



May 5, 2026

**BARRY DUSOME**

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**Application No.** : **2,701,028**  
**PCT No.** : **CA2008001735**  
**Owner** : DUSOME, BARRY; DUSOME, WYATT  
**Title** : **METHOD FOR PLAYING A CARD GAME**  
**Classification** : *A63F 1/00 (2006.01)*  
**Our File No.** : RM 2095E

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## REDETERMINATION – PRELIMINARY REVIEW

The judgment in *Dusome v Canada (Attorney General)*, 2025 FC 1809 [*Dusome*], directs the Commissioner of Patents “to consider [this] Application afresh based on the Amended Proposed Claims submitted by the Appellant and in accordance with these reasons”.

A Panel of the Patent Appeal Board has been established to review this application on behalf of the Commissioner of Patents. The Panel consists of the following members:

Mehdi Ghayour

Lewis Robart

Christine Teixeira

We have reviewed the prosecution record, including the Final Action dated November 22, 2018, the Applicant’s response to the Final Action received on May 21, 2019, and all subsequent correspondence between the Applicant and the Patent Appeal Board.

The following are the results of our preliminary review, including what we consider to be the outstanding issues. Although the judgment in *Dusome* directs the Commissioner of Patents to consider the application afresh based on the amended proposed claims, we also conducted a preliminary review of the application at the time of the Final Action and the Applicant’s latest proposed amendments to claims and the description.

In brief, we are presently inclined to recommend to the Commissioner of Patents that the application be refused.

## **INVITATION TO ATTEND HEARING, PROVIDE WRITTEN SUBMISSIONS**

A hearing has been tentatively scheduled for **June 16, 2026** at **1:30 PM**, via MS Teams.

The Applicant is requested to do both of the following:

- **By May 19, 2026:** Confirm the suitability of the above date and time for the hearing, propose an alternative date that is no later than July 16, 2026 (please contact the undersigned to arrange a mutually convenient time) or indicate that a hearing is not required. Further, please indicate if the Applicant needs the hearing to be held in an alternative format.
- **By June 5, 2026:** Provide written submissions addressing the outstanding issues and including any other observations the Applicant wishes to make, or indicate that no submissions will be made.

Any written submission may include **one** set of proposed claims addressing only the preliminarily identified outstanding issues.

If the Applicant does not respond by the above dates, or indicates that they do not wish to participate in a hearing or make written submissions, we will complete our review based on the written record and make our recommendation to the Commissioner of Patents.

In addition, if the Applicant no longer has an interest in this application, or does not want a Commissioner's Decision, they may request to withdraw the application. A letter requesting withdrawal of the application should be addressed to the **Commissioner of Patents**. Language to the effect that "The Applicant requests withdrawal of Canadian Patent Application no. 2701028" would clearly indicate their intention.

## **THE APPLICATION**

The application is related to a wagering poker game, where players split their starting hand into two (or more) hands to play consecutive sub-games as part of the overall game. The

application indicates that the poker game may be played either with a standard 52-card deck or on a computer device.

The application has 24 claims (the claims on file), which were received at the Patent Office on September 12, 2018. The description on file was received at the Patent Office on January 29, 2018.

The latest set of proposed claims (the proposed claims) includes 24 claims, which were received on April 12, 2024. The latest proposed description (the proposed description) was received on June 7, 2022.

## ISSUES

As stated above, in this preliminary review we consider the application on file, which was rejected in the Final Action, and the latest proposed amendments.

The Final Action dated November 22, 2018 was issued according to subsection 30(3) of the *Patent Rules*, SOR/96-423, as they read immediately before October 30, 2019 [the former *Rules*]. It identified the following defects in the application on file:

- Claims 1-24 on file are not directed to patentable subject-matter and do not comply with section 2 of the *Patent Act*, RSC 1985, c P-4 [the *Patent Act*];
- Claims 1 and 22-24 on file are indefinite and do not comply with subsection 27(4) of the *Patent Act*;
- The description on file contains interlineations, cancellations or corrections, and does not comply with subsection 68(1) of the former *Rules*;
- The pages of the specification on file are not numbered consecutively and do not comply with subsection 73(1) of the former *Rules*.

The previous Commissioner's Decision, *Barry Dusome & Wyatt Dusome (Re)*, 2024 CACP 11, [CD 1670], identified an additional basis under subsection 27(8) of the *Patent Act* for the patentable subject-matter defect, an additional indefiniteness defect in claim 23 on file as well as the following additional defects with respect to the claims on file:

- Claim 1 lacks support and does not comply with section 60 of the *Patent Rules*, SOR/2019-251 [the *Patent Rules*]; and
- Claim 24 depends on more than one claim, and does not comply with subsection 63(3) of the *Patent Rules*.

In addition, during this preliminary review, we identified further defects related to indefiniteness. The Applicant is hereby notified of the defects other than those identified in the Final Action in accordance with subsection 86(9) of the *Patent Rules*.

Our analysis and preliminary views of the application on file and the proposed amendments are set out below.

## **PURPOSIVE CONSTRUCTION**

We present our preliminary analysis of the purposive construction of the claims on file below.

### **Legal principles**

Purposive construction is antecedent to any consideration of validity (*Free World Trust v Électro Santé Inc*, 2000 SCC 66 [*Free World Trust*] at para 19; *Whirlpool Corp v Camco Inc*, 2000 SCC 67 [*Whirlpool*] at para 43).

In accordance with *Free World Trust* and *Whirlpool*, purposive construction is performed from the point of view of the person skilled in the art in light of the relevant common general knowledge at the publication date, considering the whole of the disclosure including the specification and drawings, in order to determine the subject-matter defined by a claim and to ascertain the nature of the invention. In addition to interpreting the meaning of the terms of the claim, purposive construction distinguishes the essential elements of the claim from the non-essential elements.

The test for non-essentiality is two-part: 1) a purposive construction of the words of the claim indicate it was clearly not intended to be essential; and 2) at the date of the publication of the patent, the skilled person would have appreciated that the element could be substituted or omitted without affecting the working of the invention (*AGI Suretrack, LLC v Farmers Edge Inc*, 2025 FCA 134 [*AGI*] at para 61 citing *Free World Trust* at paras

52, 55). The onus is on the party alleging non-essentiality to establish this (*AGI* at para 61). As explained in *Boehringer Ingelheim (Canada) Ltd v Jamp Pharma Corporation*, 2024 FC 1198 at paragraph 100, it would be entirely inconsistent to find an element of the claim not essential if the language of the claims and a reading of the patent indicates otherwise.

Furthermore, purposive construction ensures that “the Commissioner is alive to the possibility that a patent claim may be expressed in language that is deliberately or inadvertently deceptive” and “what appears on its face to be a claim for an ‘art’ or ‘process’ may, on a proper construction, be a claim to a mathematical formula”, as was the case in *Schlumberger Canada Ltd v Commissioner of Patents*, [1982] 1 FC 845 (CA) [*Schlumberger*] (*Canada (Attorney General) v Amazon.com, Inc*, 2011 FCA 328 [*Amazon*] at para 44). Determining what in good faith the inventor actually invented or discovered must be grounded in a purposive construction of the claims (*Amazon* at paras 42-43). This is in line with the Courts’ statements in *Schlumberger* at page 847 that “[i]n order to determine whether the application discloses a patentable invention, it is first necessary to determine what, according to the application, has been discovered” and in *Dusome* at paragraph 45 that “determining what in good faith the inventor actually discovered is a question that forms part of purposive construction”.

Considerations which may inform the skilled person’s understanding of the nature of the invention include whether the elements are described as well-known or operating in a well-known manner, and, in case of computer-implemented inventions, whether executing the algorithm on the computer is described as resulting in any improvements to the functioning of the computer (*Canada (Attorney General) v Benjamin Moore & Co*, 2023 FCA 168 [*Benjamin Moore*] at para 94; *ChouEIFaty v Canada (Attorney General)*, 2020 FC 837 at para 42).

## **Analysis**

Since purposive construction is performed from the perspective of the person skilled in the art in light of their common general knowledge, we must first identify the skilled person and their common general knowledge in view of the fields relevant to the invention.

According to the description, casinos and gambling establishments are interested in card games that attract new players, create player loyalty and increase their revenue (para 2).

In order to provide a higher level of excitement and complexity that is not possible in a standard poker game (para 5), the application discloses a poker game that consists of a combination of Texas Hold'em and Pai Gow poker with additional features (para 6). The invention is related to a wagering poker game, wherein players split their cards and may play two or more consecutive sub-games as part of the overall game (para 1). The description indicates that the poker game may be played either with a standard 52-card deck or on a computer device (para 13).

*The person skilled in the art*

CD 1670, at paragraphs 23 and 26, identified the person skilled in the art as a person or a team of people skilled in gaming, card gaming (specifically poker) and computer programming.

As indicated in *Dusome* at paragraph 9, the Applicant agreed with the above characterization of the person skilled in the art.

In light of the above and given the description passages cited above, we preliminarily consider the person skilled in the art to be a team of people comprising a poker game designer, a computer technician and a software developer.

*The relevant common general knowledge*

CD 1670 at paragraph 23, citing the Final Action, referenced documents D1 and D2 when identifying the relevant common general knowledge:

D1: US 6,062,565 Chadband et al. May 16, 2000

D2: US 2004/0038720 A1 Valente February 26, 2004

CD 1670, at paragraphs 23-27, identified the relevant common general knowledge as the following:

- a card game can be played using a standard 52 card deck (Description: para 3; D1: col. 5, lines 1-18) or an electronic platform (Description: para 2; D2: claim 16);

- various rules exist for playing a card game, including dividing an initial hand into a first hand and a second hand, and playing a second poker game with said second hand (Description: para 5; D1: abstract, col. 3, lines 5-27);
- various rules exist for placing multiple bets in a card game, including placing a first bet in a first pot and a second bet in a second pot (D1: abstract, col. 3, lines 5-27; D2: para 18);
- various poker games are played with 52 poker cards, and would include a dealer, table, players, chips, wagering and hierarchy of poker hands to determine the winning hands (Applicant's response to the Final Action at page 26);
- gaming techniques could be performed with a specifically programmed computer including a representation of the essential 52 cards (Applicant's response to the Final Action at page 26), including programming a poker game on a computer, gaming machine, portable computerized device or network; and
- client/server computer architecture, internet communication and use of "cookies" allowing users to participate in a virtual poker event on the internet (Applicant's response to the Supplementary Preliminary Review Letter received on March 22, 2024 at pages 15-16).

As indicated in *Dusome* at paragraph 9, the Applicant agreed with the above characterization of the relevant common general knowledge.

For completeness, we note that the following disclosure in the description is also relevant.

The description at paragraphs 3-4 explains the basic principles of typical poker games: poker is played with a standard deck of 52 playing cards, including four suits of equal value (spades, hearts, diamonds and clubs). In a standard poker game, a player uses his available cards to form the highest value five-card hand. The hierarchy of poker hands, the ranking of hands from highest value to lowest value, is as follows:

- royal flush (10-Jack-Queen-King-Ace of the same suit),
- straight flush (all cards in numerical sequence and of the same suit),
- four of a kind (four cards of same numerical value),

- full house (three of a kind and a pair),
- flush (all cards of the same suit),
- straight (all cards in numerical sequence),
- three of a kind (three cards of same numerical value),
- two pairs,
- pair (two cards of same numerical value),
- high card (a single card of highest numerical value).

If players have the same ranked hand, the hand with the higher ranked card in the category wins. For example, a pair of kings wins against a pair of queens. If players have identically ranked hands, the remaining cards are used to determine the winner. For example, a player with A-A-K-9-5 wins against a player with A-A-Q-9-5.

