

Commissioner's Decision #1456

Décision du commissaire #1456

TOPICS: O00 Obviousness

SUJETS: O00 Évidence

Application No: 2,729,402

Demande no: 2 729 402

IN THE CANADIAN PATENT OFFICE

DECISION OF THE COMMISSIONER OF PATENTS

Patent application number 2,729,402, having been rejected under subsection 30(3) of the *Patent Rules* (SOR/96-423), has consequently been reviewed in accordance with paragraph 30(6)(c) of the *Patent Rules*. The recommendation of the Board and the decision of the Commissioner are to refuse the application.

Agent for the Applicant

BORDEN LADNER GERVAIS LLP

World Exchange Plaza

100 Queen Street, Suite 1300

OTTAWA Ontario

K1P 1J9

INTRODUCTION

[1] This recommendation concerns the review of rejected Canadian patent application number 2,729,402, which is entitled “PROCESS FOR MANUFACTURING FERMENTED MILK AND FERMENTED MILK”. The application is owned by Meiji Co., Ltd. (“the Applicant”). A review of the rejected application has been conducted by the Patent Appeal Board (“the Board”) pursuant to paragraph 30(6)(c) of the *Patent Rules*.

[2] As explained in more detail below, our recommendation is to refuse the application.

BACKGROUND

The Application

[3] Patent application 2,729,402 (“the instant application”) was filed in Canada on June 29, 2009 under the provisions of the *Patent Cooperation Treaty* and was laid open to the public on January 7, 2010.

[4] The instant application relates to a method for manufacturing fermented milk (e.g., yogurt). In particular, it relates to a method of alleviating the continuous production of acids that can occur during the transportation and storage of fermented milk caused by the starter bacteria used in the fermentation process and that leads to a sour taste in the final delivered product. The addition of bacteriocin (antibacterial substances such as nisin and lactococcin) decreases the ability of a starter to produce acid. However, the addition of bacteriocin and its subsequent growth can produce a further undesirable cheese-like flavor. The instant application proposes to address this issue by adding the bacteriocin-producing bacteria but subsequently killing the bacteria by heat treatment once they have produced the desired bacteriocin. In this manner, the desired restriction of increase in acidity of the product is achieved while avoiding the undesired possible cheese-like flavor.

Prosecution History

- [5] On December 30, 2015, a Final Action (“FA”) was written pursuant to subsection 30(4) of the *Patent Rules*. The FA stated that the instant application is defective on the ground that all of the claims on file at the time of the FA (“claims on file”) would have been obvious and therefore non-compliant with section 28.3 of the *Patent Act*.
- [6] In a March 24, 2016 response to the FA (“R-FA”), the Applicant submitted proposed claims 1-12 (“proposed claims”) as well as arguments in favor of non-obviousness.
- [7] As the Examiner considered the application not to comply with the *Patent Act*, pursuant to paragraph 30(6)(c) of the *Patent Rules*, the application was forwarded to the Board for review on July 11, 2016 along with an explanation outlined in a Summary of Reasons (“SOR”). The SOR indicated that both the claims on file and the proposed claims were defective on the ground of obviousness.
- [8] In a letter dated July 22, 2016, the Board forwarded to the Applicant a copy of the SOR and offered the Applicant the opportunity to make further submissions and/or attend an oral hearing.
- [9] In a written communication dated October 20, 2016 (“R-SOR”), the Applicant declined the opportunity for an oral hearing and elected to wait to receive the assigned panel’s preliminary analysis before providing further written submissions.
- [10] In a preliminary review letter (“PR letter”) dated March 19, 2018, the present panel (“the Panel”) set out its preliminary analysis of the obviousness issue with respect to both the claims on file and the proposed claims. The Panel also identified an error in the content of claims 7 and 8 on file. The PR letter offered the Applicant the opportunity to make further submissions.

- [11] As no response to the PR letter was received, the Applicant's agent was contacted to ensure that they had received the letter. In a telephone call on May 28, 2018, the Applicant's agent confirmed that there would be no submission made in response to the PR letter and that the Panel should proceed based on the record to date.

ISSUES

- [12] The issue to be resolved from the FA is whether claims 1-11 on file would have been obvious.
- [13] If the claims on file are considered to have been obvious, we may turn to the proposed claims 1-12 and consider whether they constitute amendments necessary for compliance with the Act and Rules.

