Federal Court  Cour fédérale

Date: 20230728

Docket: T-201-23

Citation: 2023 FC 1033

Toronto, Ontario, July 28, 2023

PRESENT: Madam Justice McDonald

BETWEEN:

ROBERT TAILLEFER

Applicant

and

ATTORNEY GENERAL OF CANADA AND SYLVAIN FREDETTE

Respondents

ORDER AND REASONS

[1] By a Motion filed pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 [Rules], the Intellectual Property Institute of Canada / Institut de la propriété intellectuelle du Canada [IPIC] seeks an Order pursuant to Rule 109 to intervene in this judicial review Application.

[2] Legal counsel for the Applicant advises that they support IPIC's proposed intervention, however, they provided no submissions in support.

[3] The Respondent, Attorney General of Canada [AGC], opposes IPIC's Motion to intervene. The Respondent, Sylvain Fredette, made no submissions on the Motion.

I. Background

[4] The underlying judicial review Application seeks review of the December 20, 2022 decision of the Commissioner of Patents [Commissioner], refusing to reinstate the Applicant's patent because he did not take "due care" to keep his patent in good standing. The judicial review Application was filed on January 27, 2023, and is scheduled for a hearing on September 25, 2023.

[5] IPIC filed this Motion on June 28, 2023. In its Motion materials, IPIC describes itself as follows:

> The Intellectual Property Institute of Canada / Institut de la Propriété Intellectuelle du Canada (**IPIC**) is Canada's professional association of patent agents, trade-mark agents, lawyers and academics practicing in intellectual property. As part of its efforts to advocate for effective intellectual property rights in Canada, IPIC has a long history of intervention before the courts. It also frequently makes submissions to legislature on new policies and laws affecting intellectual property, including on the 2019 amendments to the *Patent Act* that implemented "due care".

[6] IPIC says that it seeks to intervene on this Application to assist the Court in assessing the reasonableness of the Commissioner's interpretation of the "due care" standard under paragraph 46(5)(b) of the *Patent Act*, RSC 1985, c P-4. IPIC submits this application is the first time the Court will consider the "due care" standard under the recent amendments to the *Patent Act*.

II. Issue

[7] The sole issue is if IPIC should be granted leave to intervene in this Application.

III. Analysis

[8] Rule 109(1) states: “The Court may, on motion, grant leave to any person to intervene in a proceeding.”

[9] The three part test for granting intervener status was outlined in *Right to Life Association of Toronto and Area v Canada (Employment, Workforce and Labour)*, 2022 FCA 67 at paragraph 10 as follows:

> I. Will the proposed intervener will make different and useful submissions, insights and perspectives that will further the Court's determination of the legal issues raised by the parties to the proceeding, not new issues? To determine usefulness, four questions need to be asked:
>
> - What issues have the parties raised?
> - What does the proposed intervener intend to submit concerning those issues?
> - Are the proposed intervener’s submissions doomed to fail?
> - Will the proposed intervener's arguable submissions assist the determination of the actual, real issues in the proceeding?
>
> II. Does the proposed intervener have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills, and resources and will dedicate them to the matter before the Court?

III. Is it in the interests of justice that intervention be permitted? The list of considerations is not closed but includes the following questions:

- Is the intervention consistent with the imperatives in Rule 3? For example, will the orderly progression or the schedule for the proceedings be unduly disrupted?
- Has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court?
- Has the first-instance court in this matter admitted the party as an intervener?
- Will the addition of multiple interveners create the reality or an appearance of an "inequality of arms" or imbalance on one side?

[10] I will consider the three part test below.

A. *Useful Submissions*

[11] In considering if the proposed intervener will make different and useful submissions and not raise new issues, I note IPIC submits it would provide submissions on the reasonableness of the Commissioner's decision in light of the purpose and statutory context of paragraph 46(5)(b) of the *Patent Act*. IPIC says it will make submissions regarding the interpretation of the "due care" standard that have not been raised or addressed by either party.

[12] In its written submissions, IPIC states that it intends to argue:

> 6. If granted leave to intervene, IPIC will argue that the Commissioner's decision was unreasonable as it failed to show it was alive to the context and purpose of paragraph 46(5)(b) of the *Patent Act*. This caused the Commissioner to apply an unreasonably elevated "due care" standard in a manner that is

> contrary to the modern principles of statutory interpretation. More specifically, the decision was unreasonable because it:
>
> (a) ignores the purpose of the maintenance fee regime;
>
> (b) ignores the legislative intent of the *Patent Act* amendments;
>
> (c) does not consider the broader statutory scheme; and
>
> (d) fails to uphold the purpose of the *Patent Act*.
>
> …
>
> 29. IPIC, as a proposed intervener, has no direct interest in Mr. Taillefer's patent or his business. Rather, if leave to intervene is granted, IPIC will use its expertise, and broader perspective, in the area of patent law to assist the Court in assessing the reasonableness of the Commissioner's decision in light of the purpose and statutory context of paragraph 46(5)(b) of the *Patent Act*, as required by the modern principles of statutory interpretation. [Footnotes omitted.]

