Federal Court Cour fédérale

Date: 20240514

Docket: T-2642-23

Citation: 2024 FC 742

Ottawa, Ontario, May 14, 2024

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

CANADIAN ENERGY SERVICES L.P.

Applicant

and

COMMISSIONER OF PATENTS AND ATTORNEY GENERAL OF CANADA AND SECURE ENERGY (DRILLING SERVICES) INC.

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision by the Commissioner of Patents (the "Commissioner"). The decision varied the records of Canadian Patent 2,624,834 (the "834 Patent" or the "Patent") in light of the judgment and reasons of this Court in matter T-1534-20 (the "2023 Court Decision").

[2] Canadian Energy Services L.P. (“CES”) is the Applicant. It names Secure Energy (Drilling Services) Inc. (“Secure”), the Commissioner, and the Attorney General of Canada as respondents to this application. The Commissioner and the Attorney General took no part in this proceeding, requesting only that no costs be awarded against them.

II. Background

[3] CES was formerly listed as the owner of the 834 Patent in the Commissioner’s records. Mr. John Ewanek was listed as the inventor of its claimed subject matter.

[4] In December 2020, Secure filed a separate application (the “2020 Application”) seeking (1) a declaration that Secure is the owner or co-owner of the Patent, (2) a declaration that Mr. Simon Levey is the true inventor or a co-inventor of the Patent’s claimed invention, and (3) an order directing the Commissioner to vary the Patent’s records in accordance with the declarations. The application relied on section 52 of the *Patent Act*, RSC, 1985, c P-4 (the “Act”), which reads as follows:

> 52 The Federal Court has jurisdiction, on the application of the Commissioner or of any person interested, to order that any entry in the records of the Patent Office relating to the title to a patent be varied or expunged.

[5] The judgment in the 2023 Court Decision declared that Secure is the sole owner of the Patent and that Mr. Levey is the sole inventor of its subject matter, but it declined to issue an order directing the Commissioner to vary the Patent’s records accordingly.

[6] The Court's reasons for granting one form of relief and declining to grant the other are relevant to this application. The Court noted CES's position that, pursuant to section 3(1) of Alberta's *Limitations Act*, RSA 2000, c L-12, Secure is statute-barred from seeking a "remedial order" beyond the applicable limitation period. However, the Court held that declaratory relief "does not assert a cause of action" and would not be subject to the limitation period. In effect, the Court concluded that declaratory relief is not a "remedial order". This is consistent with the language of section 1(i)(i) of the *Limitations Act*.

[7] With respect to the order directing the Commissioner to vary the Patent's records, the Court commented *in obiter* that such relief "might arguably […] appear to be remedial in nature". However, the Court ultimately held that it is not necessary for the Court to make such an order if declaratory relief is granted under section 52 of the Act, since the Commissioner is statutorily obliged to give effect to the declaration. The Court cited the following passage from *Grenke v Corlac Inc*, 2007 FC 396 at paragraph 16, in support of this finding:

> [16] In performing its jurisdiction under section 52 of the *Patent Act*, the Federal Court does not, and in fact, is not ordering the Commissioner to do anything. The Federal Court is simply determining the rights of private parties as reflected in the Patent Office records, and it is the statutory obligation of the Commissioner to give effect to any such orders.

[8] CES has appealed the 2023 Court Decision. That appeal remains pending and is not the subject of this review.

[9] In a July 2023 letter to the Commissioner, counsel for Secure requested that the Patent's records be varied per the "order" of the Court, specifically by removing Mr. Ewanek and naming

Mr. Levey as the inventor and by removing CES and naming Secure as the owner. A separate letter to the Commissioner by a different law firm representing Secure acknowledged that the 2023 Court Decision provided declaratory relief, but clarified that "the Court […] held a declaration is sufficient".

[10] In a November 2023 letter to Secure, the Commissioner confirmed that the Patent Office will "update all office records in accordance with the judgment". The letter noted Secure as the owner of the Patent and Mr. Levey as the inventor of its subject matter.

[11] CES now brings this application for judicial review challenging the Commissioner's decision to vary the Patent's records. CES argues that the Commissioner had no authority to do so, absent a Court order to vary the records. Secure responds that the Commissioner did not err. It argues that the Commissioner had the authority to vary the Patent's records based on a declaration and without the need for an order.

[12] In another submission, CES further argues that, in any event, the Court's declaration names Secure as the owner of the *invention*, not of the *Patent*. Secure states that the language of the Court's declarations as to the ownership of "the invention", once read in light of the Court's broader reasons, clearly entail ownership of the Patent.

[13] I find that CES's latter submission regarding the wording of the declaration cannot succeed. CES's position implies that the Commissioner was incorrect or unreasonable (depending on the applicable standard of review) to look past any clerical error to glean the true substance of the

declaratory judgment by reference to the reasons in the 2023 Court Decision. Those reasons are clear that the issue is ownership of *the Patent*, not the invention. To find that the Commissioner erred by taking this context into account would represent a "triumph of form over substance".

[14] The only issue remaining is the propriety of the Commissioner's exercise of authority.

III. Issues

[15] What is the standard of review?

[16] Did the Commissioner err in their exercise of authority by varying the Patent's records based on a declaration that lacks a corresponding order to vary?

