

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160205

Docket: A-419-14

Ottawa, Ontario, February 5, 2016

**CORAM: WEBB J.A.
BOIVIN J.A.
DE MONTIGNY J.A.**

BETWEEN:

**LOUIS BROWN
2202240 ONTARIO INC. d/b/a
NOR ENVIRONMENTAL INTERNATIONAL**

Appellants

and

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA
and
HDT TACTICAL SYSTEMS, INC. d/b/a
HDT ENGINEERED TECHNOLOGIES**

Respondents

and

**INTELLECTUAL PROPERTY INSTITUTE OF CANADA/
INSTITUT DE LA PROPRIÉTÉ INTELLECTUELLE DU CANADA**

Intervener

JUDGMENT

The appeal is allowed with costs before this Court and the Federal Court and the Crown's cross-appeal is dismissed with costs. The judgment of the Federal Court judge dated August 29,

2014 (2014 FC 831) is set aside and, rendering the judgement that the judge should have rendered, the Crown's motion for summary judgment is dismissed.

“Wyman W. Webb”

J.A.

Federal Court of Appeal



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Intervener

Heard at Toronto, Ontario, on December 10, 2015.

Judgment delivered at Ottawa, Ontario, on February 5, 2016.

REASONS FOR JUDGMENT BY:

BOIVIN J.A.

CONCURRED IN BY:

WEBB J.A.
DE MONTIGNY J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT

BOIVIN J.A.

[1] This is an appeal from of a decision of a Federal Court Judge (the Judge) dated August 29, 2014 (2014 FC 831), regarding a motion for summary judgment by the Crown in a patent invalidity claim pursuant to section 53 of the *Patent Act*, R.C.S., 1985, c. P-4. This motion arose in proceedings brought by the appellants Mr. Brown and Nor Environmental International (NOR) against the Crown and HDT Tactical Systems (HDT) for infringement of Canadian Patent No. 2,285,748 ('748 Patent). The Crown responded by seeking the dismissal of the appellants' claim and summary judgment for the invalidation of Mr. Brown's '748 Patent on the basis that he was a member of the Canadian Forces when he filed the patent and, as such, breached his statutory obligations under section 4 of the *Public Servants Inventions Act*, R.C.S., 1985, c. P-32 (PSIA) by failing to disclose his public servant status. This, the Crown alleged, resulted in a material untrue allegation voiding the '748 Patent under section 53 of the *Patent Act*.

[2] The Judge granted the Crown's motion in part. She found that Mr. Brown was a public servant for the purposes of the PSIA when he applied for the patent at issue and that he did not disclose his public servant status as he was explicitly required to do pursuant to section 4 of the PSIA. The Judge found that this omission constituted an untrue allegation and that this untrue allegation was material for the purpose of subsection 53(1) of the *Patent Act*. However, the Judge decided that the issue of whether the untrue material allegation needed to be made wilfully with the purpose of misleading, and if so, whether Mr. Brown had the requisite intention, was an issue best determined at trial.

[3] For the reasons that follow, I am of the view that the appeal should be allowed.

I. Factual Background

[4] The parties do not dispute the relevant factual background.

[5] Between 1973 and 1993, Mr. Brown was enrolled in the Canadian Forces' Regular Force.

[6] In June 1993, following his retirement, Mr. Brown was placed in the Reserve Force. The Reserve Force includes both the Primary Reserve and the Supplementary Reserve.

[7] From 1993 to 1995, Mr. Brown was placed on the Supplementary Reserve. During that time, he founded NOR. Mr. Brown was then transferred to the Primary Reserve in October 1995, and, between 1995 and July 1998, he was remunerated for part-time work for the Air Forces which included the writing of training and equipment manuals.

[8] In June 1999, Mr. Brown was released from the Primary Reserve and was listed on the Supplementary Holding Reserve, which is a subset of the Supplementary Reserve. In this capacity, Mr. Brown was notably listed as an individual who was not available to undertake any duties, including in time of emergency; he did not receive any benefits or remuneration and was not subject to the Canadian Forces' Code of Discipline. While he was listed on the Supplementary Holding Reserve until June 2009, Mr. Brown was never placed on active service and received no benefits or remuneration.

