

Federal Court



Cour fédérale

Date: 20140407

Docket: T-1112-13

Citation: 2014 FC 326

Toronto, Ontario, April 7, 2014

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

**E. MISHAN & SONS, INC. AND
BLUE GENTIAN, LLC**

**Plaintiffs/
Defendants by Counterclaim**

and

**SUPERTEK CANADA INC., INTERNATIONAL
EDGE, INC. AND TELEBRANDS CORP.**

**Defendants/
Plaintiffs by Counterclaim**

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an action respecting the infringement and validity of some of the claims of Canadian Patent No. 2,779,882 entitled “Expandable and Contractible Hose”. The subject matter is a garden hose which is quite compact when stored, but when water pressure is applied, the hose expands to about two and a half times its length and retracts to its original length when the pressure is removed. This hose has been promoted for sale, particularly through television spot commercials.

[2] For the reasons that follow, I find that the asserted claims of the patent are invalid for obviousness.

[3] I provide the following index to these reasons:

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THE PARTIES

[4] The Plaintiff E. Mishan & Sons, Inc. is a New York corporation with its principal office located in New York City. It is referred to as “Emson”. Edward (Eddie) Mishan, a principal of that corporation, appeared as a witness at trial.

[5] The Plaintiff Blue Gentian LLC is a limited liability Florida corporation with its principal office located in Jupiter, Florida. The patent at issue was issued and granted to Blue Gentian who remains as the owner of that patent. It is the patentee. Michael Berardi is a principal of Blue Gentian and is the named inventor of the patent. He appeared as a witness at trial.

[6] The Defendant Supertek Canada Inc. is a Canadian corporation with its principal office located in Montreal, Quebec. It sells in Canada “As seen on TV” products such as the hoses at issue.

[7] The Defendant Telebrands Corp. is a New Jersey corporation with a principal office located in Fairfield, New Jersey. It promotes on TV, and the internet, and sells products such as the hoses at issue. Ajit Khubani, a principal of Telebrands, appeared as a witness at trial.

[8] The Defendant International Edge Inc. is a New York corporation with offices at the same place as Telebrands. It is not corporately related to Telebrands but Poonam Khubani, the wife of Ajit Khubani, is the principal of International Edge. It supplies hoses at issue to customers outside the United States such as Supertek.

THE '882 PATENT IN GENERAL

[9] At issue are Canadian Letters Patent No. 2,779,882 entitled “Expandable and Contractible Hose”, which will be referred to as the '882 patent; or simply, the patent. A copy of the patent was entered as Exhibit P-1.

[10] The application for the patent was filed through the provisions of the Patent Co-operation Treaty with an effective filing date in Canada of April 3, 2012. The file history of the patent application was entered as Exhibit P-7. Since the application was filed after October 1, 1989, the provision of the “new” *Patent Act*, RSC 1985, c.P-4, apply to the patent.

[11] Priority was claimed from an application filed in the United States Patent Office on November 4, 2011; application US13/289,447.

[12] The application for the patent was made available for public inspection (publication date) on August 23, 2012. The patent application as available at that time was entered as Exhibit D-13.

[13] The patent was issued and granted to the Plaintiff Blue Gentian, LLC on May 28, 2013; it names Michael Berardi as the only inventor. Mr. Berardi appeared as a witness at the trial before me.

[14] Unless the patent is held to be invalid by this Court, the term of the patent will expire twenty years from its Canadian filing date; that is, on April 3, 2032.

[15] The '882 patent contains 42 claims; but, by agreement between the parties, only claims 1, 15, 28, and 42 (through 32 back to 28) are at issue here in respect of both validity and infringement.

THE '882 PATENT IN DETAIL

[16] The '882 patent is entitled "Expandable and Contractible Hose" begins at paragraph 0001 with a statement of the "Field of the Invention":

[0001] The present invention related to a hose for carrying fluid materials. In particular, a hose that automatically contracts to a contracted state when there is no pressurized fluid within the hose and automatically expands to an extended state when a pressurized fluid is introduced into the hose. In the contracted state the hose is relatively easy to store and easy to handle because of its relative short length and its relative light weight and in the extended state the hose can be located to where ever the fluid it required The hose is comprised of an elastic inner tube and a separate and distinct non-elastic outer tube positioned around the circumference of the inner tube and attached and connected to the inner tube only at both ends and is separated, unattached unbonded and unconnected from the inner tube along the entire length of the hose between the first end and the second end.

[17] At paragraphs 0002 to 0004 the patent provides a “Background of the Invention” in which a number of problems with current hoses are set out: hoses must be wrapped or coiled when not in use; fire hoses and the like can be stored flat but are impractical for homeowners. A solution is promised at paragraph 0004.

BACKGROUND OF THE INVENTION

[0002] Hoses which are used to carry various fluids are known in the art. One of the problems encountered with these hoses is storage of the hose when it is not being used to transport the fluids. While current hoses are flexible and can be wrapped around a cylinder or drum for storage and transport, the length and width of the hose cannot be reduced. Another problem encountered with wrapped or coiled hoses is that they tend to kink when unwrapped or uncoiled. This problem is usually encountered by the average homeowner when using a garden hose to water their grass, plants, or wash their vehicles.

[003] Firefighters have a solution to the kinking problem. The hoses that they use collapse into a relatively flat state when the fluids are removed from the hoses. The hoses are then stored in layers which are formed by the hose being laid back and forth upon itself. When the firefighters use the hoses stored like this, they only have to pull at one end of the hose and it unfolds in a straight line without kinking. This is not a practical solution to a homeowner’s problem of the hose storage because garden hoses are relatively small in diameter, compared to fire hoses, and almost all garden hoses do not collapse into a flat condition when the water is emptied from the hose. Another problem with hoses known in the art is that they are heavy bulky and difficult to unravel when lying on the ground and also difficult to handle and drag around to the place where the fluid is needed both when they are filled with a fluid and are equally as difficult to handle and drag around when they are empty and needing to be returned to their original place of storage. Also, if the user does not have a device for winding the hose then he must try to place the hose on the ground in a way as to not entangle the hose within itself because if the hose does become entangled within itself this makes it difficult and frustrating to unravel the hose the next time the hose is used.

[0004] Therefore, what is needed in the art is a hose that can be automatically contracted and reduced in length when not in use, and automatically expanded and extended to a length which is practical

for use, and automatically returned to the reduced length when not in use. Also, a hose which is relatively light in weight will not kink when taken from storage and filled with fluid for use.

[18] From paragraphs 0005 to 00029 the patent lists some twenty-five prior patents providing a brief description as to each. A booklet containing all of the patents in full was filed in evidence at trial as Exhibit D-21. These patents describe a variety of hoses used to transport water, air and even gasoline. One of them, Ragner 6,948,527 is relied upon by the Defendants in arguing invalidity. Two other patents relied on by the Defendants, Many 1,220,661, and McDonald 6,948,527 are not listed. We do not know how the patents listed were located or by whom. Berardi, the named inventor, gave evidence that he did a prior art search before he turned the matter over to the patent attorney but we do not know if this list is the result of his search or otherwise. At paragraph 0065 the patent states that these patents are “indicative” of the prior art:

[0065] All patents and publications mentioned in this specification are indicative of the levels of those skilled in the art which the invention pertains.

[19] At paragraphs 0030 to 0037 a “Summary of the Invention” is provided. I reproduce paragraph 0030:

SUMMARY OF THE INVENTION

[0030] A hose which automatically expands longitudinally and automatically expands laterally upon the application of a fluid pressure within the hose is disclosed. The hose can automatically expand longitudinally up to six times its unexpanded or contracted length and can automatically expand laterally up to six times its unexpanded width. Upon release of the fluid pressure within the hose, the hose will automatically contract to a contracted condition. The hose includes an expandable inner tube made from an elastic material and a separate, distinct outer tube made from a non-elastic material, positioned around the outer circumference and length of

the inner tube and secured to the inner tube only at first and second end and is unattached, unconnected, unbonded, and unsecured to the inner tube along the entire length of the inner tube between the first and the second end and is able to move freely with respect to the inner tube along the entire length of the inner tube between the first end and the second end.

[20] The drawings, Figures 1 through 8 are identified at paragraphs 0038 through 0045 and can be found at the last several pages of the patent.

[21] Commencing at paragraph 0046 through to paragraph 0063 a detailed description is provided for a hose. The experts seem to agree that the description is adequate such that a hose of this type can be constructed. However the patent makes it clear at paragraphs 0037, 0046 and 0066 and 0067 that the description is not intended to be limiting and that changes can be made. I repeat those paragraphs:

[0037] Other objects and advantages of this invention will become apparent from the following description taken in conjunction with any accompanying drawings wherein are set forth, by way of illustration and example, certain embodiments of this invention. Any drawings contained herein constitute a part of this specification and include exemplary embodiments of the present invention and illustrate various objects and features thereof.

...

DETAILED DESCRIPTION OF THE INVENTION

[0046] While the present invention is susceptible of embodiment in various forms, there is shown in the drawings and will hereinafter be described a presently preferred, albeit not limiting, embodiment with the understanding that the present disclosure is to be considered an exemplification of the present invention and is not intended to limit the invention to the specific embodiments illustrated.

...

[0066] It is to be understood that while a certain form of the invention is illustrated, it is not to be limited to the specific form or arrangement herein described and shown. It will be apparent to

those skilled in the art that various changes may be made without departing from the scope of the invention.

[0067] One skilled in the art will readily appreciate that the present invention is well adapted to carry out the objectives and obtain the ends and advantages mentioned, as well as those inherent therein. The embodiments, methods, procedures and techniques described herein are presently representative of the preferred embodiments, are intended to be exemplary and are not intended as limitations on the scope. Changes therein and other uses will occur to those skilled in the art which are encompassed within the invention and are defined by the scope of the appended claims. Indeed, various modifications of the described modes for carrying out the invention which are obvious to those skilled in the art are intended to be within the scope of the following claims.