Standard poker games, such as Texas Hold'em, Omaha, Razz, Stud and Draw, are generally played using a buy-in system, where players contribute a certain amount of money to partake in the game. A buy-in may be in the form of an "ante", where every player places an equal amount of money into a central pot, and/or in the form a "blind", where one or more players to the left of the dealer place an amount of money into the central pot as a "blind bet" (a bet placed before a player sees his cards).

Standard poker games, such as Texas Hold'em, generally consist of multiple rounds of betting, where at each round a new card or cards are dealt by the dealer and players are given the opportunity to take one of the following actions:

- "check": the player passes the action to the next player without betting (putting more money into the pot). This is only possible if no other player has made a bet (put more money into the pot), before the player checking in that betting round,
- "fold": the player drops out of the round, discarding cards and losing any bets the player made into the pot,
- "call": the player puts an additional amount of money into the pot, matching the highest bet made by another player, in order to stay in the round, and

- “raise”: the player bets an additional amount of money, increasing the amount of the current bet on the hand, which forces opponents to either fold, call (bet more to match the additional amount), or raise the bet.

Players may use the cards in their hand in addition to “community” cards, which are dealt face-up by the dealer and are available to all players, to create the best hand. If, at the end of the final round of betting, more than one player remains, the player with the highest hand is awarded the central pot.

The description at paragraph 5 further discloses that there exists a number of casino games, such as Pai Gow poker, in which a player is dealt a large initial hand and must split this initial hand into two smaller hands to be sequentially played. Pai Gow poker is played against the casino, and involves only a single bet which occurs before cards are dealt. There are no betting rounds. Players are dealt an initial hand of seven cards, which are split into 2-card and 5-card smaller hands. Each smaller hand is scored against the dealer’s corresponding 2-card and 5-card hands. The winner of each hand wins half the bet.

It is therefore our preliminary view that, in addition to the common general knowledge cited in *CD 1670* and reproduced above, the following also form part of the common general knowledge of the skilled person:

- The rules of standard games of poker including Texas Hold’em and Pai Gow poker;
- Buy-in rules including ante and blind bets;
- Betting rules including actions that a player may take at each round including check, fold, call and raise actions;
- The use of community cards, cards that are dealt face-up in the middle of the table and are shared by all players to create the best possible hand;
- The standard hierarchy of 5-card poker hands from highest to lowest value as: Royal Flush, Straight Flush, Four-of-a-Kind, Full House, Flush, Straight, Three-of-a-Kind, Two Pair, Pair, and High Card.

### *The disclosure*

Having identified the person skilled in the art and their relevant common general knowledge, we assess the skilled person's understanding of the invention by examining the disclosure.

According to the description, prospective casino game players look for new card games that are easy to learn yet challenging and rewarding. Casinos and gambling establishments are also interested in card games that attract new players, create player loyalty and increase revenues to the casinos and gambling establishments (para 2). In order to provide a higher level of excitement and complexity that is not possible in a standard poker game (para 5), the application discloses a new poker game that consists of a combination of Texas Hold'em and Pai Gow poker with additional features (para 6). The specification states that the disclosed game may be played either with a standard deck of physical cards or on a computerized system.

Similar to Pai Gow poker, the invention requires players to split their initial cards into two hands, and play sequential sub-games with their first and second hands. The first sub-game is similar to Texas Hold'em, where players use their first hand in combination with a first set of community cards to place bets over a number of betting rounds, and ultimately win a first pot. The second sub-game is played similarly as well, where over a number of betting rounds, players use their second hand in combination with the first set of community cards, and if applicable an additional set of community cards, to place bets. A winner of the second sub-game is ultimately declared. The winner then plays against the dealer's "showdown" hand, which has the same number of cards as the player's second hand. In the showdown round, face-up community cards are available to the dealer and the second sub-game winner to make the best hand. If the player wins, they take the pot, consisting of the entire second pot. However, if the dealer ties or beats the player, the second pot is split between the player who won the second sub-game and a "holdover" pot, which is added to the pot for the second sub-game pot of subsequent games (para 4, 6, 12).

The description states that the disclosed game would allow players to be involved until the end of the game by having a final "showdown" hand, where losing players maintain a stake in the game as they still have a chance to win a large pot if they win the subsequent second sub-game (para 6).

According to the description, the invention provides a poker game that creates a new math and fresh strategies from prior poker games, and encourages larger pots (paras 6, 14). It also provides two or more rounds of play for each dealt hand, leading to two or more pots that may be won, and possibly different winners for each pot per dealt hand (para 14). The disclosed poker game also allows additional bets per deal in comparison to some known poker games such as Texas Hold'em and Omaha. For example, in a 7-card embodiment, there would be up to five betting rounds per hand, with a minimum of two betting rounds and a "showdown" round, whereas in Texas Hold'em there would only be up to 4 betting rounds. It further allows the possibility for all betting rounds to occur, even if the first sub-game ends before all betting rounds are completed, the remaining betting rounds are done in the second sub-game in order for the remaining community cards to be dealt (para 32).

With respect to the computer implementation of the disclosed game, the description states that it is understood that the game can be played on electronic video poker gaming machines, on linked electronic video poker gaming machines, electronically from home through the internet, or via handheld electronic devices which may be connected to other nearby devices or to a central device such as mobile phones, palm computers or any mobile electronic device that may connect to other devices (para 13). The only other reference to a computer implementation of the disclosed poker game appears to be in paragraph 22 which mentions that a computer program may act as a dealer. The description does not disclose any details with respect to programming of the computer device to implement the disclosed poker game.

The claimed invention as defined by the claims on file is discussed below.

### *The claims on file*

The application contains 24 claims on file. We take claim 1 on file as illustrative of the invention for the purpose of this preliminary review.

Claim 1 on file reads:

1. A method of playing a wagering poker card game comprising the steps of:
  - a) providing card game apparatus including at least one physical 52 card poker deck of standard playing cards comprising four different suits of thirteen cards depicting Hearts suit of cards numbered 2 to 10, Jack, Queen, King and Ace,

thirteen cards depicting Diamonds suit of cards numbered 2 to 10, Jack, Queen, King and Ace, thirteen Spades suit of cards numbered 2 to 10, Jack Queen, King and Ace, thirteen cards depicting Club suit of cards numbered 2 to 10, Jack, Queen, King and Ace,

and allowing a plurality of players to ante at least a first buy-in bet into a first pot upon commencement of a first poker game.

and a second buy-in bet into a second pot upon commencement of a second poker game;

b) shuffling the physical number generator playing cards into a new order and the dealer dealing to each player an initial hand comprising a plurality of predetermined number of playing cards;

c) each player dividing his initial hand into a first hand and a second hand, the first hand consisting of a first plurality of predetermined number of playing cards and corresponding to said first pot and the second hand consisting of a second plurality of predetermined number of playing cards and corresponding to said second pot;

d) the players playing a first poker game using their first hand and initiating a first betting round wherein each player takes turns to Raise, Call, Fold or Check, the first betting round continues until, 1) players fold and only one player remains, in which case the remaining player wins the first pot; or 2) one player raises and all other players call or fold; or 3) all players check.

e) if two or more players are still in the hand then the dealer dealing a showdown card face-down in a designated area for a dealer's showdown hand, and the dealer dealing a first community cards face-up;

f) initiating a second round of betting, identical to the first betting round with the remaining players, if there are any remaining players, the dealer dealing a second showdown card face-down in the designated area for the dealer's showdown hand, and the dealer dealing a second community card face-up;

g) initiating a third round of betting, identical to the first and second betting rounds with the remaining players, if there are any remaining players, then the remaining players combining the cards in their first hand with the two face-up community cards to form the best possible first poker hand, the player having the best possible first poker hand winning the first pot;

h) the players then playing a second poker game using their second hand and initiating a first betting round in the second poker game wherein each player taking turns to Raise, Call, Fold or Check, if any player remains after the first betting round, the dealer discarding a burn card from the deck, and the dealer dealing a third community card face-up;

i) initiating a final betting round in the second poker game, after which the last player to raise the second pot must show his or her second hand, and the players after him or her may either fold their second hand or show their second hand, then the players each combining their second hand and the three face-up community cards to form a second poker hand, the player having the highest second poker hand is the winner of the second poker game, and awarding a first portion of the second pot to the winning player of the second poker game;

j) comparing the winning player's second poker hand with the dealer's showdown hand comprising the two showdown cards and the three face-up community cards to form a five-card dealer's showdown hand, and awarding the second winning player the remaining portion of the second pot if the winning player's hand of the second poker game has a higher poker hand ranking than the dealer's showdown hand, and wherein the remaining portion of the second pot not won by the winner of the second poker game in a showdown hand is allocated to a showdown pot of a further game played thereafter;

k) if a winner is declared in the first poker game before a prescribed number of community cards are exposed or betting rounds completed then the remaining community cards and associated betting rounds are transferred to the second poker game;

l) if a winner is declared in the second poker game before revealing all the community cards, the dealer will proceed to create the dealer's showdown hand and reveal any further community cards with no associated betting rounds.

Dependent claims 2-21 on file recite further limitations regarding the claimed wagering poker card game, including details related to the number of cards in players' initial, first and second hands, number of community cards, number of cards in the dealer's showdown hand, amount for buy-in bets, details of sub-games involving players' first and second hands and the dealer's showdown hand, and the addition of a joker or wild card to represent any card in the deck.

While claims 1-21 are directed to a method of playing the poker game with physical cards, claims 22-24 are directed to a computerized implementation of the game in claim 1.

Claim 22 is directed to a method of playing the game in claim 1 on a computer device. Claim 23 recites that the computer device is a personal computing device or a casino-type gaming machine. Claim 24 specifies that the computer device is operated wirelessly over the internet to connect a group of players virtually.

### *Meaning of terms*

Though no issues appear to have been raised during the prosecution with regard to the meaning or scope of any of the terms used in the claims on file, in line with the Court's reasons in *Dusome*, we provide an assessment with respect to the meaning of terms used in the claims in order to identify the skilled person's understanding of the elements of the claimed invention as contemplated by the Applicant and which define the subject-matter of the claims.

In our preliminary view, the person skilled in the art, considering the disclosure of the application in light of the relevant common general knowledge, would construe the meaning of the following terms recited in the claims on file as follows:

- "first buy-in bet": the claims on file are directed to an ante buy-in system. A first buy-in bet is the set amount of money each player is required to put into the first pot (description: paras 11, 22).

- “second buy-in bet”: the set amount of money that each player is required to put into the second pot (description: paras 11, 22).
- “the physical number generator playing cards”: The description and drawings do not mention this term. The description discloses the use of physical cards and a computer implementation with virtual representations of cards. However, given that this term is recited in claim 1 on file which specifies the use of physical cards, not a computer implementation of the game, it is our preliminary view that a person skilled in the art would construe the term “the physical number generator playing cards” to mean a standard deck of 52 physical cards.
- poker hand rankings: the claims on file refer to players with the “best possible first poker hand” / “highest second poker hand” / “higher poker hand ranking” winning. The description at paragraph 3 discloses that “a player must use his available cards to form the highest value five-card hand” based on the standard poker hand hierarchy. The description discloses embodiments with different number of cards in the initial hand, where in each of the first sub-game, second sub-game and the showdown round, the player with the best five-card poker hand wins (paras 27, 30, 37, 38, 41). It is therefore our preliminary view that the skilled person would construe the ranking of poker hands in the claims on file to correspond to the standard poker hand rankings based on the best five-card combination of the player’s in-hand cards and shared community cards on the table.
- “showdown”: a final round that is played at the end of the claimed poker game, where the winner of the second sub-game plays against the dealer’s showdown hand. The dealer’s showdown in-hand cards consists of face-down cards given to the dealer throughout the game. The dealer and the winner of the second sub-game have the same number of cards in their hand for the showdown round. The dealer and the winner would combine their in-hand cards with the face-up community cards to make the best poker hand in accordance with the rankings explained above (paras 4, 6).
- “showdown pot”: the portion of the second pot (pot for the second sub-game) that does not get awarded to the winner of the second sub-game if the winner does not beat the dealer’s showdown hand. The showdown pot is held in trust by the dealer and is added to the second pot of subsequent hands (paras 12, 30).

