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TOPIC: F00 Novelty  
O00 Obviousness

SUJET: F00 Nouveauté  
O00 Évidence

Application No. : 2,972,289

Demande n° 2 972 289

IN THE CANADIAN PATENT OFFICE

DECISION OF THE COMMISSIONER OF PATENTS

Patent application number 2,972,289, having been rejected under subsection 86(3) of the *Patent Rules* (SOR/2019-251) ("*Patent Rules*") has consequently been reviewed in accordance with paragraph 86(7)(c) of the *Patent Rules*. The recommendation of the Patent Appeal Board and the decision of the Commissioner are to refuse the application.

Applicant:

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## **INTRODUCTION**

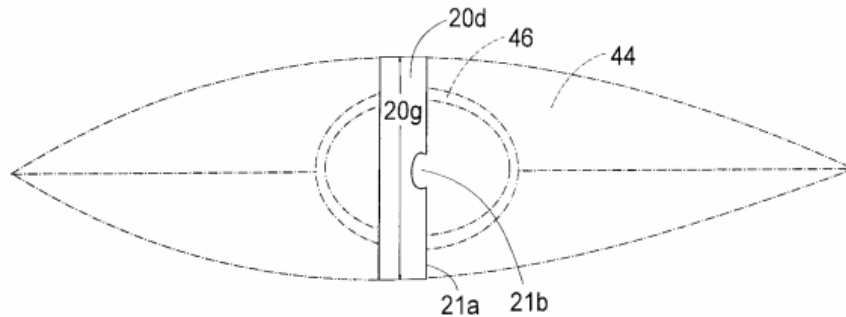
- [1] This recommendation concerns the review of rejected Canadian patent application number 2,972,289 (“the instant application”), which is entitled “INFLATABLE CARRYING DEVICE OF WATERCRAFT BY PERSON” and is owned by Ivan L. Nakamoto (“the Applicant”). A review of the rejected application has been conducted by the Patent Appeal Board (“the Board”) pursuant to paragraph 86(7)(c) of the *Patent Rules* (SOR/2019-251) (“*Patent Rules*”). As explained in more detail below, the Board’s recommendation is that the Commissioner of Patents refuse the application.
- [2] This recommendation and Commissioner’s Decision are being released concurrently with the recommendation and Commissioner’s Decision for co-pending Canadian patent application number 2,970,031 (“the ‘031 Application”), also owned by the Applicant.

## **BACKGROUND**

### **The Application**

- [3] The instant application was filed on July 4, 2017, with a US priority date of October 2, 2016. It was laid open to public inspection on September 14, 2017.
- [4] The instant application relates to an inflatable device for use in carrying a watercraft. Generally, the device is comprised of one or more inflatables having an open side and an opposite closed side. The device fits about a user’s shoulders so as to support a watercraft, such as a kayak, when it is being carried by a user. Figure 10 of the instant application, shown below, illustrates one embodiment of the inflatable 20d as it would be used in association with a kayak.

FIG. 10



### Prosecution History

- [5] On October 9, 2020, a Final Action (“FA”) was written pursuant to subsection 86(5) of the *Patent Rules*. The FA stated that the instant application is defective on the grounds that all of the claims 1-20 on file at the time of the FA (“claims on file”) lacked novelty and would have been obvious to a person skilled in the art at the relevant date. The defects were based on a prior art document published by the Applicant more than one year before the Canadian filing date and therefore outside of the grace period provided by paragraphs 28.2(1)(a) and 28.3(a) of the *Patent Act*.
- [6] In a February 1, 2021 response to the FA (“R-FA”), the Applicant provided extensive arguments in favor of the patentability of the claims on file, as well as certain allegations in relation to the manner in which prosecution of the instant application occurred. No amendments were proposed.
- [7] As the Examiner considered the application not to comply with the *Patent Act*, pursuant to subsection 86(7) of the *Patent Rules*, the application was forwarded to the Board for review on April 26, 2021 along with an explanation outlined in a Summary of Reasons (“SOR”). The SOR indicated that the claims on file remained defective for lack of novelty and obviousness as set out in the FA.
- [8] In a letter dated April 27, 2021, the Board forwarded to the Applicant a copy of the SOR and requested that the Applicant confirm their continued interest in having the application reviewed.
- [9] In a response dated July 12, 2021, the Applicant indicated their desire for the

Board to proceed with a review of the application. The Applicant included further submissions consistent with those submitted in the R-FA.

- [10] The undersigned panel (“the Panel”) of the Board was assigned to review the instant application and to make a recommendation to the Commissioner of Patents as to its disposition.
- [11] In a preliminary review letter (“PR letter”) dated September 20, 2022, the Panel set out its preliminary analysis of the lack of novelty and obviousness issues with respect to the claims on file. The Panel was of the preliminary view that claims 1-20 on file lacked novelty and would have been obvious to the person skilled in the art in view of the Applicant’s own prior published US patent document.
- [12] The PR letter provided the Applicant with an opportunity to make oral and/or written submissions.
- [13] In a response dated October 3, 2022, the Applicant declined the opportunity for an oral hearing.
- [14] On October 17, 2022, the Applicant provided written submissions (“R-PR”) in response to the preliminary opinion set out in the PR letter.
- [15] The Panel has reviewed the instant application and provide our final analysis below.
- [16] During the review of the instant application, the Applicant made additional submissions to the Commissioner of Patents, the Patent Appeal Board Chair and the Ministers of the Innovation, Science and Economic Development portfolio. These submissions have been considered by the Commissioner of Patents in making a final decision.

## **ISSUE**

- [17] The issues to be addressed by the present review are whether the claims on file lack novelty/are anticipated and whether they would have been obvious to the person skilled in the art.

## **LEGAL PRINCIPLES AND OFFICE PRACTICE**

## **Purposive Construction**

- [18] 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.
- [19] All elements set out in a claim are presumed essential unless it is established otherwise or such presumption is contrary to the claim language.