[22] Two particular comments have to be made in respect of the description given in the '882 patent. One has to do with the restrictor the other has to do with fluid.

[23] The evidence of the experts all is that certain pressure level must be maintained in the hose so that the hose remains in an expanded state when in use.

[24] The evidence is that, without any restriction at the end of the hose there would be insufficient pressure as to retain the hose in its expanded state. Fluid, such as water entering the hose from a faucet outside the house generally emerges at about 60 psig and falls off to zero psig at the end of a hose without restriction. A nozzle is one kind of restriction, depending on the flow through the nozzle a certain level of pressure is maintained in the hose at or near the nozzle so as to maintain the hose in an expanded state. As the nozzle is opened under the pressure so maintained drops.

[25] The restrictor is described at paragraph 0054 of the patent as anything that restricts the flow of the fluid within the hose:

A separate flow restrictor 37 is illustrated with coupler 16. Other types of flow restrictors, such as hose nozzles, sprayers, etc. can also be employed. Anything that restricts the flow of the fluid within the hose can be employed.

[26] The other matter that must be mentioned is the use of the word “fluid” in the patent. While the claims at issue are confined to water, the patent makes it clear that what is being described is a hose that can carry a broad range of fluids. At paragraph 0064 the patent makes this clear:

[0064] The preferred embodiment of the present invention utilizes water to fill and expand the hose 10. However, other fluids can also be employed with the present invention. For example gases can be introduced into and transported through the hose 10. Liquids, which are not corrosive to the inner tube 14 can also be employed in the present invention. Flowable semisolids can also be employed with the present invention. The temperatures of the fluids employed in the present invention are lower than temperatures which will alter the physical and chemical properties of the materials used in the hose of the present invention. Also, because the inner tube is elastic is can expand if the water within the tube freezes. For example, if a garden hose of the present invention were left outside in the winter, the water contained therein would freeze. Normal garden hoses would split, but the present invention would expand when the water turns to ice because the inner tube is elastic.

[27] In summary, while the patent particularly describes a garden hose carrying water, the description is at pains to state that other fluids such as “gases” can be equally used and that “anything” that serves to restrict can be used. The patent is at pains to say that the description provided is illustrative and that a “person skilled in the art” can make “various changes” without departing from the scope of the invention.

CLAIMS AT ISSUE

[28] Claims 1, 15, 28, and 42 (through 32 back to 28) of the ‘882 patent read as follows:

Claim 1. A water hose comprising:

A flexible elongated outer tube constructed from a fabric material having a first end and a second end, an interior of said outer tube being substantially hollow;
A flexible elongated inner tube having a first end and a second end, an interior of said inner tube being substantially hollow, said inner tube being formed of an elastic material;
A first coupler secured to said first end of said inner and outer tubes;
A second coupler secured to said second end of said inner and said outer tubes with the inner and outer tubes unsecured to each other between first and second ends; and
Said first coupler fluidly coupling said hose to a source of pressurized water, said second coupler coupling said hose to a water flow restrictor,
Whereby said water flow restrictor creates an increase in water pressure between said first coupler and said second coupler within said hose, said increase in water pressure expands said elongated inner tube longitudinally along a length of said inner tube and laterally across a width of said inner tube thereby increasing a length of said hose to an expanded condition and said hose contracting to a substantially decreased or relaxed length when there is a decrease in water pressure between said first coupler and said second coupler.

...

Claim 15. The water hose of any one of claims 1 to 14 wherein said hose is a garden hose.

...

Claim 28. A water hose assembly comprising: an outer tube assembly formed from a soft nonelastic based control material housing an inner tube member constructed from a elastic based material, said outer tube assembly and said inner tube member each having a first end attached together by a first coupler and a second end attached together with a second coupler; whereby said outer tube assembly and said inner tube member have a substantially shortened first length in a non-water flow contracted state with said outer tube assembly extending about an outer surface of said inner member in a undulating state and a substantially longer second length with said outer tube assembly capturing said inner tube member in an expanded state upon the application of water pressure to the interior of the elastic inner tube.

...

Claim 32. The water hose assembly according to any of Claims 28 to 31 wherein said second coupler is a male hose connector attached to said outlet of said inner tube member and said second end of said outer tube assembly, said male hose connector available for attachment to a water flow restrictor.

...

Claim 42. The water hose assembly of any one of claims 28 to 41 wherein a water flow restrictor is placed within said male coupling whereby attaching said hose assembly in a contracted state to pressurized water allows water to flow through said inlet to said outlet, said water flow restrictor creating an increase in water pressure causing an expansion of said inner tube member thereby extending said outer tube to said expanded state as allowed by said control material.

[29] Claim 42 is written in dependent form such that it incorporates the wording of some of the earlier claims. The Plaintiffs are relying upon claim 42 as it depends on claim 32 which in turn depends on claim 28. The Defendants are attacking the validity of the claim as so written. Claim 42 as it depends on claim 32 as it depends on claim 28 can be written as follows:

Claim 42. A water hose assembly comprising: an outer tube assembly formed from a soft nonelastic based control material housing an inner tube member constructed from an elastic based material, said outer tube assembly and said inner tube member each having a first end attached together by a first coupler and a second end attached together with a second coupler wherein said second coupler is a male hose connector attached to said outlet of said inner tube member and said second end of said outer tube assembly wherein a water flow restrictor is placed within said male coupling whereby attaching said hose assembly in a contracted state to pressurized water allows water to flow through said inlet to said outlet, said water flow restrictor creating an increase in water pressure causing an expansion of said inner tube member thereby extending said outer tube to said expanded state as allowed by said control material.

THE WITNESSES

[30] The Plaintiffs called the evidence of two fact witnesses and one expert witness, all of whom appeared in person and were cross-examined. Called as fact witnesses were:

1. Edward (Eddie) Mishan, of New York. He is a principal of the Plaintiff E. Mishan and testified as to telemarketing practices of that company and, in particular, as to the development, sales and marketing of a product called X HOSE and X HOSE PRO, said to embody the features of the '882 patent. His evidence also was directed to the commercial success of those products and the impact on the sales and marketing of those products by the Defendants' products at issue.
2. Michael Berardi, of Jupiter, Florida. He is the named inventor in the '882 patent and a principal of the Plaintiff Blue Gentian. He gave evidence as to his development of what is described in the '882 patent, his assignment of the patent rights to Blue Gentian, and licensing of rights to National Express. He also testified as to the impact on him and his wife of the sales and marketing of the Defendants' products at issue.

[31] Called as an expert witnesses for the Plaintiffs was:

1. Tom (Tommi) L. Kuutti, of West Palm Beach, Florida. He provided a report as to infringement of the patent, Exhibit P-16; and another as to validity of

the patent; Exhibit P-51; and testified as to those matters including the drawing of a diagram depicting water pressure in a hose (Exhibit P-17).

[32] Defendants called one fact witness and two expert witnesses, all of whom appeared in person and were cross-examined. Called as a fact witness was:

1. Ajit Khubani, of Fairfield, New Jersey. He is the CEO, President and sole owner of the Defendant Telebrands Corp. He testified generally as to the telemarketing practices of that company and, in particular, as to the development, marketing and sales of the Pocket Hose products at issue.

[33] Called as expert witnesses for the Defendant were:

1. Dr. Ken (Kenneth) Kamrin, of Cambridge, Massachusetts. He is an assistant professor in the mechanical engineering department at Massachusetts Institute of Technology (MIT). He provided a report as to validity of the patent, Exhibit D-41; and another as to infringement of the patent; Exhibit D-42; and testified as to those matters including the drawing of a diagram depicting a regulator (Exhibit D-43).
2. Steve Haubert, of Sylvania, Ohio. He is a consultant in the field of hoses. He provided a report as to validity of the patent; Exhibit D-44; and another as to infringement of the patent; Exhibit D-45; and testified as to those matters.

[34] The Plaintiffs entered into evidence portions of the transcripts of their examination for discovery of each of the Defendants, Exhibits P-8 to P-12. The Defendants entered into evidence portions of their examination for discovery of each of the Plaintiffs, Exhibits D-46 to D-50.

THE DEVICES ALLEGED TO INFRINGE

[35] Four devices as marketed and sold by the Defendants were alleged to infringe the claims at issue of the '882 patent. They are identified as:

- Pocket Hose-typified by Exhibit P-3 and P-15
- Pocket Hose Ultra-typified by Exhibit P-4
- Deluxe Pocket Hose-typified by Exhibit P-5
- Magic Hose-typified by Exhibit P-6

[36] The Plaintiffs seek injunctive relief in respect of all hoses except the Magic Hose, which was discontinued from sale before the '882 patent issued. The Plaintiffs seek reasonable compensation with respect to the Magic Hose, and such of the Pocket Hoses as were sold in Canada before the patent issued. The Plaintiffs seek damages or profits in respect of all of the above hoses as were sold after the patent was granted, as well as delivery up of any such hoses still in the Defendants' possession in Canada as of the date of Judgement. They also seek solicitor-client costs.

FOREIGN LITIGATION

[37] There has been litigation in countries other than Canada involving patents that are, in some ways, similar to the Canadian patent at issue here. I am informed that such litigation is ongoing in at least the United Kingdom, Australia, France and the United States.

[38] Proceedings in the United Kingdom are at the stage where a decision has been given by Justice Birss of the High Court of Justice, Chancery Division, Patents Court in a case between *Blue Gentian LLC and E. Mishan & Sons, Inc v Tristar Products (UK) Limited and Tristar Products Inc.*, dated December 20, 2013, neutral citation [2013] EWHC 4098 (Pat). I am advised by Counsel that leave to appeal is being sought.

