

Date: 20071105

Docket: T-1667-06

Citation: 2007 FC 1142

Ottawa, Ontario, November 5, 2007

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

DBC MARINE SAFETY SYSTEMS LTD

Applicant

and

**THE COMMISSIONER OF PATENTS and
THE ATTORNEY GENERAL OF CANADA**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a notice issued by the office of the Commissioner of Patents declaring a patent application abandoned for failure to respond to an examiner's requisition by the prescribed deadline. The notice was issued after the reinstatement period had expired. The applicant's agent erred in overlooking the requisition. The Patent Office erred in failing to follow their normal practice of providing a timely "courtesy" notice. Nonetheless, for the reasons that follow, I conclude that the application was abandoned by operation of law and that the Court is unable to provide a remedy.

BACKGROUND:

[2] The relevant provisions of the *Patent Act*, (R.S., 1985, c. P-4) (“the Act”) and the *Patent Rules* (SOR/96-423) (“the Rules”) are attached as Schedule “A” for ease of reference.

[3] The applicant filed Canadian Patent Application No. 2,233,846 on April 2, 1998 claiming priority from a U.S. application. The matter was placed in the application queue and eventually assigned to a Patent Examiner who on August 10, 2004, sent a letter (called an “office action”) to the applicant requiring further information. That office action highlighted a number of perceived defects in the application and contained the following passage:

You are hereby notified of:

- A requisition by the Examiner in accordance with Subsection 30(2) of the *Patent Rules*;
- A requisition by the Examiner in accordance with Section 29 of the *Patent Rules*

In order to avoid **multiple abandonments** under Paragraph 73(1)(a) of the *Patent Act*, a written reply **to each requisition** must be received within **6** months after the above date. (emphasis in original)

[4] The requisition in relation to subsection 30 (2) called for amendments to the application in order to comply with the act and the rules, or, arguments as to why the application did comply.

[5] Under section 29 the patent examiner has the discretion to request the applicant to provide particulars of the prosecution of any foreign patent application for the same invention. The requisition in this instance called for the "identification of any prior art cited in respect of the United States and United Kingdom applications describing the same invention on behalf of the

applicant, or on behalf of any other person claiming under an inventor named in the present application" or, if such particulars were not available to the applicant, the reason why was to be stated.

[6] The applicant had no connection to the UK application to which the requisition referred. That document had been referenced in another pending Canadian patent application for a similar invention. A statement to the effect that the applicant did not have the information would have been sufficient to dispose of that aspect of the requisition. The requisitioned information respecting the US application was either already before the examiner in the application materials or was readily available to him through online access to the US patent office.

[7] The six month limitation period for replies to requisitions is set out in paragraph 73 (1)(a) of the Act. That paragraph does not refer to "multiple abandonments" but states that an application shall be deemed to be abandoned for failure to reply "in good faith" to "any requisition" within the prescribed period.

[8] The use of the term "multiple abandonments" stems from a change of practice adopted by the Patent Office in 2003 and conveyed to the profession by means of a practice notice dated September 2, 2003 and an updated notice issued on April 2, 2004. Through these notices, the office advised that responses which were completely silent in respect of any of the requisitions in an examiner's report would not be considered as replying in good faith to that particular requisition and that the application would be deemed to be abandoned.

[9] From correspondence exchanged between the Commissioner and the President of the Intellectual Property Institute of Canada in 2004, it appears that this change was prompted by concerns about the failure of applicants, in general, to adequately respond to s. 29 requisitions.

[10] On February 7, 2005, three days before the deadline to reply to the requisitions in the August 2004 examiner's report, the applicant's patent agent filed a response to the requisition that was issued in accordance with subsection 30(2) of the Rules. He failed to respond to the second requisition respecting the s. 29 information and gave no reason as to why the particulars required were not provided. This was simply an oversight, as the agent acknowledges in an affidavit. However, the effect was to invoke a deemed abandonment pursuant to s.73(1)(a) of the Act and to start the clock ticking on the twelve-month period for reinstatement prescribed in the Rules. That period expired on February 10, 2006.