Furthermore, we address a number of terms in the claims on file to remove any uncertainty in their meaning.

Claims 1, 8, 15, 18 on file mention first/second poker games, while claims 14-18, 21 on file recite first/second sub-games. In our preliminary view, the skilled person would construe the two sets of terms to refer to the same portion of the overall game, i.e. sub-games that are played with the first and second hands respectively.

Claim 19 on file recites “dealer deals a number of cards equal to the number of cards in the second round to a “showdown ” [sic] hand”. As explained under the “Indefiniteness” section below, claim 1 on file, on which claim 19 indirectly depends, refers to rounds only in terms of betting rounds within the first and second sub-games. It is therefore our preliminary view that the skilled person would construe all the iterations of the term “second round” in claim 19 on file to refer to the previously claimed second poker game or sub-game. Similarly, claim 21 on file recites “betting rounds from the first round being transferred to the second round”. It is our preliminary view that the skilled person would construe the terms “first round” and “second round” to refer to the previously claimed first and second poker game or sub-games, respectively.

Claim 22 on file recites “wherein a computer device...providing a non-transitory computer readable medium coded with instructions comprising: a processor...a display...and input means...; wherein the card game and representation of a 52 card playing deck stored thereon entails the processor to perform the steps of claim 1.” It is our preliminary view that the skilled person would construe this phrase to mean that the computer device comprises the display, the input means, the processor and the computer readable medium coded with instructions, which when executed instruct the processor to perform the steps of claim 1. Additionally, as explained under the “Indefiniteness” section below, it is our preliminary view that claim 22 and its dependent claims 23-24 are indefinite as it is not clear whether these claims are directed to the game being played using physical cards or on a computerized system. However, as explained above, despite this ambiguity, in our preliminary view the skilled person, given the language of claims 22-24, would reasonably construe these claims to be directed to a computerized implementation of the poker game defined by claim 1, not the use of physical cards.

*Essential elements*

As explained under the “Legal principles” section, the identification of essential and non-essential elements of a claim depends on the intent in the language of the claim and on the obvious substitutability of the elements.

Starting from the intent of the inventor as expressed in or inferred from the language of the claims, we also consider the specification and the drawings to determine if the inventor establishes any of the claimed elements to be non-essential.

We first consider the intent expressed in, or inferred from, the language of the claims on file.

Claims 1-21 on file are directed to a method of playing a wagering poker game using a standard deck of physical cards. It is our preliminary view that the skilled person would understand that there is no use of language in the claims indicating that any of the claimed elements are optional, a preferred embodiment, or one of a list of alternatives. Similarly, the intent expressed in, or inferred from, the language of claims 1-21 on file, in light of the above discussion on the disclosure and the meaning of the claim terms, does not indicate that any of the claimed features were intended to be non-essential. Therefore, in our preliminary view, there is no indication that a purposive construction of the words of claims 1-21 indicate that any of the claimed features were clearly not intended to be essential.

Claims 22-24 on file recite a computerized implementation of the game in claim 1. As indicated above, although these claims directly or indirectly depend on claim 1 on file, which recites the use of physical cards, in our preliminary view the skilled person would construe these claims as being directed to a computerized implementation with virtual representations of the cards.

In our preliminary view, the skilled person would understand that there is no use of language in claims 22-24 on file indicating that the Applicant intended any of the claimed elements to be optional or a preferred embodiment. Although claim 23 on file includes a list of alternative embodiments, it is our preliminary view that the person skilled in the art would understand that the Applicant intended that each alternative or combination of alternatives, when chosen, would be an essential feature of the claim. Similarly, the intent expressed in, or inferred from, the language of claims 22-24 on file, in light of the above discussion on the disclosure and the meaning of the claim terms, does not indicate that

any of the claimed features were intended to be non-essential. Therefore, in our preliminary view, there is no indication that a purposive construction of the words of claims 22-24 indicate that any of the claimed features were clearly not intended to be essential.

As explained under the “Legal principles” section above, a claimed feature is considered essential if its purposive construction indicates that it was intended to be essential. Given our preliminary assessment above with respect to the first part of the non-essentiality test that all the claimed elements as purposively construed were intended to be essential, it is our preliminary view that the skilled person would consider all the claimed elements to be essential.

However, for completeness, we also consider the second part of the non-essentiality test, which asks whether, at the publication date, the skilled person would have considered that a particular element could be substituted or omitted without affecting the working of the invention. That is, had the skilled person at that time been told of both the element specified in the claim and a variant, and asked whether the variant would obviously work in the same way, the answer would be yes. Work in the same way is taken to mean that the variant would perform substantially the same function in substantially the same way to obtain substantially the same result (*Free World Trust* at para 55).

Claims 1-21 on file are directed to a method of playing a wagering poker game using a standard deck of physical cards while claims 22-24 on file recite a computerized implementation of the game in claim 1. In our preliminary view, there is no indication that the skilled person, considering the disclosure in view of the relevant common general knowledge, would have appreciated that any of the claimed features, including the claimed rules of the game and the claimed form of cards (physical in claims 1-21; virtual representations in claims 22-24), could be omitted or substituted with other means that would perform substantially the same function in substantially the same way to obtain substantially the same result. In our preliminary view, the skilled person would not have considered the claimed rules of the game and the claimed form of cards to be omittable or substitutable without affecting the working of the invention.

Therefore, it is our preliminary view that the person skilled in the art would consider all the elements in the claims on file to be essential.

*The invention as claimed*

Having assessed the disclosure and the claims on file from the perspective of the person skilled in the art in view of the relevant common general knowledge, we provide below our preliminary view of the skilled person's understanding of the nature of the claimed invention.

In light of the above, it is our preliminary view that the skilled person considering the disclosure would understand the nature of the invention in the claims on file to involve a poker game, played with either physical cards or on a computer, which combines the rules of Texas Hold'em and Pai Gow poker with additional features including a showdown round with the dealer.

Furthermore, as explained under the "Legal principles" section above, *Dusome* at paragraph 45 states that "determining what in good faith the inventor actually discovered is a question that forms part of purposive construction". This is in line with the Court's statement in *Schlumberger* at page 847 that "[i]n order to determine whether the application discloses a patentable invention, it is first necessary to determine what, according to the application, has been discovered".

With respect to the physical card implementation of the poker game in claims 1-21, given that the physical cards are standard and their use to play poker games is part of the common general knowledge at the relevant time, it is our preliminary view that the skilled person, considering the whole disclosure and the relevant common general knowledge, would understand the discovery to lie in the set of rules governing the poker game.

With respect to the computer implementation of the poker game, as explained under the "Legal principles" section above, a number of factors, such as the nature of the computer components and the steps they perform as well as their impact on the functioning of the computer, may be considered to inform the nature of the invention. As explained under "The disclosure" section above, the description does not disclose details with respect to the claimed computer device or its programming to implement the poker game. There is no suggestion in the specification that the claimed computer device or any of its components, such as the processor, computer readable medium, input means, display and wireless operation means, represent anything other than well-known computer components. Similarly, there is no suggestion in the specification that the claimed computer steps

performed by these components, such as executing programmable instructions to perform the steps of claim 1 or operating the computer device wirelessly over the internet to connect a group of players virtually, represent anything other than the well-known functions of a generic computer system.

Furthermore, there is no indication in the specification that the functioning of the computer device is improved by the claimed steps. There is no suggestion in the specification that there were any challenges or deficiencies in the operation of a computer system used to implement the claimed poker game. There is no detailed discussion of the computer implementation of the claimed poker game in the specification that would suggest any difficulties would be overcome in that respect. Therefore, in our preliminary view, the skilled person would consider that the claimed computer elements are well-known components merely used in a well-known manner, and that the claimed method steps do not result in any improvements to the functioning of the computer device.

In light of the above and with respect to the computer implementation of the poker game in claims 22-24, it is our preliminary view that the skilled person considering the whole of the disclosure and the relevant common general knowledge would understand the discovery to lie in the algorithm or set of programmable instructions which is coded on the non-transitory computer readable medium and executed by the processor to implement the claimed invention, the algorithm corresponding to the set of rules governing the poker game.

Therefore, in our preliminary view, the skilled person, considering the whole disclosure in light of the relevant common general knowledge at the publication date, would understand the invention defined by the claims on file to be a poker game governed by a specific set of rules, which consists of players splitting their initial hand into two hands, playing sequential sub-games with the two hands as well as a final showdown round between the winner of the second sub-game and the dealer. The specification indicates that the poker game may be implemented with a standard 52-card deck or on a computer device, both embodiments being reflected in the claims on file. Both the standard deck of cards and the computer device (and its components) are well-known implementation instruments which, in our preliminary view, the skilled person would not regard as supplying the discovery. In our preliminary view, the skilled person would consider what has been discovered to lie in the claimed set of rules itself, not the well-known physical or virtual means by which those rules are carried out.

## PATENTABLE SUBJECT-MATTER

We preliminarily consider the claims on file to define unpatentable subject-matter.

### Legal principles

Once a purposive construction of the claims is performed and the subject-matter defined by the claims is determined, a patentable subject-matter assessment can be conducted. This requires assessing whether the claimed subject-matter, as purposively construed, meets the definition of “invention” under section 2 of the *Patent Act* and does not otherwise fall within a statutory or judicially-excluded category.

Any patentable invention must fall within the definition set out in section 2 of the *Patent Act*, including falling within one of the categories defined therein:

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

Subsection 27(8) of the *Patent Act* also prescribes that:

No patent shall be granted for any mere scientific principle or abstract theorem.

*Shell Oil Co of Canada v Canada (Commissioner of Patents)*, [1982] 2 S.C.R. 536 [*Shell Oil*] is the starting point for the definition of a patentable “art” and focuses the inquiry on whether there is a practical application of the discovery or idea (*Amazon* at para 50, citing *Amazon.com, Inc v Canada (Attorney General)*, 2010 FC 1011 at para 50). Later Courts have interpreted *Shell Oil* as establishing that a process or method is a patentable art if it (i) is not a disembodied idea but has a method of practical application; (ii) is a new and innovative method of applying skill or knowledge, and (iii) has a result or effect that is commercially useful (*Amazon* at para 50; *Progressive Games, Inc v Canada (Commissioner of Patents)* (1999), 177 FTR 241 (FC) [*Progressive Games FC*] at para 16; *Dusome* at para 42).

In accordance with *Shell Oil* at 554, “[a] disembodied idea is not *per se* patentable. But it will be patentable if it has a method of practical application.”

The Federal Court of Appeal in *Amazon* at paragraphs 61, 66 and 69 clarified that an

abstract idea does not become patentable subject-matter merely because it has a practical application. It is implicit in the definition of “invention” that patentable subject-matter must be something with physical existence, or something that manifests a discernible effect or change. This physicality requirement cannot be met merely by the fact that the claimed invention has a practical application. This was the situation in *Schlumberger* where the claims “were not saved by the fact that they contemplated the use of a physical tool, a computer, to give the novel mathematical formula a practical application”.

A relevant and necessary question in understanding a claimed invention so as to assess patentable subject-matter is what in good faith the inventor actually invented or discovered (*Amazon* at para 42; *Benjamin Moore* at para 68). As explained above under “Purposive construction”, this is in line with the Court’s statement in *Schlumberger* at 847 that “in order to determine whether the application discloses a patentable invention, it is first necessary to determine what, according to the application, has been discovered”. This determination is grounded in a purposive construction of the claims (*Amazon* at para 43; *Dusome* at para 45).

