Federal Court Cour fédérale

Date: 20100126

Docket: T-329-09

Citation: 2010 FC 86

Ottawa, Ontario, January 26, 2010

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

FRÉDÉRIC PICARD

Applicant

and

THE COMMISSIONER OF PATENTS

and

THE CANADIAN INTELLECTUAL PROPERTY OFFICE

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under subsection 77(1) of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) by Frédéric Picard (the applicant) against the Canadian Intellectual Property Office (the Office) and the Commissioner of Patents (together, the respondents).

FACTS AND LEGISLATIVE FRAMEWORK

[2] A person who wishes to patent an invention in Canada (an inventor) must file an application for a patent together with a petition, an abstract summarizing the subject-matter of the invention and a specification that contains "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" with the Commissioner of Patents, in accordance with section 27 of the *Patent Act*, R.S.C. 1985, c. P-4. "[I]f an application for the patent in Canada is filed in accordance with [the *Patent Act*] and all other requirements for the issuance of a patent under this Act are met", the Commissioner shall grant a patent for the invention.

[3] The patent application is prepared by the inventor or a patent agent retained by the inventor. It may be filed in English or French.

[4] Once the application is filed, the inventor may request that it be examined. When such a request is made, the Commissioner of Patents causes the application to be examined by an examiner employed by the Patent Office (*ibid.*, s. 35). The examiner must be satisfied that the invention to which the patent application relates meets the requirements of the *Patent Act* in terms of patentability.

[5] An examiner may communicate with the inventor regarding any irregularities in the patent application or the accompanying documents. Inventors may amend their applications in response to a communication, but examiners may not make amendments themselves.

[6] Under section 10 of the *Patent Act*, a patent application is confidential for a period of 18 months, on expiry of which the application and the documents relating to it, and the patents, may be inspected.

[7] When examination of the application has been completed, a patent will be granted if the invention meets the requirements of the *Patent Act*; otherwise, the application will be refused (*ibid*., section 40). A decision refusing a patent application may be appealed to the Federal Court (*ibid*., section 41).

[8] If a patent is granted to an inventor, the inventor receives a certificate entitled "Canadian Patent", containing certain information required under sections 42 and 43 of the *Patent Act* (in particular, the name or title of the invention covered, the filing date of the application for the patent and the date on which the patent was granted). That information is in both official languages. Attached to the certificate are a copy of the petition, the abstract, the specification and the drawings, as submitted by the inventor, and a cover page, produced by the Patent Office, containing the name of the inventor and the name of the patent owner, a drawing representing the invention (as submitted by the inventor) and the abstract submitted by the inventor.

[9] The result is that even when a patent application becomes open to public inspection, it is in one official language only, the language in which it was filed. Only certain information, none of which allows the reader to understand how the invention covered functions and the scope of the monopoly granted, is available in both official languages once the patent is granted.

[10] At the applicant's request, the Office of the Commissioner of Official Languages (the OCOL) investigated whether this situation is consistent with the *Official Languages Act*, and in particular with Parts II, IV and VII of that Act.

[11] The OCOL submitted its final report on January 6, 2009. It concluded that the Patent Office was not in violation of Part II (relating to "Legislative and Other Instruments") and Part IV (relating to "Communications with and Services to the Public") of the Act. However, it recommended that the Office develop an action plan with a view to making patent abstracts available in both official languages, so the Patent Office would meet the objective of promoting linguistic equality in accordance with Part VII of the *Official Languages Act*.

[12] The Office approved three projects in response to the recommendations made by the OCOL. It will make available bilingual abstracts of patent applications from the international application system under the *Patent Cooperation Treaty* and possibly provide an unofficial automated translation of abstracts for all other patents. In addition, the Office will make available to the public a bilingual keyword search system capable of returning results in both languages in response to a search in one language.

[13] The applicant was not satisfied with the report by the OCOL and the response from the Office and brought this application.

ISSUES

[14] The applicant submits that patents and patent applications must be bilingual to meet the requirements of the *Official Languages Act*. The issue is therefore whether the fact that those documents are available in only one of the two official languages violates

(1) Section 7 of the *Official Languages Act*;

(2) Section 12 of that Act;

(3) Section 22 of that Act; or

(4) Part VII of that Act (and in particular section 41).

[15] In the event that the answer to that question is yes, the Court will have to consider the appropriate remedy in the circumstances.