[39] The United Kingdom decision was concerned with United Kingdom patent 2,490,276 (Exhibit D-14). That patent is similar to, but not identical with, the '882 patent at issue here. The United Kingdom patent seems to be a later version of a patent since it also claims priority from not only the same United States patent application as does the '882 patent, but also from a subsequent United States patent application. There are additional drawings in the United Kingdom patent; the text is somewhat different, as are the claims.

[40] The defendants in the United Kingdom proceedings are different from, and not related to, the Defendants in this action. The alleged infringing product in those proceedings is known as Flex Able Hose (Exhibit P-27) which is not quite the same as the allegedly infringing products at issue here. None of the witnesses in those proceedings were the same as those before me.

[41] Having said all that, the United Kingdom product at issue and patent are very similar to the products and patent at issue here. The main issue that Justice Birss had to come to grips with was that of novelty and obviousness having regard to prior art; principally, Ragner and McDonald, which are two of the principal pieces of prior art asserted in this Canadian action.

[42] I am advised that, in Australia, there has been a trial, but no decision has yet been given. The proceedings in France and the United States have yet to go to trial.

[43] I will give my decision having regard to the evidence before me, the Canadian patent before me, the products before me and the law in Canada as I understand it.

MR. BERARDI'S DEVELOPMENTS

[44] Michael Berardi, the person named as inventor in the '882 patent and a principal of Blue Gentian - one of the Plaintiffs - gave evidence as to how he developed the expandable hose at issue here.

[45] He has an eclectic background. He grew up in New Jersey, where he worked in his father's hardware store, and undoubtedly gained knowledge about things sold in such stores; including hoses. He graduated with a BA from a local university and soon found himself in the music business. His involvement in that business ultimately led him to produce music videos, and that ultimately led him to produce what we call infomercials; the television advertisements where gadgets and other products are touted and offered for sale.

[46] Berardi was living in Florida when, in 2011, he was approached by business people from Las Vegas who were seeking to involve him both as a promoter and possible financier for an expandable hose product of the type described in a patent - which forms part of the prior art here - called Ragner. Ragner himself was part of the group who approached Berardi.

[47] The Ragner product, called “Micro Hose” was, in simple terms, a lightweight hose formed with a coiled spring along the length; such that, when water pressure was applied, the spring would stretch and the hose would substantially expand in length and retract to its original length when the pressure was turned off. A video showing the Ragner “Micro Hose” and its operation was shown in Court: Exhibit D-30.

[48] Berardi was intrigued by the concept of a lightweight, expandable garden hose, but determined that expensive, sophisticated equipment would be needed to make the Micro Hose, and that the hose would be so expensive to make that, it could not be readily sold in the “infomercial” market. He set out to make a less expensive, easier to produce, expandable hose.

[49] While working out at a local gym, Berardi observed equipment used in certain exercises. That equipment had grips joined by flexible rubber tubes and webbing. It struck Berardi that such materials may make a useful hose.

[50] Berardi, being in the business of making TV videos, recorded his development of the hose at issue using a handheld tablet camera operated by his wife. Several hours of video were taken. In Court, an edited version of the video recordings, about thirteen minutes long, was shown (Exhibit P-31). In cross-examination, two other brief excerpts were shown (Exhibits D-32 and D-33). Mr. Berardi’s voice, and that of his wife, can be heard on the videos. Mr. Berardi provided further comments as to what was shown in the videos in his evidence in Court.

[51] In late August or September 2011, having seen the Ragner Micro Hose, and having concluded that no deal could be reached with the Ragner group, Berardi went to a local hardware store and purchased items including: hose fittings, flat tubular webbing, and round rubber tubing. He experimented with various ways of making a hose; including, having water pass through the webbing, and using the rubber tubing just as an elastic device and not to transport water, or using a garden “soaker” hose as the outer tubing.

[52] In early November 2011, Berardi settled on a combination of elements whereby water from a source such as a faucet outside a house passed through the inner rubber tube which expanded under the pressure of the water, but was constrained in its outward and lineal expansion by a hollow outer webbing in which the rubber tube was situated. The rubber tube and web were attached only at their ends. Suitable fittings were provided to attach the hose at one end to a faucet and at the other end to a device such as a nozzle. A restrictor at the outlet end of the hose was necessary to maintain sufficient pressure within the hose while water was flowing through it so as to keep the hose extended. When the water was turned off the hose contracted to its original size.

[53] Berardi did some kind of a preliminary search on the internet to determine what prior art existed; then went to a local patent attorney who prepared patent applications; resulting in, among other things, the patent at issue.

[54] Berardi assigned his patent rights to his company, Blue Gentian, and sought to exploit those rights. Blue Gentian licensed at least some of those patent rights to a company called National

Express, Inc. The evidence of Eddie Mishan is that the Plaintiff Emson obtained at least some of those patent rights by way of a sub-licence from National Express.

OBSERVATIONS AS TO THE FACTUAL WITNESSES AND EVIDENCE

[55] Michael Berardi is the person named as the inventor of the '882 patent. He struck me as an honest, straightforward person. He is not a sophisticated scientist; he is more of a home handyman, having gained experience working in his father's hardware store.

[56] He came to his development of the hose in question in what might be described as a grass-roots way. He saw the Ragner hose (called Micro Hose), which was lightweight, expanded when water pressure was applied, and contracted when the pressure was removed. It was too complex and expensive to make, so Berardi set about to make a cheaper and simpler one; inspired some degree by a piece of gym equipment he used from time to time. He succeeded. The hose he developed filled a particular marketing niche; it was cheap; it was intriguing; it worked in a gimmicky way. It has been a huge success.

[57] No doubt, subjectively in Berardi's mind, it was new and inventive. The question before me is different. The question that I have to resolve is whether the patent (not the product) is a good one; and whether, viewed objectively, the patent describes and claims a new, non-obvious invention in accordance with Canadian law.

[58] Berardi testified that he first learned of the Defendants' hose products when he and his wife were at a pub in Florida and saw an infomercial for Pocket Hose on TV. They were devastated. His

wife is still very upset. Blue Gentian claims that it has lost royalty income since the Defendants' sales are unlicensed and take away sales from Emson, its licensee.

[59] Eddie Mishan and Ajit Khubani are the principal owners of two rival organizations, Emson and Telebrands; both in the direct retail business. They sell products directly to consumers through television infomercials and the internet. A lesser part of their business is the sale of those products to retailers, who in turn, sell them to the public. It is a very successful business for each of these companies. These companies sell vast quantities of merchandise and receive very large income. There is skill involved in selecting the right product to sell. There is skill in preparing the infomercial and other advertising. There is skill in presenting the right sort of offer (e.g. if you buy now, you receive two items for the price of one, plus a gadget); and skill in presenting a product at the right price point. These skills do not depend upon the patentability of the product, although words like "patented" or "new" or "revolutionary" may be part of the surrounding hype used in promoting the product. Khubani gave evidence as to products such as amber sunglasses and, dust mops that were old products, but were successfully hyped and sold through telemarketing.

[60] Emson sells products called XHose and XHose Pro under its licence from National Express which, in turn, is licenced by Blue Gentian. Emson claims damages through the loss of sales taken away by the Defendants products at issue and related losses.

[61] Mishan testified that he had been approached by representatives of Supertek to inquire as to whether they could do a deal so that Supertek could sell the hose in Canada. No deal was made.

[62] Khubani testified that the life span of products sold by telemarketing was up to about two years. He identified a hose product call Roll a Hose, Exhibit 35 which Telebrands had sold by telemarketing several years ago and had discontinued. That hose was constructed with a rubber inner tube and a fabric outer tube connected together only at the ends. The tube was flat when there was no water pressure applied. It expanded radially but not longitudinally when water pressure was applied. The hose wound flat in a reel provided with the hose.

[63] Telebrands next made a deal with Ragner (Microhose) to market the Ragner (Micro Hose) product. Telebrands did not proceed to do so; instead, it proceeded to have made for it and sell the Pocket Hose products at issue.

[64] Telebrands sells its Pocket Hose products directly to consumers through infomercials on television and the internet. Those infomercials originate in the United States but are seen by some Canadians who purchase the product directly from Telebrands. Sales to retailers outside the United States are made by International Edge which purchases the product from Telebrands and resells it to non-United States distributors. Supertek is one such customer of International Edge, it purchases the hose products from International Edge and resells them to Canadian retailers such as Home Depot.

[65] I do not need to comment as to the credibility of the witnesses Khubani or Mishan. They were both cross-examined in some instances in ways in which it was endeavoured to lessen their credibility. In certain instances, I found their answers to be evasive or non-responsive. This is immaterial to the questions that I have to address here.

OBSERVATIONS AS TO THE EXPERT WITNESSES AND THEIR EVIDENCE

[66] Three expert witnesses gave evidence at trial, Kuutti for the Plaintiffs, Kamrin and Haubert for the Defendants. Their evidence largely covered the same subjects directed to the validity and infringements of the claims at issue of the '882 patent. The parties each provided a stipulation as to the field of expertise of the witnesses they put forth.

[67] The Plaintiffs proposed the following stipulation as to the expertise of Kuutti:

Tom Kuutti has experience and expertise in aerospace engineering and mechanics, and mechanical engineering, including the design and manufacture of products, systems and devices that are mechanical in nature. He also has experience with high reliability application systems and with devices that control pressure, temperature and flow of liquids and air.

[68] The Defendants proposed the following stipulation as to the expertise of Kamrin:

Ken Kamrin is an expert in fluid and solid mechanics including the way fluid materials flow through a hose and the effects of that flow on the materials used to construct the hose.

[69] The Defendants proposed the following stipulation as to the expertise of Haubert:

Steven Haubert is an expert in the field of hoses, including their design, manufacture, testing and uses for hoses.

[70] I find each of the above stipulations to be appropriate however I clearly find that the witness Haubert has the expertise that is most pertinent to the issues that I have to decide.