[9] On October 8, 1999, approximately 4 months after his release from the Primary Reserve, Mr. Brown filed an application for the '748 Patent in the Canadian Patent Office. The '748 Patent is entitled "Transportable Collective Protection System". It is directed to a system for decontamination and containment of biological and chemical hazards. NOR is a licensee of the '748 Patent.

[10] In June 2008, Public Works and Government Services Canada (Public Works) published a draft performance specification for transportable collective protective (ColPro) systems. A year later, in July 2009, Public Works published a request for proposals for ColPro systems and received bids from, amongst others, NOR and HDT. The contract was awarded to HDT in December 2009. The parties agree that ColPro systems are for the defence of Canada or for the training of or maintaining of the efficiency of the Canadian Forces.

[11] On April 2012, Mr. Brown and NOR launched proceedings in the Federal Court for patent infringement.

[12] The Crown and HDT responded by way of a motion seeking dismissal of the appellants' claim and summary judgment for the invalidation of the '748 Patent. The Crown claimed that the '748 Patent was void because Mr. Brown did not identify himself as a public servant when he made his application. This omission, the Crown argued, constituted a material untrue allegation which resulted in an invalid '748 Patent pursuant to section 53 of the *Patent Act*.

II. Legislative provisions

[13] This appeal concerns the following main legislative provisions:

- Section 2 of the PSIA:

2. In this Act,

“public servant” means any person employed in a department, and includes a member of the Canadian Forces or the Royal Canadian Mounted Police.

2. Les définitions qui suivent s’appliquent à la présente loi.

« fonctionnaire » Toute personne employée dans un ministère et tout membre du personnel des Forces canadiennes ou de la Gendarmerie royale du Canada.

- Section 4 of the PSIA:

4. (1) Every public servant who makes an invention

(a) shall inform the appropriate minister of the invention and shall provide the minister with such information and documents with respect thereto as the minister requires;

(b) shall not file outside Canada an application for a patent in respect of the invention without the written consent of the appropriate minister; and

(c) shall, in any application in Canada for a patent in respect of the invention, disclose in his application that he is a public servant.

4. (1) Le fonctionnaire auteur d’une invention a l’obligation :

a) d’en informer le ministre compétent et de fournir à celui-ci les renseignements et documents qu’il lui demande à ce sujet;

b) d’obtenir le consentement écrit du ministre compétent avant de déposer, hors du Canada, une demande de brevet concernant l’invention;

c) de révéler sa qualité de fonctionnaire, dans toute demande de brevet déposée au Canada à l’égard de l’invention.

(2) If it appears to the Commissioner of Patents that an application for a patent relates to an invention made by a public servant, the Commissioner shall inform the appropriate minister of the application

(2) S’il lui apparaît qu’une demande de brevet vise une invention dont l’auteur est un fonctionnaire, le commissaire aux brevets en informe le ministre compétent et fournit à ce dernier les renseignements qu’il

and give to the minister such information with respect thereto as the minister requires.

sollicite à cet égard.

- Section 53 of the *Patent Act*:

53. (1) A patent is void if any material allegation in the petition of the applicant in respect of the patent is untrue, or if the specification and drawings contain more or less than is necessary for obtaining the end for which they purport to be made, and the omission or addition is wilfully made for the purpose of misleading.

53. (1) Le brevet est nul si la pétition du demandeur, relative à ce brevet, contient quelque allégation importante qui n'est pas conforme à la vérité, ou si le mémoire descriptif et les dessins contiennent plus ou moins qu'il n'est nécessaire pour démontrer ce qu'ils sont censés démontrer, et si l'omission ou l'addition est volontairement faite pour induire en erreur.