With respect to the three elements of “art” in *Shell Oil* as mentioned above, *Amazon* at paragraph 51 stated that they reflect the statutory requirement of novelty, utility, non-obviousness, and the prohibition on the granting of a patent for a mere scientific principle or abstract. Similarly, the Federal Court of Appeal in *Benjamin Moore* at paragraph 65, considering the approach in *Shell Oil*, stated that novelty and ingenuity were relevant considerations in determining whether the addition to human knowledge fell within the statutory definition of “invention” at section 2, which refers to “new and useful art”.

As noted in *Benjamin Moore* at paragraph 94, “if the only new knowledge lies in the method itself, it is the method that must be patentable subject matter. If, however, the new knowledge is simply the use of a well-known instrument (a book or computer) to implement this method, then it will likely not fall under the definition found at section 2 without something more to meet the requirement described at paragraph 66 of *Amazon*.”

With respect to the use of well-known instruments or tools, such as a computer to implement a method, the mere presence of such instruments as essential elements may not be sufficient to meet the physicality requirement (*Amazon* at para 69; *Benjamin Moore* at para 87). In such cases, an assessment with respect to the *Schlumberger* question is conducted to determine whether the purposive construction of the claims leads to the

conclusion that the claimed invention is distinguishable from *Schlumberger* where “the Court concluded that the only novel aspect of the claimed invention was the mathematical formula which, as a ‘mere scientific principle or abstract theorem’, cannot be the subject of a patent because of the prohibition in subsection 27(8)” (*Amazon* para 62). This is in line with *Dusome* at paragraph 48 which states that “the Commissioner should consider whether *Schlumberger* is distinguishable because the rules of the game and the use of playing cards and a computer are not the whole invention but only one of a number of essential elements in a novel combination”.

With respect to card games, *Progressive Games, Inc v Canada (Commissioner of Patents)*, 2000 CanLII 16577 (FCA) [*Progressive Games FCA*] “considered the changes in the method of playing poker by comparing them to the poker game as it was generally known, and affirmed the Federal Court’s conclusion that although the changes involved the physical manipulation of cards (allegedly a practical application), this was insufficient to qualify them as an invention as they were not a ‘contribution or addition to the cumulative wisdom on the subject of games’ within the meaning of *Shell Oil*” (*Benjamin Moore* at para 66). *Progressive Games FCA* also noted that “we do not want to be taken as deciding that more substantial changes in the existing game would have changed the result.”

## **Analysis**

Based on the purposive construction of the claims on file, and having identified their essential elements and the nature of the discovery, it is necessary to determine whether the subject-matter defined by the claims is directed to patentable subject-matter, in compliance with section 2 of the *Patent Act* and statutory and judicial exclusions including subsection 27(8) of the *Patent Act*.

### ***Claims 1-21***

Claims 1-21 on file are directed to a method of playing a wagering poker game with physical cards.

We first consider independent claim 1 on file. As purposively construed, the subject-matter defined by independent claim 1 on file is a method of playing a wagering poker game and

includes a set of rules for the game and a standard deck of physical cards as essential elements.

As discussed under the “Legal principles” section above, the Courts have indicated that determining what in good faith the inventor actually invented or discovered is a question that forms part of purposive construction (*Dusome* at para 45) and that such a determination is a relevant and necessary question when assessing patentable subject-matter (*Benjamin Moore* at para 68).

As discussed under the “Purposive construction” section above, it was our preliminary view that the claimed physical cards belong to a standard deck of cards and that the skilled person would consider the discovery or new knowledge to lie in the specific set of rules governing the claimed poker game.

As explained in the “Legal principles” section above, although the *Shell Oil* test is the starting point for the definition of “art”, the Federal Court of Appeal in *Amazon* clarified that a physicality requirement is implicit in the definition of “invention” under section 2 of the *Patent Act* (*Amazon* at para 66), and that this requirement cannot be met merely by the fact that the claimed invention has a practical application (*Amazon* at para 69). Particularly for cases where an abstract idea is implemented using a well-known tool, the Federal Court of Appeal in *Benjamin Moore* provided the following guidance at paragraph 94: if the only new knowledge lies in an abstract method itself, it is the method that must be patentable subject-matter. If, however, the new knowledge is simply the use of a well-known tool, such as a book or a computer, to implement this method, then the physicality requirement will likely not be satisfied without something more.

As explained above, the physical cards are nothing more than a well-known tool, albeit essential elements in the claim as intended by the Applicant, that are simply used to implement the game. In our preliminary view, the skilled person would not consider the use of a standard deck of cards to implement the game to alter the nature of the discovery identified above. The use of the physical cards does not, in itself, add to human knowledge on the subject of poker games. As explained above, the skilled person would consider the new knowledge or discovery to lie in the set of rules for the claimed game of poker. These rules by themselves are abstract in nature. In view of the guidance in *Benjamin Moore* at paragraph 94, it is our preliminary view that since the new knowledge or discovery is an abstract idea (a set of rules governing a poker game), the use of a well-known tool (a

standard deck of physical cards) to implement this abstract idea would not satisfy the physicality requirement without something more. Although claim 1 on file may be considered to involve a practical application in the form of the physical manipulation of a standard deck of cards, it is our preliminary view that the claimed subject-matter as purposively construed does not provide the “something more” to which the Court in *Benjamin Moore* refers to provide a practical application that meets the physicality requirement in *Amazon*.

The above assessment is in line with the inquiry suggested in *Dusome* at paragraph 48, which stated that based on a purposive construction of the claims, “the Commissioner will need to determine whether the only inventive aspect of claims 1-21 are the rules of a game.... Alternatively, the Commissioner should consider whether *Schlumberger* is distinguishable because the rules of the game and the use of playing cards and a computer are not the whole invention but only one of a number of essential elements in a novel combination”.

With respect to *Schlumberger*, *Benjamin Moore* at paragraph 87 stated that:

*Schlumberger* is an example of a case that is found at one end of this spectrum, where the computer was nothing more than a tool, albeit an essential one in the claim as drafted by the patentee, that simply manipulated information faster than a human could. This is why our Court in *Amazon* at paragraph 62 noted that there was nothing novel in the claimed invention in *Schlumberger* other than the mathematical formula. Using the Court’s terminology in *Shell Oil*, I would say that there was no new knowledge other than that the use of a computer can manipulate information faster and more efficiently than a human, which did not add anything to human wisdom on the subject.

It also stated in paragraph 69 that:

In *Amazon*, our Court noted that in *Schlumberger* the particular patent application had failed for want of patentable subject matter because the only novel aspect of the claimed invention was the mathematical formulae (*Amazon* at para. 62). It also referred to the “inventive aspect” of the claimed invention at paragraph 63.

In our preliminary view, the subject-matter of claim 1 on file as purposively construed is not distinguishable from the situation in *Schlumberger*. As discussed above, the skilled person would consider the discovery or new knowledge in claim 1 on file to lie in the rules of a game. The subject-matter of claim 1 on file as purposively construed involves the physical manipulation of a standard deck of cards to give the set of rules for the poker game a practical application. However, a standard deck of physical cards is nothing more than a well-known tool, albeit an essential one in the claim, that is used to simply implement the game. The skilled person would not consider the use of a standard deck of physical cards to play the claimed poker game to add to human wisdom on the subject of poker games at the relevant date. Like in *Schlumberger*, there is no novel or inventive aspect in the claimed invention other than the set of rules for the poker game.

It is therefore our preliminary view that the subject-matter of claim 1 on file as purposively construed is not distinguishable from *Schlumberger* and does not provide the “something more” to which the Court in *Benjamin Moore* refers in order to satisfy the physicality requirement in *Amazon*.

Dependent claims 2-21 on file recite further limitations regarding the claimed method of playing a wagering poker card game, including details related to the number of cards in players’ initial, first and second hands, number of community cards, number of cards in the dealer’s showdown hand, amount for buy-in bets, details of sub-games involving players’ first and second hands and the dealer’s showdown hand, and the addition of a joker or wild card to represent any card in the deck. It is our preliminary view that the skilled person would consider that the new knowledge or discovery in the dependent claims lies in the set of rules specified in each of these claims, and that the dependent claims do not add any features that would distinguish them from *Schlumberger* and provide the “something more” in *Benjamin Moore* in order to satisfy the physicality requirement in *Amazon* and render these claims patentable.

It is therefore our preliminary view that the subject-matter of claims 1-21 on file as purposively construed is not distinguishable from *Schlumberger*; it does not satisfy the physicality requirement in *Amazon* and is not directed to patentable subject-matter.

### *Claims 22-24*

Claims 22-24 on file are directed to a computerized implementation of the poker game defined in claim 1 on file.

As explained under “Purposive construction” above, although these claims directly or indirectly depend on claim 1 on file which recites the use of physical cards, it is our preliminary view that the skilled person would construe claims 22-24 as being directed to a computerized implementation with only virtual representations of the cards.

We first consider claim 22 on file. As purposively construed, the subject-matter defined by claim 22 on file is a computerized method of playing the poker game in claim 1, and includes as essential elements a set of rules governing the poker game and a computer device, comprising a number of components.

Similar to the above patentable subject-matter assessment of claims 1-21, we preliminarily consider, based on the purposive construction of claim 22, what according to the application has been discovered (*Amazon* at paras 42-44; *Dusome* at para 45; *Benjamin Moore* at para 68 referring to *Schlumberger*).

As discussed under “Purposive construction” above, in our preliminary view, the skilled person would consider the computerized implementation in claim 22 on file to involve programming an algorithm into the claimed computer device to cause it to take the steps necessary to implement the poker game in claim 1. There are no physical elements in claim 22 on file beyond the computer device and its components, including a processor, computer readable medium, input means and a display screen. And, the skilled person would consider that the claimed computer elements are well-known components merely used in a well-known manner and that the claimed steps do not result in any improvements to the functioning of the computer.

It was therefore our preliminary view as explained under the “Purposive construction” section above that the skilled person would consider the discovery or new knowledge to lie in the algorithm or set of programmable instructions which is coded on the non-transitory computer readable medium and executed by the processor to implement the claimed invention, the algorithm corresponding to the set of rules governing the poker game. This algorithm or set of instructions is abstract in nature.

As explained in *Amazon* (paras 61-63, 66, 69), programming an abstract idea onto a well-known computer would not be sufficient to satisfy the physicality requirement implicit in the definition of “invention” in section 2 of the *Patent Act*. This was the situation in *Schlumberger* where nothing other than an abstract algorithm, a mathematical formula, was discovered and the claims “were not saved by the fact that they contemplated the use of a physical tool, a computer, to give the novel mathematical formula a practical application” (*Amazon* at para 69).

In light of our preliminary view that the essential elements of claim 22 on file do not include any physical elements outside the well-known computer device and its components which operate in a well-known manner without any improvements to their operation, and given that the mere use of well-known computer elements may not be sufficient to meet the physicality requirement (*Amazon* at para 69; *Benjamin Moore* at para 87), it is important to ask the *Schlumberger* question in order to determine whether claim 22 on file meets the physicality requirement in *Amazon*

This is in line with the guidance in *Dusome* at paragraph 48 that, based on a purposive construction of the claims, “the Commissioner will need to determine...whether the only inventive aspect of claims 22-24 is the algorithm that is programmed into the computer to cause it to take the necessary steps to accomplish the subject-matter defined by the claims (which may or may not be new rules of a game). Alternatively, the Commissioner should consider whether *Schlumberger* is distinguishable because the rules of the game and the use of playing cards and a computer are not the whole invention but only one of a number of essential elements in a novel combination.”

In our preliminary view, the subject-matter of claim 22 on file as purposively construed cannot be distinguished from the situation in *Schlumberger*, where the computer was merely acting in a well-known manner. In our preliminary view, like in *Schlumberger*, the skilled person would consider the only new knowledge, or novel and inventive aspect, of claim 22 to lie in the algorithm or set of programmable instructions which is coded on the non-transitory computer readable medium and executed by the processor to implement the poker game defined in claim 1.

