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TOPIC: J-00 Meaning of Art  
J-50 Mere Plan  
SUJET: J-00 Signification de la  
technique  
J-50 Simple plan

Application No. : 2633227

Demande n° 2633227

IN THE CANADIAN PATENT OFFICE

DECISION OF THE COMMISSIONER OF PATENTS

Patent application number 2633227, having been rejected under subsection 30(3) of the *Patent Rules* (SOR/96-423) as they read immediately before October 30, 2019, has subsequently been reviewed in accordance with paragraph 199(3)(c) of the *Patent Rules* (SOR/2019-251). The recommendation of the Patent Appeal Board and the decision of the Commissioner are to refuse the application.

Agent for the Applicant:

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## INTRODUCTION

- [1] This recommendation concerns the review of rejected patent application number 2633227, which is entitled “Methods, systems and computer-readable media for facilitating forensic investigations of online activities” and is owned by BCE Inc. The outstanding defect indicated by the Final Action (FA) is that the claims do not define statutory subject matter, contrary to section 2 of the *Patent Act*. The Patent Appeal Board (the Board) has reviewed the rejected application pursuant to paragraph 199(3)(c) of the Patent Rules (SOR/2019–251). As explained below, our recommendation is to refuse the application.

## BACKGROUND

### The application

- [2] Canadian patent application 2633227 was filed on June 2, 2008 and has been open to public inspection since June 28, 2009.
- [3] The invention relates to methods and systems for facilitating the forensic investigation of online transactions and activities.

### Prosecution history

- [4] On March 28, 2017, an FA was issued pursuant to subsection 30(4) of the *Patent Rules* (SOR/96–423) as they read immediately before October 30, 2019 (the former *Rules*). The FA indicated the application to be defective on the ground that claims 1 to 25 (i.e. all claims on file) are directed to subject matter outside the definition of invention and thus do not comply with section 2 of the *Patent Act*.
- [5] In its September 22, 2017 response to the FA (RFA), the Applicant submitted arguments as to why the claims on file do comply with section 2 and also proposed an amended set of 25 claims (the first proposed claims). The Examiner neither considered that the amendment would remedy the defect nor was persuaded by the Applicant’s arguments to withdraw the rejection.
- [6] Therefore, pursuant to subsection 30(6) of the former *Rules*, the application was forwarded to the Board for review on behalf of the Commissioner of Patents. On

November 10, 2017, the Board forwarded to the Applicant a copy of the Examiner's Summary of Reasons along with a letter acknowledging the rejection.

- [7] A Panel was formed to review the rejected application and make a recommendation to the Commissioner as to its disposition. Following our preliminary review, we sent a letter on July 25, 2019 (the PR letter) presenting our analysis and rationale as to why, based on the record before us, we did not consider the subject matter of the claims on file (as well as of the first proposed claims) to comply with section 2 of the *Patent Act*. The PR letter also explained that we additionally did not consider the description to comply with subsection 81(1) of the former *Rules*.
- [8] In a response to the PR letter (RPR) on November 7, 2019, the Applicant proposed modifications to the first proposed claims to address the issues identified in the PR letter, resulting in a replacement set of 25 claims (the second proposed claims). The Applicant also proposed an amendment to the description to remedy its defect and submitted arguments for patentability.
- [9] A hearing was held on November 21, 2019. During the hearing, the Applicant further articulated their position, as reflected in the RPR. They also suggested consideration of a new set of claims; a representative claim 1 was provided. The Applicant confirmed during the hearing and a telephone conversation on November 25, 2019 that they were proposing this new set of amended claims (the third proposed claims). The third proposed claims comprise 13 claims, based on a subset of the second proposed claims, where the independent claims have been narrowed and the dependent claims remain the same.

## ISSUES

- [10] The issues addressed by this review are whether:
- the claims on file define subject matter falling within the definition of invention in section 2 of the *Patent Act*; and
  - the description on file complies with subsection 57(1) of the *Patent Rules* (subsection 81(1) of the former *Rules*).
- [11] We then address whether the proposed amendment to the description and the third proposed claims would constitute necessary amendments under subsection 86(11) of the *Patent Rules*.

