

Federal Court of Appeal



Cour d'appel fédérale

Date: 20150504

Docket: A-293-13

Citation: 2015 FCA 115

**CORAM: DAWSON J.A.
STRATAS J.A.
NEAR J.A.**

BETWEEN:

**ZERO SPILL SYSTEMS (INT'L) INC.,
KATCH KAN HOLDINGS LTD., QUINN
HOLTBY and KATCH KAN RENTALS LTD.**

Appellants

and

**BILL HEIDE dba CENTRAL ALBERTA PLASTIC PRODUCTS,
RAT PLASTIC LTD. and 1284897 ALBERTA LTD.**

Respondents

Heard at Toronto, Ontario, on October 16, 2014.

Judgment delivered at Ottawa, Ontario, on May 4, 2015.

REASONS FOR JUDGMENT BY:

STRATAS J.A.

CONCURRED IN BY:

**DAWSON J.A.
NEAR J.A.**

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] Zero Spill Systems (Int'l) Inc., Katch Kan Holdings Ltd., Quinn Holtby and Katch Kan Rentals Ltd. (collectively, Zero Spill) appeal from the judgment dated June 7, 2013 and the amended judgment dated July 18, 2013 of the Federal Court (*per* Justice Barnes): 2013 FC 616.

[2] Zero Spill is a non-exclusive licensee of Canadian Patents 2,136,375 ('375 Patent) and 2,258,064 ('064 Patent) and Canadian Industrial Design 86,793 ('793 Design). These patents and the design cover certain fluid containment apparatuses for use in oil field operations.

[3] In the Federal Court, Zero Spill sued Bill Heide, Central Alberta Plastic Products and Rat Plastic Ltd. (collectively, the Heide respondents) and 1284897 Alberta Ltd. (Lea-Der) for infringing the patents by making and selling competing oil field fluid containment products. Further, Zero Spill sued the Heide respondents for infringing the '793 Design by making and selling a product that is substantially similar in appearance. Zero Spill also sought a declaration that Canadian Industrial Design 102,346 ('346 Design), held by the Heide respondents, was invalid.

[4] Both the Heide respondents and Lea-Der alleged that they did not infringe either the '375 Patent or the '064 Patent. Lea-Der further alleged that these Patents were invalid and sought declarations to that effect. Lea-Der also sought a declaration that another patent, Canadian Patent 2,166,265 ('265 Patent), at one time said to be infringed, was invalid. The Heide respondents alleged that they did not infringe the '793 Design and that their '346 Design was valid.

[5] The Federal Court dismissed the action. On infringement, it held that Lea-Der and the Heide respondents had not infringed the '375 Patent or the '064 Patent. Further, the Heide respondents had not infringed the '793 Design. On invalidity, it held that the '375 Patent was valid but both the '064 and '265 Patents were not. Both were invalid on the basis of obviousness,

and the '064 Patent was also invalid on account of anticipation. The Federal Court did not deal with the validity of the '346 Design.

[6] Zero Spill appeals all of the Federal Court's findings of non-infringement and invalidity and also the Federal Court's failure to deal with the validity of the '346 Design.

[7] I would allow Zero Spill's appeal in part, remitting several issues to the Federal Court judge in accordance with the following reasons.

[8] Owing to the complexity of this appeal, with multiple issues stemming from multiple pieces of intellectual property, I propose to organize these reasons by addressing each piece of intellectual property individually, dealing with issues as they arise.

A. The Industrial Designs

[9] As described briefly above, there are two industrial designs at issue in this appeal. Zero Spill is a licensee of one of them, the '793 Design, which it alleges that the Heide respondents have infringed. The Heide respondents own the other, the '346 Design, which Zero Spill seeks to invalidate.

(1) The '793 Design

[10] The Heide respondents are in the moulded plastic fabrication and plastic welding business. They make line pipe trays known as the “CAPP trays” for use in an oilfield and sell them directly to customers. These trays are designed to capture fluids that either leak or are spilled during oil field operations.

[11] Before the Federal Court, Zero Spill alleged that the Heide respondents had infringed the '793 Design by selling the CAPP tray. The Federal Court rejected this: Reasons of the Federal Court at paragraph 135. As will be seen, its conclusions hinge on section 5.1 of the *Industrial Design Act*, R.S.C. 1985, c. I-9. Paragraph 5.1(a) limits the protection available under the *Industrial Design Act* in certain circumstances. Section 5.1 provides as follows:

<p>5.1. No protection afforded by this Act shall extend to</p> <p>(a) features applied to a useful article that are dictated solely by a utilitarian function of the article; or</p> <p>(b) any method or principle of manufacture or construction</p>	<p>5.1. Les caractéristiques résultant uniquement de la fonction utilitaire d'un objet utilitaire ni les méthodes ou principes de réalisation d'un objet ne peuvent bénéficier de la protection prévue par la présente loi.</p>
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[12] The Federal Court noted that there were many similarities between the '793 Design and the CAPP tray and that the Heide respondents had used Zero Spill's product – covered by the '793 Design – as a model for their own: Reasons of the Federal Court at paragraphs 125-26, 129, and 133. However, Zero Spill had failed to identify, in their pleadings or evidence, the features of the '793 Design that were protected under paragraph 5.1(a) of the *Industrial Design Act*: Reasons of the Federal Court at paragraphs 123, 125-27 and 129.

[13] The Federal Court may also be taken to have held that because many features of the '793 Design were in some way functional, those features were unprotectable under the *Industrial Design Act* by virtue of paragraph 5.1(a) notwithstanding that they might also appeal to the eye: Reasons of the Federal Court at paragraphs 130-32 and 134-35.

[14] Zero Spill appeals these two holdings. First, Zero Spill submits that, in law, it had no burden under paragraph 5.1(a). In its view, the burden was actually on the Heide respondents to show that paragraph 5.1(a) applied in this case. Second, Zero Spill submits that paragraph 5.1(a) excludes from protection only those features whose form is dictated solely by their function, rather than all features which may have some coincident function, as the Federal Court may be taken to have held.