[71] Tom Kuutti is what could be described as a "bricoleur" or jack of many trades. He runs a business that designs and manufactures many different pieces of apparatus. However his experience with hoses is limited. For the most part I accept his evidence except his evidence respecting the '882

patent invention restricting it only to water, I disagree, and his evidence as to an air flow regulator, such as shown in the McDonald patent in respect of which he says it is not a restrictor; I am satisfied that it serves the same function as the restrictor in the '882 patent hose.

[72] Dr. Kamrin is an academic; he has no practical experience with hoses. He is undoubtedly very clever. He gave good evidence as to the basics of fluid flow and his explanation as to the operation of a regulator, illustrated by Exhibit 43, I accept. With respect to his interpretation of the claims at issue I have difficulty. It was too forced, too much of an endeavour to find problems rather than endeavouring to understand the patent and claims in an understanding way.

[73] Haubert has been in the hose business throughout his working career. He knows hoses. He gave his evidence thoughtfully, simply and directly. He was prepared to concede points against the interests of the Defendants where it was evident that he should do so. I rely most heavily on his evidence and, where it conflicts with the evidence of the other experts, I prefer his evidence unless I state otherwise.

THE ISSUES

[74] The pleadings raise several issues including infringement and validity of the '882 patent, infringement and validity of Canadian Registered Design 146676 (the '676 Design), false and misleading statements under the provisions of section 7(a) of the *Trade-Marks Act*, RSC 1985, c. T-13 and sections 36 and 52 of the *Competition Act*, RSC 1985, c. C-34.

[75] By a Bifurcation Order of Prothonotary Aalto dated January 20, 2014 certain matters were bifurcated such that the trial before me dealt only with issues respecting the validity and infringement of the '882 patent, remedies that I was to consider were restricted to: declaratory relief; injunctive relief; and delivery up, leaving the quantification of damages or profits, if required, to a later time. The '676 Design, *Trade-Marks Act* and *Competition Act* issues have been deferred to a later time.

[76] As a result of Prothonotary Aalto's Order and an agreement between the parties, the issues that I have to determine at this time have been further reduced to those respecting infringement and validity only of claims 1, 15, 28 and 42 (as dependent upon claims 32 and 28).

[77] To determine the issues before me I must address the following:

1. Person Skilled in the Art- to whom is the patent addressed?
2. Prior Art Background- what is the relevant prior art?
3. Construction of the Claims at Issue- in particular the following terms are contested by the Defendants:
 - a. "expanded condition" or "expanded state" in claims 1, 15, 28 and 42
 - b. "substantially decreased" or "relaxed length" in claims 1 and 15
 - c. "increase in water pressure between said first coupler and said second coupler" in claims 1 and 15
4. Infringement- depending on the construction of the claims, are any of claims 1, 15, 28 or 42 infringed by any of the Magic Hose or Pocket Hose devices at issue
5. Validity-General

6. Validity- Anticipation having regard to the Many patent
7. Validity- Obviousness having regard to the prior art and in particular the McDonald patent
8. Validity-Claims Broader than the Invention Disclosed
9. Relief
 - a. Injunction and delivering up
 - b. Reasonable compensation
 - c. Damages or profits
10. Costs- in particular are solicitor-client costs warranted?

PERSON SKILLED IN THE ART

[78] The '886 patent is directed to a hose, particularly an expandable and contractible hose as the title says. The patent begins by defining the Field of the Invention at paragraph 1 including the following sentences:

The present invention relates to a hose for carrying fluid materials. In particular, a hose that automatically contracts to a contracted state when there is no pressurized fluid within the hose and automatically expands to an extended state when a pressurized fluid is introduced into the hose...

[79] Each of the parties, assisted by their experts put forward their definition as to the person skilled in the art to whom the patent was addressed. I find that such person need not be a sophisticated post-graduate specializing in fluid mechanics but should be a person with familiarity with hoses gained through experience and/or some reasonable level of education. I prefer the definition set out by Haubert at paragraph 26 of his first report Exhibit D-44 with some modification.

[80] The Person Skilled in the Art I define as follows:

A person such as an engineer or technician with experience in the manufacture and/or supply and/or use of hoses for various types of fluids. This person would have at least a basic knowledge of fluid mechanics and materials science as they relate to hoses and how hoses generally work to convey fluids from one place to another.

[81] The Court will be required to address certain issues such as construction and obviousness through the eyes of such a person skilled in the art. It is also relevant to note the date upon which such consideration is to be made. Here the filing date of the application for the patent in Canada is effectively April 3, 2012, the priority date is November 4, 2011 and the publication date is August 23, 2012. There is nothing in the evidence or in the argument of the parties that requires me to distinguish between any of those dates. Nothing material happened between any of those dates and no party urged in argument that I should make a distinction, for one reason or another, between them.

PRIOR ART BACKGROUND

[82] It is common knowledge what a hose is. I refer to and accept the definition provided by Haubert at paragraph 29 of his first Report, Exhibit D-44 in citing Webster's Dictionary:

29. In general terms, a hose is a hollow tube used for transporting pressurized fluid materials from one point to another. A hose is a flexible means for transporting pressurized fluids, as compared to a pipe which is a non-flexible conduit. A helpful definition of the word "hose" that maps well onto the Skilled Person's understanding of the term is the definition of "hose" found in the Webster's Third New International Dictionary at Exhibit "E" to my report:

"3 pl sometimes hoses a: a flexible tube (as of rubber, plastic or fabric) for conveying fluids (as air, steam, powdered coal, or water from a faucet or hydrant), b: such tube with nozzle and attachments c: the tubing as material."

[83] I accept Haubert's distinction, as made in his testimony, Volume 4, page 653 at lines 21 to 26, between a hose, which conveys fluid and the same object in a static state where it contains fluid but the fluid is not flowing. In the latter state it is not the hose but a pressure vessel.

[84] A reasonable starting point in considering the prior art is the Roll A Hose product, Exhibit D-35 sold by Telebrands starting in 2002. That hose was constructed with an inner tube which carried water, surrounded by a fabric cover. The tube and cover were connected to each other at each end with appropriate male and female connectors but otherwise not connected. The hose rolled up flat in a reel (provided with the hose) when the hose was not in use. This hose expanded radially when water pressure was applied within the hose. Such as when the hose was connected at one end to a faucet and there was a nozzle at the other end, but did not expand longitudinally.

[85] The next piece of prior art to consider is the Micro Hose which was promoted by a group that I have called Ragner and is the subject of the Ragner patent, US 6,948,527 (the '527 patent). That patent was made available to the public on September 27, 2005. Khubani testified that he had seen a video (Exhibit D-30) in which Ragner demonstrated this hose, in the summer of 2011. Berardi testified that he also saw this, or similar, video in late summer 2011 as well as a sample of the hose. There was no evidence that the video or sample were confidential, in fact, Berardi testified that he had seen the video at least a year before meeting the Ragner group in about July 2011.

[86] The Micro Hose comprised an elongated spiral spring to which an inner and outer layer of flexible material was applied. This spring was metal but the '527 patent says it also could be an elastic material. The hose was filled with a male and female connected at the respective ends. When

water pressure was applied the hose expanded lineally and when the pressure was removed the hose contracted to its original length. The spring deferred the radial dimension thus the hose did not materially expand radially when pressure was applied.

[87] The last piece of prior art to be considered is US patent 6,523,539 (the '539 patent or McDonald patent) which was granted, hence published, February 25, 2003. This patent is entitled "Self-Elongating Oxygen Hose for Stowable Aviation Crew Oxygen Mask." In the "Field of Invention" at column 1 the following statement is made:

More particularly, the invention is concerned with such assemblies [aircraft supplemental oxygen masks] wherein a self-elongating gas hose which, when pressurized, axially expands to a significant extent.

[88] It is important to note that the evidence that I have, and I expect Birss J. in the United Kingdom trial did not have, is that a person skilled in the art would have found McDonald. Haubert at paragraph 27 of his first Report, Exhibit D44 says that a skilled person would search for, read and understand patents in the field of hoses:

27. The Skilled Person would have experience specifying appropriate hoses for particular uses and applications, and would have some ability to select from appropriate materials for a given hose application, and to search for, read and understand patents in the field of hoses. So, for example, when designing a hose a Skilled Person would be likely to refer to catalogues and patents to learn about hose existing hoses have been designed and manufactured.

[89] Haubert continues at paragraph 143 of his first Report, Exhibit D44 says:

I was able to locate the '539 patent in a search for "expandable hoses."

[90] Khubani testified that when he became aware of the Plaintiffs' XHose product he asked his attorneys to do a patent search. They came up with McDonald. They clearly did not come up with the Canadian patent application for the '882 or any patent application elsewhere since, at the time, the patent application had not yet been made public. Instructions were then given to Telebrand's manufacturer in China. They came up with the products at issue.

[91] In brief, McDonald was not only findable but found by those interested in expandable hoses. There is no evidence to the contrary.

CONSTRUCTION OF THE CLAIMS

[92] It is well understood in Canadian patent law that the Court must first construe the claims at issue before turning to the issues of infringement and validity. Construction is to be done by the Court, through the eyes of a person skilled in the art, as of the date of the publication of the patent application. The assistance of expert evidence may be sought to explain technical terms and the state of the art, but the Court, not the expert, must construe the claims. Construction cannot be done in a vacuum, the Court must know where the parties disagree or, as some cases have said, where the shoe pinches.