## **Lack of Novelty/Anticipation**

- [20] Subsection 28.2(1) of the *Patent Act* requires claimed subject matter to be new:

The subject-matter defined by a claim in an application for a patent in Canada (the “pending application”) must not have been disclosed

(a) 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 subject-matter became available to the public in Canada or elsewhere;

(b) before the claim date by a person not mentioned in paragraph (a) in such a manner that the subject-matter became available to the public in Canada or elsewhere;

[remainder of subsection omitted]

- [21] There are two separate requirements to show that prior art anticipates a claimed invention: there must be a prior disclosure of the claimed subject-matter and the prior disclosure must enable the claimed subject-matter to be practised by a skilled person (*Apotex Inc v Sanofi–Synthelabo Canada Inc*, 2008 SCC 61 [*Sanofi*] at paras 24–29, 49).

## **Obviousness**

[22] 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.

[23] In *Sanofi*, 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?

## **ANALYSIS**

[24] In the response dated December 15, 2020 to the Preliminary Review letter for the co-pending ‘031 Application, the Applicant indicated that many general arguments made in relation to that case would also apply to the review of the instant application. The Panel’s responses to the arguments made by the Applicant in relation to the ‘031 Application may be found in the corresponding Commissioner’s Decision for that case.

[25] Below we address the Applicant’s arguments made specifically in respect of the instant application.



## Purposive Construction

### *The person skilled in the art*

[26] In the PR letter at pages 5-6, we reviewed the characterization of the person skilled in the art in the FA, as well as the Applicant's submissions in respect of that characterization, arriving at our own preliminary view of the suitable person skilled in the art:

In the FA at page 3, under the Sanofi assessment of obviousness, the person skilled in the art was set out:

The person skilled in the art is a team comprising an experienced swimmer; an operator of a small, personal, pleasure craft (e.g. kayaker); and one or more engineers or related technologists in the field of manufacturing and/or design.

In the R-FA at page 87, the Applicant repeated his comments on the person skilled in the art made in response to a previous Office Action dated April 15, 2019. There appear to be some points raised by the Applicant in the R-FA for the instant application that relate instead to the prosecution of co-pending Canadian Patent Application no. 2,970,031 ("the '031 Application"). For example, the above-identified skilled person does not include a "lifeguard" or a "sailor" as referred to by the Applicant in the R-FA, as is the case for the skilled person identified in the FA for the '031 Application. The Applicant's comments are reproduced below:

Additionally, respectfully, Applicant does not agree with Examiner's provided identification of "the notional 'person skilled in the art'", explained as follows.

Applicant does not agree with "*a lifeguard*". Applicant submits that the lifeguard must have "*experience*" in a wide variety of natural, environment conditions (e.g., including rough water, and strong winds), not just "*a lifeguard*" at a local, indoor, community swimming pool, where lessons are provided for 'moms and tots'.

Applicant does not agree with "*one or more of a kayaker, an experienced swimmer and/ or a sailor*", which includes just "*a sailor*", such as of ships, e.g., of cruise lines, oil tankers, and ocean-going freighters. Applicant submits that "*a sailor*" be of small, personal, pleasure crafts, such as those that accommodate one or two people. Applicant submits that "*a kayaker*" and "*a sailor*"—not just "*swimmer*"—be "*experienced*". Furthermore, Applicant submits that "*a kayaker*", "*an experienced swimmer*", and "*a sailor*" must be "*experienced*" in a wide variety of natural, environmental conditions (e.g., including rough water, and strong winds), and in large bodies of water (e.g., lakes and rivers), under which the water self-rescue apparatus will be operated.

For example, Examiner's "*experienced swimmer*" must have "*experience*" "*swimming*" in natural environmental conditions, not just in indoor swimming pools, with 'moms and tots'.

Applicant submits that operators of small, personal, pleasure crafts such as canoes, paddle boards, and wind surfers, with experience operating them in a wide variety of natural environmental conditions, should be included in Examiner's team (e.g., instead of "*a sailor*" of cruise ships).

Applicant submits, regarding Examiner's "*engineers or related technologists in the field of manufacturing*", that the field of design of apparatus, is more relevant.

Applicant submits that Examiner's selection of her team, is additional proof of her errors, of: (i) a Fact, i.e., "accommodate" vs. "secure"; and (ii) the alleged Lack of Inventive Step defect, the alleged "obviousness". Additionally, Examiner's errors for the "person skilled in the art", is also proof of her error for the "Lack of Novelty" defect."

Given the similarity of the Applicant's submissions in this case to those of the '031 Application and the similarity of the subject-matter of both, we propose using substantially the same "person skilled in the art" here. We propose slightly altering the definition of the person skilled in the art to remove a "lifeguard" as a team member, given the focus on the use of the inflatable for carrying a watercraft in this case:

A team comprising an operator of small, personal pleasure craft with experience functioning in a wide variety of natural environmental conditions and experience using small, personal pleasure craft carrying aids, as well as one or more engineers or technologists experienced in the design and manufacture of small, personal pleasure craft, water rescue devices and small personal pleasure craft carrying aids.

[27] In the R-PR at page 12, the Applicant withdrew all previous statements concerning the persons skilled in the art and contended that the team of persons skilled in the art should comprise one or more engineers or technologists experienced in the design of watercraft carrying devices used by a person. We agree that this would be an appropriate characterization of the skilled person, with the qualification that, in our view, such persons would be experienced in both the design and manufacture of watercraft carrying devices. Such skilled persons would need to have an appreciation of the manufacturing issues surrounding a given design. The person skilled in the art then becomes:

- a team comprising one or more engineers or technologists experienced in the design and manufacture of watercraft carrying devices used by a person.

*The relevant common general knowledge*

[28] In the PR letter at pages 6-7, after reviewing the FA and the submissions of the Applicant in the R-FA, we set out our preliminary view as to the content of the relevant CGK:

In the FA at page 3, the relevant CGK was set out:

The person skilled in the art is familiar with portaging watercrafts such as kayaks, as well as conventional devices used for portaging. Furthermore, the person skilled in the art is familiar with water self-rescue techniques in natural bodies of water of various sizes and a variety of environmental conditions, as well as conventional devices used for water self-rescue.