[15] Both of Zero Spill's submissions involve issues of statutory interpretation, matters on which the Federal Court is required to be correct: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. For the reasons that follow, I accept both of Zero Spill's submissions. Consequently, I would allow Zero Spill's appeal on these grounds and remit this issue to the Federal Court judge.

[16] Statutes are to be interpreted by considering the text of their provisions in light of the other words in the Act and the greater context and purpose of the Act: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193.

[17] The right to sue for industrial design infringement depends on the existence of a registered industrial design: *Industrial Design Act*, sections 9 and 11. Under subsection 7(3), if the certificate of registration is in evidence in an infringement action, there is a presumption that the registered industrial design complies with the Act. Subsection 7(3) reads as follows:

<p>7. (3) The certificate, in the absence of proof to the contrary, is sufficient evidence of the design, of the originality of the design, of the name of the proprietor, of the person named as proprietor being proprietor, of the commencement and term of registration, and of compliance with this Act. [emphasis added]</p>	<p>7. (3) En l'absence de preuve contraire, le certificat est une attestation suffisante du dessin, de son originalité, du nom du propriétaire, du fait que la personne dite propriétaire est propriétaire, de la date et de l'expiration de l'enregistrement, et de l'observation de la présente loi. [j'ai souligné]</p>
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[18] Subsection 7(3) creates a blanket presumption of compliance with the entire Act, including paragraph 5.1(a), and places the burden to rebut this presumption squarely on the defendant resisting an infringement claim. One way to rebut the presumption of validity could be to successfully invoke paragraph 5.1(a). The Federal Court cited subsection 7(3), but did not recognize that, on its face, it places the burden to invoke paragraph 5.1(a) on the defendant: Reasons of the Federal Court, at paragraph 126.

[19] This interpretation is further confirmed by the internal structure of the *Industrial Design Act*. Paragraph 5.1(a) appears in a different sub-part of the Act than section 11. Paragraph 5.1(a) appears in the sub-part “Registration”; section 11 appears in the sub-part “Exclusive Right”. Other provisions in the “Registration” sub-part establish the formal requirements of an application to register an industrial design (subsection 4(1)), examination and correspondence concerning objections (section 5), and registrability of industrial designs (section 6). Sandwiched

as it is within sections 4, 5 and 6, paragraph 5.1(a) creates a substantive validity requirement for industrial designs, not an element of the cause of action for the plaintiff to satisfy (section 11).

[20] The Federal Court erred in law when it required Zero Spill to lead evidence explaining which features of its '793 Design complied with paragraph 5.1(a). Rather, the Heide respondents were required to plead that asserted features of the design were unprotectable because they were dictated solely by function and were required to adduce evidence to prove it. But they did not. In the Federal Court, the sole defence pleaded by the Heide respondents was non-infringement: Reasons of the Federal Court at paragraph 124; Heide's Statement of Defence, at paragraph 7 (Appeal Book page 195).

[21] It follows that the Federal Court's finding of non-infringement, based as it was solely on paragraph 5.1(a) of the *Industrial Design Act*, cannot stand. The issue of infringement must now be remitted to the Federal Court judge for redetermination.

[22] Before leaving this issue, I wish to examine the Federal Court's apparent finding that all features of an industrial design that are functional are unprotectable by virtue of paragraph 5.1(a) even though those features might also appeal to the eye: Reasons of the Federal Court at paragraphs 130-32, 134-35. Here, too, I disagree with the Federal Court.

[23] The Federal Court's interpretation runs counter to both the ordinary meaning of paragraph 5.1(a) and the purpose of the *Industrial Design Act*. Properly understood, only features

of an industrial design whose form are dictated solely by function are excluded from protection by paragraph 5.1(a).

[24] Looking first at the ordinary meaning of paragraph 5.1(a), functional features of an industrial design may be protected by the *Industrial Design Act*. Paragraph 5.1(a) states that features “applied to a useful article that are dictated solely by a utilitarian function of the article [my emphasis]” are ineligible for protection. Features may be simultaneously useful and visually appealing. In such a case, on its face, paragraph 5.1(a) cannot apply.

[25] Moreover, the very purpose of the *Industrial Design Act* is to provide residual protection for functional designs that would, but for section 64 of the *Copyright Act*, R.S.C. 1985, c. C-42, be subject to copyright protection: Roger T. Hughes and Susan J. Peacock, *Hughes on Copyright and Industrial Design*, loose-leaf (consulted on April 7, 2015), 2d ed. (Markham, ON: LexisNexis, 2005) at §152; Roger T. Hughes, *Copyright Legislation & Commentary*, 2015 ed. (Markham ON: LexisNexis, 2015) at pages 360-61.

[26] Under subsection 64(2) of the *Copyright Act*, an article is exempt from copyright protection if two conditions are met. First, there must have been more than 50 copies of the article lawfully made. Second, the article must be functional. The *Industrial Design Act* would serve no purpose if it did not protect functional features.

[27] Together, the plain text of paragraph 5.1(a) and the purpose underlying the *Industrial Design Act* confirm that functional features of designs may be protected under the Act. Only those features whose form are dictated *solely* by function are not protected.

(2) The '346 Design

[28] The sole issue concerning the '346 Design is whether the Federal Court ought to have addressed its validity.

[29] In the Federal Court, Zero Spill pleaded in its twice-amended Statement of Claim that the '346 Design of the Heide respondents was invalid for two reasons. First, the '346 Design was invalid under subsection 6(1) of the *Industrial Design Act* because it too closely resembled Zero Spill's own '793 Design. Second, it was invalid because the Heide respondents could not, at the date of application to register the '346 Design, state in accordance with paragraph 4(1)(b) of that Act that to their knowledge the '346 Design was not already in use by another person.