[11] The annual maintenance fee for the application was submitted and accepted in July 2005. The applicant was not informed after the payment was made that the application was considered to have been abandoned at that time.

[12] On April 10, 2006, unaware of the deemed abandonment and the subsequent expiration of the reinstatement period two months previously, the applicant's agent wrote to the Commissioner asking when the application would be examined. In response, the Patent Office returned a copy of the agent's letter bearing a stamp which indicated that there was an outstanding action on the application and that notice of abandonment had been mailed on February 10, 2005. That stamp bears the date of May 9, 2006. There is no evidence that such a notice was in fact mailed.

[13] It is not disputed by the respondents that no notice was provided to the applicant or to its agent that the application was deemed to have been abandoned. The evidence is that when an applicant has responded to a portion of a Patent Office action but has failed to respond to another part, the normal practice in the office is that the examiner would contact the applicant in a timely fashion to provide an opportunity to correct the defect without any loss of rights to the applicant. Where a notice of abandonment was issued, ample time would be provided to take steps to reinstate the application.

[14] This is supported by extracts from the Manual of Patent Office Procedure, revised in December 2003, which states, in section 19.07.03, that the applicant would be notified by a courtesy communication, or, if the due date had already passed, by a notice of abandonment when the response to a requisition under s. 29 was found to be incomplete.

[15] In this instance, the notice of abandonment, containing a paragraph describing the steps to be taken to reinstate the application, was issued on May 8, 2006, far too late for the applicant to take such action. Upon receipt, the applicant appealed to the Commissioner of Patents, submitting the missing documentation and filing the appropriate fee. The response on behalf of the Commissioner, dated August 15, 2006, concludes that the Commissioner has no discretionary power to reinstate an abandoned application after the reinstatement period specified in the Rules. The letter states that when a response to a requisition is considered incomplete the applicant will, when there is time left to respond before the due date, be notified by a courtesy communication requesting information or reasons why a full response was not received. If the due date for responding has already passed, a

notice of abandonment will be sent allowing for reinstatement action to be taken. In this case, the letter acknowledges that a notice of abandonment was not sent prior to the expiry of the reinstatement period. Citing section 20.07 of the Manual of Patent Office Procedure, the letter states that the practice of notification was merely a courtesy and the Patent Office accepts no responsibility for failure to send a notice in a particular situation.

[16] This application for judicial review was filed on September 14, 2006 seeking that the decision made by the Commissioner in the letter of August 15, 2006 be quashed, reinstatement of the application and referral back to the examiner for a determination on the merits.

[17] While it is clear that in this instance the Patent Office neglected to follow their customary practice to notify applicants that an application was in default, upon the evidence submitted I find that the Commissioner made no decision and took no action to determine that the application was abandoned or to deny reinstatement of the application within the prescribed time.

ISSUES:

[18] In its written submissions, the applicant raised several arguments respecting alleged errors of law made by the Commissioner in her interpretation of the Act and the Rules. These arguments are predicated upon the assumption that the Commissioner made a reviewable discretionary decision that resulted in the abandonment of the application and denial of the opportunity to seek reinstatement. I will deal with these interpretation questions briefly in addressing the key issues.

[19] In oral argument counsel for the applicant submitted that the central issue was denial of procedural fairness.

[20] The respondents stress that they have no interest in whether this particular patent application is reinstated or not. In their submission, the key issue is whether the Court has jurisdiction to review a non-discretionary outcome mandated by operation of law.

ANALYSIS:

Standard of Review

[21] The question of what standard of review to apply does not arise on the jurisdictional issue. The Court must make its own determination of whether it has the competence to review the actions taken by the Commissioner. Questions of procedural fairness are reviewed against a standard of correctness: *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 at para. 100.