[93] Here the Defendants have raised three issues in respect of terms used in the relevant claims. I will consider them in turn:

- a) **“Expanded condition” or “expanded state” in claims 1, 15, 28 and 42.**

[94] Claim 1 (and dependent claim 15) speak of the hose being in “expanded condition” and claim 28 (and dependent claim 42) speak of the hose being in an “expanded state”. I will repeat part of claim 1 and claim 28 to put those words which I highlight in context:

Claim 1

*Whereby said water flow restrictor creates an increase in water pressure between said first coupler and said second coupler within said hose, said increase in water pressure expands said elongated inner tube longitudinally along a length of said inner tube and laterally across a width of said inner tube thereby increasing a length of said hose to an **expanded condition** and said hose contracting to a substantially decreased or relaxed length when there is a decrease in water pressure between said first coupler and said second coupler.*

Claim 28

*Claim 28. A water hose assembly comprising: an outer tube assembly formed from a soft nonelastic based control material housing an inner tube member constructed from a elastic based material, said outer tube assembly and said inner tube member each having a first end attached together by a first coupler and a second end attached together with a second coupler; whereby said outer tube assembly and said inner tube member have a substantially shortened first length in a non-water flow contracted state with said outer tube assembly extending about an outer surface of said inner member in a undulating state and a substantially longer second length with said outer tube assembly capturing said inner tube member in an **expanded state** upon the application of water pressure to the interior of the elastic inner tube.*

[95] The Court may refer to the specification to seek assistance as to the meaning of terms used in the claims (*Western Electric Co. Inc. v Baldwin International Radio of Canada*, [1934] SCR 570 per Duff J at page 572).

[96] The specification speaks of the inner tube expanding within the outer tube when fluid pressure is applied until the inner tube is constrained, both in diameter and length, by the outer tube.

In particular I refer to paragraph 0051. At paragraph 0053 the specification states:

*The pressure coming from a typical house is approximately 60 psi. If the flow of fluid at the other end of the present invention was turned off and totally restricted, the psi inside the inner tube would be the same as the pressure coming from the house, 60 psi. At this high pressure, the inner tube 14 and the outer tube 12 in the present invention would expand to its maximum length of fifty feet. As the fluid at the end of the hose is released, the pressure becomes reduced inside the hose and the hose begins to contract. However, the present invention will remain **fully expanded** even when the pressure at the opposite end is reduced below the typical pressure of 60 psi coming from a house. In one example, the water pressure coming from the house was 60 psi and the water pressure exiting the nozzle at the other end of the hose was 35 psi. This 35 psi of pressure inside the elastic inner tube 14 was enough pressure to cause the inner tube 14 to expand laterally and longitudinally **until its lateral and longitudinal expansion became constrained** by the non-elastic outer tube 12 and expanded to a maximum length and width of the non-elastic outer tube 12. In a preferred embodiment, the hose 10 expands from ten feet in length in its contracted condition to fifty feet in length in its expanded condition.*

[97] I accept the evidence of Kuutti (Exhibit P-16, para 79) that the amount of expansion will depend, at least in part, on the pressure of the water or other fluid being supplied and the level of restriction provided by whatever restrictor means exists.

[98] Therefore I construe “expanded condition” and “expanded state” to mean that the hose is in a condition wherein pressure is applied at one end and restriction is provided at the other end such that the inner tube has substantially reached a state where its diameter and length are restrained by the outer tube.

b) “substantially decreased or relaxed length” in claim 1 and depended claim 15

[99] Again I repeat a portion of claim 1 with the words “substantially decreased or relaxed length” highlighted:

*Whereby said water flow restrictor creates an increase in water pressure between said first coupler and said second coupler within said hose, said increase in water pressure expands said elongated inner tube longitudinally along a length of said inner tube and laterally across a width of said inner tube thereby increasing a length of said hose to an expanded condition and said hose contracting to a **substantially decreased or relaxed length** when there is a decrease in water pressure between said first coupler and said second coupler.*

[100] Again, turning to the specification of the patent, it says at paragraph 0030:

Upon release of the fluid pressure within the hose, the hose will automatically contract to a contracted condition.

[101] At paragraph 0053 it says:

In a preferred embodiment, the hose 10 expands from ten feet in length in its contracted condition to fifty feet in length in its expanded condition.

[102] I am puzzled as to why these words would cause any controversy. The hose, when pressure is released, shrinks back substantially to its original length.

c) “increase in water pressure between the first and second coupler” in claim 1 and dependent claim 15

[103] I reproduce claim 1 with the “increase in water pressure between the first and second coupler” and other terms highlighted:

Claim 1. A water hose comprising:

A flexible elongated outer tube constructed from a fabric material having a first end and a second end, an interior of said outer tube being substantially hollow;

A flexible elongated inner tube having a first end and a second end, an interior of said inner tube being substantially hollow, said inner tube being formed of an elastic material;

***A first coupler** secured to said first end of said inner and outer tubes;*

***A second coupler** secured to said second end of said inner and said outer tubes with the inner and outer tubes unsecured to each other between first and second ends; and*

Said first coupler fluidly coupling said hose to a source of pressurized water, said second coupler coupling said hose to a water flow restrictor,

*Whereby said water flow restrictor creates an **increase in water pressure between said first coupler and said second coupler** within said hose, said increase in water pressure expands said elongated inner tube longitudinally along a length of said inner tube and laterally across a width of said inner tube thereby increasing a length of said hose to an expanded condition and said hose contracting to a substantially decreased or relaxed length when there is a decrease in water pressure between said first coupler and said second coupler.*

[104] The specification speaks to the pressure within the hose at paragraph 0053:

[0053] The nozzle provides various amounts of restriction of fluid at the end of the hose depending on how large the opening in the nozzle is. The smaller the opening in the nozzle, the more the nozzle restricts the release of fluid at the end of the hose, and the higher the pressure and fluid volume inside the hose. The larger the opening in the nozzle, the less the nozzle restricts the release of fluid at the end of the hose, and the lower the pressure and fluid volume inside the hose. The pressure coming from a typical house is approximately 60 psi. If the flow of fluid at the other end of the present invention was turned off and totally restricted, the psi inside the inner tube would be the same as the pressure coming from the house, 60 psi. At this high pressure, the inner tube 14 and the outer tube 12 in the present invention would expand to its maximum length of fifty feet. As the fluid at the end of the hose is released, the pressure becomes reduced inside the hose and the hose begins to contract. However, the present invention will remain fully expanded even when the pressure at the opposite end is reduced below the typical pressure of 60 psi coming from a house. In one example, the water pressure coming from the house was 60 psi and the water pressure exiting the nozzle at the

other end of the hose was 35 psi. This 35 psi of pressure inside the elastic inner tube 14 was enough pressure to cause the inner tube 14 to expand laterally and longitudinally until its lateral and longitudinal expansion became constrained by the non-elastic outer tube 12 and expanded to a maximum length and width of the non-elastic outer tube 12. In a preferred embodiment, the hose 10 expands from ten feet in length in its contracted condition to fifty feet in length in its expanded condition.

[105] I agree with the witness Kuutti where he says that the phase at issue would be understood by a person skilled in the art to be referring to the increase in pressure within the hose when the fluid flows through the hose is restricted by a flow restrictor (transcript vol 1, pages 103 to page 11012 and Exhibit P.17).

[106] I do not agree with the convoluted evidence of Dr. Kamrin at paragraph 336 38 of his second report, Exhibit D-42. I find that he is creating imaginary difficulties with the wording. On this point I agree with Counsel for the Plaintiffs that Dr. Kamrin is simply engaging in word play.

INFRINGEMENT OF CLAIMS 1, 15, 28 AND 42

[107] In considering the issue of infringement I will presume that the claims are valid. There can, of course, be no infringement of an invalid claim. I will consider the devices alleged by the Plaintiffs to infringe claims 1, 15, 28 and 42 and the construction that I have given to the disputed terms in those claims.

[108] An objection was raised by the Defendants that the Magic Hose was never tested by the Plaintiffs' expert. This is true but the Pocket Hose was tested and a simple observation discloses that

the Magic Hose has essentially the same features. Common sense does have to prevail at some point and here I accept that the Magic Hose will perform in the same manner as the Pocket Hose as tested.

[109] I accept Kuutti's evidence, substantiated by a simple examination of the Defendants' garden hoses put in issue that the Defendants' hoses comprise an elastic inner tube through which water will flow, constrained by an inelastic outer tube. The tubes are connected only at the ends; a female coupler is fixed at one end for attachment to, for instance, a water faucet outside a house. At the other end is a male coupler to which is attached a ball valve which opens and shuts. The Magic Hose has a nozzle, not a ball valve. The nozzle or ball valve together with, to some extent, the interior of the male coupler serve as a restrictor to prevent and regulate the flow of water through the hose.

[110] Kuutti's tests demonstrate that when the hose is attached to a water supply and the ball valve is shut, the hose expands to the point where the inner tube becomes constricted in diameter and length by the outer tube. When the water supply is turned off and the valve is opened the hose returns to its original size with the outer tube wrinkled up along the exterior of the inner tube.

[111] Kuutti's evidence, which I accept, is that when the water was turned on the hose stayed expanded when the valve was closed and also when the valve was opened so that water flowed through the hose and out the end (Report Exhibit P-16 para 133 and transcript Vol 1 page 108, ll 9-13).

[112] I am satisfied that each of the Magic Hose, and Pocket Hose versions at issue meet all the elements of claims 1, 15, 28 and 42 of the '882 patent and, if valid, those claims would be infringed.

[113] I am satisfied, on the evidence, that each of the Defendants Telebrands and Supertek have sold the Magic Hose and the Pocket Hose products at issue in Canada.

[114] I am satisfied that there is no evidence that International Edge has sold product in Canada. There is, in effect, a paper shuffle such that title to the product in question passes from Telebrands to International Edge to Supertek but there is no evidence that title passes from International Edge to Supertek in Canada. Therefore while Telebrands and Supertek are direct infringers there is no evidence that International Edge is.

[115] The Plaintiffs argue that International Edge has induced infringement by Supertek. I have no evidence to what International Edge has done other than act as a conduit through whom the title to the product passes.