As was the case for the person skilled in the art, the Applicant in the R-FA reiterated his submissions in respect of the relevant CGK made in response to a previous Office Action dated April 15, 2019. Further, the submissions appear to be very similar to those submitted in response to the FA for the '031 Application. They are set out below:

Respectfully, Applicant does not agree with Examiner. However, Applicant agrees that the relevant common general knowledge must include—“experience”—such as Examiner specified for her “*experienced swimmer*”.

Applicant submits that the relevant common general knowledge must include —“experience”—of the conditions under which the inflatable water self-rescue apparatus will be operated, the impact the conditions will have on the operation of the apparatus (e.g., “accommodate” vs. “secure”), and the resulting impact on the operator (i.e., death or survival).

Applicant submits that the conditions under which the inflatable water self-rescue apparatus will be operated, is uncontrollable (i.e., the natural environment), unpredictable (i.e., the weather can change quickly and without warning), and varies greatly (i.e., the apparatus is not operated in one controllable, static, condition, e.g., an indoor, heated swimming pool); and the requirement to operate the apparatus increases, as the environmental conditions worsen (e.g., stronger winds and higher wave height).

Therefore, the relevant common general knowledge must include “experience”, of rescuing oneself (i.e., alone), while immersed in

natural bodies of water of various sizes, in a variety of environmental conditions.

Respectfully, it can not be limited to “water self-rescue techniques and conventional devices” in an indoor swimming pool, with “moms and tots”, where, arguably, a very significant number of “lifeguards” and “swimmers” obtain their training, knowledge and experience.

Thus, more specifically, the relevant common general knowledge must include to —“secure”—(not just “accommodate”, in an indoor swimming pool) an inflatable water self-rescue apparatus to one or two lower extremities of a human, operated under a variety of environmental conditions, under which water self-rescue would be required—which was “unobvious” to Examiner—as evidenced by the results of her analysis, provided in her Notice of Requisition dated 12 March 2019, which was her—third (3rd)—Notice for said current application, i.e., proof of the great extent, of how “unobvious” it was to Examiner.

Therefore, the results of Examiner’s analysis included in Step (I)(b), is also, additional proof of her errors, of: (i) a Fact, i.e., “accommodate” vs. “secure”; (ii) her alleged Lack of Inventive Step defect; and (iii) her alleged Lack of Novelty defect.

In our preliminary view, the relevant CGK set out in the FA takes into account the Applicant’s points in relation to “experience” set out in the R-FA. The Applicant also raises an issue in relation to knowledge of securing an inflatable water self-rescue apparatus to one or two lower extremities of a human, operated under a variety of environmental conditions, under which water self-rescue would be required. Since the person skilled in the art includes those familiar with water self-rescue techniques in natural bodies of water of various sizes and a variety of environmental conditions, we accept this to have been part of the relevant CGK as well.

Further, due to the nature of the person skilled in the art identified above, we also preliminarily add that the relevant CGK would include knowledge of small, personal pleasure craft and water rescue device design and manufacture.

[29] The Applicant made no submissions in the R-PR in relation to the identified relevant CGK.

[30] We note that though the relevant CGK includes knowledge of “portaging watercrafts such as kayaks, as well as conventional devices used for portaging”, taken from the FA, which is the focus of the claims on file, it also includes material relevant to water self-rescue devices, as the Applicant contended was part of the relevant CGK. The description of the instant application describes both a carrying device for watercraft such as kayaks as well as a water self-rescue device.

*The claims on file*

[31] The instant application contains one independent claim 1 (an inflatable carrying device of a watercraft by a person). The subject-matter of the dependent claims will be reviewed in detail later during the analysis of lack of novelty/anticipation and obviousness. Independent claim 1 is set out below for convenient reference:

1. An inflatable carrying device of watercraft by person, comprising: (a) a one or more than one inflatable; (b) said one or more than one inflatable having a shape; (c) said shape having an open side having an opening and an opposite closed side; (d) said opening having a depth, a width, and a length sized to a human being having a pair of shoulders; (e) said depth of at least a part of said opening, as considered from a top of said opening orthogonally straight down toward said opposite closed side, having a distance of at least a part of a depth of said pair of shoulders, as considered from a superior to inferior of said pair of shoulders; (f) said width of at least a part of said opening, as considered traversing said opening, is about a width of said pair of shoulders, as considered from an anterior to posterior of said pair of shoulders at a greatest distance of said pair of shoulders contained within said depth of said opening; (g) said length of said opening having a distance of at least a part of a length of said pair of shoulders, as considered laterally from side to side of said pair of shoulders; and (h) said one or more than one inflatable having a shear and tensile strength to support a watercraft by one or two of said one or more than one inflatable.

[32] As we stated in the PR letter at page 8, there have been no issues raised during the prosecution of the instant application in regard to the meaning or scope of any of the terms used in the claims on file.

*The essential elements*

[33] As stated in the PR letter at page 8, the FA did not provide a purposive construction of the claims on file. Given that 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, alternatives or a preferred embodiment, in our view, all the elements of the claims on file are considered to be essential and are taken into account in our analysis below.

[34] The Applicant asserted in the R-PR at pages 4-5 that the Panel did not “define” the “subject-matter defined by a claim” in performing the assessments of novelty and obviousness. However, it is not the Panel that defines the subject-matter of the claims. That is defined by the language of the claims themselves as drafted by the

Applicant. The Panel can only construe them from the point of view of the person skilled in the art.

### Special Advantage

[35] In the PR letter at pages 14-15 we addressed the Applicant's submissions in respect of a "special advantage":

As was also the case for the '031 Application, in the R-FA for this case, for example at pages 50-52, the Applicant alleges that the Office has violated the principles set out in *Sanofi*, in particular by not taking into account the "special advantage" of the claims. In this particular case, that is alleged to be the securement of an inflatable carrying device of a watercraft by a person to one or two shoulders of a person (see R-FA at page 52).

We note that claim 1 on file contains no feature of securement of the inflatable carrying device either to a person or to the watercraft itself. However, some of the dependent claims relate to a means for releasably securing the inflatable carrying device to the watercraft.

In our preliminary view, the FA did take into account the securement of the inflatable to the watercraft. In particular, at page 2 of the FA it is stated that for the apparatus of D1:

It is taught that the device further includes a third means (34) for releasably fastening said one or more than one inflatable to said watercraft which in combination with said one or more than one inflatable releasably fastened to said third means for releasably fastening secures said one or more than one inflatable to said watercraft.