ANALYSIS

(1) Section 7 of the *Official Languages Act*

[16] Section 7 of the *Official Languages Act* reads as follows:

Legislative instruments

7. (1) Any instrument made in the execution of a legislative power conferred by or under an Act of Parliament that

(*a*) is made by, or with the approval of, the Governor in Council or one or more ministers of the Crown,

(*b*) is required by or pursuant to an Act of Parliament to be published in the *Canada Gazette*, or

Textes d'application

7. (1) Sont établis dans les deux langues officielles les actes pris, dans l'exercice d'un pouvoir législatif conféré sous le régime d'une loi fédérale, soit par le gouverneur en conseil ou par un ou plusieurs ministres fédéraux, soit avec leur agrément, les actes astreints, sous le régime d'une loi fédérale, à l'obligation de publication dans la *Gazette du Canada*, ainsi que les actes de nature publique et générale. Leur impression et leur publication éventuelles se font dans les deux langues officielles.

(*c*) is of a public and general nature

shall be made in both official languages and, if printed and published, shall be printed and published in both official languages.

Instruments under prerogative or other executive power

(2) All instruments made in the exercise of a prerogative or other executive power that are of a public and general nature shall be made in both official languages and, if printed and published, shall be printed and published in both official languages.

…

Prérogative

(2) Les actes qui procèdent de la prérogative ou de tout autre pouvoir exécutif et sont de nature publique et générale sont établis dans les deux langues officielles. Leur impression et leur publication éventuelles se font dans ces deux langues.

…

Submissions by the Parties

[17] In the applicant's submission, this provision is applicable to patents, which he submits are legislative in nature, in a manner similar to regulations, to which section 133 of the *Constitution Act, 1867*, the requirements of which are reiterated in section 7 of the *Official Languages Act*, applies, as the Supreme Court explained in *Attorney General of Quebec v. Blaikie*, [1981] 1 S.C.R. 312, 123 D.L.R. (3d) 15.

[18] The applicant submits that a patent meets the criteria proposed by the Supreme Court of Canada in *Reference re Manitoba Language Rights*, [1992] 1 S.C.R. 212, to determine whether orders-in-council are "of a legislative nature" and so the constitutional bilingualism requirement applies. In his submission, patents meet the formal criterion, the requirement that the instrument in question be made by the government or subject to its approval, because the Commissioner of Patents, who approves patent applications, is appointed by the Governor in Council and his seal is similar to the Great Seal of Canada. He submits that patents also meet the content criterion

because they embody rules of conduct, in this instance a prohibition on making the product covered by a patent; they have force of law because they bear the Commissioner's seal; and they apply to an undetermined number of persons.

[19] He relies on *Whirlpool Corp. v. Camco Inc.*, 2000 SCC 67, [2000] 2 S.C.R. 1067, at paragraph 49, in which Binnie J., writing for the Court, explains that once a patent is issued it is a "regulation" within the meaning of the *Interpretation Act*, R.S.C. (1985), c. I 21.

[20] The applicant also cited the decision of the Supreme Court in *Sinclair v. Quebec (Attorney General)*, [1992] 1 S.C.R. 579, 89 D.L.R. (4th) 500, in which the Court concluded that "[t]he requirements of s. 133 cannot be circumvented by the disingenuous division of the legislative process into a series of discrete steps, and then claiming that each of these steps, when examined in isolation, lacks a legislative character". The Court therefore held that a municipal corporation's letters patent, which the applicant believes are comparable to patents, had to be published in both official languages.

[21] The applicant's final argument is that patents are covered by the specific provisions of section 7 of the *Official Languages Act*, because they are letters patent and are made in the exercise of the executive prerogative.

[22] The respondents submit that section 7 of the *Official Languages Act* does not apply to patents. In their submission, a patent is not an "instrument made in the execution of a legislative power conferred by or under an Act of Parliament", and is rather title to property that defines

private rights. Notwithstanding the fact that those rights are published, a patent is a private document.

[23] In the opinion of the respondents, patents do not meet any of the criteria relating to content and effect proposed by the Supreme Court in *Reference re Manitoba Language Rights*, *supra* at paragraph 18, that an instrument must meet in order to be characterized as “legislative”. In their submission, a patent does not have force of law, although, like any document defining private rights, it produces legal effects. To have “force of law”, a rule must be unilateral, and this is not the case for a patent since it is the inventor who creates the instrument. In addition, a patent does not apply to an undetermined number of persons, since it is granted to only one inventor. It is the *Patent Act* that makes it enforceable against third parties.

[24] In addition, the respondents draw an analogy between a patent and a title deed, to show that the former is no more a legislative instrument than the latter. The *Patent Act* sets out the process to be followed for obtaining and publishing a patent, the exclusive privileges of the patent owner and the remedies available to the patent owner to enforce those privileges. As well, the Act sets out the rights of the owner and prohibits others from infringing them. The rules relating to title deeds have force of law and apply to an undetermined number of people, but each title deed is granted to only one individual.