LEGAL PRINCIPLES AND OFFICE PRACTICE

Claim Construction

- [14] In accordance with *Free World Trust v Électro Santé Inc*, 2000 SCC 66, essential elements are identified through a purposive construction of the claims done by considering the whole of the disclosure, including the specification and drawings (see also *Whirlpool Corp v Camco Inc*, 2000 SCC 67 at paragraphs 49(f) and (g) and 52). In accordance with the *Manual of Patent Office Practice*, revised June 2015 (CIPO) at §13.05, the first step of purposive claim construction is to identify the person skilled in the art and their relevant common general knowledge ("CGK"). The next step is to identify the problem addressed by the inventors and the solution put forth in the application. Essential elements can then be identified as those required to achieve the disclosed solution as claimed.

Obviousness

- [15] The *Patent Act* requires that the subject matter of a claim not be obvious to a person skilled in the art. Section 28.3 of the *Patent Act* provides:

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

- (a) information disclosed more than one year before the filing date by the applicant, or by a person who obtained knowledge, directly or indirectly, from the applicant in such a manner that the information became available to the public in Canada or elsewhere; and
- (b) information disclosed before the claim date by a person not mentioned in paragraph (a) in such a manner that the information became available to the public in Canada or elsewhere.

- [16] In *Apotex Inc v Sanofi-Synthelabo Canada Inc*, 2008 SCC 61 [*Sanofi*] at paragraph 67, the Supreme Court of Canada stated that it is useful in an obviousness inquiry to use the following four-step approach:

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

ANALYSIS

Claim Construction

The person skilled in the art

[17] In the PR letter, we applied the following characterization of the person skilled in the art, as identified in the FA:

a food chemist with knowledge of fermented dairy products and the use of bacteria in producing said products.

[18] There being no response to the PR letter, this characterization has not been disputed. We apply it in our analysis below.

The relevant common general knowledge (CGK)

[19] In the PR letter, with respect to the relevant CGK, we stated:

In the FA at page 3, the relevant common general knowledge (“CGK”) of the person skilled in the art was characterized as:

based, in part, on the background information in the patent application and, in part the knowledge of food chemistry, specifically, the production of fermented dairy products. In addition, it is common general knowledge in the art that different bacteria possess different deactivation (i.e. “killing”) temperatures and that the use of an alternative micro-organism would likely require a different deactivation temperature range. It would be understood that this would apply to the different bacteriocin-producing *Lactococcus* strains.

The above characterization of the CGK was also not disputed by the Applicant.

With respect to the points of CGK to be taken from the background information in the instant patent application, for clarification purposes the Panel sets out below a list of these points:

- During transportation and storage of fermented milk, the continuous production of acids from the starter bacteria used in production of the fermented milk can lead to a sour taste in the delivered product (instant application at paragraph [0002]);
- Bacteriocin, which are antibacterial substances such as nisin and lactococcin, are produced by lactic acid bacteria and such substances restrict the increase of acidity in fermented milk during transportation and storage (instant application at paragraph [0002]);
- Fresh cells of bacteriocin-producing *Streptococcus thermophilus* and *Lactococcus lactis* were known to be inoculated into a yogurt mix (i.e., fermented milk) in order to restrict the increase in acidity during transportation and storage of the yogurt (instant application at paragraphs [0002]-[0003]);
- The lactic acid bacterial used to produce bacteriocin are the same as those used in cheese manufacture. As a result the yogurt flavor deteriorates and a cheese-like flavor increases (instant application at paragraph [0005]); and
- The use of bacteriocin-producing bacteria as both a yogurt starter bacteria and for producing the bacteriocin to control acidity reduces the possible variety of tastes and properties in the final product (instant application at paragraph [0005]).