As such, even if there was a special advantage outside the subject-matter set out in the claims that needs to be taken into account in the novelty assessment, it seems to have been taken into account in the FA, as it has in our preliminary analysis above.

However, it is also our preliminary view that the present case is not like that of *Sanofi*, where what differentiated a bare chemical compound from a previously disclosed genus was not evident from the claim itself. In such cases, it is permissible to look to the description to find the advantage of the claimed invention that may be used to differentiate it for the purposes of a novelty and obviousness assessment.

In the present case, claim 1, for example, is directed to an inflatable carrying device for a watercraft comprising a combination of features, including an open side and a closed side, as well as other physical characteristics. It is the combination of features that represents the invention and in our preliminary view, there is no need to look to the description to determine any further "special advantage." Again, we

note that the feature of securement of the inflatable carrying device is only found in the dependent claims and that this additional feature has been taken into account in the novelty analysis above and in the FA.

[36] In the R-PR at pages 7-9, the Applicant further submitted that the shape of the inflatable apparatus is the means by which the inflatable carrying device is secured to one or two shoulders of a human user and represents an essential element/feature. Claim 1 on file does specify the shape of the inflatable as being sized to a human having a pair of shoulders and other structural limitations, but does not specify that this is how the inflatable is secured.

[37] Further, while there are passages in the rest of the specification of the instant application that support the idea that the shape itself is the means of securing the inflatable to one or two shoulders of a user (see e.g., page 13, "FIG. 1 is a front perspective view of one embodiment depicting an inflatable having an incurvate shape open side which is sufficiently curved to secure to a lower extremity of a self-rescuer, or one or two shoulders of a human carrier"), independent claim 1 is not so limited. Likewise, there is no language in the dependent claims that sets out the shape of the inflatable itself as the means of securing the inflatable to the user's shoulders.

[38] We proceed on the basis of the subject-matter as set out in the claims on file, considering the combination of elements of each claim.

### **Lack of Novelty/Anticipation**

[39] For a claim to be found to have lacked novelty, the claimed subject-matter must be disclosed and enabled in a single prior art document.

[40] In the PR letter at page 8, we set out the premise of the lack of novelty/anticipation defect, namely that the combinations of elements of the claims on file were previously disclosed and enabled by the Applicant's own prior US patent document. This prior art document was published more than one year before the Canadian filing date and is therefore a bar to obtaining claims to the same subject-matter in Canada:

In the FA at page 2, it is indicated that all of the claims on file lack novelty under paragraph 28.2(1)(a) of the *Patent Act* in view of the following prior art document:

D1: US20150259055 Nakamoto

Published: September 17, 2015

We note that D1 is a US published patent application owned by the same applicant as the instant application. In accordance with paragraph 28.2(1)(a) of the Patent Act, D1 was published more than one year before the filing date of the instant Canadian patent application and therefore is citable for lack of novelty/anticipation against it.

Having reviewed D1 in its entirety, it is our preliminary view that D1 discloses and enables all of the subject-matter of the claims on file and therefore anticipates them. We note that the description of D1 is substantially the same as that of the instant application, with the exception of some additional material in the instant application focussed on the watercraft carrying aspect. However, the additional material of the instant application is based on the drawings, which appear to show the same subject-matter as the drawings of D1.

[41] As part of our analysis in the PR letter, we provided a breakdown of the features of the claims on file and the corresponding features of the prior art document D1, in the form of a table. The heading of the second column presented below has been updated to reflect that it is the features of D1 as a whole that were referred to, as was evident from the contents of the column relating to D1 in the PR letter:

<b>Claims of the instant application</b>	<b>Corresponding features of D1</b>
<p>1. An inflatable carrying device of watercraft by person, comprising:                      (a) a one or more than one inflatable;                      (b) said one or more than one inflatable having a shape;                      (c) said shape having an open side having an opening and an opposite closed side;                      (d) said opening having a depth, a width, and a length sized to a human being having a pair of shoulders;                      (e) said depth of at least a part of said opening, as considered from a top of said opening orthogonally straight down toward said opposite closed side, having a distance of at least a part of a depth of said pair of shoulders, as considered from a superior to inferior of said pair of shoulders;                      (f) said width of at least a part of said opening, as considered traversing said opening, is about a width of said</p>	<p>(a) See Figures 10, 11A and 11B showing embodiments using one and two inflatables (20d and 20) fitting across the shoulders and about the neck of a user for carrying a watercraft such as a kayak. See also paragraphs [0139] and [0144].                      (b) As shown in Figure 10 and discussed at paragraph [0139], the inflatable has an open incurvate shape on one side for accommodating a user's neck and is flat on the opposing side.                      (c) As above, Figure 10 and paragraph [0139] show and discuss the open incurvate shape on one side of the inflatable and the closed opposing side. See also Figures 11A and 11B, as well as paragraph [0151] that show a further embodiment in which inflatables 20 are positioned one on each shoulder, with the incurvate side positioned about the shoulder.                      (d) As discussed at paragraph [0139]: "FIG. 10 is a top view of the water self-rescuer for the single human carrying watercraft such as kayak 44 having single</p>



