr. Plett states that the two are not identical because the JTL Hopper lacks circumferentially distributed air, has multiple inlets, has solid barriers that prevent the air from being distributed, and has legs that have passage.

[53] The challenge with this evidence is that Mr. Plett's assessment is partly based on a drawing that was redrawn 18 months after the inspection of the bin and the original drawing. The exhibit attached to his affidavit is not the same model of the JTL Hopper as the one he inspected. There are some fundamental changes from the initial drawing to the drawing

18 months after, such as the length of the channels being the same or different. Mr. Paulson relied on this redrawing to further assert that the Airpro System and the JTL Hopper are not identical. Even though Mr. Plett described the inaccuracies between his drawing and the bin he inspected being a result of the drawing being a simplified diagram, this creates an issue of credibility. This is better dealt with at a trial.

[54] There is a genuine issue before the Court as to whether the 430 Patent is valid or not. Concept says that the 430 Patent is not new or an advancement. This defence turns on the factual finding of whether the JTL Hopper precedes the 430 Patent. The stickers of 2017 and the evidence provided by Concept is insufficient to definitively determine that the JTL Hopper was publicly available prior to the filing of the 430 Patent. There is a significant factual dispute between the parties with respect to the date that the JTL Hopper was publicly available. The resolution of this disagreement will likely turn on the credibility of the various witnesses. Therefore, it is inappropriate to determine the issue of validity of the 430 Patent on a motion for summary judgment.

[55] I am not convinced that the validity of the 430 Patent can be decided based on the facts and evidence provided by the parties in this motion for summary judgment. Mr. Thiessen's affidavit includes evidence that purports to show the JTL Hopper as prior art; screenshots from websites retrieved using the "Wayback Machine" internet archive, a YouTube video from February 2017, two WhatsApp videos from 2021, and an undated screenshot from a [hopperbottomsmontanta.com](http://hopperbottomsmontanta.com).

[56] Meridian asserts that Mr. Thiessen did not take the YouTube video and does not know or have knowledge of the circumstances under which the video was taken. The YouTube video seems to be showing the JTL air system and it was posted on February 28, 2017, there is no question that precedes the 430 Patent. However, it is unclear whether it shows the JTL Hopper as claimed by Mr. Thiessen. If the YouTube video does show the JTL Hopper, then it seems quite likely that the Airpro System is similar and possibly identical to the JTL Hopper. This lack of verification is further reason why this case is more appropriate for trial than for a motion for summary judgment.

## **8. Conclusion**

[57] For these reasons, these motions are dismissed. Each party shall bear its own costs. The action shall continue under case management.

**ORDER in T-1506-20**

**THIS COURT ORDERS** that the motions for summary judgment are dismissed,  
without costs to either party.

"Russel W. Zinn"

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1506-20

**STYLE OF CAUSE:** MERIDIAN MANUFACTURING INC. v CONCEPT INDUSTRIES LTD.

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE

**DATE OF HEARING:** NOVEMBER 22, 2022

**ORDER AND REASONS:** ZINN J.

**DATED:** JANUARY 4, 2023

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