To the above points taken from the background information, the Panel also adds the following points of knowledge which are characterized as generally known in the description portion of the application:

- Generally, plain-type yogurt is manufactured by a post-fermentation process where the raw material mixture is placed in a container and fermented while soft-type yogurt and drink-type yogurt are manufactured by a pre-fermentation process where ingredients such as sugar syrup and sarcocarp are mixed with fermented milk and placed in a container after atomizing and homogenizing the fermented milk (instant application at paragraph [0021]);
- The raw materials, apparatuses, manufacturing conditions and such for the manufacture of fermented milk are generally known (instant application at paragraph [0022]);
- Known starters for use in the fermentation process in the manufacture of yogurt include: *L. bulgaricus*, *S. thermophilus*, *L. lactis*, *L. gasserii*, strains in the genus *Bifidobacterium* and lactic acid bacteria and yeasts generally used for manufacturing

fermented milk, or the mixtures of more than one strains of these (instant application at paragraph [0044]);

- Examples of lactic acid bacteria that produce bacteriocin include those on the genus *Lactococcus*, *Pediococcus*, *Lactobacillus*, *Leuconostoc*, *Propionibacterium*, *Bifidobacterium* and *Enterococcus* (instant application at paragraph [0031], a list of examples of bacteriocin produced by each genus is given at paragraphs [0032]-[0038]); and
- Culturing methods for bacteriocin-producing lactic acid bacteria are well known (instant application at paragraph [0039]).

[20] Again, there being no response to the PR letter, this characterization has not been disputed. We apply it in our analysis.

[21] In the PR letter, we explained why in the present case we had not undertaken a construction of the claims:

In the present case, there are no issues on the record of any debate as to the meaning of any terms in the claims, nor does the Panel see any issues in that regard. There is also no analysis as to which claimed features are essential and which are not, if any.

As will be seen in our analysis below under obviousness, in our view, the Applicant and the Examiner are in general agreement as to the identification of the person skilled in the art, the relevant CGK, the inventive concept of the claims and the differences between the claims and the state of the art. Therefore in this case, we see no need for a determination of which features of the claims are essential versus non-essential.

[22] Accordingly, we will proceed below with the analysis of the claims on file under obviousness.

Obviousness

(1)(a) Identify the notional “person skilled in the art”

[23] The person skilled in the art has been identified above under Claim Construction at paragraph [17].

(1)(b) Identify the relevant common general knowledge of that person

[24] The relevant CGK has been identified above under Claim Construction at paragraph [19].

(2) Identify the inventive concept of the claim in question or if that cannot readily be done, construe it

[25] Independent claim 1 on file is as follows:

1. A method for manufacturing fermented milk comprising:
 - a step of adding at least one of a first bacteria and cultures of the first bacteria to a yoghurt mix;
 - a step of killing the first bacteria by heating to a temperature of between 85 to 140°C, after the at least one of the first bacteria and cultures of the first bacteria have been added;
 - a step of adding a starter to the yoghurt mix containing the first bacteria which have been killed; and
 - a step of fermenting the yoghurt mix to which the starter has been added, wherein the first bacteria is bacteriocin-producing lactic bacteria in genus *Lactococcus*.

[26] In the PR letter, we stated in relation to the inventive concept that:

In the FA at page 3, the inventive concept of independent claim 1 was characterized as “a method of production of a fermented dairy product wherein an increase in the acidity of the product during transportation and storage is

restricted and which possesses good organoleptic properties (e.g. flavour, odour, etc.).”

The Applicant did not dispute the above inventive concept. Despite this, the FA considered more detailed differences between the “state of the art” and the claimed subject-matter at Sanofi step (3), which we address below.

[27] As the above has also not been disputed, we apply it below.

(3) Identify what if any differences exist between the matter cited as forming part of the “state of the art” and the inventive concept of the claim or the claim as construed

[28] With respect to this step of the *Sanofi* analysis, we stated in the PR letter:

In the FA, the following prior art documents were cited:

D2: US 5,455,835	Vedamuthu	Published: August 29, 1995
D4: CA 2,034,425	Vandenbergh et al.	Published: September 14, 1991
D5: JP 04-287636	Yamauchi et al.	Published: October 13, 1992

In the FA, D2 was considered to represent the “state of the art.”

D2 disclosed a method of producing a yogurt product wherein a milk-based medium is cultured with *Pediococcus acidilactici* in order to produce a bacteriocin that inhibits the growth of pathogenic bacteria and prevents spoilage. D2 recognized that the early introduction of bacteriocins can lead to problems caused by the resultant generation of acids (D2 at col. 1, line 60-col. 2, line 3):

Broad spectrum bacteriocins tend to retard the growth of yogurt cultures. This is true of nisin. Thus nisin has to be blended into the final product, thereby producing a significant risk of contamination of the final product.

It would be desirable if the bacteriocin could be introduced into the milk based medium used to produce the yogurt product. In this manner, the bacteriocin could protect the product as it was produced. The problem is that any acids or the like in excess generated by the bacteriocin producing cultures can inhibit the yogurt cultures.

