

# Federal Court of Appeal Overturns Infringement Finding Regarding Mobility Aiding Devices

July 18, 2019

**Human Care Canada Inc v. Evolution Technologies Inc, 2018 FC 1302, reversed in 2019 FCA 209.**

In an action by the patent holder, Human Care Canada Inc. (Human Care), against Evolution Technologies Inc. (Evolution) for a declaration of infringement, Justice Elliot found that Evolution had infringed the patent, and dismissed the Evolution's counterclaim for invalidity. The patent at issue concerned rollators (commonly known as "walkers" with wheels).

Justice Elliot preferred the evidence of the patent holder's experts and witnesses over Evolution's experts. This heavily impacted the claim construction analysis. The interpretation of several terms of the disputed claims was at issue including the meaning of "tension rod means". The Court took issue with Evolution's expert's interpretation of the claims because the expert failed to consider the meaning of the disputed terms in the context of the words around them and the context of the patent itself. When determining whether the disputed portions of the claims were essential, the Court stated "in light of the CGK, it would have been obvious to the POSITA that varying these elements would change the way the invention works. Thus, these elements are essential."

Justice Elliot determined after purposive construction that the claims at issue were infringed by Evolution's rollator because the product contained all the essential elements of the patented rollators.

The Court then determined that the patent was not invalid for obviousness, anticipation or overbreadth. The prior art was analyzed and the evidence of the expert witnesses was heavily relied on. As in the claim construction analysis, the evidence of Human Care's expert was preferred to Evolution's expert because Evolution's expert had applied the obviousness test incorrectly. The Court agreed with Human Care that Evolution's expert had used a hindsight analysis when gathering materials forming the state of the art.

The Federal Court of Appeal (FCA) allowed the appeal regarding infringement, and therefore found it unnecessary to address the Federal Court's dismissal of the invalidity

allegations. The FCA decided that the Federal Court made an extricable error of law by failing to apply at the infringement stage the same construction of “tension rod means” it had adopted during the claim construction analysis.

The Federal Court construed the term “tension rod means” to require that the “means” be primarily in tension. There was no evidence before the Court that the equivalent part of Evolution’s device was primarily in tension when in use. The FCA emphasized that the claims of a patent receive one and the same interpretation for all purposes. The FCA concluded that the Federal Court could not have made a finding of infringement without altering the construction of the term “tension rod means” during the infringement analysis. As a result, the FCA set aside the Federal Court’s decision, dismissing Human Care’s action.

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