In line with the guidance in *Benjamin Moore* at paragraph 94, since the new knowledge is an abstract idea (a set of rules governing a poker game), the use of a well-known tool (a well-known computer operating in a well-known manner) to implement this abstract idea would not satisfy the physicality requirement without something more. It is our preliminary

view that the subject-matter of claim 22 on file as purposively construed does not provide the “something more” to which the Court in *Benjamin Moore* refers in order to meet the physicality requirement in *Amazon*.

The Applicant, in the submissions received on June 7, 2022 at page 35, stated that:

...the instant invention is distinguishable from Schlumberger and is not a set of rules or algorithm that can be programmed into a general purpose computer and turned on to achieve a general result. The instant invention is the novel gaming method, which when programmed into a computer/server system creates a new specifically distinct machine to display the cards and deploy the unique method; which in combination with the internet, physical participants and their physical computer components to send or receive and display inputs (bet, fold, raise, check, fold) and outputs (chip stack and pot winnings) to calculate and process the novel gaming method to achieve a unique result (showdown hand) which is a combination of physical and abstract elements acting together to perform the novel gaming method (the operation of a poker event).

In the submissions received on March 22, 2024, in addition to similar arguments as above, the Applicant submitted at page 51 the following:

The computer is not a generic computer that adds and subtracts numbers as per Schlumberger but a unique specifically programmed computer/server that is physically altered with permanently installed memory storage which allows the practical application of the poker event.

We respectfully disagree. As discussed under “Purposive construction”, there is no suggestion in the specification that the claimed computer device or any of its components represent anything other than well-known computer components operating in a well-known manner. There is no suggestion in the specification that there were any challenges or deficiencies in the operation of a computer system used to implement the claimed poker game. There is no detailed discussion of the computer implementation of the claimed poker game in the specification that would suggest any difficulties would be overcome in that respect. Using the terminology in the Applicant’s submission above, the “new specifically distinct machine” is merely a general purpose well-known computer that is

specifically programmed to implement the claimed poker game. In our preliminary view, this is no different than the well-known computer in *Schlumberger* being considered a new specifically distinct machine as it was specifically programmed to implement a mathematical algorithm.

The Applicant also stated in their submissions received on June 7, 2022 at page 24 that:

The computer functioning is also inherently improved by the programmed instant invention, as the gaming mechanics run two games at the same time, the number of betting rounds is more, there could be two winners per round, the new specific computer allows the creation of a novel "showdown hand", the improvement is a better experience for the participants allowing them to be involved in the event until the end of the round. Basically, any improvement in the "computer" is a somewhat subjective assumption and has no place in the Patent Act or in Law. Once it is programmed it is a **new** specific computer machine. [emphasis in the original]

We respectfully disagree that the functioning of the computer is inherently improved in the claimed invention simply because the computer/server can run two games at once or because the claimed poker game provides an improved experience for the participants. We preliminarily note that one consideration that may inform whether a computer-implemented invention is distinguishable from *Schlumberger* and satisfies the physicality requirement is whether executing the algorithm by the computer results in any improvement to the functioning of the computer (*Choueifaty* at para 42). In our preliminary view, improvements to the functioning of the computer would include such examples as improvement in memory usage or processing speed. As discussed under "Purposive construction", there is no suggestion in the specification that the claimed invention results in an improvement in the functioning of the computer.

It is therefore our preliminary view that the subject-matter of claim 22 on file as purposively construed is not distinguishable from *Schlumberger* and does not provide the "something more" in *Benjamin Moore* in order to satisfy the physicality requirement in *Amazon*.

Dependent claim 23 recites that the computer device is a personal computing device or a casino-type gaming machine. Dependent claim 24 specifies that the computer device is operated wirelessly over the internet to connect a group of players virtually. As explained

under “Purposive construction”, the skilled person would consider that the claimed computer elements are well-known components merely used in a well-known manner, and that the claimed method steps do not result in any improvements to the functioning of the computer device. It is also our preliminary view that the skilled person would consider that the new knowledge or discovery in the dependent claims lies in the set of rules governing the poker game defined in claim 1 on file, and that the dependent claims do not add any features that would distinguish them from *Schlumberger*, and provide the “something more” in *Benjamin Moore* in order to satisfy the physicality requirement in *Amazon* and render these claims patentable.

It is therefore our preliminary view that the subject-matter of claims 22-24 on file as purposively construed is not distinguishable from *Schlumberger*; it does not satisfy the physicality requirement in *Amazon* and is not directed to patentable subject-matter.

In light of the above, it is our preliminary view that claims 1-24 on file are directed to non-patentable subject-matter, falling outside the definition of “invention” under section 2 of the *Patent Act*. For the same reasons, where the subject-matter defined by the claims amounts to the implementation of the abstract rules of the poker game using well-known instruments without meeting the physicality requirements, it is our preliminary view that the claims are also excluded under subsection 27(8) of the *Patent Act*.

### *Progressive Games Considerations*

For completeness, we consider jurisprudence specifically addressing a card-game invention as articulated in *Progressive Games FC*, where patentable subject-matter was the only issue before the Court and the Court did not consider a method of playing poker to meet the definition of “art” or “process” under section 2 of the *Patent Act*. Although each case turns on its own facts, given the similarity between the two cases, below we assess the instant application with respect to the situation in *Progressive Games*.

In that case, the claimed game was a modified version of a five-card stud poker game, where each player plays their poker hand against a poker hand held by the house, and in which a player receives a bonus payment based on the type of poker hand that a player holds (*Progressive Games FC* at paras 2-3). The method is summarized as follows:

In a preferred method of play, after each player places an ante in a designed location, the dealer deals five cards to each player and to himself; all cards being dealt face down except for one of the dealer's cards. Each player views his hand and then decides whether to continue to play by making an additional bet or to fold or drop (i.e. retire), in which case he loses his ante. The dealer then reveals his entire hand; if the dealer's hand does not have a poker value of at least Ace-King, then the dealer is not permitted to continue to play. In this case, the dealer pays even money on the remaining player's antes, and returns their bets to them. If the dealer's hand has a poker value of Ace-King or better, the dealer compares his hand to each player, paying or collecting the bets as appropriate. The dealer also pays odds of more than even money on each winning player's hand of two pairs or better according to a bonus payment schedule.

As discussed under the “Legal principles” section above, *Shell Oil* is the starting point for the definition of a patentable “art”. Its test for patentable “art” contains the following elements: (i) it must not be a disembodied idea but have a method of practical application; (ii) it must be a new and innovative method of applying skill or knowledge, and (iii) it must have a commercially useful result (*Amazon* at para 50; *Progressive Games FC* at para 16).

With respect to the first criteria in the *Shell Oil* test, *Progressive Games FC* at paragraph 18 indicated that the claimed invention had a practical application as it involved the physical manipulation of cards. The Federal Court of Appeal in *Benjamin Moore* stated in paragraph 66 that the physical manipulation of cards in *Progressive Games FCA* was “allegedly a practical application”, raising the possibility in our preliminary view that the physical manipulation of cards in a poker game may not be sufficient to meet the practical application requirements in *Shell Oil*.

With respect to the practical application requirement in *Shell Oil*, the Federal Court of Appeal in *Amazon* stated at paragraph 66 that:

...the “practical application” requirement “ensures that something which is a mere idea or discovery is not patented – it must be concrete and tangible. This requires some sort of manifestation or effect or change of character”...because a patent cannot be granted for an abstract idea, it is implicit in the definition of

“invention” that patentable subject matter must be something with physical existence, or something that manifests a discernible effect or change.

*Amazon* also clarified that the mere presence of a practical application is not sufficient to satisfy the physicality requirement implicit in the definition of “invention” in section 2 of the *Patent Act* (*Amazon* at paras 61, 65-66 and 69). The physicality requirement will not likely be satisfied without something more than a well-known instrument being used to implement an abstract method (*Benjamin Moore* at para 94). This was the basis for our preliminary view above that the claimed poker game, whether played with physical cards or on a computer, is not directed to patentable subject-matter.

With respect to the second criteria, the Court in *Progressive Games FC* did not consider the claimed game to conform to the method of applying skill or knowledge criteria in *Shell Oil*, stating at paragraph 20 that:

I don't believe that the Appellant's changes in the method of playing poker are a contribution or addition to the cumulative wisdom on the subject of games. In my view, those changes do not refer to “learning” or “knowledge” as commonly used in expressions such as “the state of the art” or “the prior art”.

The Court at paragraph 23 explained that:

In the present case, I believe that the Appellant's changes in the method of playing poker — i.e. by adding a new player referred to as “the house” — do not substantially modify the poker game as it exists nor do they create a new game. The Appellant's method uses the standard deck of playing cards, uses the five-card poker hand where the priority of winning hands is determined by the conventional rules of poker. Regarding the bonus payment schedule, although it can make the game more attractive to the consumer, it does not modify the way a poker game is played. The winnings that a player earns refer to wagering and not to the game itself.

The Court also did not accept the Appellant's argument that they had invented a method of using the old card game in a new way, as the use of cards for wagering in casinos, including against the house, was a known use.

As explained under the “Legal principles” section above, *Progressive Games FCA* affirmed *Progressive Games FC* and indicated at paragraph 1 that:

[*Progressive Games FC*] concluded that the Appellant’s changes in the method of playing poker did not amount to a contribution or addition to the cumulative wisdom on the subject of the game...The Appellant’s suggested game uses the standard deck of playing cards and the conventional rules of poker with a slight variation. We do not believe this amounts to a new and innovative method of applying skill or knowledge within the meaning given to those words in [*Shell Oil*].

The Court’s reasoning suggests that, although changes to the rules of play compared to existing and well-known poker games may be identified, such changes would not necessarily be considered to amount to an addition to the cumulative wisdom on the subject of poker games, or to a new and innovative method of applying skill or knowledge within the meaning of *Shell Oil*.

Regarding the second criteria asking whether it is a new and innovative method of applying skill or knowledge, *Benjamin Moore* at paragraph 67, referring to *Shell Oil* and *Progressive Games*, confirmed that concepts of novelty and ingenuity are relevant to patentable subject-matter assessment. The Court, however, indicated at paragraph 72 that “our courts have yet to deal expressly with the extent to which the consideration of these concepts [concepts of novelty and ingenuity] in application of section 2 differs from the exercises mandated by sections 28.2 and 28.3 of the Act”.

Nonetheless, we provide a preliminary comparison of the instant application with the situation in *Progressive Games FC* with respect to the second criteria in *Shell Oil*. The claimed game in the instant application is played with a standard deck of playing cards, uses a five-card poker hand where a winning hand is determined in accordance with the conventional hierarchy of five-card poker hands. The claimed poker game combines the well-known hand splitting and two sub-game features of Pai Gow poker with the well-known rules of Texas Hold’em and adds a showdown round with the dealer to create a game that is more attractive for players by creating larger pots and more betting rounds, and maintaining the players’ interest in the game until the end. In our preliminary view, the claimed games in both the instant application and *Progressive Games* use the same standard rules of poker: using standard playing cards, at each betting round players use

their in-hand cards in combination with any available community cards to make a five-card hand where a winning hand at each round is determined in accordance with the conventional hierarchy of five-card poker hands. What is different is the manner in which cards are dealt out to players and the number and mechanics of betting rounds, which ultimately results in different odds of winning, creating new maths and strategies, but without adding to the skilled person's knowledge of poker as a game itself. However, as noted above, the Court in *Progressive Games FC* found that the addition of a new player did not substantially modify the poker game and that the winnings that a player earns referred to wagering, and not to the game itself. This, in our preliminary view, is comparable to the claimed invention in the instant application which combines features from two well-known games of poker and adds a showdown round in order to create new maths and new strategies. In the context of the state of knowledge at the relevant time, the instant application and *Progressive Games FC* both use the same standard rules of poker with modifications to the known games of poker at the relevant time for each case, resulting in different winning odds for players, which the Court in *Progressive Games FC* did not find to amount to a contribution or addition to the cumulative wisdom on the subject of the game.