<p>pair of shoulders, as considered from an anterior to posterior of said pair of shoulders at a greatest distance of said pair of shoulders contained within said depth of said opening; (g) said length of said opening having a distance of at least a part of a length of said pair of shoulders, as considered laterally from side to side of said pair of shoulders; and (h) said one or more than one inflatable having a shear and tensile strength to support a watercraft by one or two of said one or more than one inflatable.</p>	<p>cockpit 46, and <b>depicting the size of inflatable 20d extending at least transversely across cockpit 46, and one side of inflatable 20J incurvate shaped at about the area of and to secure to a neck of the carrier</b> (not shown)".</p> <p>As discussed at paragraph [0142]:</p> <p>"Operation of the water self-rescuer as depicted in FIG.10 includes inflating inflatable 20d, and <b>positioning and securing inflatable 20d across the shoulders and about the neck of the carrier , then, positioning inverted kayak 44 on inflatable 20d.</b>"</p> <p>See also Figures 11A and 11B, as well as paragraph [0151] that show a further embodiment in which inflatables 20 are positioned one on each shoulder, with the incurvate side positioned about the shoulder.</p> <p>(e) See Figures 11A and 11B, as well as paragraph [0151] that show an embodiment in which inflatables 20 are positioned one on each shoulder, with the incurvate side positioned about the shoulder.</p> <p>(f) From Figures 11A and 11B and paragraph [0151], the inflatables are positioned on the shoulders of a user and the incurvate opening would have to be wide enough to accommodate a user's shoulders.</p> <p>(g) Again, from Figures 11A and 11B and paragraph [0151], the length of the openings in each inflatable, in fitting about the shoulders of a user, would have to extend over part of the length of the user's shoulder.</p> <p>(h) See paragraph [0081] where it is specified that the inflatable(s) generally have "sufficient tensile and shear strength to resist punctures and support at least in part the self-rescuer when immersed in water for one embodiment, and support at least in part the kayak for another embodiment."</p>
<p>2. The device as defined in claim 1, wherein said opening having an incurvate shape.</p>	<p>See Figures 10 and 11B that show the device with an opening having an incurvate shape used to carry a kayak and the accompanying description at paragraph [0139] for Figure 10.</p>

<p>3. The device as defined in claim 2, wherein said incurvate shape having a curvature of about 240 to 300 degrees.</p>	<p>See paragraph [0077]: "I presently contemplate that the incurvate curvature is 240 to 300 degrees"</p>
<p>4. The device as defined in claim 1, further including a height of said one or more than one inflatable when secured to said pair of shoulders is about seven to twelve centimeters superior to said pair of shoulders.</p>	<p>See paragraph [0140]: "I presently contemplate that the height of inflatable 20d when inflated is seven to twelve centimeters above the shoulders of the carrier"</p>
<p>5. The device as defined in claim 1, wherein said open side further includes a width, wherein said closed side further includes a width, and said width of said open side is of lesser distance than said width of said closed side.</p>	<p>See Figure 3 and paragraph [0100]: "FIG. 3 is another embodiment depicting the front view of inflatable 20a having a shape in which the incurvate side is narrower than the opposite non-incurvate side"</p>
<p>6. The device as defined in claim 1, further including a means for releasably fastening said one or more than one inflatable to said watercraft which in combination with said one or more than one inflatable releasably fastened to said means for releasably fastening secures said one or more than one inflatable to said watercraft, and said means for releasably fastening having a strength to support said watercraft.</p>	<p>See Figures 11A and 11B as well as paragraph [0144]: "and a third means for releasably fastening 34 inflatables 20 to kayak 44 which in combination with inflatables 20 releasably fastened to third means 34 secures inflatables 20 to kayak 44. Third means for releasably fastening 34 having a substantial strength to support kayak 44."</p>
<p>7. The device as defined in claim 1, further including a carriage strap, comprising: an end, of which there are two opposite, with one end releasably fastened to the other end by a buckle; a length to at least encircle said watercraft at a greatest perimeter transversely; and a strength to support said watercraft.</p>	<p>See Figures 12A and 12B as well as paragraph [0147]: "FIGS. 12A and 12B is a front and top view respectively of another embodiment of the water self-rescuer for carrying kayak 44, depicting a carriage strap 36 having an end, of which there are two opposite, with one end releasably fastened to the other such as by a buckle 38 as depicted in FIG. 12A. Carriage strap 36 transversely, securely, encircles the external surface of kayak 44 at about the center of gravity of kayak 44, and has a substantial strength to support kayak 44. As depicted in FIG. 12B, inflatables 20 are positioned on the deck of kayak 44. one on each side of cockpit 46, and releasably fastened to carriage strap 36."</p>

	As shown in Figures 12A and 12B the carriage strap encircles the kayak at its greatest transverse perimeter.
8. The device as defined in claim 1, further including a one or more than one strap, comprising an end, of which there are two opposite, with both ends fastened to said one or more than one inflatable and one end is releasably fastened.	See paragraph [0100]: "I contemplate one embodiment in which both ends of strap 28 are fastened to inflatable 20 and at least one end is releasably fastened such as by a conventional hook and loop fastening system (not shown)  See also paragraph [0109]
9. The device as defined in claim 1, wherein said watercraft is a kayak having a cockpit and further including said one or more than one inflatable having a length to at least transverse said cockpit.	See Figure 10 and paragraph [0139]: "kayak 44 having single cockpit 46, and depicting the size of inflatable 20d extending at least transversely across cockpit 46"
10. The device as defined in claim 9, further including a neck side of said one or more than one inflatable having at least in part an opening.	See Figure 10 and paragraph [0139]: "and one side of inflatable 20d incurvate shaped at about the area of and to secure to a neck of the carrier (not shown)"
11. The device as defined in claim 10, further including a means for releasably fastening said one or more than one inflatable to said kayak which in combination with said one or more than one inflatable releasably fastened to said means for releasably fastening secures said one or more than one inflatable to said kayak, and said means for releasably fastening having a strength to support said kayak.	See Figures 11A and 11B as well as paragraph [0144]: "and a third means for releasably fastening 34 inflatables 20 to kayak 44 which in combination with inflatables 20 releasably fastened to third means 34 secures inflatables 20 to kayak 44. Third means for releasably fastening 34 having a substantial strength to support kayak 44."
12. The device as defined in claim 10, further including a carriage strap, comprising: an end, of which there are two opposite, with one end releasably fastened to the other end by a buckle; a length to at least encircle said kayak at a greatest perimeter transversely; and a strength to support said kayak.	See Figures 12A and 12B as well as paragraph [0147]: "FIGS. 12A and 12B is a front and top view respectively of another embodiment of the water self-rescuer for carrying kayak 44, depicting a carriage strap 36 having an end, of which there are two opposite, with one end releasably fastened to the other such as by a buckle 38 as depicted in FIG. 12A. <b>Carriage strap 36 transversely, securely, encircles the external surface of kayak 44 at about the center of gravity of kayak 44, and has a substantial strength to support kayak 44.</b> As depicted in