[25] In the respondents’ submission, the provisions of Book Nine of the *Civil Code of Québec* (entitled “Publication of Rights”) have the same relationship with title deeds to immovable property as the *Patent Act* has with the documents submitted by the inventor. They govern the

form of the documents and make them enforceable on the conditions provided by the law. However, title deeds need not be available in both official languages. Like patents, they reflect private transactions, and neither section 133 of the *Constitution Act, 1867* nor the *Official Languages Act* applies to them.

[26] As well, patents do not meet the other criteria for section 7 of the *Official Languages Act* to apply. For example, a patent is neither made under an Act nor subject to the approval of one or more ministers or of the government (paragraph 7(1)(*a*) of the English version of the *Official Languages Act*); rather, it is issued by the Commissioner and is valid from that moment. A patent need not be published in the *Canada Gazette* (paragraph 7(1)(*b*)). It is not general in nature because it does not embody a rule of conduct that applies to a large number of cases.

[27] Last, the respondents submit that the decisions of the Supreme Court on which the applicant relies are not applicable in this case. They submit that the definition in the *Interpretation Act* by which a patent is a “regulation”, to which Binnie J. referred in *Whirlpool*, does not mean that a patent is made “in the execution of a legislative power”. The requirement that an instrument be “made in the execution of a legislative power” is an essential condition for section 7 of the *Official Languages Act* to apply. In *Sinclair*, *supra*, the legislative framework in question was very different from the one in this case. The letters patent whose unilingualism was challenged provided the entire legal framework within which the new municipality created by what the Supreme Court described as a “‘shell’ statute” was to operate. The respondents submit that the la *Patent Act* is not a “‘shell’ statute”, and that the participation of the inventor and the Commissioner in the issuance of the patent is not comparable to a legislative process.

Accordingly, unlike the letters patent in *Sinclair*, a patent is not a step in a legislative process and is not subject to the obligation of legislative bilingualism.

Application in this Case

[28] In my opinion, a patent does not meet the formal criterion developed by the Supreme Court in *Reference re Manitoba Language Rights*, *supra*, at p. 224, because it is not made by a government or subject to approval by a government, and no positive action by the government is required to breathe life into it. The Supreme Court determined that the bilingualism requirement applied to instruments about which it can be said that “positive action of the Government is required to breathe life into them” in *Blaikie*, *supra*, at p. 329. If we read that decision, it is clear that when the Supreme Court referred to “the Government” it was referring to Cabinet, not the entire executive branch (see, in particular, pp. 319-21). No “positive action” by the federal Cabinet is required to “breathe life into” a patent. The patent is effective once it is issued by the Commissioner.

[29] A patent also does not meet the content criterion because it does not have “force” of law in the sense in which the Supreme Court used that expression, because it is not a unilateral rule. The text of a patent is proposed by the inventor. The Commissioner can neither create a patent on his own initiative nor even modify a single word in a patent application

[30] The requirement that an instrument be “made in the execution of a legislative power” is essential in order for subsection 7(1) of the *Official Languages Act* to apply. Patents do not meet that requirement and so that provision is not applicable in this case.

[31] The applicant's argument concerning subsection 7(2) of the *Official Languages Act*, which makes it mandatory for "[a]ll instruments made in the exercise of a prerogative or other executive power that are of a public and general nature" to be published in both official languages, also cannot be accepted. The origin of patents, in English law, indeed "rests in the royal prerogative of granting letters patent" (Adam Mossoff, "Rethinking the Development of Patents: An Intellectual History, 1550-1800", 52 Hastings L.J. 1255 at p. 1259), and a patent was therefore, initially, "an instrument made in the exercise of a prerogative".

[32] However, the rules relating to Crown prerogative are merely common law rules, which can be ousted by legislation. Accordingly, when a statute occupies a field formerly left to Crown prerogative, the statute is the source of the executive power to do what was formerly authorized by the prerogative. The *Patent Act* creates a complete statutory scheme which, in Canada, replaces the Crown prerogative to grant a patent for an invention. Accordingly, subsection 7(2) of the *Official Languages Act* does not apply to patents.

(2) Section 12 of the *Official Languages Act*

[33] Section 12 of the *Official Languages Act* reads as follows:

Instruments directed to the public

12. All instruments directed to or intended for the notice of the public, purporting to be made or issued by or under the authority of a federal institution, shall be made or issued in both official languages.

Actes destinés au public

12. Les actes qui s'adressent au public et qui sont censés émaner d'une institution fédérale sont établis ou délivrés dans les deux langues officielles.