[30] In their Statement of Defence, the Heide respondents resisted Zero Spill's validity attack, stating that the '346 Design was valid and denying both grounds of invalidity alleged by Zero Spill.

[31] Zero Spill and the Heide respondents had joined issue. The Federal Court referred to the '346 Design only once in a paragraph prefacing its analysis of whether the '793 Design had been infringed: Reasons of the Federal Court at paragraph 122. Following that analysis, the Federal

Court did not return to the validity of the '346 Design. The Federal Court should have determined the validity of the '346 Design. However, between the Federal Court's amended judgment and the hearing of this appeal, the '346 Design expired. The validity of the '346 Design is now moot. Accordingly, this issue will not be remitted.

B. The Patents

[32] In addition to the CAPP trays, the Heide respondents also produce a set of upper and lower fluid containment trays for use on well heads and drilling rigs. These are known as the Rat trays, which the Heide respondents sell directly to customers and also to Lea-Der for re-sale.

[33] Lea-Der also re-sells a line of carbon fibre upper and lower trays, known as the "Stealth trays." It purchases these from Stealth Environment Filtration Systems, which is not a party to these proceedings.

[34] Zero Spill says that these activities infringed their patents.

[35] Before the Federal Court, Zero Spill asserted two patents – the '375 and '064 Patents – against both Lea-Der and the Heide respondents. Lea-Der and the Heide respondents both defended on the basis that they did not infringe. Lea-Der, for its part, also counter-claimed for a declaration that both of these patents, as well as Zero Spill's '265 Patent, were invalid for obviousness and anticipation. I shall deal with each of the three Patents separately.

(1) The '375 Patent

[36] The '375 Patent relates to an upper containment tray that attaches to the top of the flow nipple of an operating oil well drilling rig. The flow nipple is a pipe extending up from the ground to just below the floor of the drilling rig. The flow nipple houses the drill string that actually cuts the oil well hole. The drill string is itself comprised of multiple lengths of pipe that connect at their ends to form a long continuous length of pipe down into the well hole. During drilling, a drilling fluid is circulated down the drill string around the drill bit and back up to the surface where it is diverted and filtered to remove debris. Once filtered, it is recirculated back down the drill string.

[37] When it is time to remove the drill string from the well hole, it is withdrawn and the sections of the string are detached for ease of handling above ground. This process typically discharges the drilling fluid that has accumulated above the joint between lengths of drill string. Unless the discharged fluid is somehow captured, it can soak the drilling crew and equipment.

[38] The '375 Patent is addressed to this problem. When lengths of drill string are detached and drilling fluid is discharged, the upper containment tray catches the discharge and directs it back down the well hole.

[39] The Federal Court held that the '375 Patent was valid but not infringed by either Lea-Der or the Heide respondents. Zero Spill appeals the Federal Court's finding of non-infringement, alleging that the Federal Court misconstrued the '375 Patent.

[40] In the case of the Stealth upper tray, Zero Spill says that the erroneous construction resulted in the Federal Court finding non-infringement, a finding that can no longer stand. In the case of the Rat upper tray, Zero Spill says that the Federal Court ought to have weighed the expert evidence differently.

(a) Construction

[41] Before us, the parties broadly agreed on the operative principles for claims construction. The well-accepted canons of construction are as follows:

- Claims construction is the first step in a patent suit.
- The task of claims construction rests with the court.
- The court must read the claims through the eyes of the person skilled in the art to which the patent pertains.
- The skilled reader comes to the patent armed with all of the common general knowledge in the art.
- The skilled reader construes the claims as at the patent's publication date.

- The essential elements of the claims must be sorted from the non-essential elements.
- The claims are to be read purposively with the object of obtaining a fair result as between the patentee and the public.
- The words of the claims are to be considered with reference to the entire specification, but not with a view to enlarging or contracting the claims' language as written.
- Expert evidence is admissible to assist in placing the court in the position of the skilled reader.

[42] The Federal Court correctly identified these canons of construction and the appropriate skilled reader: Reasons of the Federal Court at paragraphs 70-73.

[43] On appeal, the Federal Court's construction of a patent's claims will be reviewed for correctness: *Whirlpool Corp. v. Camco Inc.*, 2000 SCC 67, [2000] 2 S.C.R. 1067 at paragraphs 61 and 76. However, the Federal Court is entitled to deference in its appreciation of the evidence, particularly the expert evidence, that affects that construction: *Mylan Pharmaceuticals ULC v. Astrazeneca Canada Inc.*, 2012 FCA 109, 432 N.R. 292 at paragraph 20; *Wenzel Downhole Tools Ltd. v. National-Oilwell Canada Ltd.*, 2012 FCA 333, [2014] 2 F.C. 459 at paragraph 44; *Bell Helicopter Textron Canada Limitée v. Eurocopter*, 2013 FCA 219, 449 N.R. 111 at

paragraphs 73-74; see also *Consolboard Inc. v. MacMillan Bloedel (Sask.) Ltd.*, [1981] 1 S.C.R. 504 at page 537, 122 D.L.R. (3d) 203.

[44] The '375 Patent has only two claims, a method claim and an apparatus claim. These claims read as follows:

1. A method for retrofitting existing drilling rigs with a catch pan, comprising the following steps:

firstly, providing a pan-like body consisting of two portions, each portion including an interior edge having a semi-circular indentation with depending semi-cylindrical collar, the semi-cylindrical collars having interior surfaces, latching means being provided to secure the interior edges in abutting relation such that the semi-cylindrical collars mate to form a cylindrical collar with a cylindrical interior sealing surface; and

secondly, providing an annular seal;

thirdly, securing the annular seal to a flow nipple disposed below an opening in a drilling platform;

fourthly, positioning the semi-circular indentations with depending semi-cylindrical collars on opposed sides of the flow nipple with the cylindrical interior sealing surface of the cylindrical collar engaging and being telescopically movable relative to the annular seal, and using the latching means to secure the interior edges in abutting relation, such that drilling fluids from the drilling platform are caught in the pan-like body and directed into the flow nipple and as the drilling platform settles such settling is accommodated by movement of the cylindrical interior sealing surface of the cylindrical collar relative to the annular seal.