As set out in the FA at page 3, D2 solves the abovementioned problem by proposing the same general steps of producing a yogurt product as those of claim 1 on file:

- a) Fermenting a milk based medium with a bacteriocin producing *Pediococcus acidilactici* to produce a first fermentate

- containing the bacteriocin;
- b) Heating the milk based medium to “terminate the growth” of the *Pediococcus acidilactici*;
- c) Adding a starter containing *Lactobacillus bulgaricus* and *Streptococcus thermophiles*; and
- d) Fermenting the first fermentate to which the starter has been added.

The FA at page 3 identified two main differences between the state of the art as represented by D2 and the inventive concept, namely:

- D2 does not disclose the use of bacteriocin producing lactic acid bacteria of the genus *Lactococcus*; and
- D2 does not disclose the specific temperature range specified in claim 1 for killing the *Lactococcus* bacteriocin-producing bacteria (85-140°C).

[29] As we stated in the PR letter, the Applicant had not disputed the above identified differences. With no response to the PR letter, we apply the above in our analysis.

(4) Viewed without any knowledge of the alleged invention as claimed, do those differences constitute steps which would have been obvious to the person skilled in the art or do they require any degree of invention?

[30] In the PR letter, we stated in relation to the obviousness of the claims:

In the FA at page 4, the claims on file were considered to have been obvious having regard to prior art document D2 in view of either D4 or D5, the substitution of one bacteriocin-producing bacteria for another being considered to have been obvious. Further, the FA considered that once the alternative bacteria had been chosen, the heat treatment conditions necessary to kill the bacteria would also have been obvious.

In the R-FA at pages 2-3, the Applicant contends that there is no teaching in D2 that would lead the skilled person to substitute one bacteriocin-producing bacteria for another and there is no teaching that would lead the skilled person to use the specific temperature conditions claimed to kill the *Lactococcus* bacteria if it were chosen:

The Applicant submits that the Examiner is using hindsight in order to select specific features from documents and combine them together in order to arrive at the present claims. There is no teaching within D2 which would instruct the skilled person to replace the bacteria with the bacteriocin-producing lactic bacteria in genus *Lactococcus* nor is there any teachings which would lead

the skilled person to amend D2 in order to use the specific temperatures and time ranges as set out within claim 1. The Examiner states that the person skilled in the art would be aware of various bacteria that could be substituted and various temperatures that could be used. However, the Examiner has not provided any motivation to make these changes to D2. Further, the Applicant refers to the *Federal Court* comments in *Janssen-Ortho Inc. v. Novopharm Inc.* (2006), 57 CPR (4th) 6 (affirmed on appeal) where the Court held that hindsight is one of the most dangerous factors and should be avoided. It is far too easy to see how the alleged invention could have been arrived at, even easily, once it has been done. If the number of decisions to be made in arriving at the solution were few and common place, hindsight may merely confirm that no inventive ingenuity was required to arrive at the solution. However, if the points for decision were many and choices abundant, there may be inventiveness in making proper decisions and choices. See paragraph 113. The Applicant submits that in the present case, there are many points for decision and many choices which could be made by the skilled person. There is nothing within D2 which would teach the skilled person to make the changes to arrive at the claimed invention and no motivation to do so. It is only with hindsight that the Examiner can point to references which teach the separate elements of the claims. The Examiner has not provided any support for changing the heating temperature or the time periods for heating. The Examiner simply refers to common knowledge. The Applicant submits that there is nothing which would direct the skilled person to make these particular decisions and these particular choices. It would only be by chance that the skilled person might possibly trip over the invention. The Applicant submits that this is not sufficient to support obviousness.

We first note that the basic process of producing fermented milk, or yogurt, was part of the relevant CGK of the person skilled in the art, including the use of similar starter materials as those used in the present application and particularly specified in dependent claim 8. The raw materials, apparatuses, manufacturing conditions and such for the manufacture of fermented milk were also generally known. It was part of the CGK to use bacteriocin such as nisin and lactococcin, produced by lactic acid bacteria, to restrict the increase of acidity in fermented milk during transportation and storage. Many examples of lactic acid bacteria that produce bacteriocin and that could be used to restrict the increase in acidity of fermented milk during transportation and storage were also well known, as disclosed in the instant application itself.