## LEGAL PRINCIPLES AND PATENT OFFICE PRACTICE

### Purposive construction

- [12] In accordance with *Free World Trust v Électro Santé Inc*, 2000 SCC 66 [*Free World Trust*], 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* (CIPO) at §12.02.02, revised June 2015, the first step of purposive claim construction is to identify the skilled person and his or her 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 elements of the claimed matter that are required to achieve the disclosed solution.
- [13] In the RPR, the Applicant disagreed with what it called a “problem-solution approach,” referring to the test in *Free World Trust* and submitting that “[w]hile the problem and solution are acknowledged as relevant, the essential elements of the claimed invention should not be identified with regards to elements required to provide the solution.”
- [14] *Canada (Attorney General) v Amazon.com Inc*, 2011 FCA 328, at paragraphs 43, 44, 47, 61 to 63 and 69 [*Amazon.com*], indicates that the practical application or practical embodiment in a claim may nonetheless not be part of the essential elements of a claimed invention. As explained in *MOPOP*, not every element having a material effect on the operation of a given practical embodiment is essential to the solution: some recited elements define the context or environment of the embodiment but do not actually change the nature of the solution. Accordingly, purposive construction must consider which elements are fundamental to the solution proposed by the description and underlying the claimed embodiment.

### Statutory subject matter

- [15] The definition of invention is set out in section 2 of the *Patent Act*:

***invention*** means any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter.

- [16] “Examination Practice Respecting Computer-Implemented Inventions,” PN2013–03 (CIPO, March 2013) [*PN2013–03*] clarifies the Patent Office’s approach to determining if a computer-related invention is statutory subject matter.
- [17] As explained in *PN2013–03*, where a computer is found to be an essential element of a construed claim, the claimed subject matter is not a disembodied invention (e.g. a mere idea, scheme, plan or set of rules, etc.), which would be non-statutory.

### Specification

- [18] Subsection 57(1) of the *Patent Rules* is worded slightly differently from subsection 81(1) of the former *Rules* but it has the same effect. It states that “[t]he description must not incorporate any document by reference.”

## **ANALYSIS**

### Purposive construction

#### *The skilled person*

- [19] In the PR letter, we characterized the notional skilled person as a person or team comprising one or more business professionals experienced with investigating online activities, as well as programmers or other technologists experienced with developing and providing the software, tools and infrastructure conventionally used to support such online activities and the investigation of such activities.
- [20] The Applicant has not disputed this definition and we adopt it in our analysis here.

#### *The CGK*

- [21] The following references were identified in the PR letter as relevant to the determination of the CGK:
- D1: US 2007/0220604 September 20, 2007 Long
  - D2: WO 03/034633 April 24, 2003 Wilf et al.
  - D3: WO 02/008853 January 31, 2002 Wilf et al.

- D4: WO 01/057609 August 9, 2001 Shaked et al.
- D5: Neall Alcott, *DHCP for Windows 2000* (Sebastopol, California: O'Reilly & Associates, 2001).
- D6: "dhcpd.leases(5) - Linux man page" (die.net, July 12, 2007), archived online: dhcpd.leases(5): DHCP client lease database - Linux man page <<https://web.archive.org/web/20070712183932/https://linux.die.net/man/5/dhcpd.leases>>.

[22] Based on the above identification of the skilled person, and on what the present description (pages 1 and 9), D1 (paragraphs 3 to 5), D2 (pages 1 to 3 and 13 to 15), D3 (pages 1 to 3 and 7) and D4 (pages 1 to 2) describe as generally known or conventionally done in the field, we identified the CGK as:

- typical online transactions, such as purchases of goods, services and content via websites, use of online search engines and social networking websites;
- the transmission of senders' logical identifiers in datagrams and electronic messages, such as Internet Protocol (IP) addresses or transaction identifiers;
- the use of a network address (such as an IP address) to identify a user;
- database searching;
- the use of log files to store source and destination addresses; and
- the use of log files by service providers to record the lease or assignment of a dynamic IP address to a client as well as the start and end of the lease period.

[23] Regarding the final point in particular, D5 (pages 1 to 2, 46 to 47 and 238 to 240) and D6 also show well-known instances of Dynamic Host Configuration Protocol (DHCP) servers allocating dynamic IP addresses to clients, and logging both the client and the period of time for which the address is allocated.