2. A catch pan for drilling rigs, comprising:

a shallow pan-like body consisting of two portions, each portion including an interior edge having a semi-circular indentation with depending semi-cylindrical collar, such that upon the interior edges of the portions being abutted a generally circular opening with a depending cylindrical collar is formed, the cylindrical collar providing a cylindrical interior sealing surface;

latching means to secure the interior edges in abutting relation.

an annular seal having an interior attachment portion and an exterior wiper portion, the attachment portion being adapted for attachment to a flange of a flow nipple, the wiper portion engaging the interior sealing surface, the cylindrical

interior sealing surface of the cylindrical collar being telescopically movable relative to the annular seal, thereby accommodating movement of the pan-like body relative to the flow nipple when a downward force is exerted upon the pan-like body by a settling drilling platform. [emphasis added]

At trial, the parties disputed several of the terms used in these two claims. On appeal, Zero Spill takes issue with only one of those terms, “telescopically movable”.

[45] The Federal Court provided two definitions of that term, a positive definition and a negative one. Positively, the Federal Court held that “telescopically movable” described the capacity for anticipated and controlled axial movement of the tray within the limits or stops of the sealing area of the tray collar. Negatively, it held that the term did not include the idea of some minimal and unaccounted for movement of the tray at the onset of product failure: Reasons of the Federal Court at paragraph 76.

[46] In so holding, the Federal Court relied on both the '375 Patent specification, which described a specific sealing arrangement which enabled the telescopic movement, and the evidence of all three expert witnesses, including the Federal Court's preferred expert in the case, Thicke: Reasons of the Federal Court at paragraphs 40-41, 46, 49 and 76. This expert described that the skilled reader would understand “telescopic movement” with reference to the specific sealing arrangement disclosed in the '375 Patent.

[47] Zero Spill appeals on the basis that, correctly construed, “telescopic movement” refers only to a type of movement, no matter how minimal, expected or controlled. In support of its appeal, Zero Spill alleges that the Federal Court impermissibly imported a claim limitation into

its construction of “telescopic movement” by ignoring key evidence, specifically that both of Zero Spill’s Expert, Wallace, and Lea-Der’s expert – the preferred expert – Thicke: Appellant’s Memorandum of Fact at Law at paragraphs 79-80.

[48] Overall, I am of the view that this ground of Zero Spill’s appeal must fail. The full record was before the Federal Court and on appeal we must presume that all of it was reviewed: *Housen v. Nikolaisen*, above at paragraph 46; *Manitoba v. Canada*, 2015 FCA 57 at paragraph 26. It is open to a trial judge to prefer certain evidence and that weighing can only be set aside on the basis of palpable and overriding error: *Mylan Pharmaceuticals*, *Wenzel Downhole Tools*, *Eurocopter*, all above.

[49] Palpable and overriding error is a highly deferential standard. “Palpable” means an error that is obvious. “Overriding” means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall: *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at paragraph 46. Zero Spill has not persuaded me that this standard has been met.

[50] Finally, in support of its appeal, Zero Spill argued that the Federal Court’s construction of the claims of the ’375 Patent was incorrect because it impermissibly narrowed its construction of “telescopic movement” with reference to the prior art. In particular, Zero Spill cites the following passage from the reasons of the Federal Court (at paragraph 76):

Furthermore, by choosing a particular means to accomplish the advantage of tray movement and to distinguish the invention from the prior art, it is not open to the

Plaintiffs to stretch these claims to monopolize anything that may achieve the same result...” [emphasis added]

[51] Zero Spill is correct that claims cannot be construed with reference to the prior art: *Whirlpool*, above at paragraph 49(a); *Dableh v. Ontario Hydro*, [1996] 3 F.C. 751 at pages 773-74, 199 N.R. 57 (C.A.).

[52] However, this ground of Zero Spill’s appeal must also fail.

[53] An appellate court’s focus must be on the substance of the reasons for judgment, discerned by a reading of the reasons as an organic whole. It must disregard infelicitous modes of expression and surplusage that do not bear on the substance of the matter. The phrase, “to distinguish the invention from the prior art,” an isolated phrase, follows after the Federal Court completed its construction of the term “telescopic movement”. It is surplusage. The Federal Court confirms it as surplusage by using the word “[f]urthermore”.

[54] Even if the Federal Court did construe “telescopic movement” with an eye to the prior art, Zero Spill’s appeal on this ground must still fail. Appellate review is only concerned with legal errors that bear on the outcome of the case. No matter what the applicable standard of review is, if the error would not have affected the Federal Court’s judgment, the appeal must be dismissed. Where, as here, the Federal Court offered other sustainable and overwhelming reasons for holding as it did – namely its reliance on the wording of the specification and the expert evidence – merely pointing to an inconsequential legal error will not result in the appeal being allowed.

[55] Moreover, in my view, the Federal Court's construction of the claims of the '375 Patent was correct. In describing the preferred embodiment, the description of the '375 Patent takes for granted that over time the drilling rig will settle and that, when it does, the weight of the drilling rig will come to rest upon the catchment pan pushing downward relative to the flow nipple: '375 Patent at page 5. The invention of the '375 Patent addresses that very problem, ensuring the integrity of the catchment pan despite rig settling. Anticipated and controlled axial movement will accomplish that goal; minimal and unaccounted for movement of the tray at the onset of product failure will not: Reasons of the Federal Court at paragraphs 87, 89.