Jurisdiction;

[22] The respondents maintain the position previously advanced by Ministers in *Pfizer Inc. Canada (Commissioner of Patents)* (1999) 1 C.P.R. (4th) 200 rev'd on other grounds (2000), 9

C.P.R. (4th) 13 (F.C.A.): *Hoffman-LaRoche AG v. Canada (Commissioner of Patents)* 2003 FC 1381, aff'd 2005 FCA 399 and *Eiba v. Canada (Attorney General)* 2004 FC 250. The jurisdiction of the Federal Court on an application for judicial review of the actions of federal administrative bodies is limited to that found in subsection 18.1(3) of the *Federal Courts Act*, R.S., 1985, c. F-7. That provision permits the Court to provide a remedy with respect to any "decision, order, act or proceeding". The respondents submit that as the deemed abandonment of the patent application was due to the operation of section 73 of the Act, there is no reviewable decision or action on the facts of this case. The Commissioner's correspondence notifying the applicant of that fact is purely an administrative act, not subject to review.

[23] The applicant acknowledges that, in this instance, there was no formal decision of the Commissioner to refuse the patent application for registration. However, the applicant submits, the Court has the jurisdiction to review the actions of federal bodies if the exercise of administrative action stems from statutory authority and affects the rights and interests of others: *Nunavut Tunngavik Inc. v. Canada (Attorney General)*, 2004 FC 85, (2004) 245 F.T.R. 42 at paragraphs 8-9. The Commissioner's letter of August 15, 2006 refusing to reinstate the application should be considered as falling within that category, in the applicant's submission.

[24] In *Nunavut Tunngavik*, at paragraph 8, Justice James O'Reilly found that the Court's role in judicial review "extends beyond formal decisions. It includes review of "a diverse range of administrative action that does not amount to a 'decision or order', such as subordinate legislation, reports or recommendations made pursuant to statutory powers, policy statements, guidelines and operating manuals, or any of the myriad forms that administrative action may take in the delivery by

a statutory agency of a public programme.” However, in that case the agency in question, the Privy Council office, had no authority to act as the applicants sought to have it do. Justice O’Reilly found that the refusal to take the action requested was not reviewable as it did not flow from any statutory power.

[25] In *Pfizer*, above, the applicant had been sent an erroneous notice of reinstatement with respect to a patent application deemed to have been abandoned for non-payment of fees. This was subsequently corrected in further correspondence. Justice Cullen concluded that as the correspondence was issued by a federal body pursuant to a statutory power and clearly affected the rights and interests of the applicant, the letters constituted an “act or proceeding” subject to review. His determination that the application had been validly reinstated through the initial correspondence was overturned on appeal. The Court of Appeal did not question whether the Commissioner’s actions were reviewable but held that as the statutory requirements for reinstatement under section 73 had not been met, the erroneous notice was of no force or effect.

[26] By analogy to *Pfizer*, the Commissioner’s errors in this case including the acceptance of the 2005 maintenance fee and failure to issue a notice of abandonment can’t be relied upon to revive an application which the statute has deemed abandoned.

[27] *Pfizer* was followed in *Hoffman-LaRoche* and *Eiba*, above, also cases dealing with the failure to pay fees. In each instance, the Court determined that as a threshold question, it had jurisdiction under section 18.1 of the *Federal Courts Act* to judicially review administrative actions taken by the Commissioner of Patents. However, this does not mean that the Court has the jurisdiction to grant a remedy under subsection 18.1(3) of the *Federal Courts Act*, where the

abandonment, or as was the situation in *Hoffman-LaRoche*, the expiry of a reissued patent, results not from any discretionary decision of the Commissioner but by operation of the statute.