The problem set out to be solved by the instant application, set out at paragraph [0008], was “to offer a method by which an increase of the acidity in fermented milk during transportation and storage can be effectively restricted and the manufacture of fermented milk with a good flavor is attained.” However, this problem was not a new one, as evidenced by the CGK discussed above, which already sought to address it by the use of bacteriocin-producing bacteria, as the Applicant has done in the instant application.

Further, the CGK includes knowledge that if bacteriocin-producing bacteria such as *Lactococcus lactis* are used as the acidity restricting bacteria, the growth of such bacteria can cause problems such as an undesirable flavor (the cheese-like taste). The instant application sought to address this problem by heat treating the bacteriocin-producing lactic acid bacteria prior to addition of the starter materials. As discussed above at *Sanofi* step (3), prior art document D2 recognized a similar problem (that the early introduction of bacteriocins can lead to problems caused by the resultant generation of acids) and like the instant application, prior art document D2 sought to solve this problem by introducing a heat treatment step to terminate growth of the *Pediococcus acidilactici* bacteria that was chosen as the bacteriocin-producing species. In this way, just as in the instant application, bacteriocin could be present to inhibit undesirable bacterial growth during the second stage fermentation without the issues caused by further growth of the bacteriocin-producing species. We note that contrary to the Applicant's assertion at page 2 of the R-FA, the process disclosed in D2 does intend to obtain bacteriocin (e.g., D2 at col. 2, lines 31-38).

In our preliminary view, only the choice of bacteriocin-producing bacteria and the particular conditions used to terminate its growth are different. In this respect, as noted above, the instant application set out to solve the same problem as the prior art and disclosed many commonly known examples of lactic acid bacteria that could be used as part of the disclosed process that solved the problem. That list of bacteria includes both those of the genus *Lactococcus*, particularly exemplified and claimed in the application and those of the genus *Pediococcus*, which includes the particular species used in prior art document D2. In light of this CGK, in our view, the person skilled in the art would have considered the particular species of both genera, as well as those of the others that form part of the CGK, as viable bacteriocin-producing species that would be suitable to address the known issues in the yogurt fermentation process.

As such, in our preliminary view, it would have been self-evident to the person skilled in the art that both groups of bacteria would work. The only issue would have been the conditions necessary to heat treat the bacteria to deactivate them.

In our preliminary view, the determination of the particular heat-treatment conditions necessary to kill a particular bacteriocin-producing species would have been a matter of routine experimentation not requiring inventive ingenuity, as opposed to long and arduous testing that might not be considered routine. Although the instant application discloses several comparative examples that were studied to determine the effects of varying fermentation process conditions, there is nothing to indicate that the experimentation was unduly long and arduous. In our preliminary view, such studies are no different than those that would be necessary in refining any such process given a particular yogurt starting material and desired final product.

In that respect, we note that at paragraph [0047] of the instant application it is stated that "[t]he fermentation conditions, such as the temperature, can be arranged considering the strains of lactic acid bacteria added to a yogurt mix, the desired flavors of fermented milk, and such." Therefore, such process

conditions are left to the person skilled in the art to determine using their CGK. Likewise, given the direction from prior art document D2 to use a heat treatment step to address the issues of using a lactic acid bacteria as the bacteriocin source in the fermentation process, and the well-known applicable lactic acid bacteria, it would not have required inventive ingenuity for the skilled person, using their CGK, to determine the particular heat treatment conditions associated with the use of a particular lactic acid bacteria as a source of bacteriocin.

With respect to the Applicant's contention in the quotation from the R-FA, above, that there was a lack of motivation to use a different lactic acid bacteria than that of D2, in our preliminary view, given that the person skilled in the art would have viewed each of the well-known lactic acid bacteria as suitable (see CGK above and instant application at paragraph [0031]), there was a motivation to use any one of them in a yogurt fermentation process as a source of bacteriocin.

Further, while there may be inventive ingenuity in a case where proper decisions and choice are made when the points for decision were many and choices abundant, in our preliminary view, in the present case, given that the person skilled in the art would have viewed many lactic acid bacteria as suitable and that the refinement of process conditions associated with any choice of a particular one would have only required routine experimentation, we do not see any decisions or choices that needed to be avoided to arrive at a suitable solution in this case. In the instant application the Applicant merely picked one suitable bacteriocin-producing lactic acid bacteria, whereas prior art document D2 picked a different suitable bacteriocin-producing lactic acid bacteria. We see no invention in picking one bacteria over the other or in determining the suitable process conditions associated with each choice of bacteria.

