

## **Mattress manufacturer wins Injunction in patent breach dispute**

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In May, the Federal Court issued an interlocutory injunction in a patent infringement case, despite the affidavit of a patent agent filed by the defendant stating that, in his view, the patent was invalid.

The plaintiff, Louisville Bedding Company owned a patent for a “Fitted Mattress Cover and Method of Making Same”, issued in December, 1993. The defendant Kwilt-Kraft Industries Ltd. had been selling allegedly infringing mattresses since at least the previous summer. Shortly after its patent issued, Louisville wrote to Kwilt-Kraft demanding that it cease and desist selling the infringing products. When the defendant wrote back denying patent infringement, Louisville started an action and sought an injunction.

At the hearing, the defendant Kwilt-Kraft conceded “for purposes of this injunction proceeding only” that its product infringed the patent. But it denied that the patent was valid. In support of this, Kwilt-Kraft filed an affidavit by Mr. Robert E. Mitchell, a patent agent, who opined that, based on the prior art that had been in front of the Canadian and US patent examiners, the patent was invalid, in his view. In other words, he thought the examiners were wrong to have allowed the patent to issue.

There were two things about Mr. Mitchell’s evidence which concerned the Court.

First, Mr. Mitchell was a partner in Swabey Ogilvy Renault, a partner of the respondent’s law firm, Ogilvy Renault. “Mr. Mitchell’s affidavit clearly goes to the key point in this matter, and in my view it is clearly improper to have an affidavit from a partner in a firm which is in partnership with the lawyers for whom the expert affidavit is produced,” wrote Mr. Justice McKeown of the Federal Court, Trial Division. This, he found, weakened the strength of the opinion.

Secondly, Mr. Mitchell was not an expert in technology related to mattress pads, “and therefore his opinion of what was common knowledge in the art and whether a claim is obvious from the prior art is inadmissible.”

There appears to have been no evidence filed by the plaintiffs going to the issue of validity, but Mr. Justice McKeown noted that a patent is presumed to be valid in the absence of any evidence to the contrary under section 43 of the Patent Act.

On the issue of irreparable harm, the court doubted the ability of the defendant Kwilt-Kraft to pay damages. It also appeared to accept that the plaintiffs might suffer irreparable harm because its sales would be hurt by the presence in the market of the defendant's lower priced product (although one might have thought that this could be dealt with through an undertaking to keep an accounting of sales). There is no mention in the case of the recent line of cases in the Federal Court of Appeal where it has been held that evidence of irreparable harm in interlocutory injunction cases must not be "speculative". The defendant did not file any evidence as to any irreparable harm it might suffer if the injunction were granted.

The case was argued in Ottawa by Gregory Piasetski of Toronto's Bereskin & Parr for the plaintiffs, and by Johanne Gathier of Montreal's Ogilvy Renault for the defendant.