(2) Where it appears to a court that the omission or addition referred to in subsection (1) was an involuntary error and it is proved that the patentee is entitled to the remainder of his patent, the court shall render a judgment in accordance with the facts, and shall determine the costs, and the patent shall be held valid for that part of the invention described to which the patentee is so found to be entitled.

(2) S'il apparaît au tribunal que pareille omission ou addition est le résultat d'une erreur involontaire, et s'il est prouvé que le breveté a droit au reste de son brevet, le tribunal rend jugement selon les faits et statue sur les frais. Le brevet est réputé valide quant à la partie de l'invention décrite à laquelle le breveté est reconnu avoir droit.

(3) Two office copies of the judgment rendered under subsection (1) shall be furnished to the Patent Office by the patentee, one of which shall be registered and remain of record in the Office and the other attached to the patent and made a part of it by a reference thereto.

(3) Le breveté transmet au Bureau des brevets deux copies authentiques de ce jugement. Une copie en est enregistrée et conservée dans les archives du Bureau, et l'autre est jointe au brevet et y est incorporée au moyen d'un renvoi.

III. Decision of the Judge

[14] The Judge granted the motion in part. In so doing, she began her analysis with an overview of the law of summary judgment making reference to the *Federal Courts Rules*,

S.O.R./98-106 (Rules 214-219) and relevant jurisprudence. She noted that the standard to grant summary judgment requires that the judge be satisfied that there is no genuine issue for trial.

[15] The Judge then determined that Mr. Brown was a public servant within the meaning of section 2 of the PSIA when he applied for the '748 Patent on October 8, 1999. She concluded that Mr. Brown was a member of the Canadian Forces and, as such, did not have to be employed in order to fall within the definition of public servant for the purpose of the PSIA.

[16] In finding that Mr. Brown was a public servant pursuant to the PSIA, the Judge held that Mr. Brown's failure to disclose his status amounted to an untrue allegation which was material as per subsection 53(1) of the *Patent Act*. In coming to this conclusion, she noted that the framework of the PSIA imposed an explicit statutory duty of disclosure and found that Mr. Brown's omission prevented the Commissioner of Patents from properly fulfilling his or her obligations pursuant to subsection 4(2) of the PSIA which is to inform the appropriate minister about the patent application.

[17] With respect to the issue of whether untrue material allegations must be wilfully made for the purpose of misleading, the Judge was of the view that it was a genuine issue which should be determined at trial considering the paucity of evidence before the Court. She observed that the alleged contravention of section 53 of the *Patent Act* was akin to fraud. She added that if it was determined at trial that such an intention was required, it would also be required that it be determined whether or not Mr. Brown had the required intention.

[18] Finally, the Judge held that the question of whether or not the *Crown Liability and Proceedings Act*, R.S.C., 1985, c. C-50 (CLPA) trumps the *Patent Act* was a genuine issue for trial. More particularly, in the event that the '748 Patent was not void, the issue of whether Canada was immune for liability pursuant to the CLPA because the invention falls within the exception of section 8 would also need to be determined. The parties did not make any submission on this issue on appeal.

[19] On June 17, 2015, the Intellectual Property Institute of Canada (IPIC) was granted leave to intervene in this appeal by order of a judge of this Court. HDT did not participate in this appeal.

IV. Issues

[20] The issues before this Court are as follows:

1. Did the Judge err in concluding that Mr. Brown was a public servant within the meaning of section 2 of the PSIA at the time he filed his application for the '748 Patent?
2. Did the Judge err in concluding that Mr. Brown's failure to disclose his public servant status at the time he filed his application for the '748 Patent was an untrue and material allegation pursuant to section 53 of the *Patent Act*?

V. Standard of Review

[21] The standard of review for questions of law is correctness. Questions of fact and mixed fact and law in respect of which there is no extricable question of law are reviewed on the standard of palpable and overriding error (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 7-37).

VI. Analysis

A. Did the Judge err in concluding that Mr. Brown was a public servant within the meaning of section 2 of the PSIA at the time he filed his application for the '748 Patent?