[116] In *Varco Canada Limited v Pason Systems Corp*, 2013 FC 750 Justice Phelan of this Court, in referring to his previous decision in *Weatherford Canada Ltd v Corlac Inc*, 2011 FCA 228 summarized the elements to be proved in order to establish inducement of infringement at paragraph 251:

As held in Weatherford Canada Ltd v Corlac Inc, 2011 FCA 228, 95 CPR (4th) 101, a determination of inducement requires the application of a three-prong test:

- *the act of infringement must have been completed by the direct infringer;*

- *the completion of the acts of infringement must be influenced by the acts of the alleged inducer to the point that, without the influence, direct infringement would not take place; and*
- *the influence must knowingly be exercised by the inducer.*

[117] Point two states that the acts of infringement must be influenced by the acts of the alleged inducer. Point three states that the influence must be knowingly exercised by the inducer. There simply is no evidence with respect to International Edge that would meet the requirements of those two points and for that reason alone the action must be dismissed as against that party.

VALIDITY - GENERALLY

[118] The *Patent Act* sub-section 43(2) provides that a patent, once granted, is presumed to be valid in the absence of evidence to the contrary. As stated by the Supreme Court of Canada in *Whirlpool Corp. v Camco Inc.*, [2000] 2 SCR 1067, the burden lies on the party alleging invalidity to prove it on the balance of probabilities.

VALIDITY – ANTICIPATION HAVNG REGARD TO THE MANY PATENT

[119] The Defendants' argue that claim 1 of the '882 patent is invalid because it is anticipated by United States Patent No. 1,220,661 dated March 27, 1917. I will refer to this as the Many patent after the inventor named in the patent.

[120] It has been acknowledged by the Supreme Court of Canada that anticipation by a prior publication is a difficult matter to prove. I quote from a part of the decision written by Justice Binnie for that Court in *Free World Trust v Électro Santé Inc.*, [2000] 2 SCR 1024 at paragraph 25:

25 Anticipation by publication is a difficult defence to establish because courts recognize that it is all too easy after an invention has been disclosed to find its antecedents in bits and pieces of earlier learning. It takes little ingenuity to assemble a dossier of prior art with the benefit of 20-20 hindsight. In this case, the respondents contended that all of the essential elements of the appellant's alleged inventions were disclosed in a single publication, the Solov'eva article, which predated the patent application by almost 4 years. If this is correct, the patent would be invalid.

[121] The Supreme Court examined the legal requirements for establishing anticipation in *Apotex Inc. v Sanofi-Synthelabo Canada Inc.*, [2008] 3 SCR 265. Those reasons are extensive; I summarized them in my decision in *Abbott Laboratories v Canada (Minister of Health)*, 2008 FC 1359. I repeat and adopt what I wrote at paragraphs 65 to 68 of that decision which, in brief, can be stated as what is asserted as anticipatory must both disclose and enable subject matter which would, if practiced, infringe upon the claim in question. Correction of obvious errors may be made. Routine trials may be conducted provided that they are not unduly burdensome:

65 The law as to anticipation was very recently reviewed and restated by the Supreme Court of Canada in Sanofi, supra, particularly at paragraphs 18 to 50. That Court at paragraphs 20 to 22 reviewed the legal test for anticipation used by the Trial Judge namely "that the exact invention has already been made and publicly disclosed". This test, the Supreme Court wrote at paragraph 23, was overstated:

23 For the reasons that follow, and in light of recent jurisprudence, I am of the respectful opinion that the applications judge overstated the stringency of the test for anticipation that the "exact invention" has already been made and publicly disclosed.

66 The Supreme Court discussed with approval at paragraph 24 to 37 the decision of the House of Lords in the Synthon case, supra. Two separate requirements are necessary for there to be anticipation, prior disclosure and enablement.

67 Prior disclosure means that the prior patent (publication, use or other disclosure) must disclose subject matter which, if performed, would necessarily result in infringement of the patent (claim at issue). The person skilled in the art looking at the disclosure must be taken to be trying to understand what the prior patent (or other disclosure) meant. There is no room for trial and error, the prior art is simply to be read for the purposes of understanding.

68 The second requirement is that of enablement which means that the person skilled in the art would have been able to perform what had been disclosed. At this stage the person skilled in the art is assumed to be willing to make trial and error experiments to get it to work. The Supreme Court at paragraph 37 of Sanofi summarized a non-exhaustive list of factors that may be applied in the consideration of enablement:

37 Drawing from this jurisprudence, I am of the opinion that the following factors should normally be considered. The list is not exhaustive. The factors will apply in accordance with the evidence in each case.

1. Enablement is to be assessed having regard to the prior patent as a whole including the specification and the claims. There is no reason to limit what the skilled person may consider in the prior patent in order to discover how to perform or make the invention of the subsequent patent. The entire prior patent constitutes prior art.

2. The skilled person may use his or her common general knowledge to supplement information contained in the prior patent. Common general knowledge means knowledge generally known by persons skilled in the relevant art at the relevant time.

3. The prior patent must provide enough information to allow the subsequently claimed invention to be performed without undue burden. When considering whether there is undue burden, the nature of the invention must be taken into account. For example, if the invention takes place in a field of technology in which trials and experiments are generally carried out, the threshold

for undue burden will tend to be higher than in circumstances in which less effort is normal. If inventive steps are required, the prior art will not be considered as enabling. However, routine trials are acceptable and would not be considered undue burden. But experiments or trials and errors are not to be prolonged even in fields of technology in which trials and experiments are generally carried out. No time limits on exercises of energy can be laid down; however, prolonged or arduous trial and error would not be considered routine.

4. Obvious errors or omissions in the prior patent will not prevent enablement if reasonable skill and knowledge in the art could readily correct the error or find what was omitted.

[122] The Many patent, at column 1, lines 8 to 11 states:

“My invention relates to hose, and more particularly to an improved construction of fire and mill hose of larger sizes, which are usually flat when empty” (A mill hose is a small fire hose)

[123] The Many patent proceeds to describe a hose which has a rubber lining placed inside a cotton jacket but not attached to the jacket, whether by rubber cement or plastic filling, so as to be able to withdraw the rubber lining for replacement or repair. In use the rubber lining is said to expand in both a longitudinally and lateral direction (second page, lines 8 to 11). The lining, when emptied of water immediately returns to its normal flat position (second page, lines 27 to 32). When flat the lining, because it is independent of the jacket, is not under strain (second page, lines 40 to 45).

[124] The Defendants’ expert Haubert admitted that the Many patent does not describe fittings such as a connector and a nozzle at the ends of the hose but said that they were implicit since the hose was a fire hose, and that the nozzle would act as a flow restrictor, He said that the Many patent

hose would operate in the same way as the hose described in the '882 patent. I repeat his testimony found in Volume 4 of the transcript at page 647 line 14 to page 648 line 6:

Q. So turning to the prior art that you discussed in your expert report D44, just by way of summary, why do you say the Many patent is pertinent to the asserted claims of the 882 patent?

A. The Many patent describes a hose with an elastic inner tube which will expand both radially and longitudinally when it's pressurized. It also has a fabric cover which is relatively inelastic. They aren't attached, other than at the end fittings.

Q. And what type of hose is described in the Many patent?

A. It's a fire hose.

Q. And what, if any, other equipment is implicit since it's a fire hose?

A. Because it's a fire hose it's implicit that it would have fittings. The far end fitting would have a nozzle and that would act as a flow restrictor.

Q. And how does the Many structure and operation compare to the hose of the 882 patent?

A. It's the same.

[125] The cross-examination of Haubert as found in Volume 4 of the transcript beginning at page 668 line 18 to page 671 line 3 establishes that the Many patent does not say how much the inner tube expands or contracts; it could be a couple of centimetres in thirty meters or three inches in a hundred feet. If the inner and outer tubes were clamped together, the outer tube would have to be bunched up to some extent to provide for expansion of the inner tube if the expansion was anything more than minimal, yet this is not described in the text of the patent nor shown in the drawings.

[126] I conclude that the Many patent does not disclose a hose that would operate in the manner described in the '882 patent, particularly in claim 1. There is no explanation in Many how to deal

with the linear expansion of the inner tube if it is anything more than minimal. There is nothing in Many to describe the elongation and substantial decrease as described in the '882 patent and claimed in claim 1.

[127] The Many patent does not anticipate claim 1 of the '882 patent.

VALIDITY – OBVIOUSNESS HAVING REGARD TO THE PRIOR ART AND IN PARTICULAR THE McDONALD PATENT

[128] The Supreme Court of Canada in *Sanofi-Synthelabo Canada Inc. v Apotex Inc.*, 2008 SCC 61 and subsequent decisions in this Court and the Federal Court of Appeal such as *Pfizer Canada Inc. v Apotex Inc.*, 2009 FCA 8; *Apotex Inc. v Sanofi-Aventis Canada Inc.*, 2013 FCA 186 and *Novartis Pharmaceuticals Canada Inc. v Cobalt Pharmaceuticals Co.*, 2013 FC 985 have identified the approach to be taken in determining whether a claimed invention was obvious. I re-iterate that obviousness is not a subjective test but rather is an objective test; the question is not whether the inventor thought that he or she made an invention rather the test is whether the notional skilled person would have thought that the invention was obvious or not.

[129] In determining obviousness the Court must:

- a) Identify the national person skilled in the art;
- b) Identify the relevant common general knowledge and prior art forming the state of the art;
- c) Identify the inventive concept of the claims at issue;

- d) Identify what, if any, differences exist between the state of the art and the inventive concept;
- e) With respect to those differences was a degree of inventiveness required to arrive at the claimed inventor, questions may be asked such as:
 - Was it more or less self evident?
 - What effort, routine or not, was required?
 - What motive was there to find a solution?

[130] I have already identified the notional person skilled in the art.

[131] I have to some degree already reviewed the state of the art; it included the Roll A Hose which was a flat garden hose made up of a rubber inner tube and a non-elastic outer tube which was adapted to be rolled up flat on a reel. One end would be attached to a water source such as a faucet outside the house. The other end had a nozzle, sprinkler or the like attached. When the water was turned on the hose expanded radially but not axially, that is, it got fatter but not longer.

