Federal Court of Appeal | Cour d'appel fédérale

Date: 20250204

Docket: A-103-24

Citation: 2025 FCA 28

CORAM: **STRATAS J.A.**
GOYETTE J.A.
HECKMAN J.A.

BETWEEN:

ROBERT TAILLEFER

Appellant

and

ATTORNEY GENERAL OF CANADA and SYLVAIN FREDETTE

Respondents

Heard at Ottawa, Ontario, on February 4, 2025.

Judgment delivered from the Bench at Ottawa, Ontario, on February 4, 2025.

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

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on February 4, 2025).

HECKMAN J.A.

[1] We have before us an appeal from a judgment of the Federal Court in *Robert Taillefer v. Attorney General of Canada and Sylvain Fredette*, 2024 FC 259 (*per* Furlanetto J.) dismissing the Appellant's application for judicial review of the Commissioner of Patents' decision [the Decision] to reject the Appellant's reinstatement request for Canadian Patent No. 2,690,767 [767

Patent]. The 767 Patent was deemed to have expired in 2020 because the Appellant and his patent agent [Agent] failed to pay a mandatory annual maintenance fee on it, as required by section 46 of the *Patent Act*, R.S.C. 1985, c. P-4 [Act], following an email communication failure.

[2] The Appellant had instructed the Agent to notify him of the maintenance fee payment deadlines before the due date and to pay the fees only upon receipt from the Appellant of specific instructions for payment. Every year between 2012 and 2019, after receiving an emailed payment reminder from the Agent, the Appellant emailed instructions for payment to the Agent. However, in 2019 and 2020, unbeknownst to either of them, eight emails sent by the Agent to the Appellant's email address went to this email's junk folder. Four sought instructions for payment. Three notified the Appellant that the 767 Patent would be deemed to expire if payment was not received within the prescribed late fee period. A final email advised the Appellant of the 767 Patent's deemed expiry. The Appellant only became aware of these emails three months after the expiry of the late fee period. The Agent received no indication that its emails were not delivered and, as instructions were not received, did not pay the maintenance fee. Until this point, the Appellant and the Agent had not experienced a failure in their email communication channel.

[3] Where a patentee fails to pay the annual maintenance fee by the prescribed deadline, the patent is deemed to have expired pursuant to subsections 46(1) to 46(4) of the Act, unless the patentee pays the maintenance fee and a late fee before the expiry of the prescribed late fee period. To have its patent reinstated, the patentee must meet the requirements of subsection 46(5) of the Act. Notably, under paragraph 46(5)(b), the Commissioner must be satisfied that the

patentee's failure to pay the maintenance and late fees by the prescribed date "occurred in spite of the due care required by the circumstances having been taken." The Commissioner decided that they were not satisfied that due care was taken, because the Appellant and the Agent had failed to establish that they had considered and developed options to mitigate the risk posed by a breakdown in their chosen email communication method or otherwise ensured that the Appellant had a system in place to monitor the maintenance fees and ensure that they were paid on time.

[4] The Federal Court dismissed the Appellant's application for judicial review of the Decision. It determined that the Commissioner's finding that the Appellant did not satisfy the due care requirement was reasonable.

[5] On this appeal, this Court must determine whether the Federal Court chose the correct standard of review and properly applied it to the Decision. It must "step into the shoes" of the Federal Court judge, focusing on the Decision: *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, [2021] 3 S.C.R. 107 at paras. 10-12; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47.

[6] The Federal Court properly identified the standard of review as reasonableness. When conducting reasonableness review, a reviewing court must take a "reasons first" approach that evaluates the administrative decision maker's justification for its decision: *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, 485 D.L.R. (4th) 583 at para. 8. A reasonable decision is based on an internally coherent and rational chain of analysis and justified in relation to the facts and law that constrain the decision maker: *ibid*. The Appellant bears the burden to

show that the Decision is unreasonable, by satisfying the Court that it suffers from sufficiently serious shortcomings such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 563 at para. 100.

[7] The Appellant claims that the Commissioner failed to adequately justify its interpretation of the due care standard under the Act. This argument is without merit. At the beginning of their detailed reasons, the Commissioner observed that the Act and *Patent Rules*, SOR/2019-251 were amended in 2019 in order to implement provisions of the *Patent Law Treaty*, 21 May 2001, Can TS 2019 No 25 (entered into force 28 April 2005, ratification by Canada 30 July 2019), an agreement administered by the World Intellectual Property Organization [WIPO] and aimed at simplifying and harmonizing the administrative practices of national IP offices.

[8] Consistent with these amendments' objective of aligning the Canadian regime more closely with international standards, and following the non-binding guidance provided in section 27.03.03 of the Manual of Patent Office Practice [MOPOP], the Commissioner referred to the international guidance set out in paragraph 166M of the WIPO Receiving Office Guidelines [WIPO guidelines] to establish the meaning of the due care standard in paragraph 46(5)(b) of the Act. The WIPO guidelines note that a request for restoration of priority under the *Patent Cooperation Treaty*, 19 June 1970, Can TS 1990 No 22 (entered into force 24 January 1978, ratification by Canada 02 October 1989) should be approved if the applicant's failure to file the international application within the priority period occurred "in spite of due care required by the circumstances having been taken," and that this due care standard can only be met if the

applicant has taken all measures which a reasonably prudent applicant would have taken in light of the facts and circumstances of each particular case. For the identically worded due care standard in paragraph 46(5)(b) of the Act, the Commissioner adopted an analogous standard which asks whether the patentee took all measures that a reasonable patent holder would have taken, given the particular set of circumstances, to avoid the failure.

[9] The Commissioner's reasons thus disclose a rational chain of analysis that justifies its decision to interpret the meaning of the due care standard set out in paragraph 46(5)(b) of the Act in a manner consistent with that adopted by the WIPO to interpret and apply an identically worded standard in a different, though related, context.

[10] With regards to the Appellant's claim that the Commissioner unreasonably applied the due care standard to the facts before it, we agree with the result reached by the Federal Court for the reasons that it gave. In stark contrast to the consistent pattern whereby the Appellant had, since 2012, emailed instructions for payment of the annual maintenance fee in response to the Agent's email notices, numerous email notices went unanswered in 2019 and 2020. It was reasonable for the Commissioner to find that due care would have required the Agent to have in place, and given the particular set of circumstances, to use alternative communication mechanisms to ensure that the Appellant was aware of the maintenance fee deadlines. It was also reasonable for the Commissioner to decide that the Appellant, having retained the responsibility to instruct the Agent to pay the annual maintenance fees, was required to exercise due care by having a system in place to monitor and pay the fees, notably by ensuring that his communication channel with the Agent remained effective.

[11] At the hearing, counsel for the Appellant submitted that in circumstances where email communications between the Appellant and the Agent had occurred flawlessly for eight years, a breakdown in communications was unforeseeable and that the Commissioner's finding of a lack of due care amounted to imposing on the Appellant and Agent a standard of perfection. On a fair reading of the Commissioner's reasons, we are of the view that the Commissioner determined that, in the absence of a backup system, including alternative communications methods, the unfortunate circumstances experienced by the Appellant were an accident waiting to happen.

[12] For the foregoing reasons, we will dismiss the appeal with costs to the Respondent.

"Gerald Heckman"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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