[22] Mr. Brown submits that the Judge erred in finding that he was a public servant within the meaning of section 2 of the PSIA when he filed his application for the '748 Patent on October 8, 1999. Essentially, Mr. Brown asserts that the definition of "public servant" in section 2 of the PSIA must be interpreted in a broader context as to solely include those who perform work or service in exchange for remuneration. As such, Mr. Brown argues, since he was an unpaid member of the Canadian Forces' Supplementary Reserve in 1999, he was not "employed" and thus could not be considered a "member of the Canadian Forces" within the meaning of section 2 of the PSIA.

[23] I cannot accept Mr. Brown's contention. In my view, the Judge properly concluded that Mr. Brown, as a member of the Supplementary Reserve, was a "public servant" within the meaning of the PSIA when he applied for the '748 Patent.

[24] I note that in undertaking her statutory interpretation, the Judge conducted a thorough bilingual review of the statutory term "public servant" as used in section 2 of the PSIA in conformity with the well-established principle that both versions of bilingual enacted legislation are authoritative: "both must be read with care and both must be considered in resolving interpretative issues" (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Canada: LexisNexis, 2014) at & 5.16 and 5.17 (*Sullivan*)).

[25] On its face, the language of section 2 of the PSIA and the specific use of “member of the Canadian Forces” and “membre du personnel des Forces canadiennes” as opposed to “employed in a department” and “employée dans un ministère”, clearly evidence Parliament's intention to extend the definition of “public servant” to more than members of the Canadian Forces who are “actively employed”.

[26] I further observe that the Judge's reasons are well-supported. On the whole, in reading section 2 of the PSIA in both official versions, I can only agree with the Judge that the wording is “sufficiently clear in English and crystal clear in French” to support her finding and I therefore agree with her statutory interpretation of “public servant” in section 2 of the PSIA.

[27] It follows that, for the purpose of the PSIA, all members of the Canadian Forces are “public servants” whether they are in the Regular Force or the Reserve Force. Indeed, the text of section 2 of the PSIA makes it clear that members of the Canadian Forces do not need to be employed or receive benefits to be included in the definition of “public servant” for the purpose of the PSIA.

[28] Therefore, I see no reason to interfere with the Judge's conclusion in this regard.

B. Did the Judge err in concluding that Mr. Brown's failure to disclose his public servant status at the time he filed his application for the '748 Patent was an untrue and material allegation pursuant to section 53 of the Patent Act?

[29] Having found that Mr. Brown was a public servant under the PSIA, the Judge concluded that his failure to disclose his public servant status as contemplated by the PSIA when he filed

his application for the '748 Patent was an untrue material allegation for the purpose of section 53 of the *Patent Act*.

[30] The appellants and the intervenor argue that this conclusion is wrong in law as nothing in the *Patent Act* requires that Mr. Brown had to disclose his public servant status when he applied for the '748 Patent. The Crown disagrees and submits that a statutory interpretation of both the PSIA and the *Patent Act* leads inescapably to the conclusion that Mr. Brown's failure to disclose his public servant status is a material untrue allegation pursuant to section 53 of the *Patent Act*. In cross-appeal, based on a highly strict, technical, and grammatical interpretation of section 53 of the *Patent Act*, the Crown further alleges that the Judge's factual finding that Mr. Brown made an untrue allegation that was material suffices to void the '748 Patent pursuant to section 53 of the *Patent Act* and that, as such, there is no additional requirement to prove wilful intent. The Crown further submits that the Judge erred in stopping short of voiding the '748 Patent under subsection 53(1) of the *Patent Act*.

[31] The Judge correctly noted at paragraph 47 of her reasons that the present matter raises the novel issue of the relationship between section 4 of the PSIA and section 53 of the *Patent Act* in the specific context of voiding a patent under section 53 of the *Patent Act* as a result of a contravention of section 4 of the PSIA. I would further add that this issue is decisive in determining what obligations Mr. Brown had as a public servant pursuant to the PSIA and the *Patent Act* when he filed his application for '748 Patent.

