

Citation: BCE INC. (Re), 2022 CACP14
Commissioner's Decision #1621
Décision du Commissaire n° 1621
Date: 2022-05-17

TOPIC:	O00	Obviousness
	B00	Ambiguity or Indefiniteness
SUJET:	O00	Évidence
	B00	Caractère ambigu ou indéfini

Application No. : 2,748,272

Demande n° 2 748 272

IN THE CANADIAN PATENT OFFICE

DECISION OF THE COMMISSIONER OF PATENTS

Patent application number 2,748,272, having been rejected under subsection 30(3) of the *Patent Rules* (SOR/96–423) as they read immediately before October 30, 2019 (former *Rules*), has consequently been reviewed in accordance with paragraph 199(3)(c) of the *Patent Rules* (SOR/2019–251) (*Patent Rules*). The recommendation of the 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 Canadian patent application number 2,748,272 which is entitled “SYSTEM FOR END USER PREMISE EVENT NOTIFICATION” and is owned by BCE INC. (the Applicant).
- [2] A review of the rejected application has been conducted by the Patent Appeal Board (the Board) pursuant to paragraph 199(3)(c) of the *Patent Rules* (SOR/2019-251). As explained in more detail below, our recommendation to the Commissioner of Patents is to refuse the application.

BACKGROUND

The application

- [3] The application, based on a previously filed *Patent Cooperation Treaty* application, was filed on December 24, 2008, and was laid open to public inspection on July 1, 2010.
- [4] The application relates to a notification system and method where, upon detection of an undesirable event at a premise, a wireless communication link is established with a second premise and notification is sent thereto. For example, if a detector of the system at a given premise detects a fire, the system would connect to a neighbour’s WiFi and cause the neighbour’s devices to issue an alarm. This would allow the neighbours to evacuate in view of the potential propagation of the fire.
- [5] The application has 77 claims on file (claims on file), which were received at the Patent Office on November 19, 2015.

Prosecution history

- [6] On February 12, 2019, a Final Action (FA) was issued pursuant to subsection 30(4) of the former *Rules*. The FA identified the following defects in the application:
- Claims 1-77 on file would have been obvious and do not comply with section 28.3 of the *Patent Act*,

- Claims 36 and 50 do not comply with subsection 87(1) of the former *Rules*, and
- Claims 51 and 52 do not comply with subsection 27(4) of the *Patent Act*.

- [7] On August 12, 2019, a response to the FA (RFA) was filed by the Applicant. In the RFA, the Applicant argued that the claims on file would not have been obvious. The Applicant also submitted a proposed set of claims 1-77 (proposed claims) to overcome the indefiniteness and claim dependency defects identified in the FA.
- [8] As the Examiner considered the application not to comply with section 28.3 of the *Patent Act*, pursuant to paragraph 30(6)(c) of the former *Rules*, the application was forwarded to the Board for review on March 10, 2020 along with an explanation outlined in a Summary of Reasons (SOR). The SOR indicated that the claims on file were still considered not to comply with the *Patent Act* and *Patent Rules*, but that the proposed claims would overcome the claim dependency and indefiniteness defects.
- [9] In a letter dated March 11, 2020, the Board forwarded to the Applicant a copy of the SOR along with a letter acknowledging the rejection and requested an indication of the Applicant's continued interest in having the application reviewed. The Applicant did not submit a response to the letter.
- [10] A Panel of the Board (the Panel), comprised of the undersigned members, was formed to review the instant application under paragraph 199(3)(c) of the *Patent Rules*.
- [11] In a preliminary review letter (PR letter) dated February 28, 2022, the Panel presented its preliminary analysis with respect to the claims on file and the proposed claims. The Panel was of the preliminary view that:
- Claims 1-77 on file would not have been obvious to a person skilled in the art and therefore comply with section 28.3 of the *Patent Act*,
 - Claims 36 and 50 on file do not comply with subsection 63(2) of the *Patent Rules*,
 - Claims 7, 26, 51, 52, 69 and 73 on file do not comply with subsection 27(4)

of the *Patent Act*,

- Proposed claims 1-77 would comply with section 28.3 of the *Patent Act*, proposed claims 36 and 50 would comply with subsection 63(2) of the *Patent Rules*, and proposed claims 51 and 52 would comply with subsection 27(4) of the *Patent Act*,
- Proposed claims 7, 26, 69 and 73 would not comply with subsection 27(4) of the *Patent Act*. Therefore, the proposed claims cannot be considered a necessary amendment under subsection 86(11) of the *Patent Rules*.