[132] The art also included the Ragner patent and its exemplification in the Micro Hose. That hose was formed using a long coiled spring sandwiched between two expandable layers of tubing. When water pressure was applied the hose grew longer, but not fatter, as the spring stretched. The hose returned to its original length when the water was turned off.

[133] Then we come to the McDonald patent. On the evidence before me, as previously set out, that patent would have been located by the notional person skilled in the art.

[134] The description set out in specification of the McDonald patent includes the following:

Column 1, lines 8 -18:

BACKGROUND OF THE INVENTION

1. Field of the Invention

The present invention is broadly concerned with supplemental gas assemblies such as supplemental oxygen units typically used in aircraft for supplying supplemental oxygen to aircraft crew in the event of a cabin depressurization or other emergency. More particularly, the invention is concerned with such assemblies wherein a self-elongating gas hose assembly is employed which, when pressurized, axially expands to a significant extent. This gives the user a relatively long effective hose length, while avoiding the problems of handling and stowage typical with conventional hoses.

Column 1, line 54 to Column 2, line 11:

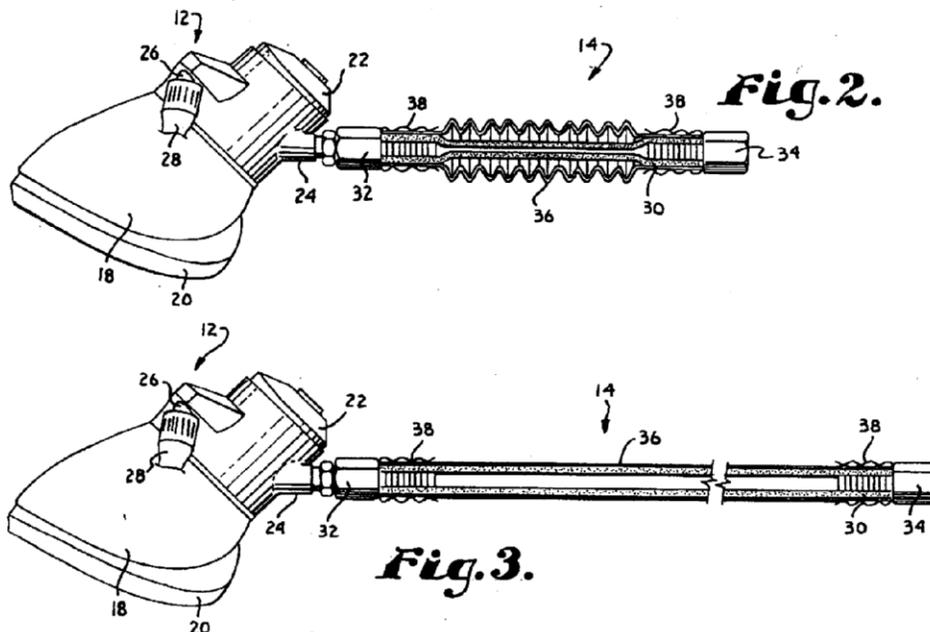
SUMMARY OF THE INVENTION

The present invention overcomes the problems outlined above and provides supplemental gas (e.g., oxygen) assemblies including a mask adapted to fit over at least the nose and mouth of a wearer, with a flexible hose coupled with the mask and the hose are received within a stowage box. In accordance with the invention, the hose assembly comprises a length-expandable hose which, when a user grasps the mask and pulls it from the stowage box, will inflate and axially expand to a deployed length greater than the relaxed length thereof. In this way, the stowage requirements for the hose assembly are reduced, or alternately a hose having a substantially longer effective length can be used in a standard stowage box designed to accommodate a much smaller length conventional hose assembly. In preferred forms, the hose assembly includes an inflatable elastomeric inner tube together with an exterior sheath formed of woven or braided material which in use restricts the radial expansion of the inner tube upon pressurization thereof, while allowing the tube to expand axially. The hose assemblies may have a deployed length of at least about 1.5 times the relaxed length thereof, and more preferably greater than about two times the relaxed length.

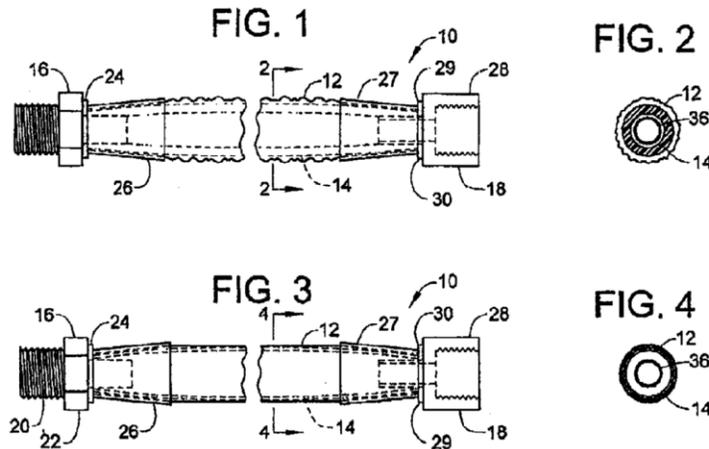
Column 2, line 61 to Column 3, line 14:

In more detail, the tube 30 may be formed of an elastomeric material, and particularly those selected from the group consisting of silicone rubber materials. The sheath on the other hand is preferably formed of "NOMEX (a synthetic resin fiber material commercialized by DuPont)" flexible fabric; the sheath could also be formed of other suitable materials such as KEVLAR (a synthetic resin fiber material commercialized by DuPont), NYLON (polyamide fiber), or monofilament. The sheath 36 has a length which is two to three times the length of the inner tube 30. As best seen in FIG. 2, in the relaxed condition of the assembly 14, the sheath 36 is in a gathered or shirred condition along the length of the unexpanded tube. However, as depicted in FIG. 3, when a pressurized gas such as oxygen is delivered into the tube 30, it expands in both radial and axial directions. However, the presence of the sheath 36 serves to inhibit and restrict the extent of radial expansion of the tube 30, but permits axial elongation thereof. Preferably, the deployed length of the hose assembly 14 is at least about 1.5 times the relaxed length thereof, and more preferably at least about two times the relaxed length.

[135] Figure 2 of McDonald shows the hose in a contracted state with the outer hose wrinkled up over the inner hose; Figure 3 shows the hose in an expanded state:



[136] For comparison I show Figures 1, 2, 3 and 4 of the '882 patent also showing the hose in a contracted state with the outer hose wrinkled up over the inner hose (Figures 1 and 2) and in an expanded state (Figures 3 and 4):



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[137] The differences between what is described in the McDonald patent and the '882 patent include:

- The hose in the McDonald patent is intended to be used in conjunction with an auxiliary oxygen supply unit in an aircraft; the '882 patent hose is used to convey water such as in a garden hose.
- The McDonald hose conveys oxygen or air, the '882 patent describes the conveyance of fluid, including gases such as air, but claims only water.
- The McDonald hose has a regulator and a gas mask affixed to the free end, the '882 patent claims a restrictor.

[138] These differences become almost irrelevant when reading the description of the '882 patent which I have already reviewed in detail earlier. The '882 patent description tells the reader that the hose can convey "fluid" including water, gases and even flowable solids. The '882 patent also says that "*anything that restricts the flow of fluid within the hose can be employed*" as a restrictor.

[139] The Plaintiffs expert, Kuutti was in my opinion, pushing it too far when he says that a person skilled in the art would not readily see that the McDonald gas mask hose could be adapted for use as a water hose - it could, and too far when he said that the regulator and gas mask assembly was not a restrictor- it was.

[140] I prefer the evidence of Haubert in this regard. I repeat part of his testimony at trial as set out in Volume 4 of the transcript. At pages 648 and 649 of his direct testimony he gave the following answers:

Page 648

Q. And again in summary, what is the relevance of the McDonald patent in your view?

A. The McDonald patent is an example of a hose that expands and contracts. It expands with fluid pressure and it maintains its length during use.

Q. And what about the construction of the hose?

A. It's a flexible tube. It's separate from the cover, which is inelastic.

Q. And what's the flexible tube made from?

A. Elastomer.

Q. What comment do you have about the fact that the hose in the McDonald patent is used in the context of an oxygen mask for transporting oxygen?

A. Its method of operation is the same.

The pressure drives it to expand.

Q. What structures, if any, in the McDonald patent would a skilled person recognize as a flow restrictor?

A. The regulator is one and the other is 28 the end fitting that the regulator attaches to.

Page 649

Q. Why would they see those as flow restrictors?

A. The end fitting, as I described before, has to be smaller than the ID of the — or the inside diameter of the hose and the regulator is also a flow restrictor.

Q. What in your opinion would the skilled person make, of the fact that the McDonald hose is shown as being used on an airplane?

A. What's important is the expansion is driven by pressure. No matter how long it is or what the fluid is, it still expands when it's pressurized.

[141] At page 691 of the transcript he gave the following answers on cross-examination:

Q. Have you seen a physical embodiment

of the McDonald patent?

A. I would say that this is the same as the 882 hose actually.

Q. I'm sorry, you have to speak up?

A. I would say it's the same as the 882 hose.

Q. So you're saying that you've seen an embodiment of McDonald, it's there in the 882, or it's there in the Pocket Hose? But you've not seen an embodiment of McDonald in the cockpit of an airplane, have you?

A. No.

Q. And this patent is directing the person of skill in the art to imagine that the environment for this invention to be the cockpit of an airplane?

A. The McDonald patent is a hose patent.

It's used — happens to be used in the cockpit of an airplane with a breathing mask.

Q. Nowhere in the patent of the McDonald — nowhere in the McDonald patent does it suggest that this invention can be used anywhere else than in -- at the cockpit of an airplane, isn't that right?

