Federal Court of Appeal | Cour d'appel fédérale

Date: 20210914

Docket: A-398-19

Citation: 2021 FCA 180

CORAM: **RENNIE J.A.**
DE MONTIGNY J.A.
MACTAVISH J.A.

BETWEEN:

EUGENE SEYMOUR

Appellant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
(CANADIAN INTELLECTUAL PROPERTY-RIGHTS OFFICE)

Respondent

Heard at Ottawa, Ontario, on September 9, 2021.

Judgment delivered at Ottawa, Ontario, on September 14, 2021.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: RENNIE J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] Mr. Seymour appeals the Order of LeBlanc J. (as he then was), (the Motions Judge) dismissing his motion for an extension of time to file a notice of appeal from a decision of the Commissioner of Patents (the Commissioner). In that decision, dated December 10, 2018, the Commissioner had refused to grant the appellant's application for a patent.

[2] Pursuant to section 41 of the *Patent Act*, R.S.C. 1985, c. P-4, the appellant had six months to file an appeal of the Commissioner's decision to the Federal Court. Shortly before the expiry of that delay, the appellant sought an order extending the time to file a notice of appeal, on the basis that the impending 2019 federal election could result in a change in unspecified government officials involved in his application, which would require him to re-file his application with name changes. The Motions Judge reasoned that an extension of time was not warranted in the circumstances, considering that there was no reasonable explanation for the delay and no merit to the appeal.

[3] The discretionary decision of a judge in relation to a motion for an extension of time is a question of mixed fact and law (*Thompson v. Canada (Attorney General)*, 2018 FCA 212, 2018 CarswellNat 12364 (WL Can) at para. 8). As per this Court's direction in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, 402 D.L.R. (4th) 497 at paras. 69-72, 79 [*Hospira*], the standard of review is that of palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 8, 37). Thus, this Court can only interfere with the Order if the Motions Judge exercised his discretion on wrong principles or misapprehended the evidence (*Hospira* at para. 54).

[4] Prior to the hearing, the appellant submitted a motion for default judgment and requested that a patent be granted to him. This Court deferred ruling on the merits of that matter, instead requesting to hear arguments orally at the beginning of the September 9, 2021 hearing. Having heard the parties, I am of the view that the motion is ill-founded. Contrary to the appellant's submission, the respondent is not in default pursuant to Rule 382.3(2) and (4), and all the

chronological steps of the *Federal Courts Rules*¸ S.O.R./98-106 (the Rules), have been completed.

[5] The appellant argues that it was unreasonable to refuse his request for an extension of time. He explains that offering extensions is a common practice of the Court, and that the 2019 federal election would have resulted in changes to the federal officials responsible for reviewing his application.

[6] Further, the appellant argues that the Order is invalid because the Motions Judge did not sign it and because he ruled on the merits of the patent application. The appellant also contends that he was denied due process rights contrary to section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, s. 91(24) (the Charter) based on the Motions Judge's affirmation of the Commissioner's "fraudulent false assertion" that the appellant made impermissible changes to his patent application.

[7] I am of the view that the Motions Judge did not err in his decision to dismiss the appellant's motion.

[8] LeBlanc J. first applied the criteria outlined in *Canada (Attorney General) v. Hennelly*, 167 F.T.R. 158, 244 N.R. 399 at para. 3 [*Hennelly*] to determine whether an extension of time was warranted. He focused his analysis on whether a reasonable explanation for the delay existed.

[9] The Motions Judge did not find the appellant's justification for delay – namely, that granting extensions is common practice and that the 2019 election would result in name changes of unspecified government officials – to be reasonable. He concluded this for two reasons: (1) the importance of respecting time limits set by Parliament (*Strungmann v. Canada (Citizenship and Immigration)*, 2011 FC 1229, 2011 CarswellNat 4487 (WL Can) at para. 8; and (2) it would collide with the principle of political neutrality that governs the federal public service (*Schmidt v. Canada (Attorney General)*, 2018 FCA 55, 421 D.L.R. (4th) 530 at para. 89).

[10] The Motions Judge further noted that the appeal had no merit for two reasons. First, the appellant failed to explain how the Commissioner's conduct violated his subsection 15(1) Charter rights. Second, the appellant failed to address the other grounds for which his application was denied, including that the claims on file would have been obvious contrary to section 28.3 of the *Patent Act*. For these reasons, the Motions Judge found that the appeal was bound to fail.

[11] Having carefully considered the oral and written arguments of the parties, I am of the view that the Motions Judge made no reviewable error. He properly applied the criteria outlined in *Hennelly*, focusing on those most pertinent. He did not misrepresent or exaggerate the appellant's position regarding his reason for delay. His evaluation that such an extension would undermine the integrity of statutory limitation periods was reasonable. The Motions Judge's reasoning that the appellant's position conflicted with the principle of political neutrality was sound, with appropriate authorities cited to support his position.

[12] At the hearing, Mr. Seymour made much of the fact that he had been granted a patent for the same invention by the U.S. Patent and Trademark Office. The Commissioner addressed that issue, and noted that the appellant's equivalent U.S. Patent is not automatically determinative of the patentability of a corresponding Canadian patent application and was in any event published after the Canadian filing date of the appellant's application. In and of itself, the different outcome of an application for a patent in the U.S. and in Canada is insufficient to establish unequal and discriminatory treatment by the Commissioner. Indeed, Mr. Seymour did not provide any evidence to support his claim that his indigenous identity played any role in the dismissal of his patent application, and even acknowledged at the hearing before us that it may not be because he is an indigenous person that he was not granted the patent but because he is an applicant applying on his own. As a result the Motions Judge did not err in concluding that the appellant's argument based on section 15 of the Charter was bound to fail.

[13] As for the argument that the Motions Judge's Order is not valid because the signature of the Judge is not handwritten, it is also without any merit. Rule 392 of the Rules only requires that an order be signed by the judicial officer issuing it. The Rules do not define what constitutes a "signature", and it is the practice of the Federal Court to issue parties a copy of the order with an electronic signature. That said, the original signed copy of an order is always available for in-person viewing at the Registry upon request. Moreover, as noted by the respondent, requiring that signatures be only handwritten would not be consistent with Rule 3, according to which the Rules should be interpreted and applied to secure the most expeditious and least expensive determination of proceedings.

[14] Finally, it is very clear from the wording of the impugned Order that the Motions Judge did not rule on the merits of the appellant's application, but simply dismissed his motion for an extension of time. While the Order obviously had the incidental effect of preventing the appellant's patent application from being reconsidered by the Federal Court on appeal, the Motions Judge did not himself rule on the merits of the patent application in his Order.

[15] As a result, I would dismiss the appeal, with costs in the amount of $500.00 in favour of the respondent, all inclusive.

"Yves de Montigny"
J.A.

"I agree
Donald J. Rennie J.A."

"I agree
Anne L. Mactavish J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE:	EUGENE SEYMOUR v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA (CANADIAN INTELLECTUAL PROPERTY-RIGHTS OFFICE)
PLACE OF HEARING:	OTTAWA, ONTARIO
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REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	RENNIE J.A. MACTAVISH J.A.
DATED:	SEPTEMBER 14, 2021

APPEARANCES:

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