[12] The PR letter also offered the Applicant the opportunities to make written submissions and to attend an oral hearing.

[13] In a letter dated March 11, 2022, the Applicant declined the opportunity for a hearing and indicated that they did not wish to provide further written submissions.

ISSUES

[14] This review will address the following issues:

- whether claims 1 to 77 on file are obvious and non-compliant with section 28.3 of the *Patent Act*,
- whether claims 36 and 50 comply with section 63 of the *Patent Rules* (equivalent to section 87 of the former *Rules*); and
- whether claims 7, 26, 51, 52, 69 and 73 on file are indefinite and non-compliant with subsection 27(4) of the *Patent Act*.

[15] In this review, we will first consider the issues that pertain to the claims on file. We will then consider whether the proposed amendments constitute amendments necessary for compliance with the *Patent Act* and *Patent Rules*, pursuant to subsection 86(11) of the *Patent Rules*.

LEGAL PRINCIPLES AND OFFICE PRACTICE

Purposive construction

- [16] In accordance with *Free World Trust v Électro Santé Inc*, 2000 SCC 66, and *Whirlpool Corp v Camco Inc*, 2000 SCC 67, purposive construction is performed from the point of view of the person skilled in the art in light of the relevant common general knowledge (CGK), considering the whole of the disclosure including the specification and drawings. In addition to interpreting the meaning of the terms of a claim, purposive construction distinguishes the essential elements of the claim from the non-essential elements. Whether or not an element is essential depends on the intent expressed in or inferred from the claim, and on whether it would have been obvious to the skilled person that a variant has a material effect upon the way the invention works.
- [17] “Patentable Subject-Matter under the *Patent Act*” (CIPO, November 2020) [PN2020-04] also discusses the application of these principles, pointing out that all elements set out in a claim are presumed essential unless it is established otherwise or such presumption is contrary to the claim language.

Obviousness

- [18] Section 28.3 of the *Patent Act* requires claimed subject matter to not be obvious:

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 before the one-year period immediately preceding the filing date or, if the claim date is before that period, before the claim 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.

- [19] In *Apotex Inc v Sanofi-Synthelabo Canada Inc*, 2008 SCC 61 at para 67, the Supreme Court of Canada stated that it is useful in an obviousness inquiry to

follow 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?

Reference to Preceding Claim

[20] The *Patent Rules* require that a dependent claim only refer to a preceding claim or claims.

[21] While the FA referred to subsection 87(1) of the former *Rules*, the reference should have been to subsection 87(2), now subsection 63(2) of the *Patent Rules*.

[22] Subsection 63(2) of the *Patent Rules* states:

A dependent claim may only refer to a preceding claim or claims.

Indefiniteness

[23] Subsection 27(4) of the *Patent Act* requires that a claim distinctly and explicitly define subject-matter:

The specification must end with a claim or claims defining distinctly and in explicit terms the subject-matter of the invention for which an exclusive privilege or property is claimed.

[24] In *Minerals Separation North American Corp v Noranda Mines Ltd*, [1947] Ex CR 306, 12 CPR 99, at page 146, the Court emphasized both the obligation of an

applicant to make clear in the claims the ambit of the monopoly sought and the requirement that the terms used in the claims be clear and precise:

By his claims the inventor puts fences around the fields of his monopoly and warns the public against trespassing on his property. His fences must be clearly placed in order to give the necessary warning and he must not fence in any property that is not his own. The terms of a claim must be free from avoidable ambiguity or obscurity and must not be flexible; they must be clear and precise so that the public will be able to know not only where it must not trespass but also where it may safely go.