(b) Infringement

[56] Patent infringement requires that the defendant has misappropriated *all* of the essential elements of a valid patent claim: *Free World Trust v. Électro Santé Inc.*, 2000 SCC 66, [2000] 2 S.C.R. 1024, at paragraphs 68 and 75. If even one of the essential elements is omitted from the defendant's alleged infringing activities, there is no infringement.

[57] Once the claims have been construed, infringement is a question of fact, reviewable only for palpable and overriding errors: *Whirlpool*, above at paragraph 76, *Monsanto Canada Inc. v. Schmeiser*, 2004 SCC 34, [2004] 1 S.C.R. 902 at paragraph 30. This is nothing more than an expression of the general principle of appellate review that factual holdings can only be set aside on the basis of palpable and overriding error. As we have seen, this is a high standard: *Housen v. Nikolaisen*, above; *South Yukon*, above at paragraph 46.

[58] The Federal Court found that the Rat upper tray did not infringe because it had not appropriated the capacity for telescopic movement as the Federal Court had construed that term: Reasons of the Federal Court at paragraph 91. On appeal, Zero Spill submits that this finding ignored expert and documentary evidence.

[59] In my view, Zero Spill has not established palpable and overriding error on this point. The absence of references to expert and documentary evidence does not automatically translate to a finding of palpable and overriding error. As mentioned in paragraph 48 above, the full record was before the Federal Court and on appeal we must presume that all of it was reviewed. On a point such as this, we must ask whether the Federal Court grappled with the matter as a whole. To determine this, as mentioned above, our focus must be on the substance of the reasons for judgment, discerned by a reading of the reasons as an organic whole. On this, the following paragraphs from *South Yukon*, above, are apposite:

[49] Immersed from day-to-day and week-to-week in a long and complex trial such as this, trial judges occupy a privileged and unique position. Armed with the tools of logic and reason, they study and observe all of the witnesses and the exhibits. Over time, factual assessments develop, evolve, and ultimately solidify into a factual narrative, full of complex interconnections, nuances and flavour.

[50] When it comes time to draft reasons in a complex case, trial judges are not trying to draft an encyclopedia memorializing every last morsel of factual minutiae, nor can they. They distill and synthesize masses of information, separating the wheat from the chaff and, in the end, expressing only the most important factual findings and justifications for them.

[51] Sometimes appellants attack as palpable and overriding error the non-mention or scanty mention of matters they consider to be important. In assessing this, care must be taken to distinguish true palpable and overriding error on the one hand, from the legitimate by-product of distillation and synthesis or innocent inadequacies of expression on the other.

[60] Overall, reviewing the Federal Court's reasons as a whole, I do not accept that the Federal Court ignored expert and documentary evidence in making the finding it did. The reasons show that the Federal Court did grapple with this matter, considering all the evidence before it. Zero Spill has not persuaded me otherwise.

[61] As for the Stealth upper tray, Zero Spill properly conceded that this Court's disposition of the issue of infringement depended upon its disposition of the issue of claim construction. In its words, "[i]f the appellants' proposed construction is correct, the appellants submit that the finding by the trial judge that the Stealth Tray will accommodate movement is determinative on this issue of the infringement of claim 2": Zero Spill's Memorandum of Fact and Law at paragraph 84. Since the Federal Court correctly construed the claims of the '375 Patent, the Stealth upper tray does not infringe the '375 Patent.

(c) Validity

[62] On appeal, Lea-Der attempted to assert that the '375 Patent was invalid: Lea-Der's Memorandum of Fact and Law at paragraphs 91-92.

[63] However, this issue is not properly before us. In its judgment, the Federal Court declared that the '375 Patent was valid. If, in this Court, Lea-Der wished to set aside that declaration and challenge the validity of the '375 Patent, it had to bring a cross-appeal. It has not done so. Therefore, the Federal Court's declaration that the '375 Patent is valid stands.

(2) The '064 Patent

[64] The '064 Patent relates to a sectional fluid containment tray that is mounted low on the central stack of an oil well. Its purpose is to capture fluid leaking from above and to drain it away.

[65] The Federal Court held that the '064 Patent was neither valid nor infringed by either Leader or the Heide respondents. In particular, the Federal Court held that the '064 Patent was both anticipated and obvious in its entirety: Reasons of the Federal Court at paragraphs 117-18.

[66] Zero Spill appeals all of these findings. It submits that the Federal Court construed some of the claims of the '064 Patent but did so incorrectly, failed to construe all of the claims of the '064 Patent when it considered whether the '064 Patent was anticipated and obvious, and considered the obviousness of individual claim elements in the abstract rather than the claimed invention as a whole.

[67] I agree in part with Zero Spill.

[68] Those claim elements of the '064 Patent that the Federal Court did construe were construed without reversible error. This is sufficient to dispose of Zero Spill's appeal on infringement.

[69] However, the Federal Court did not construe completely the claims of the '064 Patent. As a result, it was not possible for it to properly assess the issues of anticipation and obviousness. Thus, the Federal Court's invalidity finding cannot stand and must be remitted to the judge for reconsideration.

(a) Construction

[70] The Federal Court held that it was sufficient to consider only Claims 1 and 9 of the '064 Patent: Reasons of the Federal Court at paragraph 106. Those Claims read as follows:

1. An oilwell leak containment apparatus for a completed oilwell, comprising:

a shallow tray-form body segmented into at least two segments, each of the at least two segments having a non-mating edge and a mating edge, the non-mating edge having an upstanding containment wall, when the at least two segments are coupled together to form the body the upstanding containment wall extending around a peripheral edge of the body and defining a liquid containment cavity, the mating edge mates with an other of the at least two segments, each mating edge having an arcuate portion, when the at least two segments are coupled together to complete the body the arcuate portions forming a circular collar adapted to be positioned around a christmas tree [*sic*];

at least one of the two segments having a drainage aperture; and

couplers for clamping the mating edges together.

