

Federal Court



Cour fédérale

**Date: 20240215**

**Docket: T-1790-17**

**T-416-19**

**Citation: 2023 FC 1749**

**Ottawa, Ontario, February 15, 2024**

**PRESENT: Madam Justice St-Louis**

**Docket: T-1790-17**

**BETWEEN:**

**VALLEY BLADES LTD**

**Plaintiff/ Defendant by Counterclaim**

**and**

**USINAGE PRO-24 INC  
C/O/B AS NORDIK BLADES**

**Defendant/ Plaintiff by Counterclaim**

**Docket: T-416-19**

**AND BETWEEN:**

**USINAGE PRO-24 INC  
C/O/B AS NORDIK BLADES**

**Plaintiff/ Defendant by Counterclaim**

**and**

**VALLEY BLADES LTD**

**Defendant/Plaintiff by Counterclaim**

**PUBLIC JUDGMENT AND REASONS**  
**(Identical to the Judgment and Reasons issued**  
**on December 22, 2023)**

I. Overview

[1] In 2017, Valley Blades Ltd. [Valley Blades] commenced an action against Usage Pro-24 Inc., carrying on business as Nordik Blades [Nordik Blades]. Valley Blades sought an order pursuant to subsection 60(1) of the *Patent Act*, RSC 1985, c P-4 [Patent Act], declaring that Nordik Blades' Canadian Patent No. 2,856,940 [the 940 Patent] and each of the claims thereof was invalid, void, unenforceable, and of no force and effect, as well as a declaration that Nordik Blades made false and/or misleading statements tending to discredit the business, goods, and services of Valley Blades contrary to paragraph 7(a) of the *Trademarks Act*, RSC 1985, c T-13 [Trademarks Act].

[2] Nordik Blades defended the action and counterclaimed for a declaration that claims 1 to 12 of the 940 Patent were valid and that Valley Blades infringed them.

[3] In 2019, Nordik Blades commenced an action against Valley Blades seeking a declaration that independent claims 1, 20, 35, and 50, and dependent claims 2-14, 16-19, 21-28, 30-34, 36-43, 45-49, 51-62, and 64 of Canadian Patent No. 2,965,426 [the 426 Patent] as well as independent claim 1 and dependent claims 2-14 of Canadian Patent No. 2,992,233 [the 233 Patent] had been infringed by Valley Blades, and various reliefs.

[4] Valley Blades defended the action and counterclaimed for a declaration that the 426 and 233 Patents, and each of their asserted claims, are and always have been invalid.

[5] The actions have been bifurcated and this judgment and reasons pertain to the liability issues within both.

[6] On October 3, 2022, the parties' joint Statement of Issues confirmed the issues before the Court related to: (1) the 940, 426, and 233 Patents' validity (pertaining to the person skilled in the art [POSITA], claim construction, obviousness, overbreadth, and section 53 of the Patent Act); (2) infringement (i.e., are the three patents' asserted claims infringed by Valley Blades EconoFlex-M products?); (3) Nordik Blades' liability under subsection 7(a) of the Trademarks Act; and (4) costs.

[7] The parties subsequently agreed that infringement will be found if the asserted claims are found valid; they thus confirmed that infringement is no longer an issue to assess.

[8] Nordik Blades is the listed owner of the three Canadian patents at issue in these proceedings that all relate to each other and cover the same subject matter, i.e., segmented snow plow blades: the 940, 426, and 233 Patents [the Nordik Patents]. The 426 and 233 Patents are divisional patents.

[9] Pursuant to a stipulation between the parties, the only claims being asserted are: claims 1-12 of the 940 Patent; claims 1-8, 10-14, 16, 17, 19, 20-28, 31-32, 34-37, 39-43, 45-47, 49-51, 54-62, and 64 of the 426 Patent; and claims 1-2, 4-5, 7, and 9-14 of the 233 Patent [the Disputed Claims]. However, there is no longer any dispute that claim 35 of the 426 Patent is obvious; counsel for Nordik Blades acknowledged that their own expert, Mr. Harold Bouchard, indicated as much in his expert report and admitted the same at trial.

[10] In brief, Valley Blades submits that:

- (i) the Disputed Claims are invalid for obviousness;
- (ii) the Disputed Claims are invalid for overbreadth for claiming more than what the inventor made in regard to the blades' tapered shape;
- (iii) the Nordik Patents are invalid as a whole under section 53 of the Patent Act for false and misleading statements;
- (iv) Nordik Blades is liable under subsection 7(a) of the Trademarks Act for the false and misleading statements it made to Valley Blades' customers; and
- (v) the parties should be given an opportunity to make submissions on an appropriate lump sum cost award, if they are unable to agree on costs.

[11] Nordik Blades responds that Valley Blades has not met its burden to:

- (i) demonstrate obviousness as there is no expert evidence that would enable the Court to assess how the POSITA would have been led to combine the five pieces of prior art to create the subject of the Nordik Patents;
- (ii) demonstrate the Disputed Claims are invalid for overbreadth as its arguments on the absence of limitations in regards to the shape (i.e., tapered) of the blades in the Disputed Claims are senseless;
- (iii) demonstrate it satisfies the stringent legal test under section 53 of the Patent Act; and

- (iv) prove each of the elements necessary to ground a claim under subsection 7(a) of the Trademarks Act.

[12] Nordik Blades also responds that costs should be awarded according to the top end of column IV of the Tariff.

[13] Considering the parties' submissions, the Court must determine whether Valley Blades has met its burden to demonstrate that:

- (i) the Disputed Claims of the Nordik Patents are invalid for obviousness and overbreadth;
- (ii) the Nordik Patents are void under section 53 of the Patent Act; and
- (iii) Nordik Blades violated subsection 7(a) of the Trademarks Act.

[14] The Court must also assess how costs should be awarded.

[15] For the reasons that follow, I find Valley Blades has successfully demonstrated that the Disputed Claims of the Nordik Patents are obvious. However, I find that Valley Blades has not demonstrated that the Disputed Claims are overbroad nor that it has met the test under section 53 of the Patent Act to void the Nordik Patents. As obviousness is a sufficient ground of invalidity, the Disputed Claims are invalid. Also, while I accept that Nordik Blades' statements concerning Valley Blades' products were false, I find Valley Blades nevertheless failed to satisfy each of the elements necessary to ground a claim under subsection 7(a) of the Trademarks Act. Valley Blades shall be awarded costs, with the quantum reserved pending additional submissions from the parties.

II. The evidence

A. *Evidence adduced by Valley Blades*

(1) Fact witnesses

(a) *Mr. Brad Hunt*

[16] Mr. Brad Hunt started his career at Valley Blades in or around 2001 and is now its Vice President. His primary responsibilities relate to the management of Valley Blades' business and he continues to be involved in the research and development of Valley Blades' products.

[17] Mr. Hunt was asked to provide evidence about (a) Valley Blades' development and commercialization of the PolarFlex products; (b) Valley Blades' development and commercialization of the EconoFlex-M products; (c) the false and misleading statements made by Nordik Blades to Valley Blades' customers; and (d) Valley Blades' business records.

[18] Mr. Hunt introduced 46 exhibits. He explained, *inter alia*, how he modified the rubber bushings of the Valley Blades PolarFlex in two ways. In one version, he added a depression in the bushings by removing some of the rubber in order to increase the bushing's compressibility, leading to more blade movement. In a second version, he replaced the full elliptical bushings with round bushings to create an air gap below; since air compresses more than rubber, this bushing enables an even greater range of blade movement. Valley Blades delivered about 170 units of this version before the Nordik Patents' filing date. Mr. Hunt also testified that while Canadian Patent No. 2,717,986 [the Valley Blades Patent] describes a system with separate

rubber pieces covering the blade's top and sides, the commercialized version of PolarFlex integrates the rubber pieces into one.

[19] Mr. Hunt further testified that Nordik Blades' communications to Valley Blades' customers caused Valley Blades to lose business with at least the following customers: the Government of Manitoba, the Township of Russell [the Township], and the United Counties of Stormont, Dundas, and Glengarry.

[20] I agree with Valley Blades that Mr. Hunt was a knowledgeable and careful witness who showed knowledge of the facts related to the Valley Blades' products and explained the facts to the Court without hesitation.

(b) *Mr. Jonathan Bourgon*

[21] Mr. Jonathan Bourgon is an employee of the Township of Russell, as its Director of Infrastructure. He provided evidence relating to the impact of Nordik Blades' communications on the Township's decision to return Valley Blades' EconoFlex-M products.

[22] At the relevant time in 2017, he was Manager of Operations for the Township and was responsible for approving the procurement of snow plow blades.

[23] Mr. Bourgon testified that in 2017, the Township placed an order for EconoFlex-M products from Valley Blades. In late 2017, the Township received a Notice of Patent Infringement from Nordik Blades following which the Township decided to return its purchase of EconoFlex-M systems. Mr. Bourgon testified that the potential risk of being involved in litigation was part of the Township's assessment of risk.

[24] Mr. Bourgon came across as a reliable witness.

(2) Expert witness: Mr. Gino Paonessa

[25] Mr. Gino Paonessa is the founder and chief executive officer [CEO] of Adecco Technologies Corp., which manufactures snow removal equipment. He has an Italian high school diploma, more than 30 years of experience in the snow removal industry, and conceived and commercialized a number of snow removal products.

[26] Mr. Paonessa was qualified as an expert in the design, development, and manufacture of snow removal attachments. His expertise includes the design and manufacture of segmented snow plow blade assemblies and mounting structures for snow plow blades, as well as the selection and role of materials, including steel and rubber, used for manufacturing snow plow blade assemblies.

[27] On May 10, 2021, Mr. Paonessa signed an expert report on the Nordik Patents' validity, and on July 9, 2021, he signed a responding expert report on infringement of the Nordik Patents by Valley Blades.

[28] To prepare his expert report on validity, Mr. Paonessa was provided with information in stages. His report indicates that he was first provided with, and asked by counsel to review and summarize, copies of the US Patent No. 5,746,017 [the JOMA Patent] and the Valley Blades Patent. These were the first two of the nine mandates that counsel tasked him with. The seven remaining mandates pertained to each of the Nordik Patents and their obviousness (mandates 3 to 8) and on the movement of the Nordik Blades' blades (mandate 9).



[29] Mr. Paonessa examined the JOMA Patent and the related JOMA product as well as the Valley Blades Patent and the two versions of the PolarFlex product, one that features a flexible elliptical fastening means with a depression and the other that features a round fastener flexible element that leaves an air gap in the blade apertures. He provided an opinion on the POSITA's understanding of each of the Nordik Patents and assessed whether the Disputed Claims, both the independent and dependent ones, were obvious.

[30] In brief, Mr. Paonessa opines that each of the Disputed Claims of the Nordik Patents are obvious. He asserts that there is no material difference between features described in the Disputed Claims and the state of the art, notably the JOMA Patent and products [the JOMA prior art] and the Valley Blades Patent and both versions of the PolarFlex product [the Valley Blades prior art]. For Mr. Paonessa, any differences are cosmetic in nature, and the POSITA would have reached them directly and without difficulty based on the prior art and the common general knowledge [CGK] available at the relevant date. Mr. Paonessa further opines that the Nordik Blades' blades' range of vertical and/or angular movement would not be greater than that of the blades disclosed in the Valley Blades prior art and/or the JOMA prior art. Ultimately, the range of vertical and/or angular movement for all the blades is limited by the apertures' size in the blades and/or the compressibility of the resilient bushing inserted therein, and the presence of adjacent blades.

[31] Mr. Paonessa came across as knowledgeable and honest. He admittedly received help from counsel to draft his affidavit, which is not uncommon or troublesome in itself (*dTechs EPM Ltd v British Columbia Hydro and Power Authority*, 2023 FCA 115 at paras 32-34; *Moore v Getahun*, 2015 ONCA 55 at para 55). Counsel for Nordik Blades raised this as an issue in their

opening statement, but I have found no mention of this as a persisting issue in their closing. In any event, it does not impact the weight I give to Mr. Paonessa's opinion.

[32] Mr. Paonessa was vigorously challenged during cross-examination and was at times confused and reluctant to answer the questions put to him; he seemed then more preoccupied with fulfilling his counsel's agenda than with helping the Court understand the technical issues.

B. *Evidence adduced by Nordik Blades*

(1) Fact witness: Mr. Hugo Michel

[33] Mr. Hugo Michel is the CEO and founder of Nordik Blades. He is also one of the inventors of the Nordik Patents. Mr. Michel provided evidence on the design, development, and commercialization of the Nordik MOVE Products and their related patents. He testified that the angular movement of the blade was not due to the blade's tapered shape.

[34] Mr. Michel described how he developed the Nordik MOVE. Valley Blades contends that Mr. Michel's basis for asserting his product was inventive and was undermined during cross-examination. In particular, Mr. Michel admitted that, prior to developing the Nordik MOVE, he never conducted a literature search, never purchased a Valley Blades' PolarFlex and opened it to check what was inside, and was not aware that there was a version of the PolarFlex with an elliptical bushing (and a depression) or a version with a round bushing (transcript, Michel, cross, day 3 (109:19-110:2); transcript, Michel, cross, day 3 (134:15-135:1); Ex. 4 – FC00603 Item 22).

[35] Valley Blades adds that during his examination for discovery in July 2020, Mr. Michel was clear that he considered the shape of the Nordik MOVE product's blade (i.e., tapered) to be

a part of his purported invention, and that he gave the opposite answer when he was asked the exact same question at trial. Valley Blades asserts that when confronted with his inconsistent views, it became clear that Mr. Michel changed his belief after discussions he had with his counsel (Ex. 4 – FC00603, Item 22; 25 TT(FR), Michel, Cross, Day 3 (134:15-135:1); 26 TT(FR), Michel, Cross, Day 3 (140:6-141:16)). Nordik Blades contends that Mr. Michel's testimony is not conclusive in light of the difference between questions he was asked on discovery and at trial.

[36] While the impact of Mr. Michel's answer will be assessed later, it was clear at the trial that Mr. Michel was aware of his change of testimony between his discovery and the trial. This negatively impacts the weight I give his testimony.

(2) Expert witness: Mr. Harold Bouchard

[37] Mr. Bouchard obtained a bachelor degree in industrial engineering from the *École Polytechnique* in Montréal in 1988. He has more than 30 years of experience advising companies involved in the development or improvement of technologies to claim Scientific Research and Experimental Development tax incentives. Mr. Bouchard acquired expertise in the understanding, analysis, and technological development used by businesses in the automobile industry to determine if there is an improvement of existing known technologies.

[38] He was qualified as an expert in claim construction and infringement. On May 10, 2021, Mr. Bouchard signed his expert report on infringement and construction of the Nordik Patents containing his opinion on claim construction. On July 12, 2021, pursuant to his mandate, he

signed his expert report in response to Mr. Paonessa's expert report opining on the validity of the Nordik Patents.

[39] In section 10.2 of his expert report, at page 47, Mr. Bouchard concludes that all the Nordik Patents' claims implied non-obvious inventive activity. However, during his cross-examination, Mr. Bouchard readily admitted that he knew at least claim 35 of the 426 Patent was obvious.

[40] In Mr. Bouchard's expert report, particularly in the chart he prepared outlining the essential elements of each of the Nordik Patents' independent claims in relation with their presence or absence in the prior art, he confirms that all the essential elements of the claims are found in either the JOMA and/or the Valley Blades Patents. However, oddly, Mr. Bouchard did not disclose in his conclusions the opinion that claim 35 of the 426 Patent was obvious. Despite submissions to the contrary from Nordik Blades, it was clear to the Court that up until Mr. Bouchard's testimony in cross-examination, claim 35 of the 426 Patent was among the Disputed Claims, which Nordik Blades defended as inventive.