<u>Submissions by the Parties</u>

[34] On the one hand, the applicant submits that this provision applies to patents, which he stresses are public in nature. In his submission, as letters patent, patents are "*actes*" or "legal instruments". In addition, a patent is "directed to or intended for the notice of the public" in that it is used to disclose information in return for which the public grants the inventor a monopoly.

[35] He also relies on the English version of section 12 of the *Official Languages Act* since, in his submission, the wording "intended for the notice of the public" refers to passive publication, which corresponds to what the Patent Office does when it makes patents available for public inspection, although it does not "actively" publish them, for example in the *Canada Gazette*.

[36] On the other hand, the respondents submit that section 12 of the *Official Languages Act* does not apply to patents, since they are not directed to the public with the aim of informing the public and are not made or issued by or under the authority of a federal institution.

[37] In their submission, patents are not directed to or intended for the notice of the public, but – as the Office of the Commissioner for Official Languages acknowledged – inventors, although they are available for public inspection. As did the Office of the Commissioner for Official Languages, the respondents distinguished instruments "made available to the public", to which Part IV of the *Official Languages Act* applies, from instruments "directed to or intended for the notice of" the public, which are governed by section 12 of that Act. To be directed to or intended for the notice of the public, an instrument must be [TRANSLATION] "actively brought to its

attention", as is the case, for example, with a notice posted in a place or on an object to inform the public, and this is not the case for a patent.

[38] The respondents submit that it is the inventor, not the Commissioner, who informs the public, by way of the patent, as set out in the provisions of the *Patent Act* and the *Patent Rules* governing the content of a patent application. Because it is the inventor who chooses each word in the claims, supplies the drawings and, in general, retains ownership and control of their application, the patent is made or issued by the inventor. They cite *Free World Trust v. Électro Santé Inc.*, 2000 SCC 66, [2000] 2 S.C.R. 1024, in which the Supreme Court adopted the opinion of Thorson P. in *Minerals Separation North American Corp. v. Noranda Mines, Ltd.*, [1947] Ex. Ct. 306 at p. 352.

[39] Thorson P. wrote: "By his claims the inventor puts fences around the fields of his monopoly and warns the public against trespassing on his property." The precise terms chosen by the inventor determine the "fields of his monopoly", and anyone who seeks to interpret a patent must interpret those terms in the sense intended by the inventor. The respondents submit that translating the terms chosen by an inventor would make the process of issuing patents more uncertain because of the multiple possible meanings of a single word, as noted by the Supreme Court in *Free World*, *supra*, at paragraph 58.

<u>Application in this Case</u>

[40] In my opinion, a patent is a hybrid instrument, both private and public. Its authority derives from the approval by a public institution, the Commissioner, but its content is determined

by a private person, the inventor. In exchange for disclosure of that content, the inventor obtains a right that is characterized as both a monopoly and a private property right. In the past a patent was a privilege deriving from royal favour, and today it is a title deed confirming a right created by law.

[41] I am not persuaded of the validity of the distinction drawn by the parties between "active" publication and "passive" publication of a document. The applicant seems to be saying that publication of patents in the *Canada Gazette* would be "active", but publication in a registry kept by the Patent Office is not active because an effort must be made to inspect them there. In fact, inspection of a document published in the *Canada Gazette* also calls for a certain effort to find it.

[42] The respondents suggest that a notice posted [TRANSLATION] "in a place or on an object" would be directed to or intended for the notice of the public, while a notice published in a registry would merely be available to the public. Here again, in both cases, a certain effort must be made to inspect the notice. The difference, if any, is one of degree. (I also note that the example proposed by the respondents would certainly not belong to the class of "instruments" or "*actes*", the only class to which section 12 of the *Official Languages Act* applies.)

[43] Contrary to what the respondents argue, I am of the opinion that patents are public documents. Although the issuance of patents is now authorized by a statute and patents are issued on the conditions set out in the statute, they are nonetheless letters patent. Blackstone explained that letters patent are "<u>open letters</u>, *literae patentes*: so called, because they are not

sealed up, but exposed to open view, with the great seal pendant at the bottom; and are usually directed or addressed by the king to all his subjects at large" (William Blackstone, *Commentaries on the Laws of England: a Facsimile of the First Edition 1765 – 1769*, Chicago, University of Chicago Press, 1979, vol. 2 at p. 346; emphasis added). The fact that a patent, like letters patent confirming any other royal grant, are ostensibly intended for the owner does not change the fact that they are public in nature.