In our preliminary view, similar to *Progressive Games FC*, the skilled person would consider that a more attractive game to the consumer with new wagering strategies and winning maths is claimed in the instant application without substantially modifying the poker game as it was generally known at the relevant date. In our preliminary view, like in *Progressive Games FC*, the skilled person would consider that the changes to the game of poker in the instant application in view of the common general knowledge at the relevant date do not amount to a new and innovative method of applying skill or knowledge within the meaning given to those words in *Shell Oil*.

In our preliminary view, even if the person skilled in the art considered the modifications in the claimed poker game compared to the well-known games of poker and the common general knowledge at the relevant time to be more substantial than those in *Progressive Games FC*, as explained above, *Progressive Games FCA* noted that "we do not want to be taken as deciding that more substantial changes in the existing game would have changed the result."

With respect to the third criteria in *Shell Oil* test, *Progressive Games FC* at paragraph 18 indicated that the Appellant's method reaches a result that may be commercially useful. In

our preliminary view, the poker game in the instant application also has a result or effect that may be commercially useful, as it provides a game of poker which may be licensed to gaming or gambling establishments such as casinos.

In light of the above, we preliminarily consider the conclusions reached in the present case to be consistent with *Progressive Games FC* insofar as the claimed modifications to the rules of play do not constitute a new and innovative method of applying skill or knowledge, nor a contribution or addition to the cumulative wisdom on the subject of poker games within the meaning of the second criteria in *Shell Oil*. While the Court in *Progressive Games FC* accepted that the physical manipulation of cards constituted a practical application under the framework at the time, subsequent jurisprudence has clarified that the presence of a practical application alone is not sufficient to meet the physicality requirement implicit in the definition of “invention” under section 2 of the *Patent Act*. Applying the physicality requirement articulated in *Amazon* and *Benjamin Moore*, it is our preliminary view that the claimed subject-matter in the instant application, whether implemented using a standard deck of physical cards or on a computer, does not amount to a patentable “art” or “process” within the meaning of section 2 of the *Patent Act*.

## **INDEFINITENESS**

We preliminarily consider claims 19-24 on file to be indefinite.

### **Legal principles**

Subsection 27(4) of the *Patent Act* requires claims to 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.

In *Minerals Separation North American Corp v Noranda Mines Ltd*, [1947] Ex CR 306 at 352, 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**

The Final Action indicated on page 6 that claims 1 and 22-24 on file are indefinite for the following reasons:

Claim 1 is indefinite and does not comply with subsection 27(4) of the Patent Act. The term the physical number generator playing cards has no antecedent.

Claim 1 is indefinite and does not comply with subsection 27(4) of the Patent Act. It is unclear as to what is meant by the physical number generator playing cards.

Claims 22 to 24 are indefinite and do not comply with subsection 27(4) of the Patent Act. Claim 22 is directed to a method of playing a card game as in claim 1, however, claim 22 appears to be describing a computer device, and not a method. Claim 23 is directed to “The computer device of claim 22”, however, claim 24 is directed to a method as in claims 22 and 23. Accordingly, it is unclear as to whether or not claims 22 to 24 are intended to be directed to a computer device or to a method.

We preliminarily disagree with the defects identified with respect to the term “the physical number generator playing cards”. As indicated in the “Meaning of terms” section above, given that this term is recited in claim 1 on file which specifies the use of physical cards, not a computer implementation, it is our preliminary view that the skilled person would understand the term “the physical number generator playing cards” to refer to a standard deck of 52 physical cards which is previously defined in claim 1 on file as “one physical 52 card poker deck of standard playing cards”.

We preliminarily agree with the above defects identified with respect to claims 22-24 on file. Claim 22 recites “[a] method of playing a card game as in Claim 1 wherein a computer device configured to display images of playing cards...the processor to perform the steps of claim 1”, which appears to be directed to a computerized implementation of the game. However, claim 1 is directed to a method of playing the game using physical cards, which in our preliminary view causes ambiguity as it implies the use of both physical cards and a computer implementation in the claimed method. Similarly, claim 23 is directed to “The computer device of claim 22”, however claim 22 is a method claim. Claim 24 is directed to “A method as in claim 22 and 23”, however claims 22 and 23 are directed to a method and computer device, respectively.

Furthermore, as also explained in *CD 1670*, we preliminarily note the following:

Claim 22 on file recites “wherein a computer device configured...” appears to be lacking a verb, and should possibly read “wherein a computer device is configured...”.

Claim 23 on file recites the subjective term “such as” which directs the claim to both broad and narrow embodiments, causing a lack of clarity as to the intended scope of the claim.

Finally, in our preliminary review, we identified the following additional defects:

Claim 19 on file recites “dealer deals a number of cards equal to the number of cards in the second round to a “showdown ” [sic] hand” and further refers to the winner of the second round. Claim 1 on file, on which claim 19 indirectly depends, refers to rounds only in terms of betting rounds within the first and second sub-games. It is therefore our preliminary view that the terms “second round” and “2nd round” in claim 19 cause ambiguity as it is not clear whether they refer to the previously defined second betting round or to the second sub-game. Similarly, claim 21 on file recites “betting rounds from the first round being transferred to the second round”. It is our preliminary view that the terms “first round” and “second round” cause ambiguity as it is not clear whether they refer to the previously defined first/second betting rounds or to the first and second sub-games. It is therefore our preliminary view that claims 19 and 21 on file are indefinite.

Claim 20 on file recites “at least one joker or wild card is added to the standard deck...to represent any card (value and suit) in the deck”. The inclusion of a feature in parentheses raises uncertainty as to whether this feature is optional or not. Additionally, the description does not appear to mention the use of the joker or a wild card in the poker game. It is not

clear what role the joker or a wild card would play in the poker game. For example, it is not clear how to rank two identical hands, one with the joker and another with the card that the joker represents. It is therefore our preliminary view that claim 20 on file is indefinite.

Therefore, it is our preliminary view that claims 19-24 on file are indefinite and do not comply with subsection 27(4) of the *Patent Act*.

In addition, in our preliminary review, we identified the following typographical issues in the claims on file:

Claim 1 on file appears to include additional periods in steps a) and d). In step a), it recites "...upon commencement of a first poker game.", and at the end of step d) it recites "all players check.", both which appear to include a period. These additional periods appear to be mistakenly included and should possibly be replaced with a comma and a semicolon, respectively. Additionally, step k) recites "the\_remaining", which should instead read "the remaining".

Claim 13 on file recites "the initial a number of cards". This appears to be a typographical error and should read "the initial number of cards".

Claim 16 on file recites "the initial number of cards dealt in the first sub-game consists of 7 cards". It appears that that this expression was meant to refer to the number of cards dealt in the initial hand, rather than dealt in the first sub-game.

Claim 19 on file recites "a "showdown " hand". It appears that the quotation marks around the term showdown are unnecessary, as the term has previously been introduced without quotation marks, and should be removed.

## **PRESENTATION OF THE APPLICATION**

We preliminary consider that the description on file contains cancellations or corrections, and does not comply with paragraph 13(1)(c) of the *Patent Rules*.

## **Legal principles**

Paragraph 13(1)(c) of the *Patent Rules*, equivalent to paragraph 68(1)(c) of the former *Rules*, requires that documents submitted in connection with a patent application be free of interlineations, cancellations or corrections.

## **Analysis**

The Final Action on page 6 identified the following defect:

The description does not comply with subsection 68(1) of the *Patent Rules*. Pages 6 and 6a contain interlineations, cancellations or corrections and should be replaced. These pages contain underlining and need to have a clean copy with no markups.

We preliminarily agree. We additionally note that the term “type” on page 6, line 1 also appears to be cancelled.

It is therefore our preliminary view that the description on file does not comply with paragraph 13(1)(c) of the *Patent Rules*.

## **SPECIFICATION PAGE NUMBERS**

We preliminarily consider that the pages of the specification are not numbered consecutively.

## **Legal principles**

Subsection 50(1) of the *Patent Rules* requires the pages of the specification to be numbered consecutively. The specification consists of the description and the claims.

Section 193 of the *Patent Rules* provides the following exception: where an application was filed between October 1, 1996 and October 30, 2019, the Applicant may meet the requirements of subsection 73(1) of the former *Rules*, instead of subsection 50(1) of the current *Patent Rules*. Nonetheless, this alternative would still require the pages of the description and claims to be numbered consecutively.

## **Analysis**

The Final Action on page 6 identified the following defect:

The pages of the claims are not numbered consecutively and do not comply with subsection 73(1) of the *Patent Rules*. Claim pages should start at page 25, as Description pages end at page 24.

We preliminarily agree. Claims on file start on page 90, whereas the description on file ends on page 24.

We also note that, as explained in *CD 1670*, pages 6 and 6a of the description are correctly numbered at the top, however these pages also include additional page numbers 88 and 89 at the bottom.

It is therefore our preliminary view that the specification on file does not comply with subsection 50(1) of the *Patent Rules* and subsection 73(1) of the former *Rules*.

We also preliminarily note an additional observation with respect to the Applicant's amendments to the description. It appears that the Applicant intended to amend paragraph [0006] but mistakenly submitted amendment pages 6 and 6a. The amended page 6 replaced page 6 of the original description, which also contained paragraphs [0007]-[0008] and part of paragraph [0009], thus inadvertently removing these paragraphs from the description on file. This has resulted in a discontinuity in the content of page 6a and page 7 of the description on file. Although this does not contravene the *Patent Act* or *Rules*, the Applicant may wish to submit amendments to the description containing both the amended paragraph [0006] (current pages 6 and 6a) as well as the content of page 6 of the original description (original paragraphs [0007]-[0009]). The Applicant is advised to ensure that amendment pages are numbered consecutively.

## **LACK OF SUPPORT**

We preliminarily consider that claim 1 on file is fully supported by the description on file.

## **Legal principles**

Section 60 of the *Patent Rules* requires that the claims be fully supported by the description:

The claims must be clear and concise and must be fully supported by the description independently of any document referred to in the description.

## **Analysis**

According to *CD 1670*, claim 1 on file recites the term “physical number generator” which is not mentioned in the description on file and cannot be inferred from it.

In our preliminary view, even though the term is not mentioned in the description, a person skilled in the art can infer the term “physical number generator playing cards” from the description as the description discloses shuffling a deck of physical cards to play the poker game.

It is therefore our preliminary view that claim 1 on file complies with section 60 of the *Patent Rules*.

## **REFERENCE TO CLAIMS IN THE ALTERNATIVE**

We preliminarily consider that claim 24 on file does not refer to other claims in the alternative.

## **Legal principles**

Subsection 63(3) of the *Patent Rules* states that:

A dependent claim that refers to more than one claim must refer to those claims in the alternative only.

## Analysis

Claim 24 on file recites “A method as in claim 22 and 23...”. As explained in *CD 1670*, claim 24 depends on both claims 22 and 23 at the same time, rather than in the alternative.

Therefore, it is our preliminary view that claim 24 on file does not comply with subsection 63(3) of the *Patent Rules*.

## PROPOSED AMENDMENTS

We do not preliminarily consider the latest proposed amendments to remedy all the defects.

As indicated above, the latest proposed amendments include a set of 24 proposed claims received on April 12, 2024 and the latest proposed description received on June 7, 2022.

Additionally, in their response to the Final Action, the Applicant submitted a new title. We note that the title of the patent, should it issue, will be taken from page 1 of the description on file at the time of issue. A change of the title would require that the Applicant submit an amendment to page 1 of the description that would include the new title. The Patent Office database will only be updated at the time of grant to reflect the title set out in the description.