[41] Furthermore, in its opening statement (transcript, October 17, 2023, 96), Valley Blades clearly alluded that Mr. Bouchard agreed that at least claim 35 of the 426 Patent was obvious, while eliciting no response or acknowledgement from Nordik Blades that the claim in issue was indeed obvious. It is surprising that Mr. Bouchard, who has experience and expertise in claim construction and infringement, did not highlight this conclusion for the Court in his expert report, nor address the impact of such an opinion, if any, on the other Disputed Claims.

[42] In assessing obviousness, Mr. Bouchard did not examine any of the numerous dependant claims of each of the Nordik Patents; he limited his assessment to the independent claims.

[43] Mr. Bouchard acknowledged both versions of the PolarFlex products, the one with an elliptical bushing (and a depression) and the one with a round bushing (Bouchard expert report in response, sections 7.16 to 7.21), and included both in the prior art (Bouchard expert report in response, sections 9.1 and 9.2). He referred to the depression and round bushings as a “trou,” but opined that the PolarFlex system did not include “ventilation holes” and that it was difficult to argue that the PolarFlex features were “ventilation holes” (Bouchard expert report in response, page 37).

[44] Valley Blades stressed that in *Hamel v Nordik Blades (Pro-24 Machining)*, 2021 QCCS 3405 [*Hamel*] (reversed *Nordik blades (Pro-24 machining) v Hamel*, 2023 QCCA 874), concerning Canadian Patent No. 2,423,830 [the Hamel Patent], Mr. Bouchard found that a single prior art document anticipated the Hamel Patent even though three essential elements were missing from that prior art because the missing elements were part of the CGK. In this case, Mr. Bouchard also identifies three differences between the Disputed Claims and the prior art: (i) an open top; (ii) the presence of ventilation holes in the rubber bushings; and (iii) the integration of two rubber bushings with the outer rubber layer. Despite each of these differences being part of the CGK (as explained below), Mr. Bouchard concludes that the Disputed Claims are inventive on a less stringent test compared to anticipation.

[45] The difference in Mr. Bouchard’s assessment of obviousness in this case versus his assessment of anticipation in *Hamel*, and his withholding of the conclusion that claim 35 of the 426 Patent is obvious, negatively impacts the weight I give to his opinion.

III. Overview of the patents at issue

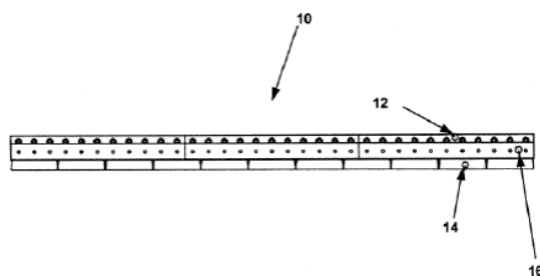
[46] The named inventors on the Nordik Patents are Hugo Michel, Stéphane Michel, and Marco Bergeron. The Nordik Patents are related patents as the 426 Patent is a divisional application of the 940 Patent and the 233 Patent is a divisional application of the 426 Patent.

A. *The 940 Patent*

[47] The 940 Patent is titled: “Adjustable sweeping blade device and sweeping blade assembly.” The following dates apply to the 940 Patent: (1) priority filing date: December 8, 2010; (2) filing date: November 30, 2011; (3) publication date: June 14, 2012; (4) issuance date: July 4, 2017; and (5) expiry date: November 30, 2031.

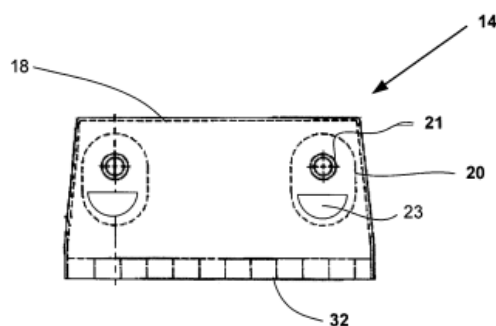
[48] The 940 Patent states that there is a need for an improved sweeping blade device and the object of the invention is to provide such a device and blade assembly for attachment to personal or commercial vehicles (the 940 Patent at paras 11-12). Per the patent’s abstract, the 940 Patent describes a sweeping blade assembly for attachment to a vehicle for sweeping a ground surface. The assembly comprises the first and the second blade supports attached parallel to and distant from each other to define a vertical channel. A plurality of sweeping blades comprises two bushing holes and a compressible bushing in each bushing hole for attachment to the first blade support and/or the second blade support. The bushing may be made of a resilient material and may comprise a ventilation hole for improving its compressibility. Whereby, upon contacting an obstacle on the ground, the bushings compress under pressure to cause a vertical and/or angular movement of the blade within the channel.

[49] The 940 Patent sets out the following challenges for blades during snow removal: (i) uneven and different road surfaces; (ii) repeated impact to the blades; (iii) hitting obstacles on the road; (iv) operator error; (v) metal-to-metal contact; and (vi) easy replacement of blades. The 940 Patent contains ten figures consisting of a sweeping blade assembly and sweeping blade device from multiple angles. Figure 2 shows a frontal view of the sweeping blade assembly:



[50] As shown, item 10 is the sweeping blade assembly, item 12 is the first blade support for attachment to a vehicle, item 14 is a sweeping blade device for attachment to a first blade support, and item 16 is a second blade support that attaches to the sweeping blade devices.

[51] Figure 7 shows a front view of the sweeping blade device:



**Fig. 7**

[52] As shown, item 14 is the sweeping blade device, item 18 is a layer of resilient material (such as rubber) covering the blade, item 20 is a bushing made of a resilient material that is inserted into an elliptical bushing hole and integrally formed with the outer layer (item 18), item 21 is a metal bushing, item 23 is a ventilation hole in the resilient material bushing (item 20), and item 32 is the lower edge of the blade.

[53] The 940 Patent has 12 claims. Claim 1 is the only independent claim. Pursuant to a stipulation between the parties, claims 1-12 of the 940 Patent are asserted.

[54] Claim 1 reads:

A sweeping blade assembly comprising:

a first blade support adapted to be attached to a vehicle, said first blade support defining a first planar surface;

a second blade support defining a second planar surface, the second blade support being adapted to be attached parallel to and distant from the first blade support whereby the first planar surface and the second planar surface define a vertical channel for receiving sweeping blade devices;

and a plurality of sweeping blade devices, each sweeping blade device comprising;

a blade portion comprising a lower edge for sweeping a ground surface, and an upper edge opposite the lower edge;

two bushing holes provided at opposite sides of the sweeping blade device for receiving two bushings;

a bushing provided in each bushing hole, the bushing comprising: a metal bushing for operably attaching the sweeping blade device to the first blade support and/or the second blade support, a resilient material bushing surrounding the metal bushing, and a ventilation hole provided in the resilient material bushing to increase the compressibility of the bushing;



wherein a substantially equal compression of the two bushings causes a vertical movement of the sweeping blade device across the vertical channel, and wherein a differential compression, wherein a first bushing is compressed more than a second bushing, causes an angular movement of the sweeping blade device around a rotation axis defined by the metal bushing of the second bushing.

[55] Claims 2 to 12 are reproduced in the Annex.

B. *The 426 Patent*

[56] The 426 Patent is also titled “Adjustable sweeping blade device and sweeping blade assembly” and it has substantially the same disclosure as the 940 Patent. The 426 Patent contains ten figures or photos.

[57] The following dates apply to the 426 Patent: (1) priority filing date: December 8, 2010; (2) filing date: November 30, 2011; (3) publication date: June 14, 2012; (4) issuance date: January 8, 2019; and (5) expiry date: November 30, 2031.

[58] The 426 Patent has 64 claims. Claims 1, 20, 35, and 50 are the only independent claims while the dependant claims add limitations.

[59] Pursuant to a stipulation between the parties, claims 1-8, 10-14, 16, 17, 19, 20-28, 31-32, 34-37, 39-43, 45-47, 49-51, 54-62, and 64 are asserted. However, there is no longer any dispute that claim 35 of the 426 Patent is obvious as Mr. Bouchard admitted this at trial.

[60] Claim 1 reads :

A sweeping blade assembly for attachment to a vehicle having a snow plough blade for sweeping a ground surface, the sweeping blade assembly comprising:

a first blade support adapted to be attached to the snow plough blade of the vehicle;

a second blade support adapted to be attached parallel to and distant from the first blade support; and

a plurality of sweeping blade devices for sweeping the ground surface, each one of the sweeping blade devices comprising a blade portion having at least two bushing holes extending therethrough and a compressible bushing inserted in each one of the at least two bushing holes, each one of the sweeping blade devices further comprises a resilient material layer coated on the blade portion with the compressible bushings being integral with said resilient material layer, wherein the sweeping blade devices are operably attached to the first blade support and/or the second blade support using the compressible bushings that allow for a vertical movement of the sweeping blade devices when the ground surface is uneven;

wherein the first blade support and the second blade support define a channel in which the plurality of sweeping blade devices are inserted, the second blade support extending continuously along the plurality of sweeping blade devices mounted in an adjacent configuration, with each one of the sweeping blade devices being shorter in length than the first and the second blade supports, and wherein the channel is open on top to allow for a free movement of the sweeping blade devices across the channel when at least one of the compressible bushings is compressed.

[61] Claims 20 reads:

A sweeping blade assembly for sweeping a ground surface comprising:

a first blade support adapted to be attached to a snow plough blade of a vehicle, said first blade support defining a first planar surface;

a second blade support defining a second planar surface, the second blade support being adapted to be attached parallel to and distant from the first blade support, the first planar surface and the second planar surface defining a vertical channel inbetween; and

a plurality of sweeping blade devices operably installed within the vertical channel with the second blade support extending continuously along the plurality of sweeping blade devices mounted in an adjacent configuration with each one of the

sweeping blade devices being shorter in length than the first and the second blade supports, the sweeping blade devices being configured for sweeping a ground surface, each one of the sweeping blade devices comprises a blade portion with two bushing holes defined therein and a resilient material bushing inserted in each one of the two bushing holes, wherein each one of the sweeping blade devices further comprises a resilient material layer coated on the blade portion with the resilient material bushings being integral with said resilient material layer, the sweeping blade devices being attached to the first blade support or the second blade support through the resilient material bushings, the sweeping blade devices being configured to move vertically and angularly within the vertical channel when the ground surface is uneven;

wherein the vertical channel has an open top and an open bottom for allowing vertical and angular movement of the sweeping blade devices across the vertical channel.

[62] Claim 50 reads:

An assembly of sweeping blade devices engageable with a blade support assembly attached to a vehicle and including a first blade support and a second blade support, the second blade support extending parallel to and spaced-apart from the first blade support, the first and second blade supports defining together a channel having an open bottom, at least a plurality of the sweeping blade devices comprising:

a blade portion having a front face, a rear face, a lower edge for sweeping a ground surface, and an upper edge opposite the lower edge, the blade portion having at least two bushing holes extending therethrough between the front face and the lower face and between the upper and lower edges, the blade portion being insertable into the channel defined between the first and the second blade supports and operably attachable to the first blade support and/or the second blade support through the at least two bushing holes:

bushings, each one of the bushings comprising a resilient bushing portion having a fastener aperture extending therethrough and each one of the bushings being inserted in a respective one of at least two bushing holes: and

a resilient material layer coated on the blade portion to at least partially cover same and the resilient material bushing portions being integral with said resilient material layer;

wherein at least one of the blade portions of the sweeping blade devices is displaceable above the first and the second blade supports through the open top.

[63] The dependant claims are reproduced in the Annex. Although they are not all in issue, they are reproduced for clarity.

C. *The 233 Patent*

[64] The 233 Patent is also titled: “Adjustable sweeping blade device and sweeping blade assembly” and has substantially the same disclosure as the 940 and 426 Patents. It shows the same ten figures and has 14 claims, directed to just the blade and not the assembly.

[65] The following dates apply to the 233 Patent: (1) priority filing date: December 8, 2010; (2) filing date: November 30, 2011; (3) publication date: June 14, 2012; (4) issuance date: July 9, 2019; and (5) expiry date: November 30, 2031.

[66] Claim 1 is the only independent claim. Pursuant to a stipulation between the parties, claims 1-2, 4-5, 7, and 9-14 of the 233 Patent are asserted.

[67] Claim 1 reads:

A sweeping blade comprising:

a blade portion having a front face, a rear face, a lower edge for sweeping a ground surface, and an upper edge opposite the lower edge, the blade portion having at least two bushing holes extending therethrough between the front face and the lower face and between the upper and lower edges;

bushings, each one of the bushings comprising a resilient bushing portion having a fastener aperture, each one of the bushings being inserted in a respective one of at least two bushing holes; and

a resilient material layer coated on the blade portion to at least partially cover the blade portion and the resilient material bushing portions being integral with said resilient material layer.

[68] The dependant claims are reproduced in the Annex. Although they are not all in issue, they are reproduced for clarity

#### IV. Other patents or products of interest

[69] Nordik Blades is also the current owner of the United States Patent No. 9,121,151 [the US 151 Patent] issued from a Patent Cooperation Treaty Application No. PCT/CA2011/001334. The named inventors are Hugo Michel, Stéphane Michel, and Marco Bergeron. The following dates apply to the US 151 Patent: (1) provisional application No. 61/421,185 filing date: December 8, 2010; (2) PCT filing date: November 30, 2011; (3) publication date: June 14, 2012; and (4) registration date: September 1, 2015.

[70] On January 26, 2017, Nordik Blades filed a PCT Application No. PCT/CA2017/050082 for a sweeping blade device with adjustable blades. The named inventors are Hugo Michel, Stéphane Michel, and Marco Bergeron. The PCT Application has a priority date of January 26, 2016, from a US provisional application No. 62/287,139.

[71] The Nordik MOVE product is based on the system described in the Nordik Patents. There are two elements found in the Nordik MOVE product that are not present in the Nordik Patents: 1) the tapered shape of the Nordik MOVE product's blade; and 2) the ideal size of the ventilation hole. After testing the product, the inventor, Mr. Michel, concluded that 3/8th of an inch was the ideal size for the ventilation hole.

[72] I also note that, due to *Hamel*, Nordik Blades now only sells the Nordik MOVE products with full bushing. Prior to August 2021, it only sold about 5% to 10% of the Nordik MOVE products with full bushing, and 90% with the bushing containing the ventilation hole.

V. Claim construction

A. *Principles*

[73] The first step in any patent suit is to construe the claims.

[74] This construction is antecedent to considering both validity and infringement issues and is the same for all purposes (*Free World Trust v Electro Santé Inc*, 2000 SCC 66 at paras 33-50; *Whirlpool Corp v Camco Inc* 2000 SCC 67 at paras 42-43 [*Whirlpool*]; *AstraZeneca Canada Inc v Apotex Inc*, 2017 SCC 36 at para 31). A claim cannot be construed with an eye on the allegedly infringing device in respect of infringement or with an eye to the prior art in respect of validity to avoid its effect (*Dableh v Ontario Hydro*, [1996] 3 FC 751, 68 CPR (3d) 129).