[28] The Commissioner has only the powers explicitly granted in the Act. A statutory body, such as the Commissioner of Patents, has no inherent jurisdiction to relieve against inadvertent errors or omissions such as occurred in this instance. This was made clear by the Court of Appeal in the analogous context of administrative actions taken by the Registrar of Trademarks in *Anheuser-Busch, Inc. v. Carling O'Keefe Breweries of Canada Ltd.*, [1983] 2 F.C. 71 (C.A.), 142 D.L.R. (3d) 548.

[29] In circumstances where a statutory regime has been expressly laid out by Parliament, without discretionary powers granted to the body overseeing the operation of the statute, the effects of that regime cannot be waived either by the administrative body or this Court. Even where steps have been taken by the Commissioner to ease harsh consequences, they are of no effect where they are not explicitly authorized by the Act: *Barton No-till Disk Inc. v. Dutch Industries Ltd.*, 2003 FCA 121, [2003] 4 F.C. 67, leave to appeal to the S.C.C. dismissed December 11, 2003, [2003] S.C.C.A. No. 204.

[30] The applicant submitted that section 73(1)(a) of the Act requires the Commissioner of Patents to decide whether an applicant's response to a requisition has been in good faith. It was further argued that that decision is reviewable, and the clear attempts of the applicant to respond to the requisition letter would meet the requirements of that section. The respondents countered that there is no question of assessing good faith where there was no response. They asserted that each

requisition must be given a separate response and that DBC Marine failed to respond to the second requisition contained in the Office Action of August 10, 2004.

[31] As I have noted above, I find the applicant's argument in this matter unpersuasive. The applicant failed to respond to both requisitions, despite the clear indication on the letter received by their agent that such lapse would result in abandonment. Replying in good faith to one requisition in an office action containing two is not the equivalent of replying in good faith to both. The statute allows for no "good faith" exception to the requirements of paragraph 73 (1)(a) where there has been a failure to respond to a requisition.

[32] The applicant further argued that the question of whether a reply has been in good faith is an inherently subjective one, which the patent applicant cannot answer for themselves. It is thus necessary, it is contended, that the Examiner issue a Final Action under Rule 30 where the applicant has failed to adequately respond to a substantive requisition, and the twelve-month period in which the application could be reinstated would begin.

[33] The abandonment and reinstatement provisions of the Act do not allow for the exercise of discretion by the Commissioner but impose obligations upon the applicant that must be met. There is no decision on the Commissioner's part in this process which affects the rights of the applicant: *F. Hoffman-La Roche AG v. Canada (Commissioner of Patents)*, 2005 FCA 399, [2005] F.C.J. No. 1977. This lack of discretion includes the inability to set a new point to begin the period in which reinstatement can occur.

[34] Thus, where an applicant fails to respond to a requisition and the application is not reinstated within the year provided to rectify the situation, the patent application is abandoned as a matter of law. There is no discretionary decision which is reviewable by the Court.

[35] In written submissions, the applicant raised an interpretive argument that the use of the phrase ‘toute demande’ as equivalent to ‘requisition’ in section 73(1)(a) is not mirrored in Rule 29, where the verb ‘exiger’ is used. Applying the statutory interpretive principle of the equal authority of the French and English language texts, this must indicate that the term ‘requisition’ in section 73(1)(a) has a different meaning than in Rule 29. The applicant then submits that the noun ‘requisition’ must be interpreted as the document on which the requests are drawn up; that is, the form itself rather than the individual requests. This argument was not raised in oral submissions, nor did the respondent articulate any position on it.

[36] It seems to me that this form of application of the bilingual rule of statutory interpretation fails to recognize that languages may not always have parallel structures. In this particular case, there is no noun form of ‘exiger’ which would convey the concept of a ‘requisition’. When the French version of section 73(1)(a) is read in its entirety, however, it is quite clear that the word ‘demande’ is given additional force to render its meaning essentially equivalent to ‘requisition’. I cannot, therefore, accept the applicant’s submissions on this point. The requirement of section 73(1)(a) is to respond to each requisition of the Commissioner; that is, each individual request for information.