...

9. An oilwell leak containment apparatus for a completed oilwell, comprising in combination:

an assemblage of components forming a christmas tree [*sic*] secured to a wellhead:

a body segmented into at least two segments, each of the at least two segments having a non-mating edge and a mating edge, the non-mating edge having an upstanding containment wall, when the at least two segments are coupled together to form the body the upstanding

containment wall extending around a peripheral edge of the body and defining a liquid containment cavity, the mating edge mates with an other of the at least two segments, each mating edge having an arcuate portion, when the at least two segments are coupled together to complete the body the arcuate portions forming a circular collar around the christmas tree [*sic*];

couplers for clamping the mating edges together;

the mating edge of the one of the at least two segments having a projecting tongue and the mating edge of the other of the at least two segments has a tongue receiving groove, with a seal positioned within the tongue receiving groove; and

at least one of the segments forming the liquid containment cavity having a drainage aperture. [emphasis added]

[71] In considering Claims 1 and 9, the Federal Court focused on a few key claim elements – “mating edge,” “a liquid containment cavity,” “completed oilwell,” and “christmas tree” [*sic*] – holding that each was essential: Reasons of the Federal Court at paragraphs 109-12.

[72] The Federal Court held that the elements, “mating edge” and “a liquid containment cavity,” meant that the tray segments would, when combined as described in Claims 1 and 9, create a single liquid containment cavity with liquid-tight edges where the segments were joined: Reasons of the Federal Court at paragraphs 109-10. In the Federal Court’s view, these essential elements of Claims 1 and 9 referred to “a single divisible tray where the sections are sealed and come together to form a single containment cavity”: Reasons of the Federal Court at paragraph 110.

[73] The Federal Court further held that the elements, “completed oilwell” and “christmas tree” [*sic*], meant that the tray claimed in Claims 1 and 9 was only claimed in conjunction with a

production oil well, a Christmas tree being a set of valves installed on a production oil well, rather than a drilling rig: Reasons of the Federal Court at paragraphs 34, 111-12.

[74] In construing Claims 1 and 9 as it did, the Federal Court relied on the plain meaning of the text of the patent and the evidence of all experts in the case: Reasons of the Federal Court at paragraphs 33-35, 44, 51, and 109-12. In particular, the Federal Court noted that on most issues, all experts were essentially agreed, but that Zero Spill's expert, Wallace, had changed his opinion on the meaning of "completed oilwell" and "christmas tree" [*sic*] mid-litigation to include use on a drilling rig, the effect of which was to render the Rat and Stealth lower trays infringing. Wallace attempted to explain his change in opinion by pointing to some of the drawings of the '064 Patent depicting a blow out preventer stack, which are rarely present on production oil wells: Reasons of the Federal Court at paragraph 111. The Federal Court preferred the evidence of Lea-Der's expert, Thicke, whose opinion did not change throughout the litigation and who was not prepared to ignore the plain language of the patent based on drawings that depicted a blow out preventer stack which was extraneous to the actual invention: Reasons of the Federal Court at paragraph 112.

[75] On appeal, Zero Spill argues that the Federal Court erred in construing these elements. In particular, Zero Spill alleges that a liquid-tight seal between tray sections is not essential to Claim 1 because Claim 3 describes a tongue and groove connection without reference to a seal while Claim 4 does include a seal. Therefore, says Zero Spill, Claim 1, which is silent about a seal, also cannot require a liquid-tight seal: Zero Spill's Memorandum of Fact and Law at paragraphs 97-98.

[76] Zero Spill says that in the absence of a liquid-tight seal between tray sections, the only way to create a liquid-tight tray as required by the '064 Patent would be by combining two liquid-tight cavities to form a single liquid-tight tray: Zero Spill's Memorandum of Fact and Law at paragraph 99. At the hearing of the appeal, Zero Spill argued that this meant that "a containment cavity" actually referred to any number of liquid containment cavities combined into a single tray.

[77] Regarding the construction of "completed oilwell" and "christmas tree" [*sic*], Zero Spill essentially repeats the argument it made to the Federal Court: that the inventor had defined "christmas tree" [*sic*] in the patent in relation to the drawings and that the skilled reader would have understood that the presence of a blow out preventer stack in those drawings to mean that the invention was claimed for use on a drilling rig: Zero Spill's Memorandum of Fact and Law at paragraphs 95-96.

[78] I reject these arguments. In my view, the Federal Court did not err when it construed any of these elements. The Federal Court relied heavily on both the text of the patent and the input of the experts in the case, who were initially all agreed. I have not been persuaded that the Federal Court committed palpable and overriding error in preferring the experts it did and there are no other reversible errors in the Federal Court's construction of the patent.

(b) Infringement

[79] Based on its construction of these elements of the '064 Patent, the Federal Court held that neither the Rat nor the Stealth lower tray was infringing because the trays had not been deployed in conjunction with a production oil well: Reasons of the Federal Court at paragraph 121. The Federal Court also held that the Rat lower tray did not infringe because it did not involve the mating of multiple tray segments to form a single containment cavity. Rather, it brought two separate trays into close proximity without requiring any liquid-tight seal being formed between them: Reasons of the Federal Court at paragraph 120.

[80] Again, Zero Spill has properly conceded that its appeal on the issue of infringement hinges on the Federal Court's construction of Claims 1 and 9: Zero Spill's Memorandum of Fact and Law at paragraph 125. Given that I have found no reversible error in the Federal Court's construction of these elements of Claims 1 and 9, I would also dismiss Zero Spill's appeal on the issue of infringement.

(c) Validity (anticipation and obviousness)

[81] The requirement that claimed inventions not be anticipated or obvious is set out in sections 28.2 and 28.3 of the *Patent Act*, R.S.C. 1985, c. P-4. Both of these sections begin with "[t]he subject-matter defined by a claim in an application for a patent in Canada..." [emphasis added] and then go on to establish formal and substantive criteria for a finding of anticipation or

obviousness. Both of these sections focus a reviewing court on the subject matter “defined by a claim”.