[75] As Justice Zinn outlined in *Meridian Manufacturing Inc v Concept Industries LTD*, 2023 FC 20 at paragraph 44, the general principles of claim construction were recently discussed in *Tearlab Corporation v I-MED Pharma Inc*, 2019 FCA 179 at paragraphs 31-34 and 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 omitted.]

B. *Relevant date for claim construction*

[76] The relevant date for claim construction is the date of publication (*Whirlpool* at para 56).

In this case, the date is June 14, 2012, which is when the 940 Patent was published (Agreed Statement of Facts, Ex. 2).

C. *Person skilled in the art*

[77] There is little dispute between the two experts as to the POSITA to whom the Nordik Patents are addressed. The main distinction is the type and level of education required, as Nordik Blades' expert, Mr. Bouchard, suggests the POSITA has education in engineering while Valley Blades' expert, Mr. Paonessa, suggests no particular level or type of education is necessary.

[78] For Valley Blades, the POSITA would be a team consisting of one or more people with the following skills gained from several years of work experience in this industry: (a) knowledge of the design of snow plow blade assemblies; and (b) knowledge of the materials used to make snow plow blade assemblies.

[79] For Nordik Blades, the POSITA to whom the Nordik Patents are addressed should have a technical or university engineering degree, about five years experience in the conception and manufacturing of parts or systems linked to the automotive industry, and about one year of experience specifically in the snow removal sector.

[80] I am prepared to accept the POSITA as suggested by Mr. Bouchard, i.e., Nordik Blades' expert.

[81] The parties agree that the experts themselves do not need to possess the characteristics of the POSITA. They must however be able to present to the Court the perspective of the POSITA at the date of the patent's publication.

[82] Insofar as Nordik Blades asserts that a POSITA would not have taken risks in the face of uncertainty to arrive at the alleged differences between the Nordik Patents' Disputed Claims and



the prior art, I disagree. The jurisprudence is clear that a POSITA is not risk-averse: “I do not accept that the skilled person avoids risk” (*Leo Pharma Inc v Teva Canada Limited*, 2015 FC 1237 at para 105; see also *Amgen v Pfizer*, 2020 FC 522 [*Amgen*] at paras 327-330). The POSITA can face some level of uncertainty along the way: “But equally, it cannot, in my judgment, be assumed that inventiveness must have been involved somewhere, just because a wager on success could have been placed at long odds” (*Amgen Canada v Apotex*, 2015 FC 1261 at para 101).

D. *Common general knowledge as of June 14, 2012*

[83] Common general knowledge does not amount to all information in the public domain. Rather, CGK is the knowledge generally known at the relevant time by the person skilled in the field of art or science to which the patent relates (*Bell Helicopter Textron Canada Limitée v Eurocopter, société par actions simplifiée*, 2013 FCA 219 at paras 63–65 [*Bell Helicopter Textron*]). In other words, as stated in *Mylan Pharmaceuticals ULC v Eli Lilly Canada Inc*, 2016 FCA 119 [*Mylan Pharmaceuticals*], “common general knowledge [...] is the knowledge generally known by POSITAs at the relevant time” (para 24).

[84] Unlike the prior art, which is a broad category encompassing all previously disclosed information in the field, a piece of information only migrates into the CGK if a POSITA would become aware of it and accept it as “a good basis for further action” (*Mylan Pharmaceuticals* at para 24). The CGK informs the way in which the claims and specifications must be read, because the patent is addressed to the POSITA. Any inquiry in patent law that is performed from the perspective of a POSITA will thus import the CGK. A POSITA’s CGK cannot be assumed; rather, it must be proven with fact evidence on a balance of probabilities (*Eli Lilly & Co v Apotex*

*Inc.*, 2009 FC 991 at para 100). For a claim construction, the relevant date to construe the CGK is the date of the publication, i.e., on June 14, 2012.

[85] Mr. Paonessa describes the CGK as of June 14, 2012 at page 43 of his expert report in which he includes the version of the Valley Blades' PolarFlex product with a round bushing that creates an air gap. His description is as follows:

(a) Knowledge of the Valley Blades Patent and the sweeping blade assembly / device it describes and claims; (b) Knowledge of PolarFlex (both the version with the elliptical bushing and the **version with the round bushing that creates an Air Gap**) and its features; (c) Knowledge of the JOMA Patent and the sweeping blade assembly / device it describes and claims; and (d) Knowledge of the JOMA 6000 and its features.

In addition, the skilled person would generally be aware of and have an understanding of the use of resilient materials (such as rubber) in structures in order to: (a) allow for compressibility and/or movement; (b) surround certain components to avoid metal-to-metal contact; and (c) absorb vibrations and sounds. [Emphasis added.]

[86] Mr. Bouchard, on the other hand, describes the CGK as of June 14, 2012 at pages 9 to 12 of his expert report (on construction and infringement) to include only holes in elliptical (allongé) or oblong forms (referencing US Patent 2,116,351 dated 1938 and the Hamel Patent dated 2003).

[87] The experts thus disagree as to whether the PolarFlex product with a round bushing that creates an air gap was part of the CGK as of June 14, 2012, but nothing turns on it as to claim construction. I note however that the Hamel Patent from 2003 also has an air gap.

E. *Claims construction*

[88] There is no dispute between the experts as to claims construction. Both Mr. Paonessa and Mr. Bouchard identified the same essential elements of the Disputed Claims. The text of the Disputed Claims are reproduced in this decision and attached in the Annex.

(1) The 940 Patent

(a) *Claim 1*

[89] The two experts agree on the essential elements of independent claim 1 of the 940 Patent.

[90] Nordik Blades asserts, in its closing submissions, that there exists a contentious issue relating to the ventilation hole since Mr. Paonessa would have required it to *pass through*. I assume Nordik Blades interprets this as if Mr. Paonessa was requiring the ventilation hole to pass all the way through. However, I am satisfied that there is no contentious issue in that regard. First, I have not seen that Mr. Paonessa considers essential that the ventilation hole passes all the way through the rubber bushing. Second, on the contrary, both experts construe the ventilation hole to have no particular shape, depth, or position (Valley Blades closing submissions at page 14; Paonessa responding expert report at page 12; Bouchard expert report (interpretation and infringement) at page 123).

[91] The essential elements of claim 1 are:

(1) **Vehicle attachment:** there is a first blade support that attaches to a vehicle.

(2) **Vertical channel:** there is a second blade support that is parallel to and distant from the first blade support, creating a vertical channel for receiving sweeping blade devices.

(3) **Blade portion:** there is a plurality of sweeping blade devices, each device containing a lower edge for sweeping the ground and an upper edge opposite the lower edge.

(4) **Bushing holes:** there are two bushing holes provided at opposite sides of the sweeping blade device for receiving two bushings.

(5) **Bushings:** there is a bushing provided in each bushing hole to allow for vertical and / or angular movement of the sweeping blade device.

Each bushing comprises the following:

(i) a metal bushing that attaches the sweeping blade device to the first and/or second blade supports.

(ii) a resilient material bushing that surrounds the metal bushing.

(iii) a ventilation hole passing through the resilient material bushing to increase its compressibility.

(b) *Claims 2-12*

[92] Each of the dependant claims 2-12 are asserted and add the following limitations to claim

1:

- Blade portion: the blade portion is made of composite material, steel, carbide, aluminum, alloy, polymer or plastic (claim 2); has an insert in the lower edge (claim 3) made of carbide (claim 4); and is covered by a layer of resilient material (claim 5)

- Resilient material bushing: the resilient material bushing is made of rubber (claim 6)

- Vehicle attachment: the vehicle attachment is removably attached to the vehicle (claim 7); the vehicle is a truck, car, four-wheeler, tractor, personal vehicle, commercial vehicles, snow plow vehicle, or van (claim 8); and the attachment can occur on the front, side, back, or underneath of the vehicle (claim 9)

- Vertical channel: the second blade support that forms the Vertical Channel is narrower than the sweeping blade devices (claim 10); has an open top adjacent to the upper edge of the blade portion (claim 11); and has an open bottom adjacent to the lower edge of the blade portion (claim 12)

(2) The 426 Patent

(a) *Claim 1*

[93] Claim 1 of the 426 Patent claims a sweeping blade assembly with the following essential elements:

(1) **Vehicle attachment:** there is a first blade support that attaches to the snow plough blade of the vehicle.

(2) **Vertical channel:** there is a second blade support that is parallel to and distant from the first blade support, creating a vertical channel for receiving sweeping blade devices. The second blade support extends continuously along the sweeping blade devices, with each of the sweeping blade devices being shorter in length than the first and second blade supports.

(3) **Open top:** the vertical channel created by the first blade support and second blade support for receiving sweeping blades has an open top to allow for free movement of the sweeping blades.

(4) **Blade portion:** there is a plurality of sweeping blade devices, each device comprising a blade portion.

(5) **Bushing holes:** there are at least two bushing holes extending through the blade portion.

(6) **Bushings:** there is a compressible bushing inserted in each bushing hole to allow for vertical movement of the sweeping blade device (does not require ventilation holes).

(7) **Integrated coating:** there is a resilient material layer coated on the blade portion with the compressible bushings being integral with the resilient material layer.

(b) *Claims 2-19*

[94] The dependent claims 2-8, 10-14, 16-17, and 19 are asserted. Some limitations pertaining to the blade portion (claims 3-5), and resilient material bushing (claim 7) are substantially the

same as the related limitations imposed on claim 1 of the 940 Patent as described above. The remaining dependant claims add the following limitations to claim 1:

- Blade support: the second blade support is narrower than the sweeping blade devices (claim 2)
- Blade portion: the blade portion is steel-based (claim 11) and the lower edges extend downwardly past the first and second blade supports (claim 14)
- Resilient material bushing: The resilient material bushing covers a majority of the front and rear faces of the blade portion (claim 16), at least the upper edge of the blade portion (claim 19), and is bonded to the blade portion (claim 17)
- Metallic bushing: a metallic bushing is inserted in the resilient material bushing that defines a fastener aperture (claim 10)
- Ventilation hole: each compressible bushing contains a ventilation hole to increase the bushing's compressibility (claim 8) that is aligned with a fastener aperture, each being closer to the lower edge than the metallic bushings (claim 13)
- Bushing hole: the bushing hole is elliptic (claim 12)

(c) *Claim 20*

[95] Claim 20 of the 426 Patent substantially overlaps with claim 1 of the 426 Patent. The essential elements are:

- (1) **Vehicle attachment:** there is a first blade support that attaches to the snowplough blade of the vehicle.
- (2) **Vertical channel:** there is a second blade support that is parallel to and distant from the first blade support defining a second planar surface creating a vertical channel for receiving sweeping blade devices. The second blade support extends continuously along the sweeping blade devices, with each of the sweeping blade devices being shorter in length than the first and second blade supports.
- (3) **Blade portion:** there is a plurality of sweeping blade devices, each device comprising a blade portion.

(4) **Bushing holes:** there are two bushing holes extending through the blade portion.

(5) **Bushings:** there is a compressible bushing inserted in each bushing so the bushings can cause both vertical and angular movement of the sweeping blade device.

(6) **Integrated coating:** there is a resilient material layer coated on the blade portion with the compressible bushings being integral with the resilient material layer.

(7) **Open top and open bottom:** the vertical channel created by the first blade support and second blade support for receiving sweeping blades has an open top and an open bottom for allowing vertical and angular movement of the sweeping blades.

(d) *Claims 21 to 34*

[96] The dependant claims 21-28, 31-32, and 34 were asserted. Some limitations pertaining to the blade support (claim 22), blade portion (claims 25, 27-28), resilient material bushing (claims 25, 31-32, 34), ventilation hole (claims 21, 27), bushing hole (claim 26), and metallic bushing (claim 24) are substantially the same as the related limitations imposed on claim 1 of the 426 Patent as described above. The remaining claims add the following limitations to claim 20:

- Blade support: the sweeping blade device attaches to the first or second blade support through the resilient material bushing (claim 21) and the first blade support is removably secure to a snow plough blade (claim 23)

(e) *Claim 35 and dependent claims 36 to 49*

[97] During the trial and in their closing submissions, Nordik Blades acknowledged that claim 35, which describes a sweeping blade assembly, is obvious and thus is no longer an issue.

[98] The claims dependant of claim 35 should still be assessed, as they are presumed valid even if they are dependent on an invalid claim. Dependant claims 36-37; 39-43, 45-47, and 49

were asserted. Some limitations pertaining to the blade support (claim 37), blade portion (claims 40, 42-43), resilient material bushing (claims 40, 46-47, 49), ventilation hole (claims 36, 42), bushing hole (claim 41), and metallic bushing (claim 39) are substantially the same as the related limitations imposed on claim 20 of the 426 Patent as described above. The remaining claim adds the following limitation to claim 35:

Blade support: the first and second blade supports are longer than the sweeping blade devices (claim 45)

(f) *Claim 50*

[99] Claim 50 of the 426 Patent also substantially overlaps with claim 1 of the 426 Patent. The essential elements are:

(1) **Vehicle attachment:** there is a first blade support that attaches to the snowplough blade of the vehicle.

(2) **Vertical channel:** there is a second blade support that is parallel to and distant from the first blade support, creating a vertical channel for receiving sweeping blade devices. The second blade support extends continuously along the sweeping blade devices, with each of the sweeping blade devices being shorter in length than the first and second blade supports.

(3) **Blade portion:** there is a plurality of sweeping blade devices, each device comprising a blade portion.

(4) **Bushing holes:** there are at least two bushing holes extending through the blade portion.

(5) **Bushings:** the bushings comprises a resilient bushing portion that must have a “fastener aperture extending therethrough”

(6) **Integrated coating:** the resilient material layer must “at least partially cover” the blade portion.

(7) **Open top and open bottom:** the vertical channel has both an open top and an open bottom.



(g) *Claims 51-64*

[100] The dependent claims 51, 54-62, and 64 were asserted. Some limitations pertaining to the blade support (claims 56, 64), blade portion (claims 57-59, 62), resilient material bushing (claim 59), ventilation hole (claims 51, 61), and bushing hole (claim 60) are substantially the same as the related limitations imposed on claims 20 and 35 of the 426 Patent as described above. The remaining claims add the following limitations:

- **Metallic bushing:** a metallic bushing is inserted in the fastener aperture and is externally surrounded by the resilient bushing (claim 55)

- **Blade portion:** the blade portion has an upper edge covered by the resilient material layer (claim 54)

(3) The 233 Patent

[101] The 233 Patent pertains an individual sweeping blade rather than a sweeping blade assembly.

(a) *Claim 1*

[102] Claim 1 of the 233 Patent claims a sweeping blade with the following essential elements:

- (1) **Blade portion:** there is a blade portion having a front face, a rear face, a lower edge for sweeping a ground surface, and an upper edge opposite the lower edge.
- (2) **Bushing holes:** there are at least two bushing holes extending through the blade portion.
- (3) **Bushings:** there is a resilient bushing having a fastener aperture inserted in each bushing hole.

- (4) **Integrated coating:** there is a resilient material layer at least partially coated on the blade portion with the resilient bushings being integral with the resilient material layer.

(b) *Claims 2 to 14*

[103] The dependent claims 2, 4-5, 7, and 9-14 were asserted. Some limitations pertaining to the blade portion (claims 10-11), resilient material bushing (claims 4-5, 7), ventilation hole (claims 2, 13, 14), bushing hole (claim 12), and metallic bushing (claim 9) are substantially the same as the related limitations imposed on the disputed independent claims of the 426 Patent as described above.