ANALYSIS

Purposive construction

The person skilled in the art and their common general knowledge

[25] The PR letter provided our preliminary identifications of the skilled person and their relevant CGK.

[26] As set out in the PR letter and taken from the FA:

The skilled worker or team is familiar with the programming techniques for building client/server networked based application[s]. Furthermore, the skilled worker (team) is also familiar with security systems; premise monitoring; emergency alarm processing; wireless technology and data management for such applications.

[27] In view of the characterization of the person skilled in the art, the cited prior art and the instant specification, the PR letter identified the relevant CGK as including:

- Alarm systems comprising sensors to monitor a premise and detect undesirable events such as fire, flood, intrusion or medical emergencies, and

- Alarm systems reporting a detected event to a monitoring entity via a wired or wireless communication network including phone lines, mobile networks and wireless local area networks such as WiFi.

[28] As the Applicant did not provide submissions in response to the PR letter, we adopt the above characterizations in this review.

The essential elements

[29] The instant application contains 77 claims on file, including independent claims 1, 33, 65, 66, 69 and 73. While there are variations in these independent claims, we take claim 1 on file as representative of the invention for the purpose of this review and address any differences as needed.

[30] Claim 1 on file reads:

1. A method for notifying a party of a particular event at a first end-user premise, comprising:

obtaining an indication of the particular event;

retrieving access information for use in granting access to end-user equipment at a second end-user premise in a neighborhood of the first end-user premise;

establishing a wireless communication link between end-user equipment at the first end-user premise and the end-user equipment at the second end-user premise upon the indication of the particular event being obtained; and

causing the end-user equipment at the first end-user premise to transmit information to the end-user equipment at the second end-user premise via the wireless communication link to direct the end-user equipment at the second end-user premise to issue a notification concerning the particular event;

wherein said establishing comprises causing the end-user equipment at the first end-user premise to use the access information to establish the wireless communication link with the end-user equipment at the second end-user premise.

[31] Independent claims 33 and 65 are directed to the corresponding apparatus and non-transitory computer-readable media for notifying a party of a particular event at a first end-user premise. Independent claims 66 and 69, in addition to the features in claim 1, recite additional details regarding devices and networks at various premises. They do not, however, specify that the second end-user premise is in the same neighborhood as the first end-user premise. The dependent claims recite further limitations related to the end-user equipment, the wireless communication link, the access information, the obtaining of an indication of a certain event and the notification.

[32] In relation to the essential elements, the PR letter stated:

PN2020-04 states in respect of the identification of essential/non-essential elements that:

In carrying out this identification of essential and non-essential elements, all elements set out in a claim are presumed essential, unless it is established otherwise or is contrary to the language used in the claim.

With respect to the claims on file, the person skilled in the art would understand that there is no use of language in any of the claims indicating that the elements in each claim are optional, a preferred embodiment or non-essential. While dependent claims 18, 22, 50 and 54 recite a list of alternatives, they are independent embodiments of the claim for each alternative wherein only that alternative is essential.

Therefore, in our preliminary view, all the elements of the claims on file are presumed to be essential.

[33] As the Applicant did not provide submissions in response to the PR letter, we adopt the above position for this review.

Obviousness

(1) Identify the notional “person skilled in the art” and their relevant CGK

[34] The person skilled in the art and their relevant CGK have been identified above

under purposive construction.

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

[35] In the PR letter, we considered the combination of the essential elements of the claims to represent their inventive concepts. In the absence of submissions by the Applicant in response to the PR letter, we adopt the same characterization in this review.

(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

[36] Below we review only those prior art documents from the FA that in our view are the most relevant:

- D2: US 2007/0090944 A1 26 April 2007 Du Breuil
- D3: US 2007/0070935 A1 29 March 2007 Prakash et al.