[44] It is also easy to understand the importance of a patent being public. A patent is different from a title deed to movable or immovable property in that it is a monopoly, which means that it grants "the exclusive right, privilege and liberty of making, constructing and using the invention and selling it to others to be used" (*Patent Act*, section 42). It therefore creates an exception to the general principles of free commerce and even of freedom itself, under which people should be free to "make, construct and sell to others" anything in which there is no law prohibiting commerce. An individual must therefore be able to know what they are not entitled to "make, construct, use or sell", when, hypothetically, they may do that with anything that is not banned from commerce by law.

[45] However, although a patent is directed to or intended for the notice of the public, it is made or issued not by a federal institution, but by the inventor. Notwithstanding the fact that it originates in the discretionary exercise of Crown prerogative, a patent today represents recognition of a right rather than the expression of the favour of the sovereign. The role of the Commissioner of Patents is limited to ascertaining that the patent application submitted by the inventor meets the requirements laid out in *Patent Act* and the regulations made under that Act.

Section 27 of the *Patent Act* gives the Commissioner no discretion in that regard: if the requirements are met, he must issue the patent (*Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76, [2002] 4 S.C.R. 45, at paragraph 144).

[46] When the Commissioner of Patents issues a patent, he confirms the inventor's right, but it is the inventor who defines the scope of their right by writing the claims. The text of a patent, including when it results from amendments made to the patent application, is proposed by the inventor, and the inventor is responsible for it. If the inventor proposes a text that is too restrictive, they will have to bear the potential loss of profits resulting from the fact that the "field" of the monopoly granted to them is too narrow; if they propose a text that is too vague, they risk having the patent subsequently found by a court to be invalid. A patent is therefore really made or issued by the inventor, not by the Commissioner of Patents. As a result, section 12 of the *Official Languages Act* does not apply.

[47] In addition, the translation of patents by the Patent Office would lead to serious tensions between the various objectives of the Canadian patent system and the *Official Languages Act*, and this suggests to me that Parliament never contemplated that Act applying to patents.

[48] For one thing, in that situation, an applicant for a patent would, if they wished to retain control of the application, have to understand and approve the translation done of the patent. That is in direct contradiction with the objective of the *Official Languages Act*, which is to implement the constitutional guarantee of everyone's right to communicate with federal institutions in either official language, at their option.

[49] For another, if the inventor is required to approve the translation of their application without understanding it, the objective of the patent system, to give inventors control over their applications and place full responsibility for the resulting patent on them, would be compromised. In addition, where there was a discrepancy between the two versions of the patent, an interpretation of the patent based on the objectives of the inventor, as advocated by the Supreme Court in *Free World*, *supra*, would become impossible, unless it were recognized that the "original" version of the patent, the one in the language of the inventor's application, took precedence over the translation. The effect of such recognition would be to cancel out any benefit for linguistic equality resulting from the fact that both versions of a bilingual instrument are equally authoritative, under section 13 of the *Official Languages Act*.

[50] Given all these difficulties, we can draw a parallel with the reasoning of Bastarache J. and the majority of the Supreme Court in *Harvard College*, *supra*, at paragraph 167, and conclude that the fact that the *Official Languages Act* and the *Patent Act*, as they now stand, do not allow for proper handling of the translation of patents is a sign that Parliament never intended that the words "instruments directed to or intended for the notice of the public, purporting to be made or issued by or under the authority of a federal institution" would cover patents.

(3) Section 22 of the *Official Languages Act*

[51] Section 22 of the *Official Languages Act* reads as follows:

Where communications and services must be in both official languages	Langues des communications et services
22. Every federal institution has the duty to ensure that any member of the public can	**22.** Il incombe aux institutions fédérales de veiller à ce que le public puisse

communicate with and obtain available services from its head or central office in either official language, and has the same duty with respect to any of its other offices or facilities

(*a*) within the National Capital Region; or

(*b*) in Canada or elsewhere, where there is significant demand for communications with and services from that office or facility in that language.

communiquer avec leur siège ou leur administration centrale, et en recevoir les services, dans l'une ou l'autre des langues officielles. Cette obligation vaut également pour leurs bureaux — auxquels sont assimilés, pour l'application de la présente partie, tous autres lieux où ces institutions offrent des services — situés soit dans la région de la capitale nationale, soit là où, au Canada comme à l'étranger, l'emploi de cette langue fait l'objet d'une demande importante.

Submissions by the Parties

[52] The applicant submits that the Patent Office is in violation of section 22 of the *Official Languages Act* and of section 20 of the *Canadian Charter of Rights and Freedoms*, which gives the Canadian public the right to which the obligation imposed on federal institutions by section 22 of the *Official Languages Act* gives effect. He submits that by making the text of patent claims and abstracts available, including in "searchable" text format on its web site, the Patent Office publishes that text and is therefore communicating with the public in only one official language.