Procedural fairness;

[37] Paragraph 73 (1) (a) of the Act provides that an application shall be deemed abandoned if the applicant does not reply “...in good faith to any requisition...” within the prescribed period. The applicant argues that the previous policy of the Patent Office had been to accept a response to an Office Action or Examiner’s Report as a sign of a good faith response to the requisitions therein even when not all of them have been answered. The applicant further submits that the alteration of this long-standing custom is unfair not only to themselves but to all patent applicants putting at risk of deemed abandonment, thousands of applications filed since 1996.

[38] The evidence is that notwithstanding the 2003 adoption of the “multiple abandonments” concept and notice to the profession in an effort to emphasize that a response was required to each requisition, the Patent Office continued the practice of formal or informal “courtesy” communications that one or more requisitions, notably those pursuant to section 29, had been overlooked. Where the deadline had passed, a timely notice of abandonment would be issued. This practice served to protect the rights of the applicants which could otherwise be lost through mere inadvertence. Had it been applied in this case, there is no doubt that the necessary steps to procure reinstatement of the application would have been taken. There is no dispute that the Patent Office failed to provide a timely notice of abandonment in this case. But in so doing, did it deny the applicant procedural fairness?

[39] While it was not characterized as such by the applicant, the submission that it was denied procedural fairness by the Patent Office is tantamount to an argument based on the principle of legitimate expectations. In essence, the applicant’s position is that it was induced to its detriment to

rely upon the pre-2003 practice of the Office to accept partial responses to multiple requisitions and upon the continuing practice of the Office to provide notice of default so as to allow timely reinstatement of applications deemed abandoned.

[40] As I found in *Eiba*, above, in an analogous context where one request for reinstatement with the required fee had been received by the Patent Office but not another, the legitimate expectations doctrine applies to situations where an applicant has been led to believe that he will have a right to make representations to, or be consulted by, a government decision-maker, prior to a particular decision being taken: *Old St. Boniface Residents Ass. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170. I was not persuaded then, nor am I now, that it applies where an administrative body has, in its past practice, brought deficiencies in the filing process to an applicant's attention, so as to create an expectation that the Commissioner will catch each slip, even inadvertent ones, of an applicant.

[41] I concluded in *Eiba* that the Commissioner has no duty to provide notice to an applicant that an application has not been properly reinstated, when the obligation to reinstate an abandoned application, by submitting certain prescribed materials and fees, is clearly placed on the shoulders of the applicant by the legislative scheme. In my view, the same reasoning applies here even where the Commissioner's office has followed a general practice of delivering timely notice when an initial deadline was missed.

[42] Finally, the applicant alleges that the Commissioner breached her duty of procedural fairness in dealing with this patent application, both in failing to follow its own guidelines and in failing to provide a reasonable notice period for the applicant to resolve the problem. It submits that the specific guideline of section 19.07.03 of the Manual of Patent Office Procedure, which provides

that the applicant will be notified where information requisitioned under Rule 29 is not supplied, should take precedence over the more general provisions of section 20.07, which notes that a notice of abandonment is not always sent and is a courtesy. The Commissioner has accepted the duty to provide notice. It is, therefore, also under a duty to provide this notice in a timely manner which allows the applicant to take remedial action.

[43] It is a general rule that, while guidelines may be legally and properly set out by a Minister, and by extension the Commissioner, those guidelines cannot confine his or her discretion: *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2, [1982] S.C.J. No. 57. As I have already decided that the Commissioner had no discretion in the automatic application of the *Act*, any failure on her part to follow the guidelines of the Manual cannot relieve the applicant of its legislated obligations, nor can it allow the applicant to avoid the legal consequences of failing to satisfy those obligations.

[44] In the circumstances the respondents do not seek their costs in this matter and none will be awarded.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application is dismissed. The parties shall bear their own costs.

