Federal Court of Appeal | Cour d'appel fédérale

Date: 20220928

Docket: A-57-21

Citation: 2022 FCA 162

CORAM: **STRATAS J.A.**
RIVOALEN J.A.
LOCKE J.A.

BETWEEN:

MAOZ BETSER-ZILEVITCH

Appellant/
Respondent on cross-appeal

and

PETROCHINA CANADA LTD

Respondent/
Appellant on cross-appeal

Heard at Toronto, Ontario, on September 28, 2022.
Judgment delivered from the Bench at Toronto, Ontario, on September 28, 2022.

REASONS FOR JUDGMENT OF THE COURT BY: LOCKE J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20220928

Docket: A-57-21

Citation: 2022 FCA 162

CORAM: **STRATAS J.A.**
RIVOALEN J.A.
LOCKE J.A.

BETWEEN:

MAOZ BETSER-ZILEVITCH

Appellant/
Respondent on cross-appeal

and

PETROCHINA CANADA LTD

Respondent/
Appellant on cross-appeal

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on September 28, 2022).

LOCKE J.A.

[1] The appellant, Maoz Betser-Zilevitch (Mr. Betser), appeals a decision of the Federal Court (the "Judgment", 2021 FC 85, *per* Manson J.) dismissing his action against the respondent, PetroChina Canada Ltd. (PCC), alleging infringement of his Canadian Patent No. 2,584,627 (the 627 Patent). Mr. Betser also appeals the Federal Court's decision on costs arising from his action

(the "Costs Judgment", 2021 FC 151, *per* Manson J.). For its part, PCC cross-appeals the Federal Court's dismissal, in the Judgment, of its counterclaim alleging invalidity of the 627 Patent.

[2] For the following reasons, we have concluded that both the appeal and the cross-appeal should be dismissed in their entirety.

[3] Mr. Betser's appeal on infringement is based on the argument that the Federal Court erred in its construction of the term "first level" in the claims in issue of the 627 Patent. Mr. Betser argues that this term should have been construed as being a volume of space (or region) sufficient to encompass the pipes (including flow lines) in PCC's allegedly infringing system rather than a single horizontal plane, as argued by PCC. The parties disagree on the standard of review that should apply to this Court's analysis of this issue, but it is not necessary to decide the point. We would dismiss the appeal regardless of the standard of review.

[4] Mr. Betser argues that the Federal Court improperly imported into the claims a "gloss" (or stray mention) from paragraph 53 of the 627 Patent that the invention involves locating a pipe between modules at the lowest possible point, which "eliminates the need for scaffolding" and "reduces the safety issues". Paragraph 16 of the 627 Patent identifies improved safety as an object of the invention. The Federal Court concluded at paragraph 117 of its reasons for the Judgment that the term "first level" refers to:

> a horizontal plane, of a measured height above ground, that allows operators to access the flow lines from the ground level, without the need for or use of scaffolding, thereby reducing safety issues, costs and allowing easier access to flow lines by operators.

[5] The Federal Court made no reviewable error in construing the term “first level”. It correctly concluded that the term is ambiguous, and appropriately had recourse to the disclosure of the 627 Patent to construe it (see *Dableh v. Ontario Hydro*, [1996] 3 F.C. 751 at para. 30 (F.C.A.); *Tetra Tech EBA Inc. v. Georgetown Rail Equipment Company*, 2019 FCA 203 at para. 103). More than a gloss or stray mention, paragraph 53 of the 627 Patent describes characteristics of the invention with reference to its objects, and the elimination of the need for scaffolding is relevant to the object of improved safety. We do not accept that the Federal Court erred in its reliance on paragraph 53.

[6] Since there is no dispute that PCC’s allegedly infringing system would infringe the 627 Patent only if the term “first level” encompassed a volume sufficient to require scaffolding, the Federal Court did not err in finding that PCC did not infringe.

[7] Because the appeal has no merit, it is not necessary to discuss the parties’ arguments concerning remedies for infringement. As for the Costs Judgment, we see no reviewable error. Therefore, the appeal will be dismissed with costs.