## Proposed claims

We preliminarily consider that the proposed claims would remedy a number of indefiniteness defects as well as the defect related to the reference to other claims in the alternative only. However, for the reasons set out below, our preliminary view is that the proposed claims would not comply with the *Patent Act* and *Patent Rules*.

Relevant portions of proposed claim 1 are reproduced below:

1. (previously amended) A method of ~~playing~~ operating a wagering poker events/games based on and directed to the 52 card Poker deck (according to the hierarchy of poker hands) comprising the steps of:

a) providing a card game apparatus including at least one physical 52 card poker deck of standard playing cards for each event/game.

Comprising four different suits of thirteen cards...,

and coordinating with a plurality of players/participants to ante at least a first buy-in bet into a first pot upon commencement of a first poker game.

and a second buy-in bet into a second pot ~~upon~~ for commencement of a second poker game;

b) shuffling the physical 52 poker playing cards into a new order and the dealer dealing to each player an initial hand comprising a plurality of predetermined number of playing cards;

...

d) the players playing a first poker game...wherein each player takes turns to Raise, Call Fold or Check...; 3) all players check;

...

[emphasis in the original]

Proposed claim 22 reads as follows:

22. ( previously amended) A specialized computer device programmed to implement the method of operating a virtual wagering poker events according to the steps of the method of Claim 1 wherein a computer device is configured into a the new computer/server device to display images of virtual playing cards on a display screen; providing a non-transitory computer readable storage medium coded with instructions comprising: a the processor for executing a set of programmable instructions for operating the poker event; a display in operative communication with said processor/server; and input means by way of remote computers through the internet in operative communication with said processor/server for receiving inputs from a participant(s) during operation of the poker events and calculating the outcomes of the participating inputs; wherein the novel gaming techniques and

a representation of a 52 card ~~playing~~ Poker deck stored thereon entails the processor to perform the steps of Claim 1 and the specific computer calculates the final output of the results as they pertain to the hierarchy of Poker hands and the specialized computer recalculating the participant/client chip stack values. [emphasis in the original]

Proposed claim 23 is directed to a specialized computer device and replaces “such as” in the claim on file with “including”.

Proposed claim 24 reads as follows:

24. (previously amended) A specialized computer device/server for operating a wagering poker events as in claim 22, wherein the specifically programmed computer device ~~programmed~~ to implement the poker events is operated wirelessly over the internet from the specifically programmed computer/server in connection with the identified remote physical computer devices of the participants/clients to connect a cooperating group of players virtually through their client computers to the merchant device/server providing table games and/or tournaments ~~to execute~~ executing the operation of a wagering poker events. [emphasis in the original]

The proposed amendment to claim 13 is typographical in nature and replaces “the initial a number of cards” with “the initial number of cards”. Similarly, the proposed amendment to claim 21 replaces “each exposed card” with “each exposed community card”.

## **Purposive construction**

We present our preliminary analysis of the purposive construction of the proposed claims below.

### *Person skilled in the art, the relevant common general knowledge and the disclosure*

The above preliminary characterization of the person skilled in the art, the relevant common general knowledge and the skilled person’s understanding of the disclosure under purposive construction of the claims on file also apply to the proposed claims.

### *Meaning of terms*

We preliminarily adopt the construction of the terms shared between the claims on file and the proposed claims in accordance with the “Meaning of terms” section under purposive construction of the claims on file above.

In our preliminary view, the person skilled in the art, considering the disclosure of the application in light of the relevant common general knowledge, would construe the meaning of the following additional terms recited in the proposed claims as follows:

- “operating wagering poker events/games”: the expression “operating a poker game” and the term “event” do not appear in the description. In our preliminary view, the skilled person would understand that poker events and poker games are equivalent, and that operating a poker game would refer to a dealer running a poker game. As indicated in the description, the dealer may be one of the actual players, a casino-appointed dealer, or a computer program which acts as a dealer (page 2 line 31 - page 3 line 2; page 11 line 32 - page 12 line 2).
- “a specialized computer device”: proposed claims 22-24 are directed to a specialized computer device programmed to implement the method of operating virtual wagering poker games. However, the term “specialized computer device” does not appear in the description. As previously mentioned, with respect to the computer implementation of the game, the description states that it is understood that the game can be played on electronic video poker gaming machines, on linked electronic video poker gaming machines, electronically from home through the internet, or via handheld electronic devices which may be connected to other nearby devices or to a central device such as mobile phones, palm computers or any mobile electronic device that may connect to other devices (para 13). There is no suggestion in the specification that the computer device is specialized in any way other than possibly being a gaming machine (the specification does not provide details regarding electronic video poker gaming machines or an indication that such a gaming machine would be specialized or different than any other well-known gaming machine or a generic computer programmed in order to offer virtual poker games). It is therefore our preliminary view that the skilled person would understand that the claimed specialized computer device refers to a generic computer device being specifically programmed to implement the claimed poker game. Proposed

claims 22 and 24 also recite “specific computer”, “specifically programmed computer device” and “specifically programmed computer/server”. In our preliminary view, the skilled person would construe these terms to refer to the specialized computer device first defined in proposed claim 22.

- “the new computer/server device”: recited in proposed claim 22, it is our preliminary view that this term is indefinite (further explanation is provided under the “Indefiniteness” section below). Given that proposed claim 22 is directed to a “specialized computer device programmed to implement...the method Claim 1 wherein a computer device is configured into a the new computer/server device...”, it is our preliminary view that the skilled person would understand that the “new computer/server device” is in fact the same device as the claimed “specialized computer device”.
- “the merchant device/server”: recited in proposed claim 24, this term does not appear in the description or the rest of the proposed claims. As explained under the “Indefiniteness” section below, proposed claim 24 contains a number of clarity defects. However, given the language of proposed claim 24 and proposed claim 22, on which claim 24 depends, it is our preliminary view that the skilled person would construe “the specifically programmed computer device” and “the merchant device/server” to be the same device as the “specialized computer device”, as all these devices are claimed to operate the poker events/games.
- “calculating the outcomes of the participating inputs”/ “calculates the final output of the results as they pertain to the hierarchy of Poker hands”/ “recalculating the participant/client chip stack values”: the expressions calculating outcomes or results and recalculating chip stack value do not appear in the description. In our preliminary view, the skilled person would understand that these expressions refer to the computer device, programmed using an algorithm to implement the claimed poker game and operate the game, determining the outcome of each round of the game including determining the players’ chip stack value after each round.
- “Chip stack value”: this expression does not appear in the description or the rest of the proposed claims. To play poker games, players generally exchange real money for poker chips for ease and speed of play. Each type of chip represents a specific monetary value. In our preliminary view, the skilled person would understand that

chip stack value refers to the monetary value of a player's total amount of chips at any given time during the game.

### *Essential elements*

As explained above, the identification of essential and non-essential elements of a claim depends on the intent in the language of the claim and on the obvious substitutability of the elements.

Starting from the intent of the inventor as expressed in or inferred from the language of the claims, we preliminarily consider the specification and the drawings to determine if the inventor establishes any of the claimed elements to be non-essential.

First, we preliminarily consider the intent expressed in, or inferred from, the language of the proposed claims.

Proposed claim 1-21 are directed to a method of operating wagering poker events/games using a standard deck of 52 physical cards. It is our preliminary view that the skilled person would understand that there is no use of language in the claim indicating that any of the claimed elements are optional (with the exception of the terms in parentheses which are discussed in the "Indefiniteness" section below), a preferred embodiment, or one of a list of alternatives. Similarly, the intent expressed in, or inferred from, the language of proposed claims 1-21, in light of the above discussion on the disclosure and the meaning of the claim terms, does not indicate that any of the claimed features were intended to be non-essential.

Proposed claims 22-24 are directed to specialized computer device programmed to implement the method of operating poker events/games according to steps of the method in proposed claim 1. Although these claims directly or indirectly depend on proposed claim 1 which recites the use of physical cards, in our preliminary view the skilled person would construe these claims as being directed to a computerized implementation with only virtual representations of the cards.

In our preliminary view, the skilled person would understand that there is no use of language in proposed claims 22-24 indicating that the Applicant intended any of the claimed elements to be a preferred embodiment or optional (with the exception of the terms in parentheses which are discussed in the "Indefiniteness" section below). Although

proposed claim 23 includes a list of alternative embodiments, it is our preliminary view that the person skilled in the art would understand that the Applicant intended that each alternative or combination of alternatives, when chosen, would be an essential feature of the claim. Similarly, the intent expressed in, or inferred from, the language of proposed claims 22-24, in light of the above discussion on the disclosure and the meaning of the claim terms, does not indicate that any of the claimed features were intended to be non-essential.

As explained previously, a claimed feature is considered essential if its purposive construction indicates that it was intended to be essential. Given our preliminary assessment above with respect to the first part of the non-essentiality test that all the claimed elements as purposively construed were intended to be essential, it is our preliminary view that the skilled person would consider all the elements in the proposed claims to be essential.

However, for completeness, we also consider the second part of the non-essentiality test, which asks whether, at the publication date, the skilled person would have considered that a particular element could be substituted or omitted without affecting the working of the invention.

Proposed claims 1-21 are directed to a method of playing a wagering poker game using a standard deck of 52 physical cards while proposed claims 22-24 recite a computerized implementation of the game in proposed claim 1. In our preliminary view, there is no indication that the skilled person, considering the disclosure in view of the relevant common general knowledge, would have appreciated that any of the claimed features, including the claimed rules of the game and the claimed form of cards used (physical in claims 1-21; virtual representations in claims 22-24) could be omitted or substituted with other means which would perform substantially the same function in substantially the same way to obtain substantially the same result. In our preliminary view, the skilled person would not have considered that the claimed rules of the game and the claimed form of cards could be omitted or substituted without affecting the working of the invention.

Therefore, it is our preliminary view that the person skilled in the art would consider all the elements in the proposed claims to be essential.

*The invention as claimed*

In our preliminary view, the proposed claim amendments are not substantive in nature. The skilled person would understand that the purpose of invention and the problem that the proposed claims seek to address are the same as those for the claims on file identified above. It is our preliminary view that the skilled person would not consider that the proposed amendments to the claims alter the nature of the invention or the discovery identified above under purposive construction of the claims on file.

With respect to the physical card implementation of the poker game in proposed claims 1-21, it is our preliminary view that the skilled person would consider the discovery to lie in the set of rules governing the poker game.

With respect to the computer implementation of the game in proposed claims 22-24, we preliminarily note, as also explained above, that the description does not provide details with respect to the computer implementation of the game beyond the brief disclosure in paragraphs 13 and 22. There is no suggestion in the specification that the components of the claimed specialized computer device represent anything other than well-known computer components. There is no suggestion in the specification that the claimed computer steps performed by the computer device or its components, such as executing programmable instructions to perform the steps of claim 1 or operating the computer device wirelessly over the internet to connect a group of players virtually, are specialized in any way or represent anything other than the well-known functions of a generic computer system. In our preliminary view, the skilled person would consider that the claimed specialized computer device and other computer elements in proposed claims 22-24 are merely well-known computer components used in a well-known manner, and that the claimed method steps do not result in any improvements to the functioning of the computer. It is therefore our preliminary view that the skilled person would consider the discovery of proposed claims 22-24 to lie in the algorithm or set of programmable instructions which is coded on the non-transitory computer readable medium and executed by the processor to implement the claimed invention, the algorithm corresponding to the set of rules governing the poker game.

Therefore, it is our preliminary view that the skilled person would consider the discovery in the proposed claims to lie in a set of rules governing the poker game, which in brief

consists of incorporating hand-splitting into the standard game of poker and providing a final showdown round between the winner of the second sub-game and the dealer.