[53] The respondents point out that an inventor may submit their patent application and communicate with the Patent Office in the official language of their choice. With each patent certificate, the Office then issues a cover page on which all of the material created by the Office is in both official languages. The Office thus meets its bilingualism obligations in relation to communications with and services to the public under the *Official Languages Act* and the *Charter*. They submit that the availability of patents on the Patent Office web site is neither a "communication with" nor a "service to" the public. The respondents draw a parallel with an

access to information request, in relation to which the government must make a document public, but has no obligation to translate it.

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[54] I agree with the respondents that publication of certain components of patents on the Patent Office web site is not a distinct "service" that, in itself, must be provided in both official languages. The Office merely reproduces (in part) the text of the patents, as they exist. The question of a violation of section 22 of the *Official Languages Act* that is distinct from a violation of section 12 would arise if the patents were bilingual but the Office published only one of the two versions of the patents on its web site. That is not the case, and accordingly I am of the opinion that the Office is not in violation either of section 22 of the *Official Languages Act* or of the *Charter*.

(4) Part VII of the *Official Languages Act*

[55] The most relevant provision of Part VII of the *Official Languages Act* (Part VII) in this case is section 41, which reads as follows:

Government policy

41. (1) The Government of Canada is committed to

(*a*) enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development; and

(*b*) fostering the full recognition and use of both English and French in Canadian society.

Engagement

41. (1) Le gouvernement fédéral s'engage à favoriser l'épanouissement des minorités francophones et anglophones du Canada et à appuyer leur développement, ainsi qu'à promouvoir la pleine reconnaissance et l'usage du français et de l'anglais dans la société canadienne.

Duty of federal institutions

(2) Every federal institution has the duty to ensure that positive measures are taken for the implementation of the commitments under subsection (1). For greater certainty, this implementation shall be carried out while respecting the jurisdiction and powers of the provinces.

…

Obligations des institutions fédérales

(2) Il incombe aux institutions fédérales de veiller à ce que soient prises des mesures positives pour mettre en œuvre cet engagement. Il demeure entendu que cette mise en œuvre se fait dans le respect des champs de compétence et des pouvoirs des provinces.

…

Submissions by the Parties

[56] The applicant submits that the fact that a disproportionate portion of Canadian patents are in English shows that Canadian francophones are excluded from the "patent process", in violation of section 41 of the *Official Languages Act*. The applicant notes that patents being available in both languages would encourage the dissemination of the information made available to the public by inventors and would help to avoid infringement.

[57] Although the Office of the Commissioner of Official Languages shares that concern, the applicant is not satisfied with the solution proposed by the OCOL, which consists of making the abstracts for patents, but not necessarily the claims, available in both official languages. In his submission, understanding the claims is crucial for avoiding infringement. Accordingly, the claims in both patents and patent applications must be available in both official languages.

[58] In addition, if patents were available in both official languages, francophone inventors would have a choice of language and they would thus not have to assimilate. The applicant cites a passage from the reasons of Charron J., writing for the unanimous Supreme Court, in

DesRochers v. Canada (Industry), 2009 SCC 8, [2009] 1 S.C.R. 194 at paragraph 55, opening the door, in *obiter*, to the possibility that "services … of equal quality in both languages but inadequate or even of poor quality, and [that do not meet] the community economic development needs of either community", would be considered to be a "breach of the duties under Part VII".

[59] In the respondents' submission, Part VII is distinct from Parts I to V of the *Official Languages Act* in that it does not implement a Charter requirement, and is therefore rather an addition to the language rights protected by the Constitution. As well, the provisions of Part VII do not grant individual rights to Canadians; they impose an obligation on the government to work for the benefit of English and French linguistic communities.

[60] They submit that the manner in which the government meets that obligation is left to its discretion, and when the courts are asked to consider it, in a proceeding, they could not limit their analysis to the factual circumstances relating to a specific decision, like the decision not to translate patents. Instead, they should have regard to all of the government's activities in respect of official languages, while giving great deference to the government's discretionary choices. In particular, that deference should be expressed in reluctance to order or direct the expenditure of public funds, a matter within the authority of elected representatives.

[61] They state that they are in compliance with Part VII, because the federal government takes positive measures to enhance the vitality of linguistic communities and promote the use of English and French in Canadian society. Accordingly, the mere fact that patents are not translated is not a violation of the respondents' obligation to promote the use of English and

French. Part VII does not impose precise obligations on federal institutions. Rather, it reflects a permanent commitment by the federal government and the fact that measures must be taken, at the discretion of the federal government, to implement that commitment. That discretion means that an applicant does not have a right, under Part VII, to specific measures.