VI. Obviousness

A. *Principles*

[104] A patent cannot be issued for an invention that was obvious on the priority filing date to a POSITA to which the patent pertains, per section 28.3 of the Patent Act. The experts agree that obviousness in this case is to be assessed as of December 8, 2010 (the priority filing date of the Nordik Patents).

[105] In *Apotex v Shire LLC*, 2021 FCA 52 [*Shire*], the Federal Court of Appeal [FCA] restated that, as with anticipation, obviousness is assessed on a claim-by-claim basis (referencing *Zero Spill Systems (Int'l) Inc v Heide*, 2015 FCA 115 at paras 83, 85). If the Court holds an independent claim obvious, it must still go on to consider each of the cascading, narrower

dependent claims for obviousness. Each claim is evaluated against the four-part test set out in *Apotex Inc v Sanofi-Synthelabo Canada Inc*, 2008 SCC 61 [*Sanofi*] at para 67:

- (1) (a) Identify the notional “person skilled in the art”;
  - (b) Identify the relevant common general knowledge of that person;
- (2) Identify the inventive concept of the claim in question or if that cannot readily be done, construe it;
- (3) Identify what, if any, differences exist between the matter cited as forming part of the “state of the art” and the inventive concept of the claim or the claim as construed;
- (4) Viewed without any knowledge of the alleged invention as claimed, do those differences constitute steps which would have been obvious to the person skilled in the art or do they require any degree of invention?

[106] The fourth step of the inquiry may require considering whether the steps to reach the claimed invention were, for the POSITA, “obvious to try” (*Sanofi* at paras 68-71). When considering obviousness, hindsight is prohibited.

B. *Person skilled in the art*

[107] As addressed earlier in paragraph 78 of these reasons, the POSITA to whom the Nordik Patents are addressed is an individual with a technical or university engineering degree, about five years experience in conceptualizing and manufacturing parts or systems linked to the automotive industry, and about one year of experience specifically in the snow removal sector.

C. *Common general knowledge as of December 8, 2010*

[108] The parties agree that the documents and products listed in their Agreed Statement of Fact were part of the POSITA’s CGK as of December 8, 2010. In particular, the parties have

agreed that the following formed part of the CGK: (i) the Hamel Patent (ii) the JOMA Patent; (iii) the JOMA product; (iv) the Valley Blades Patent; and (v) Valley Blades' PolarFlex product with the oblong (elliptical) bushings.

[109] Nordik Blades disputes that the round bushings forming "air gaps" in the other version of the PolarFlex product formed part of the CGK at the relevant date since only a modest number of products with that feature were sold before December 8, 2010. On the other hand, Mr. Hunt for Valley Blades explained that the initial "test samples" of the round bushings were sent to distributors (who sell the product to end-user customers) before the priority filing date. Mr. Hunt explained that it is typical in the industry for customer sales representatives to show customers the individual pieces including the round bushings to explain how the system works. Again, I note that, in any case, the Hamel Patent has bushings with air gaps.

[110] Hence, on a balance of probabilities, I find the round bushings forming air gaps featured in one version of the PolarFlex products formed part of the CGK at the relevant date. However, as seen below, this has no impact on my finding on obviousness.

#### D. *Prior art*

[111] Prior art is "the collection of learning in the field of the patent at issue" and "comprises any publically available teaching, however obscure or not generally accepted" (*Mylan Pharmaceuticals* at para 23). In *Ciba Specialty Chemicals Water Treatments Limited's v SNF Inc*, 2017 FCA 225 [*Ciba*] at para 56, the Federal Court of Appeal confirmed that state of the art is simply another term for prior art, and I may refer to either in these reasons. The FCA recently held that no publicly available piece of art at the relevant date should be excluded from the prior

art solely because it would not be located following a reasonably diligent search (*Hospira Healthcare Corporation v Kennedy Trust for Rheumatology Research*, 2020 FCA 30 at para 86).

[112] Valley Blades asserts there is no dispute between the parties as to the applicable prior art. It includes: (i) the Hamel Patent; (ii) the JOMA Patent; (iii) the JOMA product; (iv) the Valley Blades Patent; and (v) Valley Blades' PolarFlex product (both with elliptical bushings with depressions and with round bushings with air gaps).

[113] Oddly, both at paragraph 55 of the *Plan de Plaidoirie* it submitted in closing and in its oral closing submissions, Nordik Blades submitted that the PolarFlex product with round bushings should not be considered as prior art (transcript, October 25, closing submissions, 166-67). However, during the trial, Nordik Blades confirmed clearly that the PolarFlex product with round bushings did form part of the prior art (transcript, October 25, closing submissions, 37-38 and 167). Mr. Bouchard even considered it as prior art in his obviousness analysis.

[114] The Federal Court of Appeal in *Ciba* reminds us that:

The matter cited as forming part of the prior art is simply the prior art relied upon by the person alleging obviousness. Obviousness is not determined by reference to the prior art at large. The person alleging obviousness must point to one or more elements of prior art which make the impugned invention obvious. The choice of those elements of prior art is entirely in the hands of the party alleging obviousness, limited only by section 28.3 of the Act which sets out the cut-off date for opposable prior art. In fact, the challenger may rely on a combination of pieces of prior art under the "mosaic" theory of obviousness: *Wenzel Downhole Tools Ltd. v. National-Oilwell Canada Ltd.*, 2012 FCA 333 at paragraph 87, [2014] 2 F.C.R. 459.

[115] Valley Blades demonstrated that the version of the PolarFlex product featuring the round bushings with air gaps was first sold on January 27, 2010; hence, it was made publicly available

before the cut-off date on December 8, 2010 (Hunt's affidavit at para 28). Furthermore, and as stated earlier, Nordik Blades confirmed this version of the PolarFlex product formed part of the prior art during its oral closing submissions and Mr. Bouchard, Nordik Blades' expert, considered it as such in his expert report. I am satisfied that the Valley Blades' PolarFlex product featuring the round bushings with air gaps forms part of the prior art.

[116] The JOMA Patent discloses a segmented blade that is designed to be mounted on a plow for clearing snow, slush, and ice from the underlying surface. The JOMA product is an embodiment of the invention claimed in the JOMA Patent.

[117] The segmented blade disclosed in the JOMA Patent comprises an elastomer mass (consisting of rubber) which encases multiple moving blades and the blades of the claimed invention are sandwiched between two metal supports (a clamp bar and back support blade) that form an open channel wherein the individual blades can move.

[118] The key features of the JOMA Patent include the integration of bushing with the outer rubber layer: (1) an elastomer mass (consisting of rubber) encases the multiple blades; (2) the rubber prevents damaging metal-on-metal contact that could cause premature wear and structural damage to the blades and to any adjacent metal parts in the plow; (3) the presence of the rubber also absorbs and dampens sounds and vibrations caused by friction between the blades and the road surface; and (4) there is at least one bushing hole in each blade that is filled with rubber and is integrated with the outer rubber.

[119] The JOMA Product was first marketed in Scandinavia and became available in North America in the early 2000s (Paonessa expert report, Ex. 7 at para 68; Appendix II, Tab 3, para

71, Figure 5). The JOMA Product contains all elements of the segmented snow plow disclosed in the JOMA Patent, including that each blade contains a bushing that is integrated with the outer rubber layer. The blades of the JOMA product are sandwiched between two metal supports (a clamp bar and a back support blade) forming an open channel wherein the individual blades can move. The entire unit is mounted onto a vehicle using plow bolts that pass through the clamp bar, metal bushings in the rubber, back support blade, and the moldboard itself.

[120] The JOMA Patent teaches the benefits of vulcanizing the metal blades to the rubber mass that surrounds them. There is no dispute between the experts that the rubber inside the U-shaped blades of the invention claimed in the JOMA Patent forms at least one integrated bushing (Ex. 6 – FC00192, Col. II, ln 59-64 and Ex. 74 – FC00264, p. 43; TT(EN), Bouchard, cross, day 4 (44:17-22); Ex. 73 – FC00246, p. 43).

[121] The Valley Blades Patent describes an improved removable blade system, which may be used to mount a blade onto a vehicle for snow removal. Both versions of the PolarFlex products are embodiments of the blade system disclosed in the Valley Blades Patent. The system comprises: (i) a mounting assembly; (ii) at least one blade; (iii) a flexible absorber (i.e., rubber) consisting of one or more pieces; and (iv) a fastening means.

[122] As discussed, Valley Blades sells its PolarFlex products with two different versions of rubber bushings: elliptical bushings and round bushings.

[123] The version of the PolarFlex that was first sold on May 8, 2008, had two elliptical rubber bushings. The elliptical bushings have always been sold with a depression in them (i.e., a reduced section of rubber). The version of the PolarFlex with round bushings was first sold on

January 27, 2010. As Mr. Hunt explained, when a PolarFlex blade is outfitted with round bushings, there is an air gap between the outside of the round bushing and the bushing hole.

E. *The 940 Patent*

(1) Claim 1

(a) *Inventive concept*

[124] There does not appear to be any dispute regarding the inventive concepts of the Disputed Claims. Mr. Bouchard does not use the phrase “inventive concept” when assessing obviousness in his report, but he does compare each essential element of the Nordik Patents’ independent claims against the prior art to determine the independent claims’ inventivity (Bouchard’s responding expert report at sections 9.2 and 10.2). Mr. Paonessa finds the inventive concept is no different from the POSITA’s understanding of the claim (Paonessa expert report at paras 144, 190, 217, 244, 265, and 269) and likewise compares each essential element of the claims against the prior art. According to both experts, the inventive concept is readily apparent here and corresponds to the essential elements of the claims. It need not be independently construed (*Shire* at para 67).

[125] In the *Plan de Plaidoirie* it submitted in closing, and in its oral closing submissions (transcript, October 25, 2023, 136-37), Nordik Blades suggested, although not entirely clearly, that the inventive concept of the claims may be based in something other than the essential elements of the claims. I do not agree and find, as the experts have, that the inventive concept of each claim is found in its essential elements.



[126] Nordik Blades also alluded, particularly in its closing submissions, to the Nordik Patents being “combination patents,” and cited to case law relating to combination patents (see, for example, *Bridgeview Manufacturing Inc v 931409 Alberta Ltd (Central Alberta Hay Centre)*, 2010 FCA 188 [*Bridgeview*]). Combination patents are those that combine elements from multiple patented items; the inventivity is in the selection and combination of those elements. Nothing indicates that the Nordik Patents are combination patents or relate to a combination invention, that a combination was claimed, or that a combination was an essential element. The experts neither opined that the Nordik Patents related to a “combination invention” (*Bridgeview* at paras 51-52). I therefore do not consider the Nordik Patents as combination patents.

(b) *Difference between the inventive concept of claim 1 of the 940 Patent and the prior art*

[127] The experts agree that there are no differences between most of the elements of claim 1 of the 940 Patent and the prior art (relating to the vehicle attachment, vertical channel, blade portion, and bushing hole). These elements are common to most of the Disputed Claims. The experts also agree that the first two components of the bushing (i.e., the metal bushing and rubber rushing) were known in the prior art.

[128] The experts’ disagreement in regards to claim 1 of the 940 Patent is over the ventilation hole in the bushing. Mr. Bouchard contends that the prior art does not encompass a ventilation hole within the rubber bushing. He outlines that Valley Blades’ PolarFlex product shows either a depression in the rubber bushing or an empty space below the metal bushing, and that it is difficult to argue that these features include ventilation holes that allow a more important

deformation of the bushing for the same constraint (i.e., to increase the bushing's compressibility) (Bouchard responding expert report at section 9.2).

[129] Mr. Paonessa contends that in the first version of the PolarFlex product, the depressions in the elliptical fastener increase the deformability and compressibility of the resilient bushing, which increase the vertical and/or angular movement of the blade when it encounters an uneven road surface (with the air gap providing a greater range of movement). The PolarFlex's second version's air gaps in the round fastener allow for an even greater range of vertical and/or angular movement. Thus, these features serve the same function as the ventilation hole. Mr. Paonessa therefore opines that there is no material difference between the bushings feature of claim 1 of the 940 Patent and the Valley Blades prior art (Paonessa expert report at paras 168-69).

[130] I agree with Valley Blades (see Valley Blades' closing submissions at paras 89-92) that Mr. Bouchard's conclusion does not withstand scrutiny as:

- When construing claim 1 of the 940 Patent, both experts construed the term "ventilation hole" as not being limited by its shape, depth, or position. A ventilation hole could thus include a depression in the elastic material, like the one in the version of the PolarFlex product with elliptical (oblong) rubber bushing;
- When conducting his infringement analysis, Mr. Bouchard had no difficulty arguing that a layer of rubber inside the rubber bushings of Valley Blades' EconoFlex-M product was still a "ventilation hole" (Bouchard expert report at section 6.22). The PolarFlex with the elliptical bushing likewise has a layer of rubber;
- In his expert report, Mr. Bouchard opined that the purpose of the ventilation hole is to replace a portion of the rubber with air, which allows for greater compression of the rubber bushing. In his validity report, Mr. Bouchard describes the depressions in the PolarFlex bushings in the exact same way: "*Ces dépressions auront un impact sur le contrôle du mouvement puisqu'elles permettront un déplacement plus facile de la matière élastique,*

*facilitant ainsi la compressibilité de chacun des éléments flexibles de fixation”* (Bouchard expert report in response at section 7.16);

- Mr. Hunt described the purpose of adding depressions to the PolarFlex bushings in the same way as Mr. Bouchard did in his original construction; and
- The claim itself specifies that the purpose for the ventilation hole is to increase the bushing’s compressibility.

[131] I find there are no differences between the inventive concept (i.e., the essential elements) of claim 1 of the 940 Patent and the prior art. In particular, in regards to the contentious ventilation hole feature, I am satisfied that there is no difference between the ventilation hole and the PolarFlex product with an elliptical bushing comprising a depression in the rubber, which is in itself a ventilation hole. As mentioned earlier, the Hamel Patent, disclosed prior to both the Nordik Patents and the Valley Blades Patent, also has air gaps.

(c) *Bridge the gap between prior art and inventive concept of claim 1*

[132] Alternatively, to the extent that there are differences between the inventive concept of claim 1 of the 940 Patent and the prior art related to the ventilation hole feature, this difference would have been easily bridged by the POSITA. I note particularly that both parties accept that the version of the PolarFlex product featuring an elliptical depression in the bushing was part of the CGK as of the relevant date.

[133] It would have been obvious for the POSITA to take away more rubber, and to know how to do so. The POSITA knew that reducing rubber from the bushing would increase the bushing’s compressibility, leading to increased movement. For the POSITA it was, at a minimum, obvious to try to reduce more rubber to get more movement, even if there was no guarantee that more movement would result.

(d) *Conclusion on claim 1 of the 940 Patent*

[134] Claim 1 of the 940 Patent is obvious. There is no difference between the claim's inventive concept and the prior art; both contemplate a ventilation hole. In any case, it would have been obvious for the POSITA, equipped with the CGK, to try to take away more rubber to increase the bushing's compressibility.

(e) *Dependant claims 2 to 12*

[135] The only evidence before the Court on the validity of the dependant claims 2-12 of the 940 Patent is that they are obvious (Paonessa expert report, pages 63-68).