	<p>FIG.12B, inflatables 20 are positioned on the deck of kayak 44. one on each side of cockpit 46, and releasably fastened to carriage strap 36.”</p> <p>As shown in Figures 12A and 12B the carriage strap encircles the kayak at its greatest transverse perimeter.</p>
<p>13. The device as defined in claim 1, wherein said watercraft is a sit-on-top kayak and further including said one or more than one inflatable having a length to at least transverse said sit-on-top kayak from side to side.</p>	<p>See Figure 10 and paragraph [0139]: “FIG. 10 is a top view of the water self-rescuer for the single human carrying watercraft such as kayak 44 having single cockpit 46, <b>and depicting the size of inflatable 20d extending at least transversely across cockpit 46</b>, and one side of inflatable 20d incurvate shaped at about the area of and to secure to a neck of the carrier (not shown), illustrating another embodiment.”</p>
<p>14. The device as defined in claim 13, further including a neck side of said one or more than one inflatable having at least in part an opening.</p>	<p>See Figure 10 and paragraph [0139]: “and one side of inflatable 20d incurvate shaped at about the area of and to secure to a neck of the carrier (not shown), illustrating another embodiment”</p>
<p>15. The device as defined in claim 14, further including a means for releasably fastening said one or more than one inflatable to said sit-on-top kayak which in combination with said one or more than one inflatable releasably fastened to said means for releasably fastening secures said one or more than one inflatable to said sit-on-top kayak, and said means for releasably fastening having a strength to support said sit-on-top kayak.</p>	<p>See Figures 11A and 11B as well as paragraph [0144]: “and a third means for releasably fastening 34 inflatables 20 to kayak 44 which in combination with inflatables 20 releasably fastened to third means 34 secures inflatables 20 to kayak 44. Third means for releasably fastening 34 having a substantial strength to support kayak 44.”</p>
<p>16. The device as defined in claim 14, further including a carriage strap, comprising: an end, of which there are two opposite, with one end releasably fastened to the other end by a buckle; a length to at least encircle said sit-on-top kayak at a greatest perimeter transversely; and a strength to support said sit-on-top kayak.</p>	<p>See Figures 12A and 12B as well as paragraph [0147]: “FIGS. 12A and 12B is a front and top view respectively of another embodiment of the water self-rescuer for carrying kayak 44, depicting a carriage strap 36 having an end, of which there are two opposite, with one end releasably fastened to the other such as by a buckle 38 as depicted in FIG. 12A. Carriage strap 36 transversely,</p>

	<p>securely, encircles the external surface of kayak 44 at about the center of gravity of kayak 44, and has a substantial strength to support kayak 44. As depicted in FIG.12B, inflatables 20 are positioned on the deck of kayak 44. one on each side of cockpit 46, and releasably fastened to carriage strap 36.”</p> <p>As shown in Figures 12A and 12B the carriage strap encircles the kayak at its greatest transverse perimeter.</p>
<p>17. The device as defined in claim 1, further including two or more than two of said one or more than one inflatable each having a length of at least a part of said length of said pair of shoulders.</p>	<p>From Figures 11A and 11B and paragraph [0151], the length of the openings in each inflatable, in fitting about the shoulders of a user, would have to extend over part of the length of the user’s shoulder.</p>
<p>18. The device as defined in claim 17, further including a means for releasably fastening said one or more than one inflatable to said watercraft which in combination with said one or more than one inflatable releasably fastened to said means for releasably fastening secures said one or more than one inflatable to said watercraft, and said means for releasably fastening having a strength to support said watercraft.</p>	<p>See Figures 11A and 11B as well as paragraph [0144]: “and a third means for releasably fastening 34 inflatables 20 to kayak 44 which in combination with inflatables 20 releasably fastened to third means 34 secures inflatables 20 to kayak 44. Third means for releasably fastening 34 having a substantial strength to support kayak 44.”</p>
<p>19. The device as defined in claim 17, further including a carriage strap, comprising: an end, of which there are two opposite, with one end releasably fastened to the other end by a buckle; a length to at least encircle said watercraft at a greatest perimeter transversely; and a strength to support said watercraft.</p>	<p>See Figures 12A and 12B as well as paragraph [0147]: “FIGS. 12A and 12B is a front and top view respectively of another embodiment of the water self-rescuer for carrying kayak 44, depicting a carriage strap 36 having an end, of which there are two opposite, with one end releasably fastened to the other such as by a buckle 38 as depicted in FIG. 12A. Carriage strap 36 transversely, securely, encircles the external surface of kayak 44 at about the center of gravity of kayak 44, and has a substantial strength to support kayak 44. As depicted in FIG.12B, inflatables 20 are positioned on the deck of kayak 44. one on each side of cockpit 46, and releasably fastened to carriage strap 36.”</p>

	As shown in Figures 12A and 12B the carriage strap encircles the kayak at its greatest transverse perimeter.
20. The device as defined in claim 17, further including a one or more than one strap, comprising an end, of which there are two opposite, with both ends fastened to said one or more than one inflatable and one end is releasably fastened.	See paragraph [0100]: " I contemplate one embodiment in which both ends of strap 28 are fastened to inflatable 20 and at least one end is releasably fastened such as by a conventional hook and loop fastening system (not shown).  See also paragraph [0109]

[42] It is evident from the above table and from a simple comparison of the instant application with the Applicant's own prior US published patent application D1, that the subject-matter of the claims on file was disclosed and enabled by D1.

*Applicant's submissions in relation to Sanofi/special advantage*

[43] In the PR letter at pages 14-15, we addressed the Applicant's submissions in the R-FA in relation to how the *Sanofi* assessment was made in the FA:

As was the case for the '031 Application, we note several statements in the R-FA (e.g., pages 9, 20, 21 and 55) that suggest that a claim must be anticipated or made obvious by a person such as an examiner. However, whether a claim lacks novelty/was anticipated or would have been obvious is measured against the content of the prior art and the common general knowledge of a person skilled in the art, rather than against the knowledge of an examiner. For lack of novelty/anticipation, the claimed subject-matter must be found in a single prior art document, while for obviousness a combination of prior art documents may be used, taking into account as well the common general knowledge of the person skilled in the art.