[24] The Applicant disagreed in the RPR with the above identification of the CGK, particularly the third point:

Applicant further disagrees that it is within the CGK of the skilled person to store logical identifiers and associated user and time information in a database when they are assigned. The association between the logical identifier and the identity of the user, or the ability to

trace back the user using the logical identifier is simply not known or disclosed in any of the references.

...

There is simply no disclosure or suggestion in any of the references that enables the association between the logical identifier and the identity of the user.

- [25] The CGK was discussed during the hearing, and the Applicant acknowledged that it would be a conventional scenario for an Internet Service Provider (ISP) to assign a dynamic IP address to a user, by means of a DHCP server for example, upon their logging in to the network. The Applicant also acknowledged it to be CGK for an ISP to identify users upon logging in, to verify that they are its customers. This would be achieved by comparing the authorization credentials provided by the user with its customer files.
- [26] The Applicant did not concede that it would be CGK or conventional for an ISP to maintain any records associating the IP address assigned to a user with the user's information from the customer file.
- [27] We nonetheless consider that it would be CGK for the ISP in such a scenario to do so in some form. D2 (pages 3, 14 and 15) also suggests it would be CGK:

Another method for authenticating Internet users is described in patent applications W002/08853 and WO01/57609. This method is based on cooperation with network access providers (NAP). NAPs hold identifying information about users, and assign them network addresses. They can therefore verify a user's identifying information given his network address.

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In the Internet, IP addresses are assigned to Internet Service Providers, companies and other institutions ('owners') that assign them to their users. Such assignments are usually temporary and their durations vary. In some cases an address is assigned and used by the same user for months or years, while in other cases it is used for a few minutes.

...

For example, an IP owned by a company is usually assigned for longer periods to its users (employees), than one owned by an Internet Service Provider (ISP) serving home users.

...



It should also be noted that the entity assigning an address to a user could assist in detecting the relation between IP addresses by assigning related IP addresses to the same user. For example, an ISP can identify a user using a username and password (often done using the Password Authentication Protocol or Challenge-Handshake Authentication Protocol described in RFC 1334) and then assign him an IP address, which is numerically close to the IP addresses assigned to him in the past.

[28] D3 (page 7) also suggests as much:

This system enables service providers to use real world identity information about users that is available to the entity that provides network access to the user (hereinbelow referred to as the network access provider (NAP)), thus leveraging the trust between the user and the NAP. The NAP may make use of user information it has collected from its regular business interaction with the user. This system allows the NAP to provide the user identification automatically. The system relies on cooperation with the NAP, because the NAP operates at the point at which the user accesses the network, the point at which the most accurate user identification information is available. Among the benefits of this cooperation is use of information available to the NAP as well as information regarding the unique characteristics of the user's connection at a place where the connection is generally secure.

The automatic identification system of the present invention should accurately extract the real network address of the user and associate this address with user identification information. Applicants have further realized that if there is more than one NAP operating, then an identification switch unit is necessary in order to identify the correct NAP from among the plurality of NAPs.

In an embodiment of the present invention, the automatic identification system may be used, for example, for identifying Internet users. In this case, the request may be made to the Internet service provider (ISP) of the user. The network address of the user may be the Internet Protocol address (IP address) of the user.

[29] We accordingly consider that it would be CGK to store a record or information permitting association of a logical identifier (such as an IP address) with the identity of a user.

### *The problem and solution*

[30] The PR letter presented our preliminary view of the problem as the difficulty in investigating online financial transactions and other activities due to the scarcity of traceable data after the fact about the true individual involved in the activity. The PR letter thus presented the solution as the use of information with certain meaning

according to the disclosed plan for facilitating an investigation. The PR letter added that computer implementation was not considered to be part of either the problem or the solution.

- [31] The Applicant disagreed with this characterization of the problem and the solution, arguing in its RPR that since the problem can only arise in a computerized, online environment, the solution too must be inextricably bound to the operation of computer and network elements:

The problem addressed by the claimed invention precisely lies in the computer network realm and lies in the anonymous and distributed nature of the Internet. [Stripping] away the computer or network elements, in that a transaction or activity (no longer online) happens without the computer, or happens without means through accessing a network, there would not be any difficulty to ascertain the identity of the party involved in the transaction or activity. It is precisely the involvement of computer devices and the complicated nature of computer networks that created the problem at hand and the solution undoubtedly has to work with the confines of the computer and network elements to come to the solution of the claimed invention.