[136] Mr. Paonessa opines that there are no material differences between the prior art and the limitations described in the remaining dependant claims 2-12 of the 940 Patent, which pertain to the blade portion, resilient material bushing, vehicle attachment, and vertical channel. He adds that any differences are cosmetic in nature and that the POSITA would have come to them directly and without difficulty based on the prior art and the CGK available by the relevant date (Paonessa expert report at para 191). He provided a detailed chart comparing the essential elements of claims 2-12 against the prior art that has not been contradicted (Paonessa expert report, pages 63-66); Mr. Bouchard provided no opinion on the inventivity of the dependant claims.

[137] I accept Mr. Paonessa's expert evidence and find there are no differences between the inventive concept (i.e., the essential elements) of claims 2 to 12 of the 940 Patent and the prior art. Claims 2-12 of the 940 Patent are therefore obvious.

F. *The 426 Patent*

(1) Claim 1

(a) *Inventive concept*

[138] As mentioned above, the inventive concept, per both parties' experts, corresponds to the essential elements of the claim as construed.

(b) *Difference between the inventive concept of claim 1 of the 426 Patent and the prior art*

[139] Two elements of claim 1 are in dispute as between the experts: (1) the open top, i.e., the vertical channel created by the first and second blade supports for receiving sweeping blades has an open top to allow for free movement of the sweeping blades; and (2) the integrated coating, i.e., there is a resilient material layer coated on the blade portion which is integral with the compressible bushings.

[140] The experts agree that there is no difference between the other essential elements of claim 1 of the 426 Patent and the prior art.

[141] In regards to the open top feature, Mr. Bouchard first seemingly opined in his responding expert report (page 40) that neither the JOMA nor Valley Blades prior art presented this feature, although the language he used was not very precise. However, under cross-examination, Mr. Bouchard unequivocally confirmed that there was an open top in the JOMA prior art and that the concept of an open top was even part of the CGK of the POSITA at the time Nordik Blades filed its patents (transcript, Bouchard, cross, October 20, 2022, 72-73).

[142] So the parties ultimately agree that there is no difference between the open top claimed in claim 1 of the 426 Patent and the prior art. Furthermore, since the open top was even part of the CGK, as Mr. Bouchard acknowledged, it cannot be inventive for Nordik Blades to have claimed this feature.

[143] In regards to the integrated coating, this feature requires a resilient material layer (i.e., rubber) coated on the blade portion and integral with the compressible bushings. Mr. Paonessa opines that (1) the Valley Blades Patent describes this exact feature, as well as a non-material variation of this feature, under claim 1 which contemplates that the outer rubber layer and inner rubber bushings can be one integrated piece (see also Figure 2 of the Valley Blades Patent); and (2) the JOMA Patent already disclosed the concept of a snow plow blade covered in one integrated rubber piece. He points to Figure 2 of the JOMA Patent that shows a series of three U-shaped blades completely covered or embedded in a resilient material layer.

[144] Mr. Bouchard agrees with Mr. Paonessa that the concept of integration was known in the prior art (i.e., the JOMA prior art) for at least one bushing. We can see that when assessing claim 35 of the 426 Patent, which comprises at least one bushing hole, Mr. Bouchard agreed that the JOMA product disclosed at least one bushing that is integrated with the outer rubber layer (Bouchard responding expert report, page 43). Mr. Bouchard thus acknowledges that the integration of one bushing hole was in the prior art and was therefore obvious.

[145] However, Mr. Bouchard opines that (1) the JOMA prior art is different in that the compressible bushings cannot be integral with the material layer coated on the blade portion given the absence of two bushings; and (2) Valley Blades prior art is different because the

number of detachable pieces differs, with the result that the layers of coated material are not integral with the compressible bushings.

[146] The issue here is thus narrowed to determining whether the integration of two bushings rather than one was obvious. In his expert report, Mr. Bouchard provided no explanation as to why it would have been inventive for a POSITA to add one more integrated bushing to the blade.

[147] As Valley Blades points out, in regards to the integration, Mr. Bouchard's opinion amounts to advancing the claim that the one integrated bushing in the U-shaped blade of the JOMA prior art does not correspond to the two integrated bushings in the Nordik Patents. However, in cross-examination, Mr. Bouchard acknowledged that in *Hamel*, he had found that the one bushing hole in the U-shaped blade of the JOMA Patent *did* correspond to the two bushing holes in the Hamel Patent's blade (in that case, slip gaps). However, he stressed that his comparison in this case between the JOMA Patent (one integrated bushing) and the claim of the 426 Patent (two integrated bushings) is different as he is trying to understand how the system works, which was not his aim in *Hamel*. He did not convince me that the distinction is meaningful nor that it explains the apparent contradiction.

[148] I will nonetheless accept that there is a difference between claim 1 of the 426 Patent and the prior art, which is the integration of two bushings rather than one.

(c) *Bridge the gap between the prior art and inventive concept of claim 1*

[149] I agree with Valley Blades that any difference between the integration of one bushing versus two is obvious, as the POSITA would have easily bridged the gap. The evidence reveals there was nothing inventive about fusing rubber to the blade or the rubber bushings and that: (1)

the concept of two bushings formed part of the CGK; (2) the concept of integration of rubber with at least one bushing and the blade formed part of the CGK; and (3) even the commercialized PolarFlex product differed from the Valley Blades Patent by having most of the rubber pieces fused together.

[150] I accept Mr. Paonessa's evidence. The POSITA would not require inventive ingenuity to add one more integrated bushing or to fuse the rubber to the blade. I am satisfied that the steps to integrate two bushings rather than one constitute steps, which would have been obvious to the POSITA, who has an engineering degree and is armed with the CGK.

(d) *Conclusion on claim 1 of the 426 Patent*

[151] Claim 1 of the 426 Patent is obvious. Even if there is a difference between the claim and the prior art, due to the integration of two bushings rather than one, this difference is one that can be easily bridged by the POSITA without inventive ingenuity.

(e) *Dependant claims 2-19*

[152] The remaining features described in the asserted dependent claims 2-8, 10-14, 16-17, and 19 are also obvious in light of the prior art, and the Court has no evidence from Nordik Blades to the contrary. This includes: the type of vehicle (and location on the vehicle) that the snow plow attaches to, the location of the ventilation holes and metallic bushings, whether the bushing holes are partly or fully filled with rubber, whether the outer rubber layer partly or fully covers the blade, the length of the blade in comparison to the vehicle supports, and the type of material that can comprise the blade and lower insert. These features were already publicly available in the prior art at the relevant date.



(2) Claim 20

(a) *Inventive concept*

[153] Again, the inventive concept, per both parties' experts, corresponds to the essential elements of the claim as construed. Claim 20 substantially overlaps with claim 1, and so my conclusions on the claims that are identical apply here.

[154] The differences between claims 1 and 20 are: (1) claim 20 requires that there be exactly two bushing holes, whereas claim 1 requires "at least two" bushing holes; (2) claim 20 specifies that the bushings can cause both vertical and angular movement of the sweeping blade device, whereas claim 1 only refers to vertical movement; and (3) claim 20 specifies that the vertical channel has both an open top and open bottom for allowing vertical and angular movement of the sweeping blades, whereas claim 1 only refers to the open top.

(b) *Difference between the inventive concept of claim 20 of the 426 Patent and the prior art*

[155] Mr. Paonessa opines that the three changes between claims 1 and 20 are all feature modifications that exist in both the JOMA and Valley Blades' PolarFlex products. In particular, Mr. Paonessa opines that: (1) the Valley Blades Patent shows that the sweeping blade has exactly two bushing holes; (2) the vertical and angular movement of the sweeping blade device achieves the same function of the bushings in the Valley Blades Patent (and sold as the PolarFlex product) with an excerpt from a PolarFlex advertisement explaining the same feature of the PolarFlex blades; and (3) the open top and bottom are the vertical channel present in both the JOMA and PolarFlex products.

[156] Mr. Bouchard responds that the difference between claim 20 and the prior art lies in the integration of two bushings which is not found in the prior art (Bouchard expert report, page 41); I have addressed this reply already in assessing claim 1 of the 426 Patent above.

(c) *Bridge the gap between the prior art and inventive concept of claim 20*

[157] As discussed in my analysis of claim 1, I agree with Valley Blades that any difference between the integration of one bushing versus two would have been easily bridged by the POSITA.

[158] In regard to the three differences between claim 1 and 20, I accept Mr. Paonessa's evidence that the POSITA would not require inventive ingenuity to bridge the gap, if any, between the claim and the prior art. Claim 1 already disclosed that at least two bushing holes is required, and so no ingenuity is required to employ exactly two. The POSITA, armed with the CGK, would also be able to infer that as there is vertical movement of the bushings, angular movement is possible via an open bottom; in any case, it would be obvious to try.

(d) *Conclusion on claim 20 of the 426 Patent*

[159] Claim 20 of the 426 Patent is obvious.

(e) *Dependant claims 21-34*

[160] The remaining features described in the asserted dependent claims 21-28, 31-32, and 34 are also obvious in light of the prior art, and the Court has no evidence from Nordik Blades to the contrary.

## (3) Claim 50

(a) *Inventive concept*

[161] Claim 50 substantially overlaps with claim 1, and so my conclusions on the claims that they are identical apply here.

[162] The changes between claims 1 and 50 are: (1) claim 50 specifies that the bushings must have a “fastener aperture extending therethrough,” whereas claim 1 is silent on this; (2) claim 50 specifies that the resilient material layer must “at least partially cover” the blade portion, whereas claim 1 requires the entire blade portion to be coated; and (3) claim 50 specifies that the vertical channel has both an open top and bottom, whereas claim 1 only refers to the open top.

(b) *Difference between the inventive concept of claim 50 of the 426 Patent and the prior art*

[163] Mr. Paonessa opines that the three changes between claims 1 and 50 all exist in the Valley Blades and JOMA prior art. First, with respect to the bushings, claim 50 specifies that the bushings must have a “fastener aperture extending therethrough.” This refers to the metal bushing that passes through the rubber bushing which Mr. Paonessa asserts is the same feature in the Valley Blades Patent (citing Figure 4 of the Valley Blades Patent). Second, with respect to the integrated coating, claim 50 specifies that the resilient material layer must “at least partially cover” the blade portion; the JOMA product is completely covered in rubber material and the majority of the PolarFlex product is as well. Third, with respect to the open top and bottom, claim 50 specifies that the vertical channel has both an open top and bottom. Likewise, the JOMA product has an open top and both the PolarFlex and the JOMA product have an open

bottom. There is therefore no difference between the blade assemblies described in claim 50 and the JOMA product.

[164] Mr. Bouchard opined that the resilient material layer coated on the blade portion to at least partially cover it and being integral with the resilient material bushing portions was not found in the prior art. He opined that (1) in the JOMA product, the layer cannot be integral with the rubber bushing given the absence of holes in the bushing; and (2) that Valley Blades' PolarFlex system is different from the Nordik MOVE product because the number of detachable pieces is higher, and the material is not integral with the bushings. However, Mr. Bouchard also agreed with Mr. Paonessa that the concept of integration was known in the prior art (i.e., the JOMA prior art) for at least one bushing (Bouchard expert report (validity), page 43).

[165] Mr. Bouchard did not explain how it would be inventive to integrate two bushings rather than one. I prefer Mr. Paonessa's opinion as the evidence reveals the JOMA product is completely covered in rubber material and the majority of the PolarFlex product is as well; they thus cover the blade at least partially as contemplated by claim 50.

(c) *Bridge the gap between the prior art and inventive concept of claim 50*

[166] In any event, assuming there is a difference between one and two integrated bushings, I agree with Valley Blades that the POSITA could have easily bridged the gap; there is nothing inventive about fusing rubber to the blade or the rubber bushings. As Valley Blades contends, the JOMA Patent specifically teaches a method of vulcanizing (i.e., integrating) the individual blades to the outer rubber layer, which is the same feature contained in the Nordik MOVE product. Valley Blades further notes that one of the three Nordik Patents, the 940 Patent, does

not even claim any integration of the rubber with the bushings or the blade. Finally, Valley Blades asserts that while the rubber that covers its PolarFlex blade is not integrated with the bushings, Mr. Hunt explained in his cross-examination that this could easily be done by fusing the bushings to only one side of the rubber housing.

(d) *Conclusion on claim 50 of the 426 Patent*

[167] I find claim 50 of the 426 Patent is obvious. To the extent that there are differences between the claim's noted features and the prior art, they are obvious for the POSITA to bridge.

(e) *Dependant claims 51-64*

[168] The remaining features described in the asserted dependent claims 51, 54-62, and 64 are also obvious in light of the prior art, and the Court has no evidence from Nordik Blades to the contrary.

G. *The 233 Patent*

(1) Claim 1

(a) *Inventive concept*

[169] In my view, the inventive concept of claim 1 is no different from the POSITA's understanding of the claim. To summarize, claim 1 contemplates an individual sweeping blade with the following features: (i) blade portion; (ii) bushing holes; (iii) bushings; and (iv) integrated coating.

(b) *Difference between the inventive concept of claim 1 of the 233 Patent and the prior art*

[170] Claim 1 of the 233 Patent is virtually the same as claim 50 of the 426 Patent.

Accordingly, there is also no difference between the prior art and the inventive concept of claim 1 of the 233 Patent.

(c) *Bridge the gap between the prior art and inventive concept of claim 1*

[171] To the extent there are any differences, they would have been obvious to a POSITA, as described in my obviousness analysis for claim 50 of the 426 Patent.

(d) *Conclusion on claim 1 of the 233 Patent*

[172] For the same reasons that claim 50 of the 426 Patent is obvious, claim 1 of the 233 Patent is obvious.

(e) *Dependant claims 2-14*

[173] The remaining features described in the asserted dependent claims 2, 4-5, 7, and 9-14 are also obvious in light of the prior art, per Valley Blades' expert, and the Court has no evidence from Nordik Blades to the contrary.

H. *Conclusion on obviousness*

[174] Valley Blades met its burden in demonstrating that the Disputed Claims of the Nordik Patents are obvious and therefore invalid.

## VII. Overbreadth

### A. *Principles*

[175] The law of overbreadth is rooted in the patent bargain; an inventor shall not reap the benefits of an expanded monopoly without a corresponding sufficient disclosure to the public (*Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 1 at para 167).

Specifically, overbreadth as a ground of invalidity is concerned with two fundamental limitations on an inventor's monopoly as defined by the claims. First, the monopoly cannot exceed the invention that was made. Second, the monopoly cannot exceed the invention described in the specification (*Pfizer Canada Inc v Canada (Health)*, 2007 FCA 209 at para 115; *Seedlings Life Science Ventures v Pfizer Canada*, 2021 FCA 154 [*Seedlings FCA*] at para 50; *Western Oilfield Equipment Rentals Ltd v M-I LLC*, 2021 FCA 24 [*Western Oilfield FCA*]; *Hoffman-Laroche Limited v Sandoz Canada Inc*, 2021 FC 384 at para 222).

[176] If a claim of a patent omits a key feature that is essential to how the invention works, the claim is invalid for overbreadth:

It is apparent that determining that a feature of an invention is essential is a distinct exercise for the purpose of overbreadth than for the purpose of claim construction. For overbreadth, the focus is not whether omitting or changing the feature avoids the claim (as it is for claim construction), but rather whether that feature is so key to the invention described in the disclosure that a claim that omits it encompasses embodiments that were not contemplated in the disclosure (*Seedlings FCA* at para 54).