We also note that the Applicant appears to characterize the repeated defect of lack of novelty during prosecution as a matter of "trial and error" that is not permitted by *Sanofi*. However, the reference to the impermissibility of "trial and "error" in *Sanofi* was in relation to determining whether the subject-matter of a claim was disclosed in a single prior art document rather than the repeated identification of a lack of novelty defect during prosecution of a patent application.

[44] As noted above under the Purposive Construction assessment, in the R-PR at pages 7-9, the Applicant submitted that the shape of the inflatable apparatus is the means by which the inflatable carrying device is secured to one or two shoulders of a human user and represents an essential element/feature that should be taken into account in comparing the claims on file with the prior art.

- [45] While it may be true that the shape is such that it secures the inflatable to a user's shoulders, the shape and other characteristics have been found to be anticipated by document D1 and as such any securement based on such a shape and characteristics would necessarily follow.
- [46] In addition to the above comments, we note that the drawings of D1 are the same as those of the instant application. Further, despite the fact that there is some minor additional passages in the instant application referring to those same drawings, D1 discloses the same subject-matter as that of the instant application. D1 disclosed and enabled the features of the claims on file as well as the further features and elements that are disclosed and enabled by the rest of the instant specification. Therefore, even if a further "special advantage" from the description or essential element/feature could be taken into account, D1 discloses and enables all such subject-matter.
- [47] We noted above under Purposive Construction that the specification of the instant application does suggest that the shape of the inflatable can itself be the means by which it is secured to a user's shoulders, while the claims on file are not limited as such. We also note that D1 suggests the same shaping such that the inflatable is secured to a user's shoulders (D1 at paragraphs [0062], [0080], and [0139]). Therefore, even if claim 1 on file, for example, were to be interpreted such that the shape itself was the means of securing the inflatable, such a feature is clearly disclosed and enabled in D1 as well, in combination with the other claimed features.

### *Summary of Novelty Assessment*

- [48] In summary, we are of the view that claims 1-20 on file lacked novelty in view of prior art document D1 and are therefore non-compliant with paragraph 28.2(1)(a) of the *Patent Act*.

### **Obviousness**

- [49] For a finding of obviousness, one prior art document may be used to show that the subject-matter of a claim would have been obvious to the person skilled in the art, or a combination of prior art documents may be used. The common general knowledge of the person skilled in the art may be taken into account as well.

[50] The FA at pages 3-4 indicated that all of the claims on file 1-20 would have been obvious having regard to D1.

[51] The obviousness analysis in the FA was set out using the *Sanofi* four-step approach. We do the same below.

[52] In the R-PR at pages 10-11, the Applicant appears to take issue with the use of the *Sanofi* four-step approach, commenting that its use is not mandatory and that if used, it is possible to assess the words of the claims themselves without going beyond the claim.

[53] We agree that the use of *Sanofi* is not mandatory, but it is generally applied by both the Patent Office and the Courts. In addition, we have not gone beyond the language of the claims themselves.

[54] We also note that at page 20 of the R-PR, the Applicant alleges that the FA dismissed *Sanofi* as not relevant. While the principles set out in *Sanofi* regarding the assessment of obviousness (and novelty) are to be generally applied, the particular facts of that case and the particular outcome are not determinative of other cases. The general principles are to be applied to each set of facts for each case in determining an outcome.

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

[55] The person skilled in the art has been identified above under Purposive Construction. We apply the same characterization here.

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

[56] The relevant CGK has also been identified under Purposive Construction and we apply the same CGK here.

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

[57] In the PR letter at pages 15-16, we addressed the prior debate surrounding the identification of an inventive concept. We clarified that for the purposes of the obviousness assessment we have taken into account all the elements of the



claims:

In the FA at page 3, the inventive concept was set out as follows;

The inventive concept of these claims pertains to a watercraft carrying device comprising an inflatable body with an opening on one side of the body for the shoulders of a human.

As was the case for the assessment of novelty, the Applicant contended that the identification of the inventive concept did not take into account the “special advantage” of the invention, namely “securement” of the device, though the submissions appear to refer to the device of the ‘031 Application (see e.g., R-FA at page 91).

We have already addressed this issue above under the novelty assessment. In our preliminary view, this is not the type of case where recourse to the description is needed to identify an alleged special advantage of the invention beyond the language of the claims.

The Applicant also asserts that the FA identified an opening as part of the inventive concept, but did not associate a use with the opening.

Given that in this assessment we take into account all the elements of the claims on file, the prior characterizations of the inventive concept are not applicable. In our preliminary view, the combination of essential elements of each claim represent their inventive concepts.

[58] We note that in the R-PR at page 12, the Applicant appears to suggest that the Panel has used a “common sense meaning of the word construe” in relation to *Sanofi* step 2. As set out above, we have taken all the elements of the claims to be essential in our assessment, which we take as reflecting their inventive concepts.

*(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*

[59] In the PR letter at page 16, it was our preliminary view that since:

prior art document D1 completely anticipates the subject-matter of all of claims 1-20 on file, there are no differences between the state of the art and the inventive concepts or the claims as construed.

[60] The only submissions in the R-PR that would relate to a possible difference over the state of the art represented by D1, was the issue of the “special advantage” that the Applicant alleged needed to be considered in the lack of novelty and

obviousness assessments. This issue has already been addressed above, both under Purposive Construction and the Lack of Novelty/Anticipation assessment. From that assessment, we do not view any such “special advantage” as applicable in this case and even if it were, it was disclosed and enabled by prior art document D1.

[61] In light of the above, it is our view that there are no differences between the state of the art represented by D1 and the subject-matter of the claims on file.

*(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?*

[62] There being no differences between the subject-matter of the claims on file and what was disclosed by D1, the claims on file would have been obvious to the person skilled in the art.

#### *Summary of Obviousness Assessment*

[63] In summary, we are of the view that claims 1-20 on file would have been obvious in view of prior art document D1 and are therefore non-compliant with paragraph 28.3(a) of the *Patent Act*.