“Richard G. Mosley”

Judge

SCHEDULE A

Patent Act, (R.S., 1985, c. P-4)

<p>73. (1) An application for a patent in Canada shall be deemed to be abandoned if the applicant does not</p> <p>(a) reply in good faith to any requisition made by an examiner in connection with an examination, within six months after the requisition is made or within any shorter period established by the Commissioner;</p> <p>(b) comply with a notice given pursuant to subsection 27(6);</p> <p>(c) pay the fees payable under section 27.1, within the time provided by the regulations;</p> <p>(d) make a request for examination or pay the prescribed fee under subsection 35(1) within the time provided by the regulations;</p> <p>(e) comply with a notice given under subsection 35(2); or</p> <p>(f) pay the prescribed fees stated to be payable in a notice of allowance of patent within six months after the date of the notice.</p> <p>(2) An application shall also be deemed to be abandoned in any other circumstances that are prescribed.</p> <p>(3) An application deemed to be abandoned under this section shall be reinstated if the applicant</p> <p>(a) makes a request for reinstatement to the Commissioner within the prescribed period;</p> <p>(b) takes the action that should have been</p>	<p>73. (1) La demande de brevet est considérée comme abandonnée si le demandeur omet, selon le cas :</p> <p>a) de répondre de bonne foi, dans le cadre d'un examen, à toute demande de l'examineur, dans les six mois suivant cette demande ou dans le délai plus court déterminé par le commissaire;</p> <p>b) de se conformer à l'avis mentionné au paragraphe 27(6);</p> <p>c) de payer, dans le délai réglementaire, les taxes visées à l'article 27.1;</p> <p>d) de présenter la requête visée au paragraphe 35(1) ou de payer la taxe réglementaire dans le délai réglementaire;</p> <p>e) de se conformer à l'avis mentionné au paragraphe 35(2);</p> <p>f) de payer les taxes réglementaires mentionnées dans l'avis d'acceptation de la demande de brevet dans les six mois suivant celui-ci.</p> <p>(2) Elle est aussi considérée comme abandonnée dans les circonstances réglementaires.</p> <p>(3) Elle peut être rétablie si le demandeur :</p> <p>a) présente au commissaire, dans le délai réglementaire, une requête à cet effet;</p>
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<p>taken in order to avoid the abandonment; and</p> <p>(c) pays the prescribed fee before the expiration of the prescribed period.</p> <p>(4) An application that has been abandoned pursuant to paragraph (1)(f) and reinstated is subject to amendment and further examination.</p> <p>(5) An application that is reinstated retains its original filing date.</p>	<p>b) prend les mesures qui s'imposaient pour éviter l'abandon;</p> <p>c) paie les taxes réglementaires avant l'expiration de la période réglementaire.</p> <p>(4) La demande abandonnée au titre de l'alinéa (1)f) et rétablie par la suite est sujette à modification et à nouvel examen.</p> <p>(5) La demande rétablie conserve sa date de dépôt.</p>
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Patent Rules (SOR/96-423)