[177] The Federal Court of Appeal goes on to outline how determining essentiality for the purposes of overbreadth is a different exercise than claim construction:

[D]etermining that a feature is essential ha[s] to be done by reference to the disclosure, not the claims. This is awkward because it is the claims that define the scope of the monopoly that the inventor asserts, and it is they that are typically reviewed to determine the essential features of the invention for the purpose of claim construction. Recourse to the disclosure to construe the claims is appropriate only in certain situations. Accordingly, one might reasonably ask how a feature can be found to be essential when it is absent from the claim (*Seedlings FCA* at para 52).

[178] To identify whether an element goes to the “core of the invention,” the Court ought to consider whether implementing the invention without those elements would require inventive ingenuity (*Seedlings FCA* at para 63).

[179] The question of what the inventor has made is a question of fact and “comparison must then be made of the claims at issue to determine if the “breadth” of the claim exceeds either what the inventor(s) actually did (...)” (*Pfizer v The Minister of Health and Novopharm*, 2008 FC 11 [Novopharm] at para 46). Valley Blades cites the Federal Court’s decision in *Western Oilfield Equipment Rentals v M-I*, 2019 FC 1606 [Western Oilfield FC] at paragraphs 230-34 for the proposition that in assessing this question, the Court will look to the evidence of the inventor. This is also the preferred evidence mentioned in *Novopharm* at paragraph 46, although the latter also states that available and satisfactory secondary evidence could be considered. I note that in *Western Oilfields FC*, the Court noted the issues had been raised by Western’s expert (at para 230), and that in *Seedlings FCA*, the Federal Court of Appeal mentioned that, “[t]here is little helpful discussion in the jurisprudence as to how a feature should be assessed for essentiality for the purposes of overbreadth” (para 54).



B. *Decision*

[180] Valley Blades only asserts one branch of overbreadth, arguing that the Disputed Claims are broader than the invention actually made by Mr. Michel. It argues this is because the tapered shape of the Nordik Blades' blades is not claimed in any of the Disputed Claims.

[181] Valley Blades asserts that expert evidence is unnecessary and is of no moment because this is a factual enquiry. Valley Blades thus relies on Mr. Michel's testimony. It outlines that during his examination for discovery in July 2020, Mr. Michel was clear that he considered the shape of the Nordik Blades' blades to be a part of his purported invention, but that he indicated otherwise in cross-examination.

[182] During his examination for discovery, in July 2020, Mr. Michel indicated:

978 Q. Okay. Is it your understanding that the shape of the blade was part of your invention? L'INTERPRÈTE: Est-ce que vous compreniez que la forme de la lame faisait partie de votre invention?

R. Oui. Yes

[183] In cross-examination, Mr. Michel outlined that his opinion had changed:

Bien indirectement oui, elle a changée parce qu'ils me l'ont dit, mais à cette époque je pensais que la lame c'était un tout, tout était inclus dedans, effectivement, à cette époque quand vous m'avez interrogé. Aujourd'hui, bien je sais la réponse, donc c'est difficile de vous dire oui encore aujourd'hui parce que je le sais que la réponse c'est pas oui, ça fait que... Mais effectivement à cette époque je croyais que l'ensemble de la lame c'était un tout, tout était dans le brevet, c'était inclus, c'est dans mes revendications, c'est dans mes brevets. Dans ma tête, c'était inclus. La forme de la lame, la forme de ma lame est dessinée dans le brevet, ça fait que pour moi ça inclut la lame, elle est dessinée dans le brevet. Donc, pour moi c'est le brevet en entier, là, t'sais.

[184] He indicated that he changed his mind between his examination for discovery and the trial based on conversations with his lawyers. Valley Blades thus stresses that while Mr. Michel may have believed that the shape of the blade formed part of the Disputed Claims, the claims clearly omit this feature.

[185] In addition, Valley Blades raises Nordik Blades' PCT application WO 2017/127928 [the PCT Application], arguing it provides contemporaneous evidence that the blades' tapered shape was key to the purported invention claimed in the Nordik Patents. Mr. Michel is one of the named inventors on the PCT Application, which was originally filed on January 26, 2016—about one and a half years before the first Nordik Patent issued. The PCT Application pertains to a new Nordik Blades sweeping blade product whereby the blades are rectangular and superimposed to prevent gaps between the blades. According to Valley Blades, the description of the PCT Application clearly indicates that Mr. Michel considered the tapered shape to be a key part of his purported invention in the 940 Patent (Ex. 63 – FC00116, para 69).

[186] Nordik Blades responds that the Disputed Claims have not been shown to be broader than the purported invention actually made by Mr. Michel. It asserts that Valley Blades cannot rely solely on the PCT Application to argue overbreadth and that the blades' tapered shape is not the invention actually made and claimed in the Nordik Patents. It adds that nothing demonstrates that the tapered shape is an essential element for the invention to work as claimed in the Nordik Patents. In fact, Nordik Blades submits that the evidence is to the contrary as, essentially, (1) the only place where the tapered form is shown in the Nordik Patents is in Figures 4 and 7, as just one of the possible embodiments of the invention; (2) Mr. Michel confirmed that the angular movement is not due to the blade's tapered shape (transcript, October 9, 2022, 48); (3) Mr.

Bouchard affirmed that the form of the blade is not an essential element for the movement; and

(4) Mr. Paonessa affirmed that the tapered form could be replaced by other means.

[187] Nordik Blades thus submits that Valley Blades has not met its burden to show that the Disputed Claims are invalid for overbreadth.

[188] I agree with Nordik Blades' position. First, it is not entirely clear from the discovery read-in that the blades' shape, which Mr. Michel was questioned about was the "tapered" one. In addition, Mr. Bouchard confirmed during cross-examination that the tapered shape was not essential and that a rectangular shape could lead to the same results with adaptation. It is unfortunate that Mr. Michel was not well-informed about his own invention, and his change of testimony is somewhat troublesome. However, when I factor in all the evidence, I am not convinced on balance that the blades' tapered shape was an omitted essential element of the invention and that the claims are invalid for claiming more than the invention that was made.

#### VIII. Section 53 of the Patent Act

##### A. *Section 53 of the Patent Act and legal test:*

[189] Section 53 of the Patent Act provides as follows:

**53. (1)** A patent is void if any material allegation in the petition of the applicant in respect of the patent is untrue, or if the specification and drawings contain more or less than is necessary for obtaining the end for which they purport to be made, and the omission or addition is wilfully made for the purpose of misleading.

**53. (1)** Le brevet est nul si la pétition du demandeur, relative à ce brevet, contient quelque allégation importante qui n'est pas conforme à la vérité, ou si le mémoire descriptif et les dessins contiennent plus ou moins qu'il n'est nécessaire pour démontrer ce qu'ils sont censés démontrer, et si l'omission ou l'addition est volontairement faite pour induire en erreur.

(2) Where it appears to a court that the omission or addition referred to in subsection (1) was an involuntary error and it is proved that the patentee is entitled to the remainder of his patent, the court shall render a judgment in accordance with the facts, and shall determine the costs, and the patent shall be held valid for that part of the invention described to which the patentee is so found to be entitled.

(2) S'il apparaît au tribunal que pareille omission ou addition est le résultat d'une erreur involontaire, et s'il est prouvé que le breveté a droit au reste de son brevet, le tribunal rend jugement selon les faits. et statue sur les frais. Le brevet est réputé valide quant à la partie de l'invention décrite à laquelle le breveté est reconnu avoir droit.

[190] As Justice Southcott stated in *Amgen* at paragraph 434, “the operation of s 53(1), it has two branches: (a) untrue statements in the petition; and (b) misleading statements in the specification. Under the second branch, upon which Pfizer relies, a patent is void if: (a) the specification contains a material addition or omission that is untrue; and (b) the false statements were willfully made with the intent to mislead. The relevant date for applying s 53 is the date the patent issued, although untrue allegations made prior to issue that are not corrected as of the issue date may be included (see *Corlac Inc v Weatherford Canada Inc*, 2011 FCA 228 [*Corlac FCA*] at para 119).”

[191] Hence, a patent is void, pursuant to section 53 of the Patent Act if (1) the specification contains a material addition or omission that is untrue and (2) the false statements were made with the intent to mislead. The relevant date for applying section 53 is the date the patent issued, although untrue allegations made prior to issuance that are not corrected as of the issue date may be included.

## B. *Decision*

[192] Valley Blades contends that Nordik Blades made several statements in the Nordik Patents' specifications exaggerating the benefits of the inventions despite knowing the statements were untrue. Prior to the issuance of any of the Nordik Patents, Nordik Blades filed its

PCT Application, which highlights several deficiencies in the system described in the US 151 Patent, as previously discussed is equivalent to the 940 Patent. Valley Blades thus asserts that before the Nordik Patents issued, the inventors knew or ought to have known that the system described therein: (i) had limited movement; (ii) did not allow for efficient cleaning of snow; and (iii) had increased wear-and-tear of the blade.

[193] It adds that the Nordik Patents omit any discussion of these issues, claiming rather that the purported invention solves a number of problems that were not adequately addressed in the prior art, and that the bushings and ventilation holes are responsible for enabling improved blade movement.

[194] Valley Blades submits that as an inventor will rarely admit to intending to mislead, an intent to mislead can be inferred (*Ratiopharm v Pfizer*, 2009 FC 711 [*Ratiopharm*] at para 203). It stresses that during the 940 Patent's prosecution, the Valley Blades Patent (and others) were cited against Nordik Blades for obviousness. To overcome the objection, Valley Blades submits that Mr. Michel's patent agents misled the Canadian Intellectual Property Office [CIPO] by claiming its snow plow blade and assembly system had a free range of movement and less wear-and-tear than the Valley Blades Patent (5 Ex. 67 – FC00273, p. 60), all while knowing that the system in fact had limited movement permitted by the blades' tapered shape as explained in the PCT Application.

[195] Nordik Blades responds by pointing out that section 53 of the Patent Act "is a provision that implicates the notion of fraud. A party should not merely speculate or make imputations as to motive in a reckless manner or without sufficient evidence so as to have a reasonable belief as

to its truthfulness” (*Eli Canada Inc v Apotex Inc*, 2008 FC 142 at para 62, conf. 2009 FCA 97). It adds that the burden on the party alleging a section 53 violation is therefore heavy.

[196] Nordik Blades adds that Valley Blades’ allegations are unfounded and that, essentially, the PCT Application which was filed six years after filing the 940 Patent application concerns a different invention, is not relevant, and cannot serve as evidence of the 940 Patent invention. It claims the angular movement does not depend on the blades’ tapered shape. Nordik Blades stresses that it answered CIPO’s preoccupations without making any false declarations in the Nordik Patents’ specifications.

[197] The party raising an allegation under section 53 of the Patent Act indeed bears a heavy burden. The allegations must be akin to fraud (*Ratiopharm* at para 196). Valley Blades’ reference to untrue exaggerations by Nordik Blades while relying on *Ratiopharm* seems misplaced; the misstatements referred to in *Ratiopharm* appear considerably more serious—particularly as they relate to pharmaceutical products—than what has been raised against Nordik Blades, and are thus distinguishable (see *Ratiopharm* at para 197). Here, even assuming that Nordik Blades somehow exaggerated the blade movement, the system’s efficiency, and the blade’s wear-and-tear, I find nothing amounts to the required threshold for statements violating section 53.

[198] Valley Blades has not met its heavy burden in establishing section 53 of the Patent Act applies to invalidate the Nordik Patents.

## IX. Subsection 7(a) of the Trademarks Act

### A. *Subsection 7(a) of the Trademarks Act and legal test*

[199] Subsection 7(a) of the Trademarks Act states:

|  |   |
|--|---|
| Unfair Competition and prohibited Marks  | Concurrence déloyale et marques interdites  |
| Prohibitions   | Interdictions   |
| 7 No person shall  | 7 Nul ne peut :   |
| (a) make a false or misleading statement tending to discredit the business, goods or services of a competitor; | a) faire une déclaration fautive ou trompeuse tendant à discréditer l'entreprise, les produits ou les services d'un concurrent; |

[200] Subsection 53.2(1) of the Trademarks Act states:

|   |   |
|---|---|
| Power of court to grant relief  | Pouvoir du tribunal d'accorder une réparation   |
| 53.2 (1) If a court is satisfied, on application of any interested person, that any act has been done contrary to this Act, the court may make any order that it considers appropriate in the circumstances, including an order providing for relief by way of injunction and the recovery of damages or profits, for punitive damages and for the destruction or other disposition of any offending goods, packaging, labels and advertising material and of any equipment used to produce the goods, packaging, labels or advertising material. | 53.2 (1) Lorsqu'il est convaincu, sur demande de toute personne intéressée, qu'un acte a été accompli contrairement à la présente loi, le tribunal peut rendre les ordonnances qu'il juge indiquées, notamment pour réparation par voie d'injonction ou par recouvrement de dommages intérêts ou de profits, pour l'imposition de dommages punitifs, ou encore pour la disposition par destruction ou autrement des produits, emballages, étiquettes et matériel publicitaire contrevenant à la présente loi et de tout équipement employé pour produire ceux-ci. |

[201] The Supreme Court of Canada [the Supreme Court] confirmed in *S&S Industries Inc v*

*Rowell*, [1966] SCR 419, 56 DLR (2d) 501 [*S&S*], at page 424, that:

The combined effect of ss. 7(a) and 52 of the *Trade Marks Act* is to create a statutory cause of action for which damages may be awarded if a person is damaged by false or misleading statements

by a competitor tending to discredit the claimant's business, wares or services. The essential elements of such an action are:

1. A false or misleading statement;
2. Tending to discredit the business, wares or services of a competitor; and
3. Resulting damage.

[202] Contrasting subsection 7(a) with common law actions of injurious falsehoods and trade libel, the Supreme Court added that:

There is no express requirement that the false or misleading statements be made with knowledge of their falsity, or that they be made maliciously. To interpret these provisions as though such elements were implied would be to construe them as merely restating rules of law which already existed (*S&S* at 425).

[203] See as well, *MacDonald et al v Vapor Canada Limited et al*, [1977] 2 SCR 134, 66 DLR (3d) 1 at page 147; *E Mishan & Sons, Inc v Supertek Canada Inc*, 2016 FC 986 [*Supertek*]; *Excalibre Oil Tools Ltd v Advantage Products Inc*, 2016 FC 1279 [*Excalibre*]; *Yiwu Thousand Shores E-Commerce Co Ltd v Lin*, 2021 FC 1040 at para 57; *Immigration Consultants of Canada Regulatory Council v CICC*, 2021 FC 1434 at para 36; and *Fluid Energy Group LTD v Exaltexx Inc*, 2020 FC 81 at para 49 [*Fluid Energy*]).

[204] There is also no need for a competitor to be expressly identified in the false or misleading statements where it can be reasonably inferred that the competitor is understood to be the target (Daniel R Bereskin, *The Canadian Law of Unfair Competition* (Toronto: Thomson Reuters, 2020) at 123).

[205] In *Supertek* at paragraph 7, Justice Hughes confirmed that resulting damage is an essential element of a claim under subsection 7(a). Damages must flow from the false or



misleading statement; that is, there must be a causal link between the statement made and the damage incurred.

[206] Valley Blades and Nordik Blades are direct competitors in the snow plow parts industry.

[207] Valley Blades raises issues with two occurrences. The first concerns a statement made by Nordik Blades in a letter sent to Valley Blades and the Government of Manitoba before the 940 Patent was issued. The second concerns a separate statement made by Nordik Blades in a notice sent to third parties after the 940 Patent issued. I will examine them in turn.