[37] D2 discloses a system and method for securing neighborhoods against crime wherein a short range wireless LAN technology, such as WiFi or WiMax, is used to relay sensor information to a security server in a neighbor's house.

[38] D3 discloses a system and method for providing access parameters for a wireless communications network that are obtained for a user terminal via a different communications network. Instead of requiring the user to manually enter registration information in order to use a WLAN network, access information is downloaded from a database via an alternate communications network and used to establish a wireless link with the WLAN network.

[39] In our view, as in the PR letter, D2 is the closest prior art. It discloses a security system comprising sensors and detectors, wherein upon detection of a triggering event sensor information is transmitted to a security server in a neighbor's house via a short range wireless LAN technology, such as WiFi or WiMax.

[40] As stated in the PR letter:

With respect to the representative claim 1, in our view D2 discloses the following:

A method for notifying a party of a particular event at a first end-user premise [D2: abstract; par. [0015]; Figs 2-4], comprising:

- obtaining an indication of the particular event [D2: par. [0032]; step # 83, Fig 4];
- retrieving identifying information for use in identifying an end-user equipment at a second end-user premise in a neighborhood of the first end-user premise [D2: par. [0021], [0032]; step # 86, Fig 4];
- transmitting data from end-user equipment at the first end-user premise to the end-user equipment at the second end-user premise upon the indication of the particular event being obtained [D2: par. [0024]: “a signal may be transmitted from the monitored premise to the monitoring premise only upon the occurrence of a triggering event”; step# 94, Fig 4; step# 108, Fig 5]; and
- causing the end-user equipment at the first end-user premise to transmit information to the end-user equipment at the second end-user premise via the wireless communication link to direct the end-user equipment at the second end-user premise to issue a notification concerning the particular event [D2: par. [0023]-[0024]; step # 112, Fig 5];
- wherein said transmitting data comprises causing the end-user equipment at the first end-user premise to use the identifying information to establish the wireless communication link with the end-user equipment at the second end-user premise [D2: par. [0024]: “a signal may be transmitted from the monitored premise to the monitoring premise only upon the occurrence of a triggering event”; step# 94, Fig 4; step# 108, Fig 5].

In our view, D2 does not disclose:

- (1) retrieving access information for use in granting access to the end-user equipment at the second end-user premise, and
- (2) establishing a wireless communication link between end-user equipment at the first end-user premise to the end-user equipment at the second end-user premise using the access information.

The FA stated on page 4 that “D2 discloses specifically the usage of a look-up table to determine where to transmit the information, and as such establish wireless communication; however, fails to specifically disclose that access information will also be located during the look-up so that a connection may be established”.

[41] In the absence of submissions by the Applicant in response to the PR letter, we adopt the above position in this review.

(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?

[42] In the PR letter, we set out our preliminary view that the claims on file would not have been obvious to the skilled person:

The FA on page 4 stated that:

D3 discloses the well-known network practice of establishing a link between a user terminal (UT) and a second communication network wherein the UT accesses a parameter server on a first communications network; then downloads access parameters for a second wireless communications network; and using the downloaded access parameters establishes a wireless link between the UT and the second communications network (Fig. 4, paras. 0032-0039). Additionally, D3 discloses that to establish a wireless communication link the system may contain access information at least having a password and a key (Abstract, paras. 0010 specifically: *have associated registration information, such as a setup password, 0011*

specifically: registration information may include a security key, and 0012).

Therefore, since D2 clearly discloses a monitoring system, capable of using a wireless network for communication, as identified by the examiner above, it would be obvious to a person skilled in the art to modify said system as disclosed by D2 with the teachings for automatic network communication setup as disclosed by D3.

The RFA on pages 3 and 4 states:

Applicant submits with respect that determining which premise should receive data, for example determining an IP address of a device located at the premise, does not teach or suggest the claimed subject matter of retrieving *access information for use in granting access to end-user equipment* at a second end-user premise. Applicant submits with respect that one of ordinary skill in the art would not consider the information of D2 that at best identifies a device as suggesting the claimed access information that grants access to end-user equipment [portion of original text omitted]. As described in the disclosure as originally filed, access information differs from device identifying information. The specification describes that the identifier for a given piece of equipment may include for example a MAC address, EHA, IP address, etc. that identify equipment. In contrast to the identifier, the access information may be a password or a wireless network key in order to grant access to the equipment and make use of the equipment.