<p>29. (1) Where an examiner examining an application in accordance with section 35 of the Act or the Act as it read immediately before October 1, 1989 has reasonable grounds to believe that an application for a patent describing the same invention has been filed, in or for any country, on behalf of the applicant or on behalf of any other person claiming under an inventor named in the application being examined, the examiner may requisition from the applicant any of the following information and a copy of any related document:</p> <p>(a) an identification of any prior art cited in respect of the applications;</p> <p>(b) the application numbers, filing dates and, if granted, the patent numbers;</p> <p>(c) particulars of conflict, opposition, re-examination or similar proceedings; and</p>	<p>29. (1) Lorsque l'examineur chargé de l'examen d'une demande conformément à l'article 35 de la Loi ou de la Loi dans sa version antérieure au 1er octobre 1989 a des motifs raisonnables de croire qu'une demande de brevet visant la même invention a été déposée dans tout pays ou pour tout pays, au nom du demandeur ou d'une autre personne se réclamant d'un inventeur désigné dans la demande examinée, il peut exiger que le demandeur lui fournisse les renseignements suivants et des copies des documents connexes :</p> <p>a) toute antériorité citée à l'égard de ces demandes;</p> <p>b) les numéros des demandes, les dates de dépôt et les numéros des brevets s'ils ont été octroyés;</p> <p>c) les détails relatifs aux conflits, oppositions, réexamens ou procédures analogues;</p>
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<p>(d) where a document is not in either English or French, a translation of the document, or a part of the document, into English or French.</p> <p>(2) Where an examiner examining an application in accordance with section 35 of the Act or the Act as it read immediately before October 1, 1989 has reasonable grounds to believe that an invention disclosed in the application was, before the filing date of the application, published or the subject of a patent, the examiner may requisition the applicant to identify the first publication of or patent for that invention.</p> <p>(3) Subsections (1) and (2) do not apply to any information or document that is not available or known to the applicant, provided that the applicant states the reasons why the information or document is not available or known.</p> <p>98. (1) For an application deemed to be abandoned under section 73 of the Act to be reinstated, the applicant shall, in respect of each failure to take an action referred to in subsection 73(1) of the Act or section 97, make a request for reinstatement to the Commissioner, take the action that should have been taken in order to avoid the abandonment and pay the fee set out in item 7 of Schedule II, before the expiry of the 12-month period after the date on which the application is deemed to be abandoned as a result of that failure.</p> <p>(2) For the purposes of subsection (1), if an application is deemed to be abandoned for failure to pay a fee referred to in subsection 3(3), (4) or (7), for the applicant to take the action that should have been taken in order to avoid the abandonment, the applicant shall, before the expiry of the time prescribed by subsection (1), either</p>	<p>d) si le document n'est ni en français ni en anglais, une traduction en français ou en anglais de tout ou partie du document.</p> <p>(2) Lorsque l'examineur chargé de l'examen d'une demande conformément à l'article 35 de la Loi ou de la Loi dans sa version antérieure au 1er octobre 1989 a des motifs raisonnables de croire qu'une invention mentionnée dans la demande faisait l'objet, avant la date du dépôt de la demande, d'une publication ou était brevetée, il peut exiger que le demandeur précise la première publication ou le brevet se rapportant à cette invention.</p> <p>(3) Les paragraphes (1) et (2) ne s'appliquent pas aux renseignements et documents qui ne sont pas à la disposition du demandeur ou qui ne sont pas connus de lui, dans la mesure où il donne les motifs pour lesquels ils ne le sont pas.</p> <p>98. (1) Pour que la demande considérée comme abandonnée en application de l'article 73 de la Loi soit rétablie, le demandeur, à l'égard de chaque omission visée au paragraphe 73(1) de la Loi ou à l'article 97, présente au commissaire une requête à cet effet, prend les mesures qui s'imposaient pour éviter l'abandon et paie la taxe prévue à l'article 7 de l'annexe II, dans les douze mois suivant la date de prise d'effet de l'abandon.</p> <p>(2) Pour prendre les mesures qui s'imposaient pour éviter l'abandon pour non-paiement de la taxe visée aux paragraphes 3(3), (4) ou (7), le demandeur, avant l'expiration du délai prévu au paragraphe (1) :</p>
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(a) pay the applicable standard fee, or	a) soit paie la taxe générale applicable;
(b) file a small entity declaration in respect of the application in accordance with section 3.01 and pay the applicable small entity fee.	b) soit dépose, à l'égard de sa demande, la déclaration du statut de petite entité conformément à l'article 3.01 et paie la taxe applicable aux petites entités.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1667-06

STYLE OF CAUSE: DBC MARINE SAFETY SYSTEMS LTD

AND

THE COMMISSIONER OF PATENTS and
THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: September 24, 2007

REASONS FOR JUDGMENT: MOSLEY J.

DATED: November 5, 2007

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