B. *Statement prior to the issuance of the 940 Patent: the Demand Letter*

(1) False or misleading statement

[208] On November 24, 2016, Valley Blades received a letter from counsel for Nordik Blades in respect of the Canadian patent application for the 940 Patent and US 151 Patent. The letter [the Demand Letter] is attached to Mr. Hunt's affidavit as Exhibit 29 and it essentially states that:

(1) counsel received instructions from Nordik Blades to present formal notice;

(2) Nordik Blades is in the process of obtaining a patent for the product commonly known as "Nordik MOVE" blades, which is described and claimed in Canadian Patent Application No. 2856940;

(3) it has recently been brought to their attention that Valley Blades has been advertising and selling products that appear to be exact copies of the "Nordik MOVE" blade and would, by default, come within the scope of Canadian Patent Application No. 2856940;

(4) the United States patent has been granted with claims having similar scope;

(5) while the Canadian patent application in question is not granted yet, the law in Canada awards the patentee for damages incurred before the patent is granted, citing subsection 55(2) of the Patent Act for instance;

(6) Valley Blades immediately cease using, selling, promoting and/or referencing any product, including Valley Blades' "ECONOFLEX-M" blade, that comes within the scope of the Nordik Application from the Canadian market; and

(7) upon failure to comply with this letter, their client would hold it responsible for all damages suffered, as a result of its willful infringement of Nordik Blades' rights and they will have no other alternative than to undertake the necessary legal proceedings against Valley Blades Ltd. without further notice or delay.

[209] On November 30, 2016, Nordik Blades sent a copy of the Demand Letter to a procurement officer at the Government of Manitoba's Procurement Services Branch.

[210] On September 12, 2017, Nordik Blades sent a second letter to Valley Blades advising them that the 940 Patent had been granted and reiterating their requests made in the Demand Letter.

[211] Valley Blades submits that Nordik Blades' suggestion that it could immediately initiate infringement proceedings against Valley Blades in respect of a pending patent application (i.e., the statement: "[w]e will have no other alternative than to undertake the necessary legal proceedings against Valley Blades Ltd without further notice nor delay") is a false statement, regardless of whether the Court finds that the 940 Patent's Disputed Claims are valid. Valley Blades adds that the suggestion that Nordik Blades could sue Valley Blades pursuant to patent rights that it did not have was misleading (transcript, closing, 108).

[212] Nordik Blades acknowledges that the patent was not yet granted in November 2016 and that there was some confusion. However, it stresses that the patent was published and the Demand Letter clearly states why it was sent. Nordik Blades adds that the Patent Act provides recourse for reasonable compensation for sales made between a patent's publication date and its grant (citing subsection 55(2)), and asserts that it is perfectly normal to send somebody a letter during the laid open period (transcript, October 17, 2023, 91). Nordik Blades thus asserts that none of the Demand Letter's statements were false.

[213] As stated above, in assessing this first element of the tripartite legal test, “[t]here is no express requirement that the false or misleading statements be made with knowledge of their falsity, or that they be made maliciously” (*S&S* at 425).

[214] It appears accurate to state that, under section 55 of the Patent Act, liability can incur for acts taken before the patent issues. However, the text of subsection 55(2) of the Patent Act indicates that the action can only be taken in this regard if and when the patent is issued. The Demand Letter is misleading because it implies that in 2016—before any of the Nordik Patents issued—Nordik Blades had already crystallized patent rights that could form the basis of a patent infringement action. Furthermore, Nordik Blades' suggestion that it could immediately initiate infringement proceedings against Valley Blades in respect of a pending patent application is misleading and false.

[215] Valley Blades has demonstrated that Nordik Blades made a false or misleading statement in the Demand Letter and has thus met the first element of the test.

(2) Tending to discredit the business, wares, or services of a competitor

[216] Valley Blades amalgamated its submissions on the first two elements of the legal test (e.g., pages 43-44 of its closing submissions), which is unfortunate and proved less than helpful.

[217] Valley Blades outlines that the Demand Letter threatens patent infringement proceedings against Valley Blades as it stated: “FAILURE on your behalf to comply with this letter, our client will hold you responsible for all damages suffered, as a result of your willful infringement of Nordik Blades’ rights and we will have no other alternative than to undertake the necessary legal proceedings against Valley Blades Ltd. without further notice nor delay.”

[218] Valley Blades stresses that Mr. Michel outlined in cross-examination that although Nordik Blades did not necessarily want to preclude Valley Blades from winning the bid with the Government of Manitoba, it did want to win the bid itself. Mr. Michel admitted that it would be accurate to assume that the Demand Letter would indirectly result in precluding Valley Blades from winning said bid (transcript, trial, day 3, 149).

[219] In its oral closing submissions, Valley Blades submitted that the fact that Nordik Blades exposed the Government of Manitoba to the statements in the Demand Letter gave the false impression that Valley Blades was wrongfully offering to provide and supply EconoFlex-M products; and that statement tended to discredit a product and the business of Valley Blades.

[220] Nordik Blades responds that Mr. Hunt himself confirmed in cross-examination that his affidavit provided no evidence that Valley Blades’ clients have had a bad impression of Valley Blades following Nordik Blades distribution of the Demand Letter.

[221] It is not clear whether the case law pertaining to the impact of the Demand Letter's tone (i.e., threatening or informative), published before the 940 Patent issued, is determinative in the situation at hand. The case law cited in this regard pertain to cease-and-desist communications where a patent has already been issued. Given this uncertainty, coupled with the fact that the testimonies of both Mr. Michel and Mr. Hunt do not provide clarity—Mr. Michel's testimony is unconvincing while Mr. Hunt provided no evidence that Valley Blades' clients have retained a bad impression of Valley Blades following Nordik Blades' actions—Valley Blades has not convinced me that the Demand Letter tended to discredit its product or business.

(3) Resulting damages

[222] Valley Blades submits that Mr. Hunt's unchallenged evidence is that the Demand Letter caused Valley Blades damage vis-à-vis the Manitoba bidding process. It points to the fact that on March 27, 2017, the Government of Manitoba informed Valley Blades that it awarded Nordik Blades the contract despite Valley Blades offering a steep discount.

[223] While true, this is insufficient evidence to convince me that, on a balance of probabilities, the contract was not awarded to Valley Blades *because* of the false and misleading statements by Nordik Blades contained in the Demand Letter. No evidence was adduced from the Government of Manitoba and Mr. Hunt indicated he did not know what exactly motivated it to award the contract to Nordik Blades over Valley Blades. Valley Blades' assertion that the Demand Letter caused it to incur resulting damages is merely speculative.

- (4) Conclusion in relation to the statement made prior to the issuance of the 940 Patent

[224] The evidence adduced by the parties demonstrates on balance neither that the Demand Letter tended to discredit Valley Blades, nor that any damages flowed as a result of the false or misleading statement. I conclude that Valley Blades has not met its burden in establishing that Nordik Blades contravened subsection 7(a) of the Trademarks Act in relation with the Demand Letter.

C. *Statement after the issuance of the 940 Patent: the Notice*

- (1) False and misleading statement

[225] On October 4, 2017, hence after the 940 Patent issued (on July 4, 2017), Nordik Blades sent another communication to a number of Valley Blades' customers, i.e., the end users. The communication was titled, "Notice of patent infringement" and was signed by counsel for Nordik Blades and Mr. Michel [the Notice]. On or before November 16, 2017, Mr. Zoltan Nemeth of Nordik Blades visited the Township to inform Mr. Jonathan Goulet that Nordik Blades had a patent on the Nordik MOVE product and provided the Notice.

[226] The Notice is attached to Mr. Hunt's affidavit as Exhibit 30. It essentially states (original in French) that:

1. it has come to Nordik Blades' attention that a copy of their "Nordik MOVE" product, subject to Canadian and American Patents No. 2, 856,940 and 9,121,151 is being marketed and sold without their consent;

2. these actions not only fell under the scope of bad business practices, but could constitute patent infringement under the Canadian and American Patent Act;
3. that such legislation grants the owner of a patent the exclusive rights to make, construct, use, and sell the object of the invention described in such patent;
4. all purchases and sales of copies of the Nordik MOVE are thus strictly prohibited; and
5. Nordik Blades will take all necessary legal measures against all entities who are purchasing or selling copies of the Nordik MOVE product.

[227] In regards to the Notice, sent after the 940 Patent issued, Valley Blades submits that statements in a threatening cease-and-desist letter can form the basis of a claim under subsection 7(a) of the Trademarks Act (*Excalibre* at para 283). Valley Blades asserts that this equally applies to statements in the Notice that, for all intents and purposes, served to achieve the exact same goal.

[228] Valley Blades also submits that if the Court accepts that the Disputed Claims of the 940 Patent are invalid, it follows that Nordik Blades made false and misleading statements about Valley Blades and its EconoFlex-M product to the Township and to any other customers who received the Notice. Valley Blades asserts that in the Notice, Nordik Blades made false and misleading statements, including that it has valid patent rights and Valley Blades engaged in “bad business practice” by infringing Nordik Blades’ patent.

[229] Valley Blades asserts that if Nordik Blades threatened third parties of patent-infringement litigation based on rights that it had in a patent which were later invalidated, the statement becomes false. Valley Blades thus submits that the threat of litigation over rights in the 940

Patent which turned out to be invalidated became a false statement, even if Nordik Blades relied on the patent's presumption of validity at the time the statement was made.

[230] It adds that Nordik Blades has in fact not sued the Township nor any of the other entities to which it sent the Notice, and that Nordik Blades' counsel went as far as suggesting that Nordik Blades would have never sued recipients of the Notice for fear of "antagoniz[ing] all of the potential customers" (transcript, trial, day 1, 91-92). Valley Blades asserts that suggesting it was going to sue those customers who received the Notice was misleading if it had no actual intention of ever doing that (transcript, trial, October 25, 2022,110).

[231] Nordik Blades responds that the claim under subsection 7(a) of the Trademarks Act can be considered only if the Court concludes that the 940 Patent is invalid; and that none of the statements in the Notice were false or misleading.

[232] I have earlier concluded that the Disputed Claims of the 940 Patent are invalid for obviousness.

[233] In *Fluid Energy*, Justice McHaffie outlined that: "[...] it has long been recognized that a false allegation that a competitor infringes a patent may fall within subsection 7(a): *S&S Industries Inc v Rowell*, [1966] SCR 419 at pp 422, 424-425, 429-432. This is so even if the falsity of the allegation may not be established until later, such as after a finding that the patent is invalid: *S&S Industries* at p 425" (para 49).

[234] In *S&S*, the appellant argued that even if the patent upon which it relied was held invalid, no action lay for damages. Particularly, the appellant contended that under section 46 of the Patent Act, the patent was *prima facie* valid and that the steps it had taken to protect its



position were done with a view to protect its own property rights. The appellant also contented that so long as it acted honestly to protect its patent, no legal wrong was committed even if the patent was found to be invalid in subsequent proceedings. However, the Supreme Court rejected this argument and confirmed that the circumstances of the case did bring the respondent within the provisions of subsection 7(a). In its analysis, the Supreme Court noted that the defendant had not instituted threatened legal proceedings, turning instead to other methods for protecting its patent (*S&S* at 431).

[235] The Supreme Court made no mention of a distinction between informative and threatening cease-and-desist communications. It appears this distinction was first introduced by the Federal Court in *M&I Door Systems Ltd v Indoro Industrial Door Co Ltd* (1989), 25 CPR (3d) 477 (FCTD) [*M&I Door Systems*] at page 523. In *M&I Door Systems*, the Federal Court found the letters were in fact more informative than threatening and ultimately decided the defendant had not established a claim under subsection 7(a) of the Trademarks Act. It is unclear if the Court considered this distinction in order to determine if the statement was false or misleading and/or to determine whether it tended to discredit the product or business of a competitor.

[236] In *M&I Door Systems*, the Court noted, *inter alia*, that the “[c]laim for damages is also tempered by the fact that when a corporation has a registered patent it is prima facie valid and the patentee has the right to act on that basis” (523). At first glance, this seems at odds with the Supreme Court’s conclusion in *S&S* that rejected the appellant’s argument that it was protected by the patent’s presumption of validity until it was found invalid. However, in *S&S*, the patent holder had not instigated any action against the alleged infringer and had instead taken actions

towards third parties; the Supreme Court was clear that these particular actions overreached and were even found to be malicious despite there being no need to prove malice. In view of the facts, there was probably no need for the Supreme Court to establish a distinction.

[237] Justice Hughes precisely contrasted the facts in *S&S* with those in *M&I Door Systems* at paragraphs 8 to 10 of *Supertek* before concluding that: “It can be concluded from these cases that it is not every assertion of a patent or other intellectual property such as an industrial design which may be subsequently be held to be invalid which will be held to constitute a false and misleading statement. The Court must inquire as to the nature and circumstances of the assertions and any subsequent conduct by the party making the assertions” (para 11).

[238] In *Supertek*, the Court clearly considered the distinction between a threatening and informative letter and subsequent action in order to assess whether the statement was false or misleading. It is unclear if it considered this distinction to determine if the statement tended to discredit the product or business of a competitor.

[239] In *Excalibre* (para 283) and *Fluid Energy* (para 51-2) the Court used the distinction between threatening and informative letters to assess if the statement tended to discredit the business or wares of a competitor.

[240] In this case, I am satisfied that the Notice contains false or misleading statements because I have invalidated the Disputed Claims of the 940 Patent. Furthermore, if the tone of the statement can be considered under the first element of the test, there is no doubt that the Notice is not merely informative but is threatening; it directly alleges infringement, prohibits purchases and sales, and threatens legal action (*Fluid Energy* at para 99).

[241] The first element of the test is met.

(2) Tending to discredit the business, wares, or services of a competitor

[242] Valley Blades submits that the statements in the Notice discredited its products. It adds that what matters here is that its EconoFlex-M product was discredited. Valley Blades points to the *Excalibre* decision as an example to show that it is sufficient to have the product be the subject of, or victim of, the statements, even if other products of the same supplier continue to be purchased by the same customers.

[243] Valley Blades adds that false and misleading statements in the Notice tended to discredit Valley Blades and its EconoFlex-M product as they gave customers who were exposed to them the impression that Valley Blades may be wrongfully producing and selling EconoFlex-M products. Valley Blades also contends that the Notice created the false risk that those customers could be sued by Nordik Blades if they purchased EconoFlex-M products, and stress that, Mr. Michel even admitted that, in disseminating the Notice, Nordik Blades wanted potential customers to know “that they will be sued if they buy what [Nordik Blades] considered a copycat product.” It argues that this is also, what customers understood; after the Township received the Notice, Mr. Bourgon “thought there is a potential risk of being in litigation with Nordik Blades.”

[244] I have already concluded that the terms of the Notice were indeed threatening. Following my colleagues in *Excalibre* and *Fluid Energy*, I thus conclude that the statement in the Notice tended to discredit the product of Valley Blades.

(3) Resulting damages

[245] Valley Blades outlined that Mr. Hunt explained the statements in the Notice impacted Valley Blades' business as the Township returned the EconoFlex-M blades it had received from Valley Blades, in order to avoid any litigation risk. Valley Blades adds that despite the absence of a supporting invoice, Mr. Bourgon's best recollection of the events is that the returned EconoFlex-M blades had initially been purchased by the Township. It has not purchased any EconoFlex-M products from Valley Blades since these events.