[portion of original text omitted]

Applicant submits that D2 clearly teaches that a link is established and *maintained*. Establishing and then maintaining a link in order to transmit data does not suggest establishing the link upon the indication of the particular event being obtained.

[portion of original text omitted]

Applicant submits that even if the teachings of D3 are used to modify the teachings of D2, one of ordinary skill in the art would be led to

establish a wireless link as taught by D3 and then maintain the established link in order to transmit the data over it as taught by D2. This does not suggest the claimed subject matter of *establishing a wireless communication link* [portion of original text omitted] ***upon the indication of the particular event being obtained.*** [Original style of emphasis altered]

We preliminarily agree with the above points raised by the Applicant.

The claimed invention includes the steps of retrieving access information for use in granting access to end-user equipment at a second end-user premise and, upon obtaining an indication of a particular event, the end-user equipment at the first premise using the access information to establish a wireless communication link with the end-user equipment at the second premise.

D2 discloses that, upon obtaining an indication of a triggering event, the monitored system uses a database or a look-up table to determine the proper recipients of the monitoring data and transmits the data to those recipients [D1: par. [0021], [0024], [0032]]. In our preliminary view, D2 does not disclose that a triggering event would cause the monitored system to retrieve and use access information in order to gain access to the system at the monitoring premise and establish a wireless communication link.

With regards to the wireless LAN setup in D2, it merely discloses that the system employs a short range wireless LAN technology such as WiFi or WiMax [D2: par. [0015]], where:

- the monitoring premises are generally nearby the monitored premise, e.g. within the same neighborhood cluster, or within the same LAN or wireless LAN [D2: par. [0012]],
- a controller 59 in the monitored premise receives and formats the data from the camera or sensor. The controller 59 may be part of a residential gateway or processor, and is connected to a wireless antenna 44 which broadcasts the signal to the neighborhood [D2: par. [0016]], and

- the wireless LAN itself may be secured, so that only houses in the neighborhood cluster can log onto the same [D2: par. [0026]].

It is our preliminary view that the wireless network in D2 is established when the system is initially set up and maintained thereafter, and that it is used to transmit data to a monitoring premise upon the detection of an event. In our preliminary view, D2 does not provide any indication or suggestion to motivate the skilled person to modify the system in D2 such that the wireless communication link would only be established upon the detection of a particular event.

Furthermore, it is our preliminary view that a skilled person in the art would not have been motivated to modify the system in D2 such that access information would be required to grant access to the end-user equipment at the second premise. D2 discloses that transmission and storage of the monitoring data is secure. It discloses that "encryption is employed to secure the transmitted content. Encryption may further be employed on the monitoring premise computer or server" [D2: par. [0026]]. It also discloses that the "servers that store the results may be particularly reliable...should be protected via firewall...where all traffic of interest should be encrypted" [D2: par. [0030]]. Finally, it discloses that the transmitted "signal may be encrypted and encoded such that only one or a subset of houses within the wireless LAN receive and are able to decrypt the signal" [D2: par. [0016]]. The preference to encrypt the transmitted information, in our preliminary view, would have obviated any perceived need by the skilled person to require access information to establish and secure the wireless link.

Other than disclosing that houses would have to log onto the secure LAN, D2 does not appear to disclose any form of access information or authentication between the monitored and monitoring systems. We find no disclosure in D2 to indicate that the wireless LAN is hosted or tied to any particular premise and its local system, which could have led the skilled person to a requirement for access information for use in granting access to systems receiving monitoring data. Accordingly, in our preliminary view, there would have been no motivation for the skilled person to incorporate access information in the system of D2 to restrict access to the system at the monitoring premise.