[13] Essentially, IPIC's submissions are focused on the proper approach to statutory interpretation. In the context of the role of interveners, this was directly addressed in *Le-Vel Brands, LLC v Canada (Attorney General)*, 2023 FCA 66, where the Federal Court of Appeal held:

> [17] An intervener that intends to urge this Court to adopt a particular interpretation of legislation and impose it on the administrative decision-maker is barking up the wrong tree. Except in rare instances where *mandamus* is warranted, this Court, as a reviewing court engaged in reasonableness review, will not develop its own interpretation of the Regulations and use it as a yardstick to see whether the administrative decision-maker's interpretation measures up, nor will it impose its interpretation over that of the administrative decision-maker: *Vavilov* at para. 83, citing *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 at para. 28; see also *Hillier v. Canada (Attorney General)*, 2019 FCA 44, 431 D.L.R. (4th) 556 at paras. 31-33. After all, it is for the administrative decision-maker to decide the merits, including issues of legislative interpretation; the reviewing court reviews the administrative decision, nothing more: *Bernard*

> *v. Canada (Revenue Agency)*, 2015 FCA 263; 9 Admin LR (6th) 296; *'Namgis First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 149 and cases cited therein. At most, under reasonableness review, this Court can coach the administrative decision-maker on the methodology of legislative interpretation and how to go about its task. But it cannot tell the administrative decision-maker how the interpretive methodology should play out in a particular case.
>
> [18] This Court's decision on intervention in *Canada (Attorney General) v. Kattenburg*, 2020 FCA 164 illustrates this well. There, several parties sought to intervene in a judicial review in order to tell this Court how it should interpret the legislation in issue and how it should apply international law. But that was no part of this Court's task on judicial review. Its task was only to conduct reasonableness review of the administrative decision-maker's interpretation of the legislation and its use of international law, not to impose its own view of the legislation and international law over that of the administrative decision-maker. As a result, this Court dismissed the intervention motions because the proposed interventions would not be useful to the Court.

[14] Accordingly, to the extent IPIC intends to make submissions on the issue of the proper approach to statutory interpretation, as noted by the Federal Court of Appeal above, such an intervention is inappropriate.

[15] I do not read IPIC's submissions as being sufficiently distinct from those put forward by the Applicant. As well, I am satisfied that any of the private and public interests raised by IPIC will be raised by the Applicant in the judicial review Application.

[16] Overall, I am not satisfied that IPIC will offer useful submissions.

B. *Genuine Interest*

[17] I note that the AGC concedes that IPIC, as an industry organization, has a genuine interest in the matter.

C. *Interests of Justice*

[18] Here, the question of whether the intervention is in the interests of justice raises a couple of considerations.

[19] One consideration relates to the complexity of the matter and if the Court needs to be exposed to perspectives beyond those offered by the parties. Based upon my review of the Application materials, the issues raised appear relatively straightforward. I am not convinced the involvement of IPIC is necessary, nor desirable, as I see it as potentially complicating what otherwise appears to be a routine judicial review where the issue is the reasonableness of the Commissioner's discretionary decision.

[20] Another consideration is the timeliness of this intervention. The parties filed their written submissions in April and May 2023, and the hearing is set down for September 2023. If admitted as an intervener, IPIC would have to make submissions and the parties would need to file a response. In the circumstances, those additional submissions would interfere with the orderly and expeditious progress of the judicial review Application.

[21] As noted in *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 13 at paragraph 22:

> Intervention is a privilege bestowed to the skilled and committed who will truly assist the determination of a real-life, concrete proceeding that is up and running. Interveners have no right to disrupt the interests of those with a direct stake in the proceeding who have lived it from the beginning, often at great cost. No intervener is so grand and important that the Court will admit it

> late into the proceedings, whatever may be the prejudice to others or to itself.

IV. Conclusion

[22] In the circumstances, I am not satisfied this intervention is in the interests of justice and the request is denied.

ORDER IN T-201-23

THIS COURT ORDERS that this Motion is dismissed.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-201-23
STYLE OF CAUSE:	ROBERT TAILLEFER v ATTORNEY GENERAL OF CANADA AND SYLVAIN FREDETTE
MOTION IN WRITING PURSUANT TO RULE 369 OF THE FEDERAL COURTS RULES CONSIDERED AT:	OTTAWA, ONTARIO
ORDER AND REASONS FOR:	MCDONALD J.
DATED:	JULY 28, 2023

WRITTEN REPRESENTATIONS BY:

Timothy M. Lowman Amy Grenon Kaitlin Soye	FOR THE APPLICANT
Laura Tausky James Stuckey	FOR THE RESPONDENTS
Kristin Wall Chelsea Nimmo	FOR THE PROPOSED INTERVENER

SOLICITORS OF RECORD:

AIRD & BERLIS LLP Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENTS
Norton Rose Fulbright Canada LLP Toronto, Ontario	FOR THE PROPOSED INTERVENER