[82] Section 58 of the *Patent Act* also bears upon this. Under section 58, individual claims stand or fall independently and have no direct effect on the validity of the patent overall. Section 58 reads as follows:

58. When, in any action or proceeding respecting a patent that contains two or more claims, one or more of those claims is or are held to be valid but another or others is or are held to be invalid or void, effect shall be given to the patent as if it contained only the valid claim or claims.

58. Lorsque, dans une action ou procédure relative à un brevet qui renferme deux ou plusieurs revendications, une ou plusieurs de ces revendications sont tenues pour valides, mais qu’une autre ou d’autres sont tenues pour invalides ou nulles, il est donné effet au brevet tout comme s’il ne renfermait que la ou les revendications valides.

[83] Together, sections 28.2, 28.3 and 58 of the *Patent Act* establish that invalidity for anticipation or obviousness must be assessed claim-by-claim.

[84] Although sections 28.2 and 28.3 prohibit claims that are anticipated or obvious, these sections offer little help to distinguish between claims that are valid and invalid. In short, these sections establish a standard (novelty or inventiveness, respectively) and certain conditions for their application (including the correct date for determination), without prescribing any test for determining whether that standard is met. To determine whether a given claim is anticipated or obvious, one must apply common law tests.

[85] The leading Canadian authority on both anticipation and obviousness is *Apotex Inc. v. Sanofi-Synthelabo Canada Inc.*, 2008 SCC 61, [2008] 3 S.C.R. 265. That case affirmed two common law tests, each of which confirms that invalidity for anticipation or obviousness must be established claim-by-claim.

[86] On anticipation, *Sanofi-Synthelabo* prescribes two necessary conditions to a finding of invalidity: disclosure and enablement by a single piece of prior art: at paragraphs 28, 31-37. In discussing the second requirement, enablement, the Supreme Court stated that, to be enabling, “[t]he prior [art] must provide enough information to allow the subsequently claimed invention to be performed without undue burden” [emphasis added]: at paragraph 37(3).

[87] On obviousness, *Sanofi-Synthelabo* prescribes a four-step test, step two of which is to “[i]dentify the inventive concept of the claim in question or if that cannot readily be done, construe it” [emphasis added]: at paragraph 67.

[88] Apparent in both of these passages, binding on the Federal Courts, is that each allegedly anticipated or obvious claim must be considered individually.

[89] In this regard, the Federal Court erred.

[90] As already described, the Federal Court held that it was sufficient for the purposes of its analysis to consider the meaning and scope of Claims 1 and 9 because all of the remaining claims were dependent: Reasons of the Federal Court at paragraph 106.

[91] In considering anticipation, rather than construing Claims 2-8 and 10-14, the Federal Court merely listed some of the elements of Claims 2-8 (at paragraph 113):

The '064 Patent describes a divisible fluid containment tray that is mechanically fitted and sealed to a Christmas tree where it passively collects fluids falling from above. The captured fluids are then drained away through a drainage aperture. Included in the claims are features such as quick release couplers, tongue and groove joints that can be sealed, cascading containment trays that may be interconnected and upstanding and descending collars with or without a seal.

[92] The Federal Court then held that the '064 Patent was entirely anticipated by two patents, Shuyler (US1,507,628) and Gayaut (US5,377,748), that both describe divisible and drained fluid containment trays fixed to a wellhead pipe beneath a well floor with a sealed flange, and lower trays described by industry witnesses: Reasons of the Federal Court at paragraphs 117-18.

[93] Next, the Federal Court held that the '064 Patent was entirely obvious because changes in tray sizing or methods of tray joinder including the use of quick-release couplers are the kinds of routine adaptations that the skilled reader would readily recognize and adopt to suit the installation context: Reasons of the Federal Court at paragraph 114. Therefore, there was nothing about the lower tray of the '064 Patent that would not have been obvious to the skilled reader: Reasons of the Federal Court at paragraph 118.

[94] The Federal Court was obliged to consider the validity of the '064 Patent claim-by-claim. Not doing so was a legal error. Notwithstanding that Claim 13 is actually an independent claim, the nature of dependent cascading claims is to narrow the claims upon which they depend:

Purdue Pharma v. Pharmascience Inc., 2009 FC 726, 77 C.P.R. (4th) 262 at paragraph 10. The practical effect of this on anticipation or obviousness is that eventually a claim may be

sufficiently narrow to escape these prior art-based attacks, even though the broader claims may be invalid.

[95] Further, on the issue of anticipation, the Federal Court did not consider enablement. And on obviousness, the Federal Court did not consider that the '064 Patent may have claimed a combination invention. Assuming without deciding that the various elements claimed were known at the relevant time, the task of the Federal Court became to assess the inventiveness of each claim, asking whether the claimed combination of known elements was nonetheless inventive. It is not fair to a person claiming to have invented a combination invention to break the combination down into its parts and find that, because each part is well known, the combination is necessarily obvious: *Bridgeview Manufacturing Inc. v. 931409 Alberta Ltd.*, 2010 FCA 188, 87 C.P.R. (4th) 195 at paragraph 51.

[96] Also I note that the Federal Court may have employed different constructions of Claims 1 and 9 for its infringement and validity analyses. The claims are to be construed once, and for all purposes: *Whirlpool*, above at paragraph 49(b); *Purdue Pharma v. Canada (Attorney General)*, 2011 FCA 132, 93 C.P.R. (4th) 186.