[246] On November 16, 2017, the Township informed Valley Blades of its decision to re-evaluate whether to keep the EconoFlex-M blades they had received or return them. On December 20, 2017, Mr. Derrick Mayhew from Valley Blades sent an e-mail to Mr. Bruno Montesano from Valley Blades stating that Mr. Goulet informed Mr. Mayhew that the Township decided to return the two Econoflex-M systems it had purchased.

[247] Nordik Blades responds that the evidence reveals that the Notice sent to the Township caused no damages to Valley Blades as: (a) Valley Blades adduced no documentary evidence confirming that the Township had in fact paid for the two Econo-Flex-M systems; (b) Valley Blades adduced no documentary evidence confirming that it had reimbursed the Township (c) Valley Blades remitted to the Township two PolarFlex systems to replace the Econo-Flex-M systems; and (d) neither Valley Blades nor the Township has been able to confirm that the Township has in fact ceased to buy products from Valley Blades.

[248] In *Uview Ultraviolet Systems Inc v Brasscorp Ltd*, 2009 FC 58, the Court imported in the subsection 7(a) analysis the principles outlined by the FCA in *BMW Canada Inc v Nissan Canada*

*Inc*, 2007 FCA 255 in regards to the damages requirement (para 35). In the absence of evidence of actual or potential damage that resulted from the Notice, the Court cannot conclude that there is liability. As outlined by Nordik Blades, the evidence does not convince me, on balance, that Valley Blades suffered damages because of the Notice.

(4) Conclusion in relation with the statement made after the 940 Patent issued

[249] Valley Blades has not established its claim under subsection 7(a) of the Trademarks Act.

X. Costs

[250] Valley Blades asked the Court for a lump sum award, as opposed to costs under the Federal Court's tariff system, and the opportunity to make additional submissions on what should be the actual quantum.

[251] Nordik Blades asked the Court to establish costs according to the top end of column IV of the Tariff.

[252] I will allow the parties the opportunity to file additional written submissions, of a maximum of ten pages, to address the issue of costs.

**JUDGMENT in T-1790-17 and T-416-19**

**THIS COURT'S JUDGMENT is that:**

1. Claims 1-12 of f Patent No. 2,856,940; claims 1-8, 10-14, 16, 17, 19, 20-28, 31-32, 34-37, 39-43, 45-47, 49-51, 54-62, and 64 of Canadian Patent No. 2,965,426; and claims 1-2, 4-5, 7, and 9-14 of Canadian Patent No. 2,992,233 are invalid for obviousness.
2. The parties may file additional submissions on the issue of costs within the next 30 days, of a maximum of ten pages.
3. The parties have 30 days from the release of the confidential reasons to make submissions on redactions before a public version is released.

"Martine St-Louis"

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Judge

## XI. Annex: the dependant claims

### *The 940 Patent*

#### Claims 2-12

2. The sweeping blade assembly of claim 1, wherein each blade portion is made of composite material, steel, carbide, aluminum, alloy, polymer or plastic.
3. The sweeping blade assembly of claim 1 or 2, wherein each blade portion further comprises an insert into said lower edge.
4. The sweeping blade assembly of claim 3, wherein the insert is made of carbide.
5. The sweeping blade assembly of any one of claims 1 to 4, wherein a layer of resilient material is provided on the blade portion.
6. The sweeping blade assembly of claim 5, wherein the layer of resilient material and the resilient material bushing are made of a rubber material.
7. The sweeping blade assembly of any one of claims 1 to 6, wherein the first blade support is removably attached to the vehicle.
8. The sweeping blade assembly of any one of claims 1 to 7, wherein the vehicle is selected from the group consisting of: a truck, a car, a four-wheeler, a tractor, a personal vehicle, a commercial vehicle, a snow plow vehicle and a van.
9. The sweeping blade assembly of any one of claims 1 to 8, wherein the first blade support is for removable attachment to the front, side, back or underneath of said vehicle.
10. The sweeping blade assembly of any one of claims 1 to 9, wherein the second blade support is narrower than the sweeping blade devices.
11. The sweeping blade assembly of any one of claims 1 to 10, wherein the vertical channel has an open top adjacent the upper edge of the blade portion.
12. The sweeping blade assembly of any one of claims 1 to 11, wherein the vertical channel has an open bottom adjacent the lower edge of the blade portion

### *The 426 Patent*

#### Claims 2-19

2. The sweeping blade assembly of claim 1, wherein the second blade support is narrower than the sweeping blade devices.
3. The sweeping blade assembly of one of claims 1 and 2, wherein the blade portion is made of composite material, steel, carbide, aluminum, alloy, polymer and/or plastic.
4. The sweeping blade assembly of anyone of claims 1 to 3, wherein the blade portion has a lower edge configured to contact the ground surface and each one of the sweeping blade devices further comprises an insert in said lower edge.
5. The sweeping blade assembly of claim 4, wherein the insert comprises carbide.
6. The sweeping blade assembly of claim 5, wherein the sweeping blade devices further comprise ventilation holes defined in the resilient material layer and the compressible bushings.
7. The sweeping blade assembly of one of claims 5 and 6, wherein the resilient material comprises a rubber material.

8. The sweeping blade assembly of any one of claims 1 to 5, wherein each one of the compressible bushings comprises a ventilation hole defined therein, the ventilation being configured to increase the compressibility of a corresponding one of the compressible bushings.
9. The sweeping blade assembly of one of claims 6 and 8, wherein the ventilation holes extend through the corresponding one of the compressible bushings.
10. The sweeping blade assembly of any one of claims 1 to 9, wherein each one of the sweeping blade devices further comprises metallic bushings inserted in the compressible bushings and defining fastener apertures.
11. The sweeping blade assembly of any one of claims 1 to 10, wherein the blade portion is steel-based.
12. The sweeping blade assembly of any one of claims 1 to 11, wherein the at least one bushing hole is elliptic in shape.
13. The sweeping blade assembly of claim 6, wherein the blade portion comprises a lower edge for sweeping the ground surface, each one of the sweeping blade devices further comprises metallic bushings inserted in the compressible bushings and defining fastener apertures, and wherein each one of the ventilation holes is aligned with a respective one of the fastener apertures, each one of the ventilation holes being closer to the lower edge than a corresponding one of the metallic bushings.
14. The sweeping blade assembly of claim 4, wherein the lower edges of the blade portions extend downwardly past the first and the second blade supports.
15. The sweeping blade assembly of any one of claims 1 to 14, wherein each one of the blade portions comprises an upper edge and the upper edges of the blade portions extend up to or upwardly past the second blade support.
16. The sweeping blade assembly of any one of claims 1 to 15, wherein the resilient material layer covers a majority of front and rear faces of the blade portion.
17. The sweeping blade assembly of any one of claims 1 to 16, wherein the resilient material layer is bonded to the blade portion.
18. The sweeping blade assembly of any one of claims 1 to 17, wherein the blade portion comprises an upper edge and the resilient material layer extends at most to the upper edge of the blade portion.
19. The sweeping blade assembly of claim 18, wherein the resilient material layer covers the upper edge of the blade portion.

## Claims 21-34

21. The sweeping blade assembly of claim 20, wherein the resilient material bushings comprise a ventilation hole defined therein, the at least one of the sweeping blade devices being attached to the first blade support or the second blade support through the resilient material bushings.
22. The sweeping blade assembly of one of claims 20 and 21, wherein the second blade support is narrower than the sweeping blade devices.
23. The sweeping blade assembly of any one of claims 20 to 22, wherein the first blade support is removably securable to a snow plough blade located at a front, side, back or underneath of a vehicle.
24. The sweeping blade assembly of claim 21, wherein the at least one of the sweeping blade devices further comprises a metallic bushing inserted in the resilient material bushing and defining a fastener aperture, the metallic bushing being aligned with the ventilation hole defined in the same one of the resilient material bushings.
25. The sweeping blade assembly of any one of claims 20 to 24, wherein the blade portion is steel-based and the resilient material is rubber-based.
26. The sweeping blade assembly of any one of claims 20 to 25, wherein the two bushing holes are elliptic in shape.
27. The sweeping blade assembly of claim 24, wherein the blade portion comprises a lower edge for sweeping the ground surface and the ventilation hole is closer to the lower edge than the metallic bushing.
28. The sweeping blade assembly of any one of claims 20 to 27, wherein the blade portion comprises a lower edge for sweeping the ground surface and the lower edge of the blade portion extends downwardly past the first and the second blade supports.
29. The sweeping blade assembly of any one of claims 20 to 28, wherein the blade portion comprises an upper edge and the upper edge of the blade portion extends up to or upwardly past the second blade support.
30. The sweeping blade assembly of claim 21, wherein the ventilation hole extends through a respective one of the resilient material bushings.



31. The sweeping blade assembly of any one of claims 20 to 30, wherein the resilient material layer covers a majority of front and rear faces of the blade portion.
32. The sweeping blade assembly of any one of claims 20 to 31, wherein the resilient material layer is bonded to the blade portion.
33. The sweeping blade assembly of any one of claims 20 to 32, wherein the blade portion comprises an upper edge and the resilient material layer extends at most to the upper edge of the blade portion.
34. The sweeping blade assembly of claim 33, wherein the resilient material layer covers the upper edge of the blade portion.

## Claims 36-49

36. The sweeping blade assembly of claim 35, wherein the resilient material bushing comprises a ventilation hole defined therein configured to increase the compressibility of a respective one of the resilient material bushings.
37. The sweeping blade assembly of one of claims 35 and 36, wherein the first blade support assembly is removably securable to a snow plough blade located at a front, side, back or underneath of a vehicle.
38. The sweeping blade assembly of claim 36, wherein the ventilation hole extends throughout the resilient material layer and the resilient material bushing.
39. The sweeping blade assembly of claim 36, wherein each one of the sweeping blade devices further comprises a metallic bushing inserted in the resilient material bushing and defining a fastener aperture, the metallic bushing being aligned with the ventilation hole defined in the same resilient material bushing.
40. The sweeping blade assembly of any one of claims 35 to 39, wherein the blade portion is steel-based and the resilient material is rubber-based.
41. The sweeping blade assembly of any one of claims 35 to 40, wherein the at least one bushing hole is elliptic in shape.
42. The sweeping blade assembly of claim 39, wherein the blade portion comprises a lower edge for sweeping the ground surface and the ventilation hole is closer to the lower edge than the metallic bushing.
43. The sweeping blade assembly of any one of claims 35 to 42, wherein the blade portion comprises a lower edge for sweeping the ground surface and the lower edge of the blade portion extends downwardly past the first and the second blade supports.
44. The sweeping blade assembly of any one of claims 35 to 43, wherein the blade portion comprises an upper edge, the first blade support is securable to a snow plough blade of a vehicle, the second blade support is mountable in parallel to and distant from the first blade support, and the upper edge of the blade portion extends up to or upwardly past the second blade support.
45. The sweeping blade assembly of any one of claims 35 to 44, wherein each one of the sweeping blade devices is shorter in length than the first and the second blade supports.
46. The sweeping blade assembly of any one of claims 35 to 45, wherein the resilient material layer covers a majority of the front and rear faces of the blade portion.
47. The sweeping blade assembly of any one of claims 35 to 46, wherein the resilient material layer is bonded to the blade portion.
48. The sweeping blade assembly of any one of claims 35 to 47, wherein the blade portion comprises an upper edge and the resilient material layer extends at most to the upper edge of the blade portion.
49. The sweeping blade assembly of claim 48, wherein the resilient material layer covers the upper edge of the blade portion.

## Claims 51-64

51. The assembly as claimed in claim 50, wherein each one of the resilient bushing portions further comprises a ventilation hole defined therein and configured to increase the compressibility of a respective one of the bushings, the ventilation hole being aligned with a corresponding one of the fastener apertures.
52. The assembly as claimed in claim 51, wherein the ventilation hole extends through the resilient material layer and the resilient bushing portion.

53. The assembly as claimed in any one of claims 50 to 52, wherein the resilient material layer covers a majority of the front and rear faces of the blade portion, the resilient material layer extending at most to the upper edge of the blade portion and being bonded to the blade portion.
54. The assembly of claim 52, wherein the resilient material layer covers the upper edge of the blade portion.
55. The assembly as claimed in any one of claims 50 to 54, wherein each one of the bushings further comprises a metallic bushing inserted in the fastener aperture, the metallic bushing being externally surrounded by a respective one of the resilient bushing portions.
56. The assembly as claimed in any one of claims 50 to 55, wherein the second blade support is narrower than the sweeping blade devices.
57. The assembly as claimed in any one of claims 50 to 56, wherein the blade portion is made of composite material, steel, carbide, aluminum, alloy, polymer and/or plastic.
58. The assembly as claimed in any one of claims 50 to 57, wherein the blade portion further comprises a carbide insert inserted into the lower edge.
59. The assembly of any one of claims 50 to 58, wherein the blade portion is steel-based and the resilient bushing portion is rubber-based.
60. The assembly of any one of claims 50 to 59, wherein the at least two bushing holes are elliptic in shape.
61. The assembly of claim 51, wherein each one of the bushings further comprises a metallic bushing inserted in the fastener aperture with the ventilation hole being closer to the lower edge than the metallic bushing.
62. The assembly of any one of claims 50 to 61, wherein the lower edge of the blade portion extends downwardly past the first and the second blade supports.
63. The assembly of any one of claims 50 to 62, wherein the first blade support is attachable to a snow plough blade of the vehicle and the upper edge of the blade portion extends up to or upwardly past the second blade support.
64. The assembly of any one of claims 50 to 63, wherein each one of the sweeping blade devices is shorter in length than the first and the second blade supports.

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### Claims 2-14

2. The sweeping blade as claimed in claim 1, wherein each one of the resilient bushing portions further comprises a ventilation hole defined therein and configured to increase the compressibility of a respective one of the bushings.
3. The sweeping blade as claimed in claim 2, wherein the ventilation hole and the fastener aperture extend through the resilient bushing portion and the resilient material layer.
4. The sweeping blade as claimed in any one of claims 1 to 3, wherein the resilient material layer covers a majority of the front and rear faces of the blade portion.
5. The sweeping blade as claimed in any one of claims 1 to 4, wherein the resilient material layer is bonded to the blade portion.
6. The sweeping blade as claimed in one of claims 2 and 4, wherein the resilient material layer extends at most to the upper edge of the blade portion.
7. The sweeping blade as claimed in claim 6, wherein the resilient material layer covers the upper edge of the blade portion.
8. The sweeping blade of one of claims 2 and 3, wherein the ventilation holes of the bushings extend through the resilient material layer.
9. The sweeping blade as claimed in any one of claims 1 to 8, wherein the bushings further comprise a metallic bushing exposed in the fastener aperture, the metallic bushing being externally surrounded by a respective one of the resilient bushing portions.
10. The sweeping blade as claimed in any one of claims 1 to 9, wherein the blade portion is made of composite material, steel, carbide, aluminum, alloy, polymer and/or plastic and the blade portion further comprises a carbide insert inserted into the lower edge.
11. The sweeping blade of any one of claims 1 to 10, wherein the blade portion is steel-based and the blade portion further comprises a carbide insert inserted into the lower edge.
12. The sweeping blade of any one of claims 1 to 11, wherein the at least two bushing holes are elliptic in shape.
13. The sweeping blade of one of claims 2 and 3, wherein each one of the ventilation holes is closer to the lower edge than a corresponding one of the fastener apertures.

14. The sweeping blade of one of claims 2 and 3, wherein the blade portion has a transversal axis extending between the lower edge and the upper edge and each one of the ventilation holes is aligned with the respective fastener aperture along the transversal axis.

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