For similar reasons, it is our preliminary view that there is no motivation in D2 or elsewhere in the record to lead the skilled person to prior art document D3, which is in the field of distributing access parameters in a wireless network. D3 discloses that “[i]t would be advantageous if a [User Terminal] UT could access a wireless network automatically, without necessity of manually entering registration information, or maintaining the registration information in the permanent memory of the UT” [D3: par. [0009]]. It discloses storing access information on an alternate network which would be automatically downloaded and used to establish a wireless link with a desired wireless LAN network. Accordingly, in our preliminary view, there is no indication or suggestion in D2 to lead the skilled person to introduce into the system of D2 authentication or access information, particularly the teachings of D3, which is concerned with storing access information on a separate network.

It is therefore our preliminary view that there is no disclosure or suggestion in D2, D3 and/or the relevant CGK to lead the skilled person directly and without difficulty to the claimed invention, where a triggering event causes the monitored system to retrieve and use access information in order to gain access to the monitoring system and establish a wireless communication link therewith.

In light of the above, it is our preliminary view that claims 1-77 on file would not have been obvious to the skilled person in view of the prior art and the relevant CGK. Therefore, In our preliminary view, these claims are compliant with section 28.3 of the *Patent Act*.

- [43] The Applicant did not provide submissions in response to the PR letter. Accordingly, we conclude that claims 1-77 on file would not have been obvious to the skilled person and are therefore compliant with section 28.3 of the *Patent Act*.

Reference to Preceding Claim

- [44] In the PR letter, we set out our preliminary view that claims 36 and 50 on file do not comply with subsection 63(2) of the *Patent Rules*:

The FA on page 6 identified the following defect:

Claims 36 and 50 are dependent claims that do not refer to a preceding claim by number and do not comply with subsection 87(1) of the *Patent Rules*.

The Applicant did not dispute this characterization and submitted proposed claims which overcame this defect.

Subsections 87(1) and 87(2) of the *Patent Rules* as they read immediately before October 30, 2019 have been replaced by subsection 63(1) and 63(2) of the *Patent Rules* which state:

- (1) Subject to subsection (2), a claim that includes all the features of one or more other claims (referred to in this section as a “dependent claim”) must refer by number to the other claim or claims and must state the additional features claimed.
- (2) A dependent claim may only refer to a preceding claim or claims.

Claim 36 on file refers to itself (claim 36) and claim 50 on file refers to claim 54.

Therefore, it is our preliminary view that claims 36 and 50 on file do not comply with subsection 63(2) of the *Patent Rules*.

[45] The Applicant did not provide submissions in response to the PR letter. Accordingly, we conclude that claims 36 and 50 on file do not comply with subsection 63(2) of the *Patent Rules*.

Indefiniteness

[46] In the PR letter, we set out our preliminary view that claims 7, 26, 51, 52, 69 and 73 on file are indefinite and do not comply with subsection 27(4) of the *Patent Act*:

[47] As stated in the PR letter on pages 13-14:

The FA on page 6 identified the following defect:

Claims 51 and 52 are indefinite and do not comply with subsection 27(4) of the *Patent Act*. The term "the visual message" (claims 51 and 52, line 1) has no antecedent.

We preliminary agree for the same reasons. The Applicant did not dispute this characterization and submitted proposed claims which overcame this defect.

In our preliminary view, the following additional indefiniteness defects are present in the claims on file.

Claim 69 on file recites:

a notification entity configured to:

cause said apparatus to wireless join the second local network to establish a wireless communication link [portion of original text omitted]

retrieving access information for use in granting access to end-user equipment at the second end-user premise [portion of original text omitted]

wherein said wirelessly joining the second local network comprises causing the first communication apparatus to use the access information to establish the wireless communication link with the end-user equipment at the second end-user premise.

Given the indication that the step of wirelessly joining the second local network comprises using the access information, in our preliminary view it is not clear how the step of wirelessly joining the second local network could be performed before the step of retrieving access information. In our preliminary view, a similar issue exists in claim 73 on file.