#### **Applicant’s further submissions**

[64] As we noted in the PR letter at page 17, the Applicant made various other allegations in the R-FA in relation to the past prosecution of the instant application. Much of these allegations were repeated in the R-PR. We address them below

#### *Relevance of US prosecution*

[65] In the PR letter at page 17, we addressed the Applicant’s submissions regarding the influence of the prosecution of his US patent application on that of the instant application:

The Applicant asserted that evidence regarding the US prosecution was dismissed in the FA and in previous office actions. In particular, the Applicant asserted that “the person skilled in the art” has been limited to only Canadians (see e.g., R-FA at

pages 9, 22-23, 46, 58-59) and that the actions of the US examiner as a person skilled in the art in prosecuting D1 should be taken into account.

The “person skilled in the art” from whose point of view purposive construction is performed and assessments such as novelty and obviousness are made, is a fictitious individual or team created to enable a decision maker to put themselves in the shoes of someone in the relevant field at the relevant time. One may then use this person or team and their characteristics and knowledge to determine how such a person or team would have interpreted a document in the past or what this person or team would have done in light of past knowledge.

The US examiner, like the Canadian examiner or a member of the present Panel, are not “persons skilled in the art”. Each must however use the point of view of this fictitious person (as set out above under Purposive Construction), in understanding claims and in assessing their validity.

The actions taken by a US examiner during the prosecution of a corresponding case are not limiting on the actions that may be taken in the Canadian Patent Office. We note in particular that the US prosecution involved consideration of a different prior art document that was not a prior disclosure by the Applicant of the same invention, as is the case here.

[66] In the R-PR at page 9, the Applicant again alluded to the idea that because the USPTO examiner found a corresponding US patent application to be novel and non-obvious, that this should influence the assessment of his Canadian application. We note again that the prior art document used against the US patent application was not the same as that before the present Panel. In the present case, the Applicant’s own US patent application corresponding to the same disclosed and enabled subject-matter is citable against the instant application due to the publication of the US patent application more than one year before the Canadian filing date of the instant application.

[67] Further, in general the grant of a US Patent does not necessarily mean that one will be granted in Canada. Canadian legislation and jurisprudence relating to patents is very different from that of the US.

### *The number of reports*

[68] In the PR letter at page 17, we addressed the Applicant’s submissions in the R-FA relating to the relationship between the number of reports during examination and the strength of the arguments for lack of novelty and obviousness:

In the R-FA, for example at pages 20-26, the Applicant asserted that the case for lack of novelty and obviousness was invalid due to the number of reports that had been written prior to the application being forwarded to the Board.

During prosecution it is common for a number of office actions to be issued before an impasse is reached under subsection 86(3) of the *Patent Rules*, after which a Final Action may be issued. The number of office actions does not affect the validity of an identified defect.

[69] In the R-PR at pages 15-17 , the Applicant contended that the number of attempts at making a case for lack of novelty or obviousness during examination was indicative of the strength of that case and that based on the “balance of probabilities” the claims are patentable.

[70] As part of the complete review of the rejected instant application, the Panel has independently reviewed the prior art document D1 and assessed its content against the claims of the instant application. The number of past office actions identifying a lack of novelty or obviousness defect does not influence our assessment of this case.

### *Other allegations*

[71] In the PR letter at page 18, we addressed other allegations made by the Applicant in relation to the prosecution of the instant application:

The Applicant has made various other allegations including violation of the *Charter of Rights and Freedoms* in the way the application has been prosecuted and violation of the *Criminal Code* in doing the same.

Having reviewed the office actions during the prosecution, we see no grounds for such allegations. While arguments may have varied from office action to office action, this is expected as the reasons for a defect are refined in response to an Applicant’s submissions. Further, the introduction of an obviousness defect in the second office action is not improper. It is not unusual that such a defect is introduced in addition to a novelty defect to cover a situation where the novelty defect is not sustained during review by the Commissioner of Patents, but nevertheless, the claims may have been obvious.

In our preliminary view, all of the defects are appropriately based on the provisions of the *Patent Act*.

[72] In the R-PR at pages 18-19, the Applicant contended that he did not allege that the introduction of an obviousness defect was improper, but rather that the fact that it was not introduced sooner during prosecution was indicative that the claims on file

were not obvious.

[73] As we stated in the PR letter and is quoted above, the introduction of an obviousness defect, even though it is felt that the lack of novelty defect is valid, is not unusual. If, upon review, the Board disagrees with the lack of novelty defect, the record still includes for the Board's consideration the alternative arguments relating to why the claimed subject-matter may nonetheless have been obvious.

### **Proposed Claims**

[74] No amendments to the application were proposed in the R-FA or the R-PR.

### **CONCLUSIONS**

[75] We conclude that the claims on file lacked novelty in view of prior art document D1 and are therefore non-compliant with paragraph 28.2(1)(a) of the *Patent Act*. Further, we conclude that the claims on file would have been obvious in view of prior art document D1 and are therefore non-compliant with paragraph 28.3(a) of the *Patent Act*.

### **RECOMMENDATION OF THE BOARD**

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

- Claims 1-20 on file lacked novelty and are therefore non-compliant with paragraph 28.2(1)(a) of the *Patent Act*; and
- Claims 1-20 on file would have been obvious and are therefore non-compliant with paragraph 28.3(a) of the *Patent Act*.

Stephen MacNeil  
Member

Mara Gravelle  
Member

Andrew Pothier  
Member

## DECISION OF THE COMMISSIONER

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

- Claims 1-20 on file lacked novelty and are therefore non-compliant with paragraph 28.2(1)(a) of the *Patent Act*; and
- Claims 1-20 on file would have been obvious and are therefore non-compliant with paragraph 28.3(a) of the *Patent Act*.

[78] In reaching this conclusion I have considered the additional submissions made by the Applicant to myself, the Patent Appeal Board Chair and the Ministers of the Innovation, Science and Economic Development portfolio and find them to be consistent with submissions made to the Board. I completely agree with the Board's conclusions and have made my decision taking into account all the correspondence on file at the Patent Office.

[79] 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.

Konstantinos Georgaras  
Commissioner of Patents

Dated at Gatineau, Quebec

this 9<sup>th</sup> day of February, 2023