[8] It is, however, necessary to consider the cross-appeal, since that concerns patent claims and remedies that are not in issue on infringement. PCC argues that the Federal Court gave inadequate consideration to evidence of the obviousness of locating the steam injection line on the first level together with the heavy oil production flow line (which was the only difference between the invention and the prior art), and the fact that the “Orion modules” had done this prior to the relevant date for assessing obviousness. Importantly, it is not disputed that the Orion

modules were not "available to the public" at that time, and therefore were not citable as prior art for the purposes of obviousness (see section 28.3 of the *Patent Act*, R.S.C. 1985, c. P-4).

[9] PCC argued before the Federal Court that the Orion modules were secondary indicia of obviousness in that they established that another skilled person was able to make the invention at the relevant time, albeit not publicly. PCC now argues that it was inapt to describe the Orion modules as secondary indicia of obviousness, and that they should rather be considered as a primary factor in the assessment of obviousness. This argument cannot prevail. Section 28.3 of the *Patent Act* describes the prior art that is primarily relevant to obviousness, and the Orion modules clearly do not qualify. They could be no more than secondary indicia. Moreover, it does not follow that simultaneous invention necessarily indicates obviousness. Even the jurisprudence cited by PCC acknowledges that simultaneous invention "may or may not be an indication of obviousness": *Ecolochem, Inc. v. Southern California Edison Co.*, 227 F.3d 1361 at 1379 (Fed. Cir. 2000). For instance, the person or persons who conceived the simultaneous invention may have themselves exercised inventive ingenuity in doing so. In this case, there appears to be little or no evidence that those who conceived the Orion modules were uninventive.

[10] PCC also argues that the Federal Court erred in failing to conclude that the 627 Patent was obvious when it rejected what PCC says is the only reason proposed by Mr. Betser's expert Richard Beale as to why a skilled person would not have made the invention. PCC argues that the other expert evidence concluded that the invention was obvious. However, patents are presumed to be valid, and PCC bore the onus of proving obviousness. The Federal Court was entitled to reject PCC's argument on the issue even in the absence of any evidence of

inventiveness. The Federal Court explained its concerns with PCC's expert evidence on validity. The Federal Court also explained that "a myriad of factors" went into the design of modules of the kind described in the 627 Patent, and concluded that it would not have been obvious to a skilled person to move the steam injection line to the first level. This conclusion is entitled to deference, and we see no reviewable error in this analysis.

[11] PCC also takes issue with the Federal Court's statement, at paragraph 171 of its reasons, that "the evidence shows that no one in the industry had [moved the steam injection line to the first level] prior to the 627 patented invention being made public." PCC argues that this statement erroneously ignores the Orion modules. We do not accept that the Federal Court erred in this respect. The paragraphs immediately preceding this statement demonstrate that the Federal Court understood and considered the Orion modules. The most likely explanation for the Federal Court's statement is that it was referring to public uses, which are citable as prior art.

[12] We are also of the view that the Federal Court did not err in stating that "[t]he evidence relied on by [PCC] is typical of the 'hindsight is 20-20' problem in relation to this obviousness attack." This conclusion by the Federal Court was consistent with its view of the evidence, and was open to it.

[13] Having found no error on the issue of obviousness, we will dismiss the cross-appeal with costs.

"George R. Locke"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-57-21

APPEAL FROM A JUDGMENT AND SUPPLEMENTARY JUDGMENT OF THE HONOURABLE MR. JUSTICE MANSON OF THE FEDERAL COURT DATED JANUARY 26, 2021, AND FEBRUARY 15, 2021 IN DOCKET NO. T-1158-18.

STYLE OF CAUSE:	MAOZ BETSER-ZILEVITCH v. PETROCHINA CANADA LTD
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 28, 2022
REASONS FOR JUDGMENT OF THE COURT BY:	STRATAS J.A. RIVOALEN J.A. LOCKE J.A.
DELIVERED FROM THE BENCH BY:	LOCKE J.A.

APPEARANCES:

Michael Crinson Jennifer Ko	FOR THE APPELLANT
D. Doak Horne Nikolas Purcell Sarah Li	FOR THE RESPONDENT

SOLICITORS OF RECORD:

CRINSON LAW LLP Toronto, Ontario	FOR THE APPELLANT
GOWLING WLG (Canada) LLP Calgary, Alberta	FOR THE RESPONDENT