Claim 7 on file recites "the access information for the piece of equipment of the end-user equipment at the second end-user premise". This term is first defined in claim 4. However, claim 7 refers to claim 1.

Claim 26 on file recites "the plurality of end-user devices". This term is first defined in claim 25 which recites "the end-user equipment at the

second end-user premise comprising a plurality of end-user devices”.
However, claim 26 refers to claim 22.

Therefore, it is our preliminary view that claims 7, 26, 69 and 73 on file are indefinite and do not comply with subsection 27(4) of the *Patent Act*.

[48] The Applicant did not provide submissions in response to the PR letter. We therefore conclude that claims 7, 26, 51, 52, 69 and 73 on file are indefinite and do not comply with subsection 27(4) of the *Patent Act*.

Proposed Amendments

[49] In the PR letter, we set out our preliminary view with respect to the proposed claims:

[portion of original text omitted] in the RFA, the Applicant submitted a proposed set of 77 claims containing amendments to dependent claims 36 and 50 to remedy claim dependency defects.

In our preliminary view, the proposed amendments to the claims on file would overcome the claim dependency defects in claims 36 and 50 on file as well as the indefiniteness defects in claims 51 and 52 on file.

Considering that the proposed independent claims are identical to the independent claims on file and our preliminary view that the claims on file would not have been obvious to the skilled person in view of the prior art and the relevant CGK, it is our preliminary view that the proposed claims 1-77 would have been unobvious to the skilled person as well.

However, as discussed in the Indefiniteness section above, it is our preliminary view that claims 7, 26, 69 and 73 on file are indefinite and do not comply with subsection 27(4) of the *Patent Act*. The proposed amendments would not alter the outcome of the above reasoning with respect to the indefiniteness defects for these claims.

Accordingly, our preliminary view is that the proposed claim amendments do not make the application allowable and are therefore not necessary amendments in accordance with subsection 86(11) of the *Patent Rules*.

[50] The Applicant did not provide submissions in response to the PR letter. We therefore conclude that, as the proposed claims would not comply with subsection 27(4) of the *Patent Act*, they are not considered necessary amendments in accordance with subsection 86(11) of the *Patent Rules*.

CONCLUSIONS

[51] The Panel is of the view that:

- Claims 1-77 on file would not have been obvious to a person skilled in the art and therefore comply with section 28.3 of the *Patent Act*.
- Claims 36 and 50 on file do not comply with subsection 63(2) of the *Patent Rules*.
- Claims 7, 26, 51, 52, 69 and 73 on file do not comply with subsection 27(4) of the *Patent Act*.
- Proposed claims 1-77 comply with section 28.3 of the *Patent Act*, proposed claims 36 and 50 comply with subsection 63(2) of the *Patent Rules*, and proposed claims 51 and 52 comply with subsection 27(4) of the *Patent Act*.
- Proposed claims 7, 26, 69 and 73 do not comply with subsection 27(4) of the *Patent Act*. Therefore, the proposed claims cannot be considered a necessary amendment under subsection 86(11) of the *Patent Rules*.

RECOMMENDATION OF THE BOARD

[52] In view of the above, we recommend that the application be refused on the grounds that:

- claims 36 and 50 on file do not comply with subsection 63(2) of the *Patent Rules*; and
- claims 7, 26, 51, 52, 69 and 73 on file do not comply with subsection 27(4) of the *Patent Act*.

Mehdi Ghayour

Member

Stephen MacNeil

Member

Sean Wilkinson

Member

DECISION OF THE COMMISSIONER

[53] I concur with the conclusions and recommendation of the Board that the application be refused on the grounds that:

- claims 36 and 50 on file do not comply with subsection 63(2) of the *Patent Rules*; and
- claims 7, 26, 51, 52, 69 and 73 on file do not comply with subsection 27(4) of the *Patent Act*.

[54] 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.

Virginie Ethier
Assistant Commissioner of Patents

Dated at Gatineau, Quebec,

This 17th day of May, 2022