[62] The respondents further point out that they proposed measures to promote linguistic equality in the Canadian patent system in response to the report of the Office of the Commissioner of Official Languages. As a result, patent abstracts from international applications, which already exist in English and French, will be available in both those languages. For other patents, the Office is considering subscribing to an automated translation system. In addition, a search system that produces results in one official language in response to a keyword in the other will also be available on its web site.

[63] As we saw earlier, public access to patents is important because all patents prohibit certain activities, even though they are not prohibited by any law, and thus restrict the freedom of action of everyone in Canada. In addition, one of the public policy considerations that justify that restriction is the dissemination of the scientific and technical knowledge on which patented inventions are based.

[64] Binnie J., dissenting but not on this point, explained in *Harvard College*, *supra*, at paragraph 64, that the effect of the *Patent Act* “is essentially to prevent others from practising an invention that, but for the patent monopoly, they would be permitted to practise. In exchange for disclosure to the public, the patent protects the disclosed information from unauthorized use for a

limited time." As Binnie J., writing for the Supreme Court, explained in *Free World*, *supra*, at paragraph 42, "[t]he patent system is designed to advance research and development and to encourage broader economic activity".

[65] That objective can only be impeded if the scientific and technical information in a patent is not available to the portion of the Canadian public who do not speak the language in which the patent in question was written. In short, therefore, the fact that patents exist only in one official language deprives Canadians who do not speak that language of information that is important in both legal and scientific terms.

[66] In *Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency)*, 2004 FCA 263, [2004] 4 F.C.R. 276, at paragraph 17, the Federal Court of Appeal stressed that by creating the remedy in section 77 of the *Official Languages Act*, Parliament intended to ensure that the Act "has some teeth, that the rights or obligations it recognizes or imposes do not remain dead letters, and that the members of the official language minorities are not condemned to unceasing battles with no guarantees at the political level alone".

[67] For that reason, and with respect, I do not share the respondents' opinion that the fact that patents are not available in both official languages cannot be a violation of Part VII, having regard to the federal government's efforts in relation to language policy.

[68] However, I believe that the courts must limit themselves to the factual circumstances relating to a particular decision rather than examining the government's entire language policy

every time an application under Part VII is brought before them. The courts are simply not equipped to assess the government's language policy as a whole: that assessment is political in nature. Parliament is in a better position than the courts to make that assessment. However, the courts are used to ruling concerning the factual circumstances relating to a particular decision, and it is logical to assume that by creating a legal remedy for violations of Part VII, Parliament intended precisely to call on their expertise in the matter.

[69] I therefore conclude that the measures proposed to date by the Patent Office are not sufficient to meet its obligation, as a federal institution, to promote the use of both languages. That being said, the consequences of a violation of Part VII of the *Official Languages Act* and of the other provisions of that Act are not the same.

(5) Appropriate and just remedy in the circumstances

[70] Where the Court is of the opinion that a federal institution is not in compliance with the *Official Languages Act*, subsection 77(4) of that Act authorizes the Court to grant such remedy as it "considers appropriate and just in the circumstances". Because I am of the opinion that failing to make patents available in both official languages violates Part VII of the *Official Languages Act*, the question of the remedy must be answered.

<u>Submissions by the Parties</u>

[71] The applicant makes no distinction between the appropriate remedy for a violation of Part VII and for violations of the other provisions of *Official Languages Act*. He is seeking a series of declarations to require the Patent Office to make certain parts of patents (the title, the

abstract, the claims, the drawings and the specification) and certain parts of patent applications (the title, the abstract and the claims) available in both official languages. He is also seeking a declaration of invalidity relating to all patents available in one official language only, to be suspended to allow the respondents to make the invalidated patent applications and patents available in both languages. In addition, in future, the date for public access should be the date on which a patent or patent application becomes available to the public in both official languages.

[72] The applicant acknowledges that requiring bilingualism in the Canadian patent system would be very costly. However, he relies on the decisions in *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1 and *Devinat v. Canada (Immigration and Refugee Board)*, [2000] 2 F.C. 212, 181 D.L.R. (4th) 441 (F.C.A.), requiring that all Manitoba legislation and decisions of the Immigration and Refugee Board, respectively, be translated, notwithstanding the expenses that would cause.