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There is no disclosure of the present application that disregards the computer or network elements completely, but quite to the contrary, the solution as a whole has to work with the limitations of the various types of computer and network elements.

- [32] As noted in the PR letter, the application (pages 2 and 9 to 12) proposes as a solution that the service provider assigning logical identifiers (such as IP addresses) to clients record each of these assignments, along with the associated logical identifier, information identifying the client, user or their location, and the time period for which the assignment holds. Then, when a party conducts an investigation, the recorded information can be used to help determine if a certain user is associated with a logical identifier implicated in a certain online transaction or activity.
- [33] The application does not refer to any challenges in implementing this plan. The description (page 35) makes it clear that network communications between the investigating party and the service provider are not the focus of the solution and can be replaced by other forms of communication. During the hearing, the Applicant

acknowledged that the communication of information between the investigating party and the service provider is not the essence or significant part of the invention.

- [34] Furthermore, the computer implementation of the disclosed plan to record certain information is not enabled by the description, but by the CGK. Assignment of a logical identifier to a user or user's client device, storage of the logical identifier with associated user information, or storage of the logical identifier with associated client device and time information, establishment and searching of databases, and enablement of network communications are within the CGK. The application does not profess to teach an invention of which the computer or network implementation would require more from the skilled person than their CGK would provide.
- [35] As explained in *MOPOP* at §12.02.02d, the scope of the CGK guides the identification of the problem and the solution—the skilled person reads a specification in the expectation that it sets out something more beyond the commonly known solutions to commonly known problems.
- [36] Therefore, we view the solution as the plan to record available information with certain meaning, permitting its later use in facilitating an investigation. Although this plan is intended to address challenges arising from the use of a computerized environment or system with certain characteristics, the solution is the plan itself.

*The essential elements*

- [37] Independent claims 1, 10, 11 and 12 on file are directed to the conducting of an investigation, from the point of view of the investigating or interested party, and respectively cast in the form of a method, system (comprising an “interface” and a “processing unit”), software and a system (comprising “means for” the recited steps). For convenience, independent claim 1 follows as a representative of these claims.

Claim 1. A method for conducting an investigation, the method being executed at a server of an interested party, said method comprising:

transmitting, to a server of a service provider, information regarding a particular person or location considered in the investigation;

receiving, from the server of the service provider, a logical identifier assigned to end-user equipment and temporal information regarding when the logical identifier was assigned

to the end-user equipment, the logical identifier and the temporal information being associated in a database with the transmitted information regarding the particular person or location; and

identifying, on the basis of the logical identifier and the temporal information, an online activity initiated using the end-user equipment to which was assigned the logical identifier at a time specified by the temporal information.

- [38] Independent claims 13, 23, 24 and 25 on file are directed to the facilitation of an investigation—similar to the subject matter of independent claims 1, 10, 11 and 12 but from the point of view of the service provider, and respectively cast in the form of a method, system (comprising an “interface” and a “processing unit”), software and a system (comprising “means for” the recited steps). For convenience, independent claim 13 follows as a representative of these claims.

Claim 13. A method for facilitating an investigation, the method being executed at a server of a service provider, the service provider causing a logical identifier to be assigned to end-user equipment, said method comprising:

receiving, from a server of an interested party, information regarding a particular person or location considered in the investigation;

consulting a database on a basis of the information regarding the particular person or location to obtain the logical identifier assigned to the end-user equipment and temporal information regarding when the logical identifier was assigned to the end-user equipment; and

transmitting the logical identifier and the temporal information to the server of the interested party.

- [39] The dependent claims recite further details pertaining to the significance of the information and parties involved.
- [40] The PR letter expressed our preliminary view that the essential elements are those elements directed to the steps of a plan for conducting or facilitating an investigation, and do not include computer elements. As previously noted, the Applicant disagreed, contending that the computer and network elements cannot be disregarded.
- [41] As explained above, though, the problem here is not one of computer implementation of a plan, or how to store information, or how to communicate it via a network. The solution

works according to the steps of the plan for recording available information with certain meaning, permitting its later use in facilitating an investigation; it does not lie in the computer or network elements. Therefore, our view is that while these details provide the contextual environment of the invention, they are not essential to the solution provided by the application and embodied by the claimed subject matter.