A. That's correct.

[142] At page 695 of the transcript he gave the following answers on cross-examination:

Q. And the breathing apparatus, the mask which has this other regulator, it's a sophisticated piece of equipment?

A. It's a flow restrictor.

Q. I said it's a sophisticated piece of equipment?

A. Not really. It's a regulator.

Q. Well, do you know whether any person can calibrate and maintain regulators for firefighters or for scuba divers or people like that?

A. Calibration requirements doesn't mean it's a sophisticated piece of equipment. It means you need to keep it calibrated because it's an important piece of equipment.

[143] I am satisfied that the skilled person would readily find and adapt the McDonald patent hose for use as a water hose such as a garden hose. That water hose would have a flexible inner tube and a constraining outer tube. The tubes would be connected only at the ends. One end would have a connector for a pressure source such as water; the other would have a restrictor. This adaptation would be, in my opinion, readily accomplished by the person skilled in the art.

[144] There are a number of secondary factors that have been raised. There was motivation to create a simple, inexpensive garden hose that could be promoted in the direct retail market by television advertising and the like. It was a commercial success. But motivation and success alone do not mean that there was, in the objective sense, an invention. Khubani testified to that when he referred to items such as amber sunglasses and dust mops that had been available for years but were great successes in the direct retail environment.

[145] I find that the claims at issue, 1, 15, 28 and 42 were obvious having regard to the state of the art and, in particular, the McDonald patent.

VALIDITY – CLAIMS BROADER THAN THE INVENTION

[146] The Defendants argue that claims 1 (and 15) and 28 are broader than the invention disclosed in the '882 patent, they use the word "covetous". This argument does not pertain to claim 42 (as dependant upon claims 32 and 28) thus, whatever the outcome of this argument, the Defendants would still be faced with claim 42 were it not for my finding as to invalidity respecting obviousness.

[147] With respect to claim 1 (and dependent claim 15) the Defendants argue that the claim does not specify that the outer tube is "non elastic". They argue that it is only when we get to claim 2, which is not at issue here, do we find a requirement that the outer tube be "*made from a material which will not stretch longitudinally*", thus, they argue, claim 1 must include something that will stretch longitudinally.

[148] Similarly, with respect to claim 28 they argue that the claim does not specify a restrictor and it is not until we get to claims 32 and 42 do we find reference to a restrictor.

[149] Looking at claim 1 we find that the outer tube must be made of a "*fabric material*". In referring to the specification, for instance at page 11, paragraph 0030, the inner and outer hoses are described such that "*The hose includes an expansible inner tube made of an elastic material and a separate, distinct outer tube made from a non-elastic material...*"

[150] Looking at claim 28 we find that the claim describes "*...a substantially shortened first length in a non-water flow contracted state ... and a substantially longer second length ... in an expanded state upon the application of water pressure...*"

[151] In referring to the specification at paragraph 0052 it is stated: “*The fluid pressure within the hose is accomplished by introducing fluid under pressure into one end of the hose and restricting the flow of the fluid out of the other end of the hose*” and at paragraph 0054 “*Anything that restricts the flow of the fluid within the hose can be employed*”.

[152] The Defendants support their argument largely by referring to cases that consider claim differentiation to be determinative. The Plaintiffs, on the other hand, argue that the Defendants are reading the claims too literally and restrictively and that a broader, more generous reading of the claims should be taken.

[153] I find that the decision of the Supreme Court of Canada in *Metalliflex Limited v Rodi & Wienerberger AG*, [1961] SCR 117 is most helpful in dealing with this issue.

[154] That case dealt with a patent described to expandable metal watch bracelets and the like comprising sleeves, U-shaped connecting bows and leaf springs. It was argued that the claims omitted the holding connection thus the bracelet was inoperable (in this regard the point being made is the same as the claims broader argument here). Taschereau J., for the Court, set out the issue at pages 121 and 122:

The construction of this bracelet is simple. It consists of three parts which are sleeves, U-shaped connecting bows and leaf springs, the arrangement of which provides a relatively cheap and simple bracelet. It can be more easily adjusted in length for different wrists than the other bracelets. It is said on behalf of the appellant that although claims 1 and 2 cover a combination, the elements of which are links, bows and springs, they omit the holding connection, with the consequence that the bracelet is an inoperative device, which must necessarily fall apart, and that the claims should therefore be held invalid as lacking utility.

The respondent's contention is that claims 1 and 2 should be construed so that something to hold the parts in their specified relationship be included as part of the normal routine of a person setting out to construct the bracelet. It has been also argued, and the Court of Queen's Bench has adopted this view, that it is not sufficient to consider only the wording of the claims, but also the whole specifications, which have been described as the "Dictionary of the Claims."

[155] It is said that Counsel for the Appellant, Gordon F. Henderson Q.C. in oral argument before the Court held the unconnected pieces in his hand and let them fall to the floor to emphasise his point.

[156] Taschereau J. at pages 122 and 123 said that the claims must be construed with reference to the entire specification. A patentee is not trying to extend his monopoly. A person reading the claims in the context of the specification would know that some type of holding means was required:

The claims, of course, must be construed with reference to the entire specifications, and the latter may therefore be considered in order to assist in apprehending and construing a claim, but the patentee may not be allowed to expand his monopoly specifically expressed in the claims "by borrowing this or that gloss from other parts of the specifications". Vide: Ingersoll Sergeant Drill Co. v. Consolidated Pneumatic Tool Co.¹

But here, the respondent does not seek to enlarge or expand its monopoly by reference to the specifications, but refers to them to explain the obvious. The monopoly applied for is the combination of three elements, and the particular means by which the parts are to be held together is immaterial. The appellant does not claim a holding means. This of course, may be effected in any practical way. In the specifications, a means proposed to be used by the respondent was disclosed, but it is not essential that it should be that particular one. It is beyond question that the parts have to be held together, but the means to attain that purpose and hold together the combination, which is the invention claimed in 1 and 2, is not material.

Thus, in The King v. Uhlemann², it was held claims to a spectacle construction were valid, although it was not specified how these straps “embracing” the edges of the lenses would maintain the embrace. Vide also: Canadian Tire v. Samson In this latter case, the claims spoke of blades carried by a hub without specifying any means to retain them in position during operation. In both cases the claims were held to be valid.

I have, therefore, come to the conclusion, as did Mr. Justice Rinfret of the Court of Queen’s Bench with whom Pratte and Owen JJ. concurred, that the device, which is the subject-matter of this case, is operative and useful and that, therefore, the claims are valid.

[157] The claims are not instructional booklets; they serve to define the monopoly. The reference in claim 1 to a “fabric material” to be used for the outer tube is sufficient, taken in context of the specification to define relatively inelastic material, the claim is not broader than the invention disclosed. Claim 2 serves, in fact, to broaden claim 1 to a material that may not be fabric so long as it is a material that will not stretch.

[158] Similarly, with respect to claim 28, it speaks to the fact that the hose expands under water pressure and is retracted when no water is flowing which, taken together with the specification, is sufficient to inform a person that some kind of restrictor is to be provided.

[159] I find that claims 1, 15 and 28 are not covetous.

RELIEF

[160] Since I have held claims 1, 15, 28 and 42 of the ‘882 patent to be invalid the Defendants (Plaintiffs-by- Counterclaim) are entitled to a declaration to that effect.

[161] The Plaintiffs are not entitled to any of the relief sought by them and there will be no reference as to the extent of any reasonable compensation, damages or profits. I add a word as to reasonable compensation since, in argument, Plaintiffs' Counsel did advise the Court that the Plaintiffs were seeking such compensation only after December 27, 2012, the date when the claims in the application for the '882 were amended to be in the form in which the patent was finally issued.

COSTS

[162] The Defendants are entitled to costs which I establish at the middle of Column IV. However, I reduce the costs, including both fees and disbursements, by fifty percent since the Defendants raised many issues upon which they were unsuccessful. The case was essentially one of obviousness having regard to McDonald, had the Defendants restricted their case essentially to that issue, the length of the trial and related matters such as discovery could have been much reduced.

[163] In taxing costs I provide the following instructions:

- Fees for two senior counsel are allowed at trial;
- Fees for one counsel are allowed on discovery and motions and conferences including reasonable disbursements for travel, food and accommodation;
- Khubani, Kamrin and Haubert entitled to reasonable disbursements for travel, food and accommodation;
- Expert witness fees for Kamrin and Haubert are allowable provided they do not exceed the fees chargeable by Defendants' senior counsel for like time;

- No fees or disbursements are allowable for any other persons;
- Other reasonable disbursements are allowable;
- To the extent that costs have been provided for by any previous Order, they remain unaffected.

FURTHER MATTERS

[164] There remain certain issues in this action respecting an Industrial Design and matters arising out of the *Trade-Marks Act* and *Competition Act*. I encourage the parties to endeavour to settle these matters. If they cannot be settled within a reasonable period of time either party may request a Case Management conference with a view to setting a schedule for dealing with the remaining issues and fixing a time and place for trial.

JUDGMENT

FOR THESE REASONS PROVIDED; THIS COURT'S JUDGMENT is that:

1. It is declared that claims 1, 15, 28 and 42 of Canadian Patent No. 2,779,882 are and always have been, invalid and void;
2. The Plaintiffs' action in respect of infringement of Canadian Patent No. 2,779,882, is dismissed;
3. Either of the parties may request a Case Management conference for purpose of setting a schedule for dealing with the remaining issues in this action, if required;
4. The Defendants are entitled to one-half of their fees and disbursements at the middle of Column IV in accordance with the Reasons.

“Roger T. Hughes”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1112-13

STYLE OF CAUSE: E. MISHAN & SONS, INC. AND BLUE GENTIAN, LLC v
SUPERTEK CANADA INC., INTERNATIONAL EDGE,
INC. AND TELEBRANDS CORP.

PLACE OF HEARING: TORONTO, ONTARIO

DATES OF HEARING: MARCH 24-27 & 31, 2014

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

DATED: APRIL 7, 2014

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