[97] The identification of the proper legal approach to anticipation and obviousness is a matter of law subject to correctness review: *Eurocopter*, above at paragraph 117; *Easton Sports Canada Inc. v. Bauer Hockey Corp.*, 2011 FCA 83, 92 C.P.R. (4th) 103 at paragraph 35. Since I have held that the Federal Court's approach to anticipation and obviousness was incorrect, the Federal

Court's finding that the '064 Patent was anticipated and obvious cannot stand. These issues will be remitted to the judge for determination in accordance with these reasons.

(3) The '265 Patent

[98] The '265 Patent relates to the capture of fluid from a leaking wellhead. The specification describes an annular ring with an outer flange that is bolted directly into the central stack of the wellhead. A catch pan is attached and sealed to the outer edge of the annular ring. This way, fluids leaking from above are caught and drained away.

[99] The Federal Court found that the '265 Patent was entirely invalid because it was obvious: Reasons of the Federal Court at paragraph 140.

[100] Zero Spill appeals this finding on multiple bases, including that the Federal Court did not assess obviousness claim-by-claim and considered the obviousness of individual claim elements in the abstract rather than considering the claimed invention as a whole. I agree that the Federal Court's finding that the '265 Patent was entirely invalid because it was obvious cannot stand.

(a) Construction

[101] The Federal Court construed the entire '265 Patent – nine claims in all – in a single brief paragraph (at paragraph 136):

There are no terms in the 265 Patent claims that are in dispute. The claims describe a fluid containment system incorporating a catchment pan attached to an

annular ring and flange that is bolted to the central stack of a wellhead. The catchment pan includes a drain. The disclosure is essentially silent on the inventive concept and there are no references to any prior art. The problem addressed by the patent is simply the capture and containment of fluids leaking from a wellhead.

[102] On appeal, Zero Spill takes no issue with this passage, other than to say that the Federal Court did not really construe the claims of the '265 Patent at all. Focusing on the substance of the reasons for judgment, discerned by a reading of the reasons as an organic whole, I agree with Zero Spill's submission.

(b) Validity

[103] As described briefly above, the Federal Court held that the entire '265 Patent was obvious. Because none of the terms of the claims were in dispute, the Federal Court held that the '265 Patent universally claimed only a well-known method for collecting wellhead leaks. With this universal construction of the '265 Patent in mind, the Federal Court considered the variously claimed attachment methods for the catchment pan in the abstract, holding that each was a routine adaptation that was well-known and involved no inventive ingenuity: Reasons of the Federal Court at paragraphs 138-39.

[104] In my view, the Federal Court adopted the same approach as it did concerning the '064 Patent, an approach that I have found to be in error. Whether or not the claim language was disputed, the Federal Court was required to construe or determine the inventive concept of each of the nine claims at issue and thereafter to assess the combinations of the various elements claimed to determine whether they were inventive: *Bridgeview Manufacturing*, above.

[105] Therefore, the Federal Court's finding that the '265 Patent was obvious cannot stand and so this issue must be remitted to the Federal Court for redetermination.

C. Proposed disposition

[106] For the foregoing reasons, I would allow Zero Spill's appeal in part and set aside the judgment and the amended judgment of the Federal Court, except to the extent that the latter found that Canadian Patent 2,136,375 was valid and not infringed.

[107] I would remit the following issues to the Federal Court judge for redetermination in accordance with these reasons:

- Infringement of Zero Spill's Canadian Industrial Design 86,793 by the Heide respondents; and
- Validity of Zero Spill's Canadian Patents 2,258,064 and 2,166,265.

[108] The Federal Court set out its award of costs in a separate judgment dated September 19, 2013. Formally, this was not appealed. No notice of appeal specific to that judgment has been placed before us. However, Zero Spill's notice of appeal from the other judgments did seek costs of the appeal and in the court below. As is apparent from their memoranda and oral submissions before us, the parties have proceeded on the basis that the issue of costs in this Court and below is indeed before us.

[109] Zero Spill has been substantially successful on appeal, but not entirely. Therefore, I would grant it 70% of its costs both here and below.

“David Stratas”

J.A.

“I agree

Eleanor R. Dawson J.A.”

“I agree

D.G. Near J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-293-13

**APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE BARNES
DATED JUNE 7, 2013 AND THE AMENDED JUDGMENT OF THE HONOURABLE
MR. JUSTICE BARNES DATED JULY 18, 2013, NO. T-297-07**

STYLE OF CAUSE:

ZERO SPILL SYSTEMS (INT'L)
INC., KATCH KAN HOLDINGS
LTD., QUINN HOLTBY, and
KATCH KAN RENTALS LTD. v.
BILL HEIDE DBA CENTRAL
ALBERTA PLASTIC PRODUCTS,
RAT PLASTIC LTD. and 1284897
ALBERTA LTD.

PLACE OF HEARING:

TORONTO, ONTARIO

DATE OF HEARING:

OCTOBER 16, 2014

REASONS FOR JUDGMENT BY:

STRATAS J.A.

CONCURRED IN BY:

DAWSON AND NEAR J.J.A.

DATED:

MAY 4, 2015

APPEARANCES:

Christopher J. Kvas
William D. Regan
Adrian H. Lambert

FOR THE APPELLANTS

Bruce Comba

FOR THE RESPONDENTS, BILL
HEIDE DBA CENTRAL
ALBERTA PLASTIC PRODUCTS,
AND RAT PLASTIC LTD.

Daryl W. Schnurr
Judy Fowler Byrne

FOR THE RESPONDENT, 1284897
ALBERTA LTD.

SOLICITORS OF RECORD:

Piasetzki Nenniger Kvas LLP
Toronto, Ontario

Emery Jamieson LLP
Edmonton, Alberta

Miller Thomson LLP
Waterloo, Ontario

FOR THE APPELLANTS

FOR THE RESPONDENTS, BILL
HEIDE DBA CENTRAL
ALBERTA PLASTIC PRODUCTS,
AND RAT PLASTIC LTD.

FOR THE RESPONDENT, 1284897
ALBERTA LTD.