[42] We consider the essential elements of independent claims 1, 10, 11 and 12 on file to be a series of steps or a plan for conducting an investigation:

- communicating to a service provider information regarding a particular person or location considered in the investigation;
- receiving from the service provider a logical identifier assigned to end-user equipment and temporal information regarding when the logical identifier was assigned to the end-user equipment, the logical identifier and the temporal information being associated in a database with the communicated information regarding the particular person or location; and
- identifying, on the basis of the logical identifier and the temporal information, an online activity initiated using the end-user equipment to which was assigned the logical identifier at a time specified by the temporal information.

[43] We consider the essential elements for independent claims 13, 23, 24 and 25 on file to be a series of steps or a plan for facilitating an investigation:

- receiving from an interested party information regarding a particular person or location considered in the investigation;
- looking up, on the basis of the information regarding the particular person or location, the logical identifier assigned to the end-user equipment and temporal information regarding when the logical identifier was assigned to the end-user equipment; and
- communicating the logical identifier and temporal information to the interested party.

[44] As stated above, the additional features of the claims dependent upon these claims relate to the significance of the information and parties involved. For example:

- the logical identifier is an IP address (claims 2 and 14);
- details of the temporal information (claims 3 and 15);

- details of the information about the person or their location (claims 4 to 6, 16, 17 and 18);
- who assigned the logical identifier (claim 7);
- who is the interested party (claim 19);
- the subject of the investigation (claim 20); and
- the nature of the online activity (claims 8, 9, 21 and 22).

Statutory subject matter

[45] During the hearing, the Applicant contended that the claimed invention was a very technical process, one that involved activity at both the machine and physical layers, operations by physical and technological agents, and physical components.

[46] As construed above, however, the essential elements of the claims on file are the steps of the plan for conducting or facilitating an investigation—physical components are not among the essential elements.

[47] The Applicant also contended during the hearing that the claimed invention was patentable because it produced a useful result. In a similar vein, the Applicant had submitted in the RPR that the association produced by the claimed invention—the association between the logical identifier, the time it was assigned to a user’s device and the user’s identity—represents a practical result and a discernible effect or change of character:

The use of such an association to facilitate an investigation of an online activity has not been disclosed or suggested by any prior art. Such an association is not trivial and enables a very practical result of allowing to trace the identity of the user in an online activity, which simply cannot be achieved by any of the prior attempts.

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The claimed invention clearly manifests a discernible effect or change of character through the manipulation of information processing to enable the tracking of the user of the device.

[48] The association may represent useful information for parties conducting a certain type of investigation, but this information is itself abstract, having only intellectual meaning, and does not constitute a physical change or effect. The plan for recording certain available

information and sharing it later to facilitate an investigation does not manifest a discernible effect or change of character or condition in a physical object. It merely involves the carrying out of a plan or theory of action without the production of any physical results proceeding directly from the operation of the theory or plan itself. Such matter is outside the categories of invention in section 2.

[49] As explained in *Amazon.com* with reference to *Schlumberger Canada Ltd v Canada (Commissioner of Patents)*, [1982] 1 FC 845 (CA):

[62] *Schlumberger* exemplifies an unsuccessful attempt to patent a method of collecting, recording and analyzing seismic data using a computer programmed according to a mathematical formula. That use of the computer was a practical application, and the resulting information was useful. But the patent application failed for want of patentable subject matter because the Court concluded that the only novel aspect of the claimed invention was the mathematical formula which, as a “mere scientific principle or abstract theorem”, cannot be the subject of a patent because of the prohibition in subsection 27(8).

[50] The present case is similar in that the result of the plan is information of merely intellectual significance; the plan itself is abstract.

[51] Therefore, our view is that claims 1 to 25 on file do not define statutory subject matter and thus do not comply with section 2 of the *Patent Act*.