[73] In the respondents' submission, because the courts cannot rely on Part VII of the *Official Languages Act* to order the government to remedy a specific problem, no remedy is possible or appropriate in the circumstances. They submit that because those provisions confer no right to have a particular measure taken, it is up to the government to choose its priorities in relation to promoting the use of English and French in Canadian society. In their submission, the Commissioner of Official Languages went too far in recommending that abstracts be translated, and the Court does not have the power to order that remedy. In their submission, the role of the

Court is limited to finding that "positive measures" are being taken to promote linguistic equality.

[74] In the alternative, the respondents submit that the measures they proposed in response to the report of the Commissioner of Official Languages are sufficient. They stress the exorbitant costs of translating all patents, which would come to about $825,000,000. Ordering a remedy that costly would amount to the Court substituting itself for Parliament in setting budget policy.

[75] As I said earlier, in my opinion, a violation of Part VII of the *Official Languages Act* cannot result in the same remedies as violations of Parts I to V of that Act. Deciding otherwise would amount to eliminating the difference between those provisions and denying the effect of the precise limits that Parts I to V set on the government's obligations in respect of bilingualism. In addition, I agree with the respondents that the decisions of federal institutions to give effect to the government's commitment under Part VII are entitled to a certain deference on the part of the courts.

[76] However, they cannot be conclusive; otherwise, why would Parliament have made those provisions enforceable? Deciding that the courts do not have the power to make orders forcing the government to take specific measures to remedy violations of its obligations under Part VII would make Parliament's choice to "give it teeth" by making it enforceable pointless and ineffective.

[77] The remedies suggested by the applicant do not take into account the difference between Part VII of the *Official Languages Act* and the other provisions of that Act. Because I do not find that the Commissioner is required to issue bilingual patents under section 7, 12 or 22 of the *Official Languages Act*, I cannot declare that he must do so in order to comply with his obligations under Part VII.

[78] In *DesRochers*, *supra*, at paragraph 37, the Supreme Court adopted the conclusion of the Federal Court of Appeal in *Forum des maires*, *supra*, at paragraph 20, which was that in an application under section 77 of the *Official Languages Act*, “[t]he remedy will vary according to whether or not the breach continues”. In this case, the violation of Part VII is continuing, and the Court must therefore order a remedy accordingly.

[79] I would note that a patent is a document that is directed to or intended for the notice of, and is for the information of, the public. While it would be difficult to completely translate all patents, the Patent Office <u>must</u> at least make <u>abstracts of patents</u> available in both official languages, as the Office of the Commissioner of Official Languages proposed.

[80] Certainly, this will be an unofficial translation. However, making it available will be a remedy that is “appropriate and just in the circumstances”, within the meaning given to that expression in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 at paragraphs 55 to 58. It will therefore provide for the language rights of the applicant and all Canadians to be defended effectively, by giving them a good idea of the content of valid patents if they do a preliminary search in the official language of their choice. Requiring that the

Commissioner make bilingual abstracts available does not overstep either the mandate of the Court in our constitutional system or the limits of its expertise. In addition, this measure does not impose great hardship on the Commissioner, because it essentially confirms the measures he himself said he intended to take.

COSTS

[81] Subsection 81(1) of the *Official Languages Act* provides that, ordinarily, in an application under section 77, costs will follow the event. However, subsection 81(2) provides that "[w]here the Court is of the opinion that an application under section 77 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result."

[82] Relying on that provision, the applicant is seeking the costs of this case regardless of the result. He submits that the issues raised in the case, in particular concerning the effect of Part VII of the *Official Languages Act* and the content of the bilingualism obligation in relation to delegated legislation (the class to which patents belong, in his submission), are novel and important.

[83] The respondents oppose awarding costs to the applicant, but acknowledge the Court's discretion in this regard.

[84] Notwithstanding the applicant's very partial success, he is entitled to his costs in this case under subsection 81(2). Apart from all the technical details, the fact that patents granted by a

country that considers itself bilingual are unilingual is an important question. Although this year marked the 40th anniversary of the *Official Languages Act*, that question has never been raised before now, and the applicant did Canadians a service by making it a subject of public debate.

CONCLUSION

[85] For these reasons, the application by the applicant is allowed in part, with costs, for the sole purpose of declaring that the Commissioner is not in compliance with his obligations under section 41 of the *Official Languages Act*, and that in order to be in compliance he must make available an unofficial translation of the abstract of all patents he issues.

JUDGMENT

THE COURT ORDERS that:

The application by the applicant is allowed in part, with costs, for the sole purpose of declaring that the Commissioner is not in compliance with his obligations under section 41 of the *Official Languages Act*, and that in order to be in compliance he must make available an unofficial translation of the abstract of all patents he issues.

"Danièle Tremblay-Lamer"
Judge

Certified true translation
Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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