### **Patentable subject-matter**

For the reasons set out below, our preliminary view is that the subject-matter of proposed claims 1-24 would be directed to non-patentable subject-matter.

In our preliminary view, the proposed amendments to claims 1-21 on file would not alter our patentable subject-matter assessment of the claims on file. In view of the purposive construction of the proposed claims discussed above, it is our preliminary view that the subject-matter of these proposed claims would still be directed to a method of playing a poker game and would include a set of rules for the poker game and a standard deck of physical cards as essential elements. In our preliminary view, the skilled person would still consider that the new knowledge or discovery lies in the set of rules for the poker game, and that the subject-matter of these proposed claims would not be distinguishable from *Schlumberger*.

In view of the guidance in *Benjamin Moore* at paragraph 94 and *Dusome* at paragraph 48, similar to our preliminary analysis of claims 1-21 on file, since the new knowledge or discovery is an abstract idea (a set of rules governing a poker game), the use of a well-known tool (a standard deck of physical cards) to implement this abstract idea would not satisfy the physicality requirement without something more. It is our preliminary view that the proposed amendments do not add any limitations that would provide the “something more” to which the Court in *Benjamin Moore* refers to meet the physicality requirement in *Amazon*.

Similarly, it is our preliminary view that the proposed amendments to claims 22-24 would not alter their patentable subject-matter assessment.

As explained above, proposed claim 22 is directed to a specialized computer device programmed to implement the method of operating poker games according to the method in claim 1. Similar to claim 22 on file, it recites a computer device and its components. However, it recites a few additional limitations including a specialized computer device and the steps of calculating outcomes and recalculating participants’ chip stack values.

As explained under the “Meaning of terms” section above, it is our preliminary view that the skilled person would understand that the specialized computer device refers to a well-

known computer device operating in a well-known manner and being specifically programmed to implement the poker game. We also explained under “Meaning of terms” that the skilled person would understand that the terms “specific computer”, “specifically programmed computer device” and “specifically programmed computer/server” in proposed claims 22 and 24 refer to the specialized computer device first defined in proposed claim 22.

Additionally, as explained under the “Meaning of terms” section above, it is our preliminary view that the skilled person would understand the claimed calculating and recalculating steps to be directed to the computer device running the game and determining the outcome of each round including the players’ chip stack value.

Given the above purposive construction of the proposed amendments to claims 22-24, it is our preliminary view that these proposed amendments would not alter the patentable subject-matter assessment of the claims on file. The subject-matter of these proposed claims as purposively construed would still be directed to a method of playing a poker game and would include a set of rules for the poker game and a well-known computer as essential elements. There is no suggestion in the disclosure that this computer device and its components are specialized in any way or represent anything other than the well-known functions of a well-known computer system, or that there is any improvement to the functioning of the computer. Therefore, in our preliminary opinion, the skilled person would still consider that the new knowledge or discovery lies in the set of rules for the poker game (the set of rules corresponds to the algorithm that is programmed into the computer to cause it to take the necessary steps to implement the poker game), and that the subject-matter of these proposed claims would not be distinguishable from *Schlumberger*.

In view of the guidance in *Benjamin Moore* at paragraph 94 and *Dusome* at paragraph 48, similar to our preliminary analysis of claims 22-24 on file, since the new knowledge or discovery lies in an abstract idea (a set of rules governing a poker game), the use of a well-known tool (a well-known computer operating in a well-known manner) to implement this abstract idea would not satisfy the physicality requirement without something more. It is our preliminary view that the proposed amendments do not add any limitations that would provide the “something more” to which the Court in *Benjamin Moore* refers to meet the physicality requirement in *Amazon*.

In light of the above, it is our preliminary view that proposed claims 1-24 would be directed to non-patentable subject-matter, falling outside the definition of “invention” in section 2 of the *Patent Act*. For the same reasons, where the subject-matter defined by the claims

amounts to the implementation of the abstract rules of the poker game using well-known instruments without meeting the physicality requirements, it is our preliminary view that the claims would also be excluded under subsection 27(8) of the *Patent Act*.

## **Indefiniteness**

Proposed amendments to the claims would remedy certain indefiniteness defects identified above with respect to claims on file. However, for the reasons set out below, our preliminary view is that proposed claims 1 and 19-24 would be indefinite.

Proposed claims 19 and 21 would be indefinite for the same reason as claims 19 and 21 on file: in our preliminary view, it is not clear if the terms “the first round” and “the second round” refer to previously defined first and second betting rounds, or if they are meant to refer to the previously defined first and second sub-games.

Proposed claims 1 and 20-24 include features in parentheses which raise uncertainty as to whether these features are optional or not. Proposed claim 1 recites “(according to the hierarchy of poker hands)”. Proposed claim 20 recites “(value and suit)”. Proposed claim 22 recites “a participant(s)”. In addition, the expression “(previously amended)” in the preamble of proposed claim 1, 21, 22 and 24, and the expression “(currently amended)” in proposed claim 23 would cause ambiguity for the same reasons and should be removed.

Proposed claim 22 contains the following defects:

- it is directed to a “specialized computer device” but also recites “wherein a computer device is configured into a the new computer/server device”. The term “a the” causes ambiguity. It is not clear if the new computer/server device refers to the specialized computer device or if it is a different device altogether;
- the term “the processor” at line 6 is unclear as it lacks an antecedent;
- the term “said processor/server” at line 8 lacks an antecedent, as it is not clear whether it refers to the previously defined “processor” at line 6 or not (there is a second recitation of the term “said processor/server” at line 10 as well); and

- the term “a set of programmable instructions” at line 7 is defined with an indefinite article causing a lack of clarity as to whether it is intended to refer to “instructions” previously introduced at line 6 or an additional element thereto.

Proposed claim 24 contains the following defects:

- it recites that “the specifically programmed computer device...is operated wirelessly over the internet from the specifically programmed computer device/server”. It is not clear whether the “specifically programmed computer device” and “the specifically programmed computer device/server” are the same device. Under the “Meaning of terms” section, we stated our preliminary view that the skilled person would construe them to be the same device. In such a case, this expression would be unclear as it states that the computer device is operated wirelessly from itself;
- the term “identified remote physical computer devices” lacks an antecedent as no step of identifying remote computer devices is previously defined in the claims; and
- the term “the merchant device/server” is unclear as it lacks an antecedent.

Furthermore, we note that consistent terminology should be used to refer to various claimed components in order to avoid clarity issues. For example, proposed claims 22 and 24 recite the following set of terms, each set appears to be directed to the same item:

- “specialized computer device” (claim 22, line 1), “computer device” (claim 22, line 3), “new computer/server” (claim 22, line 4), “specialized computer device/server” (claim 24, line 1), “specific computer” (claim 22, line 14), “specifically programmed computer device” (claim 22, lines 2-3), and “the specifically programmed computer/server” (claim 22, lines 4-5);
- “processor” (claim 22, lines 6 and 14) and “processor/server” (claim 22, lines 8 and 10);
- “participant(s)” (claim 22, line 12), “participant/client” (claim 22, line 16), and “participants/clients” (claim 24, line 6);
- “remote computers” (claim 22, line 9), “the identified remote physical computer devices” (claim 24, lines 5-6) and “client computers” (claim 24, line 7).

Therefore, it is our preliminary view that proposed claims 1 and 19-24 are indefinite, and would not comply with subsection 27(4) of the *Patent Act*.

In addition, in our preliminary review, we identified the following typographical issues in the proposed claims:

Proposed claim 1 appears to include additional periods in step a). It recites “for each event/game.” (emphasis in the original) and “...upon commencement of a first poker game.” These additional periods appear to be mistakenly included and should possibly be replaced with a comma.

Proposed claim 16, like claim 16 on file, recites “the initial number of cards dealt in the first sub-game consists of 7 cards”. It appears that that this expression was meant to refer to the number of cards dealt in the initial hand, rather than dealt in the first sub-game.

Proposed claim 19, like claim 19 on file, recites “a "showdown " hand”. It appears that the quotation marks around the term showdown are unnecessary, as the term is previously introduced without quotation marks, and should possibly be removed.

Proposed claim 22 recites “participating input”, which appears to refer to participant inputs given that the claim previously recites “receiving inputs from a participant(s)”.

### **Presentation of the application**

Proposed claims 1 and 22-24 contain a number of cancellations. It is therefore our preliminary view that proposed claims 1 and 22-24 would not comply with paragraph 13(1)(c) of the *Patent Rules*.

While the Applicant may include a marked-up copy of proposed amendments in their response to better identify changes, a clean copy with no markups must be always submitted in order to ensure compliance with *Patent Act* and *Patent Rules*. As previously mentioned, the Applicant is advised to remove the expressions “(previously amended)” and “(currently amended)” in the clean copy of their proposed amendments as well.

## **Conclusion on proposed claims**

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

## **Proposed amendments to the description**

We preliminarily consider that the proposed amendments to the description would remedy the page numbering defect identified above with respect to the specification on file.

However, we preliminarily note, as we did above with respect to the description on file, that the page numbering of the proposed description amendments have resulted in the removal of the original page 6 of the description containing paragraphs [0007]-[0008]. This has resulted in a discontinuity in the content of page 6a and page 7 of the proposed description. Although this does not contravene the *Patent Act* or *Rules*, the Applicant may wish to submit amendments to the description containing both the current proposed description pages 6 and 6a, as well as the content of page 6 of the original description (original paragraphs [0007]-[0009]). The Applicant is advised to ensure that amendment pages are numbered consecutively.

## **CONCLUSIONS**

It is our preliminary view that:

- Claims 1-24 on file are directed to non-patentable subject-matter and do not comply with section 2 and subsection 27(8) of the *Patent Act*;
- Claims 19-24 on file are indefinite and do not comply with subsection 27(4) of the *Patent Act*;
- The description on file contains cancellations or corrections, and does not comply with paragraph 13(1)(c) of the *Patent Rules*;
- The specification on file does not consist of consecutively-numbered pages, and does not comply with subsection 50(1) of the *Patent Rules* and subsection 73(1) of the former *Rules*;

- Claim 24 on file does not refer to other claims in the alternative only, and does not comply with subsection 63(3) of the *Patent Rules*;
- Proposed claims 1-24 are directed to non-patentable subject-matter and would not comply with section 2 and subsection 27(8) of the *Patent Act*;
- Proposed claim 1 and 19-24 are indefinite and would not comply with subsection 27(4) of the *Patent Act*; and
- Proposed claims 1 and 22-24 contain cancellations and would not comply with paragraph 13(1)(c) of the *Patent Rules*.

In light of the conclusions above, the proposed amendments cannot be considered necessary amendments under subsection 86(11) of the *Patent Rules*.

## **NEXT STEPS**

Any written submission may include **one** set of proposed claims addressing only the preliminarily identified outstanding issues. If we ultimately conclude that the claims on file are unpatentable, we will consider the proposed claims. If we then determine that they both address the outstanding issues and comply with the *Patent Act* and *Patent Rules*, we may recommend to the Commissioner to require such amendment under subsection 86(11) of the *Patent Rules*.

Written communications to the Canadian Intellectual Property Office can be sent electronically, by mail or delivered in-person. Electronic submissions must be done via [MyCIPO Patents](#) or [General correspondence relating to applications and patents](#).

Any submissions made in response to this communication should be directed to the attention of the **Patent Appeal Board**. Submissions should be made concurrently via email to the undersigned to ensure they are received promptly.

More information on the review process can be found in the [Manual of Patent Appeal Board Procedures for Rejected Patent Applications](#) (CIPO, December 2023), and in the publication [“IP roadmap – Your path to a review by the Patent Appeal Board”](#) (CIPO, January 2024).

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Any other questions or concerns may be directed to the undersigned.

Sincerely,

A handwritten signature in blue ink, appearing to read "M. Ghayour", with a stylized flourish at the end.

Mehdi Ghayour (for the Panel)  
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