[52] In addition, as explained in the PR letter, the preamble of claim 11 on file defines its subject matter as a “[c]omputer-readable media containing program code.” It is not clear whether this is a computer-readable storage media or a computer-readable “transmission media,” defined in the description (pages 45 to 46) as being broad enough to encompass intangible media implemented using wireless transmission schemes. Claimed signals and wireless transmissions are not considered to be statutory subject matter falling within section 2 of the *Patent Act*: see *MOPOP* at §17.03.04, revised November 2017, and §22.09.05, revised October 2010.

[53] The Applicant did not submit any arguments regarding this issue, instead proposing an amendment to the preamble of claim 11 (the second proposed claims) and later deleting the claim altogether (third proposed claims).

### Description

- [54] The description on file (page 40) incorporates by reference L Mamakos, “A Method for Transmitting PPP Over Ethernet (PPPoE)”, *RFC 2516*, (The Internet Society, February 1999) contravening subsection 57(1) of the *Patent Rules*.
- [55] The Applicant did not dispute this, instead proposing an amendment to the description.

### Proposed description and claims

- [56] The amendment to the description proposed with the RPR would remove the incorporation by reference. The third proposed claims do not include a claim corresponding to claim 11 on file, so they do not possess its problematic preamble.
- [57] The third proposed claims are based on claims 13 to 25 of the second proposed claims and, through them, ultimately upon claims 13 to 25 of the claims on file. The changes to the independent claims chiefly involve the addition of steps related to the mapping of the association, but they also involve the deletion of the final step of transmitting the information to the interested party. The dependent claims are unchanged.
- [58] For reference, claim 1 of the third proposed claims follows.

Claim 1. A method for facilitating an online investigation, the method being executed at at least one server of a service provider, the service provider causing a logical identifier to be assigned to end-user equipment, said method comprising:

mapping a dedicated logical link to a port of a network element connecting the end-user equipment to a data network provided by the service provider;

mapping the port of the network element to a service point location of the end-user equipment at which the end-user equipment gains access to the data network;

assigning the logical identifier to the dedicated logical link and recording temporal information regarding when the logical identifier was assigned to the dedicated logical link, the logical identifier assigned to the dedicated logical link being the logical identifier assigned to the end-user equipment;

obtaining an intermediate mapping between the dedicated logical link and the service point location of the end-user equipment;



obtaining a final mapping between the logical identifier and the service point location of the end-user equipment based on the intermediate mapping and the assigning;

receiving, from a server of an interested party, information regarding a particular person or location considered in the investigation;

consulting a database on a basis of the information regarding the particular person or location to obtain the logical identifier assigned to the end-user equipment and temporal information regarding when the logical identifier was assigned to the end-user equipment, wherein an association between the logical identifier and the temporal information and the information regarding the particular person or location is obtained based on the final mapping and an authorization to access the data network using credentials; and

the logical identifier and the temporal information are used to facilitate the online investigation.

- [59] Although the additional steps provide more detail, they constitute the steps occurring when a user logs into a network and a logical identifier is assigned to their equipment—which is CGK and not the focus of the invention—and the recording of information with certain meaning and which naturally arose from the CGK processes. We thus consider the essential elements of the third proposed claims to also be a series of steps or a plan for facilitating an investigation.
- [60] Accordingly, our view concerning non-statutory subject matter also applies to the third proposed claims. It follows that the proposed amendment to the description and the third proposed claims are not considered necessary amendments under subsection 86(11) of the *Patent Rules*, despite their remedying the incorporation by reference and the claim preamble issue.

## **RECOMMENDATION OF THE BOARD**

[61] In view of the above, the Panel recommends that the application be refused on the basis that claims 1 to 25 define non-statutory subject matter and do not comply with section 2 of the *Patent Act*.

Leigh Matheson

Paul Fitzner

Howard Sandler

Member

Member

Member

## **DECISION OF THE COMMISSIONER**

[62] I concur with the findings of the Board and its recommendation to refuse the application on the basis that the claims on file do not comply with section 2 of the *Patent Act*.

[63] Accordingly, I refuse to grant a patent for this application. Under section 41 of the *Patent Act*, the Applicant has six months to appeal my decision to the Federal Court of Canada.

Johanne Bélisle  
Commissioner of Patents

Dated at Gatineau, Quebec

this 30th day of April, 2020