We note that in the SOR at page 2, the Examiner has broken down the obviousness analysis into the "obvious-to-try" factors set out in *Sanofi* at paragraph [69]. While it is our preliminary view that such an assessment is not required in this case, as is generally more appropriate "in areas of endeavour where advances are often won by experimentation" (*Sanofi*, para 68; e.g., in pharmaceutical research), it is our view that the consideration of such factors is subsumed within our analysis, above.

In light of the above, it is our preliminary view that claim 1 on file would have been obvious in view of prior art document D2 and the relevant CGK.

With respect to dependent claims 2-11 on file, the Applicant, in the R-FA, attempted to amend the claims on file by adding the particular heat treatment conditions of claims 10 on file to independent claim 1. The Applicant has not highlighted any other particular further features of the dependent claims that would render the claims on file unobvious.

However, in our preliminary view, for the same reasons discussed earlier with respect to the determination of particular heat treatment conditions associated with a particular choice of bacteriocin-producing bacteria, there would have been no inventive ingenuity in the determination of the exact heat treatment

conditions such as those of claim 10 on file. In our preliminary view, such conditions result from routine experimentation on the part of the person skilled in the art.

- [31] In the absence of submissions from the Applicant and for the reasons given above, we conclude that claims 1-11 on file would have been obvious in view of prior art document D2 and the relevant CGK and therefore non-compliant with section 28.3 of the *Patent Act*.

Proposed Claims 1-12

- [32] In the PR letter, we set out our preliminary opinion that proposed claims 1-12 would also have been obvious:

As noted above, in the R-FA, the Applicant proposed amending independent claim 1 on file to add the specific heat treatment conditions of claim 10 on file. We have already indicated that it is our preliminary view that such an amendment would not render the claims on file unobvious.

As such, it is our preliminary view that the proposed amendments to the claims in the R-FA do not render the claims unobvious and are therefore not “necessary” for compliance with the Patent Act and Patent Rules as required by subsection 30(6.3) of the Patent Rules.

- [33] Again, there was no submission on our preliminary view as to the obviousness of the proposed claims.

- [34] Therefore, for the reasons set out above, we conclude that proposed claims 1-12 would have been obvious and therefore non-compliant with section 28.3 of the *Patent Act*. As such, they do not overcome the defect under obviousness for the claims on file and are therefore not “necessary” for compliance with the *Patent Act* and *Patent Rules* as required by subsection 30(6.3) of the *Patent Rules*.

Other Issues

- [35] In the PR letter, we noted minor errors in the components of the fermented milk starter specified in dependent claims 7 and 8 on file. In light of the above conclusion with respect to obviousness, these points are moot.

CONCLUSIONS

- [36] We have determined that claims 1-11 on file would have been obvious and therefore non-compliant with section 28.3 of the *Patent Act*. We have also determined that proposed claims 1-12 do not overcome the obviousness defect and therefore the introduction of these claims does not constitute a specific amendment that is “necessary” pursuant to subsection 30(6.3) of the *Patent Rules*.

RECOMMENDATION OF THE BOARD

- [37] In view of the above, the Panel recommends that the application be refused on the basis that the claims on file, namely claims 1-11, would have been obvious and therefore non-compliant with section 28.3 of the *Patent Act*.
- [38] Further, proposed claims 1-12 do not overcome the obviousness defect and therefore the Panel declines to recommend the introduction of these claims since they do not constitute a specific amendment that is “necessary” pursuant to subsection 30(6.3) of the *Patent Rules*.

Stephen MacNeil
Member

Ed MacLaurin
Member

Lewis Robart
Member

DECISION

[39] I concur with the conclusions and recommendation of the Patent Appeal Board that the application be refused on the ground that claims 1-11 on file would have been obvious and therefore non-compliant with section 28.3 of the *Patent Act*.

[40] Therefore, in accordance with section 40 of the *Patent Act*, I refuse to grant a patent on this application. Under section 41 of the *Patent Act*, the Applicant has six months within which to appeal my decision to the Federal Court of Canada.

Johanne Bélisle
Commissioner of Patents

Dated at Gatineau, Quebec,
this 16th day of July , 2018