IV. Analysis

A. *The Standard of Review*

[17] The standard of review is presumed to be reasonableness unless an exception applies (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10). Among the recognized exceptions are (1) matters where an administrative body has concurrent first instance jurisdiction with the courts, or (2) matters that involve the jurisdictional boundaries between two administrative bodies (*Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 [*SOCAN*] at para 28; *Vavilov* at para 63). CES's submission is that at least one of these exceptions applies.

(1) The Concurrent Jurisdiction Exception

[18] Regarding the first exception above, CES cites *SOCAN* at paragraph 30 and argues that when a statute "involves" the Court in an administrative scheme, the presumption of reasonableness gives way to correctness. Since section 52 of the Act involves the Federal Court in the administrative scheme of varying patent records, the Court is entitled to intervene on a correctness standard.

[19] CES's submission broadens the scope of the exception recognized by the Supreme Court of Canada in *SOCAN*, suggesting that any degree of involvement would suffice. This fails to appreciate the broader context of the decision. In *SOCAN*, the Supreme Court of Canada recognized an exception where "courts and administrative bodies have concurrent first instance jurisdiction over a legal issue in a statute" (at para 28). The underlying concern was legal consistency and, more generally, the rule of law:

> [33] The presumption of reasonableness must give way to considerations aimed at maintaining the rule of law, which requires that certain questions be answered consistently and definitively. Legal inconsistency "is antithetical to the rule of law".
>
> [34] Applying reasonableness to the Board's interpretation of the rights in the *Copyright Act* creates two legal inconsistencies. First, it subjects the same legal issue to different standards of review depending solely on whether the issue arises before the Board or the courts. […]
>
> [35] Second, differing standards of review could lead to conflicting statutory interpretations. […]
>
> [Citations omitted]

[20] There is no such concurrent first instance jurisdiction under the *Patent Act*, nor any concern with legal inconsistency. While section 52 of the Act may require the Court's involvement in the varying of patent records, the Court is not an alternative forum to the Commissioner. Consistency between the two is not at risk.

[21] The first exception above does not apply.

(2) The Jurisdictional Boundaries Exception

[22] Regarding the second exception, CES effectively argues that this application examines the jurisdictional boundaries between two bodies and that this is sufficient to overcome the presumption of reasonableness. There are two problems with this submission.

[23] First, the exception at issue is focused on resolving jurisdictional boundaries between two or more *administrative bodies*. The exception exists because "the rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies, pulling a party in two different and incompatible directions" (*Vavilov* at para 64).

[24] The Court is not an administrative body. Its decisions and orders bind the Commissioner and supersede the latter's decisions and orders. There is no risk of conflicting orders or proceedings that pull a party in different and incompatible directions.

[25] The second exception does not apply.

[26] Ultimately, the question before the Court on this judicial review is the extent of the Commissioner's authority and jurisdiction under the *Patent Act* to vary a patent's records by reason of a declaration by the Court. There is only one administrative decision maker whose jurisdictional boundaries are under scrutiny: the Commissioner. In *Vavilov*, the Supreme Court of Canada was clear that such scrutiny must be exercised on a reasonableness standard (at para 67).

[27] The standard of review is reasonableness.

B. *Whether the Commissioner Erred in Exercising their Authority Absent an Order to Vary*

[28] I agree with Secure that section 4(2) of the *Patent Act* imposes a general obligation on the Commissioner to maintain accurate records. In *Procter & Gamble Co v Canada (Commissioner of Patents)*, 2006 FC 976 at paragraph 25, the Court held his obligation is implicit from placing the Commissioner in "charge" of the books and records of the Patent Office. This alone is sufficient to establish the Commissioner's authority to vary the Patent's records consistently with the 2023 Court Decision, notwithstanding the absence of an order to vary.

[29] Moreover, the difficulty with CES's position is that the 2023 Court Decision made dispositive findings on the very issue that is at the heart of this judicial review: whether the Commissioner can vary the Patent's records based solely on a declaration by the Court. Therefore, in order to challenge the Commissioner's exercise of authority, CES must inevitably confront the 2023 Court Decision.

[30] This raises two challenges for CES. First, the principles of judicial comity and horizontal *stare decisis* require the Court's analysis to remain consistent, especially since the matter pertains to the same parties and the same issues (*Makkar v Canada (Citizenship and Immigration)*, 2022 FC 1147 at para 40, citing *R v Sullivan*, 2022 SCC 19 at para 65; *Tan v Canada (Attorney General)*, 2018 FCA 186 at paras 24-26).

[31] Second, CES cannot indirectly challenge the 2023 Court Decision by way of judicial review. The Court's sole role here is to review *the Commissioner's* decision. It cannot exceed the limits of its role by scrutinizing the reasons of the 2023 Court Decision. That is a matter best left to CES's pending appeal.

[32] The 2023 Court Decision stands. That decision held that the Commissioner not only *can* vary the Patent's records to align them with the Court's declarations, but that they are *obligated* to do so, even in the absence of an additional order directing the Commissioner to do so. The Commissioner acted consistent with the Court's decision. It would be untenable for the Court to now find that the Commissioner's decision to do so was unreasonable.

[33] The Commissioner's decision was reasonable.

[34] Costs are awarded to Secure in the amount of $10,000. The Attorney General of Canada and the Commissioner are not liable for costs.

JUDGMENT in T-2642-23

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. Costs to the Respondent, Secure Energy (Drilling Services) Inc., in the amount of $10,000 inclusive of all fees and disbursements.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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