[32] Having identified the crux of the matter, the Judge then proceeded with her analysis as to whether Mr. Brown's failure to disclose his public servant status constituted a material untrue allegation within the meaning of subsection 53(1) of the *Patent Act*. However, in performing her analysis, the Judge short circuited a crucial step. Despite acknowledging that the present matter raised the interaction between section 4 of the PSIA and section 53 of the *Patent Act*, the Judge failed to properly conduct an analysis of this issue. A closer look at the interaction between the PSIA and the *Patent Act* is therefore apposite at this juncture.

[33] The interaction between the PSIA and the *Patent Act* has to be considered in accordance with general principles of interpretation. Specifically, statutes that are enacted by the legislature that deal with the same subject, in this case, patents, are presumed to be drafted with one another in mind, so as to offer a coherent and consistent treatment of the subject (*Sullivan* at §§15.25, 15.37). Furthermore, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (*Rizzo and Rizzo Shoes Ltd.(Re)*, [1988] 1 S.C.R. 27 at para. 21; also *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at para. 10).

[34] The *Patent Act*, unlike the *Copyright Act*, R.S.C., 1985, c. C-42 (subsection 13(3)), does not address the issue of ownership of patent rights in inventions made during the course of employment. Given the silence of the *Patent Act* on this issue in the context of a private employment relationship, the existence of an employee-employer relationship will not necessarily disqualify an employee from patenting an invention discovered in the course of employment. The employer can nevertheless seek ownership of the intellectual property rights if

it can demonstrate that: (i) there is formal agreement between the employer and the employee to the effect that the employer retains ownership of the intellectual patent rights; or, (ii) the employee was hired for the express purpose of inventing (*Comstock Canada v. Electec Ltd.*, [1991] F.C.J. No. 987, 45 F.T.R. 241 (QL)).

[35] However, in the context of a government employment relationship, such as the one at issue, Parliament specifically enacted the PSIA in 1954 to govern inventions developed by public servants as well as the intellectual property rights that flow from the inventions. The PSIA, for the greater part, remains unchanged to this day.

[36] It is trite to say that the object of the PSIA is to ensure that both inventions made and claimed by public servants as well as their rights are vested in Her Majesty under certain conditions. Section 3 of the PSIA entitled “Inventions Vested in Her Majesty” is aptly descriptive and states the following:

3. The following inventions, and all rights with respect thereto in Canada or elsewhere, are vested in Her Majesty in right of Canada, namely,

(a) an invention made by a public servant while acting within the scope of his duties or employment, or made by a public servant with facilities, equipment or financial aid provided by or on behalf of Her Majesty; and

(b) an invention made by a public servant that resulted from or is connected with his duties or employment. [My emphasis]

3. Sont dévolues à Sa Majesté du chef du Canada, avec tous les droits y afférents au Canada ou à l'étranger :

a) toute invention faite par un fonctionnaire soit dans l'exercice ou le cadre de ses attributions, soit grâce à des installations, du matériel ou une aide financière fournis par Sa Majesté ou pour le compte de celle-ci;

b) toute invention faite par un fonctionnaire et découlant de ses attributions, ou s'y rattachant. [Mon soulignement]

[37] Accordingly, Parliament has imposed on public servant-inventors a duty to disclose their inventions to the appropriate minister (section 4 of the PSIA). Following a disclosure of the invention by the public servant-inventor and given the nature of the invention, the appropriate minister can determine whether an invention is indeed vested in Her Majesty according to the PSIA. Hence, the appropriate minister can: (i) file an application for a patent invention vested in Her Majesty by the PSIA; or, (ii) waive, abandon or transfer all or any of its rights in respect of that invention (sections 5, 6 and 8 of the PSIA). In order for the appropriate minister to elect the best course of action and fulfil his obligations under the PSIA, the disclosure of the invention by the public servant is paramount.

[38] As for the *Patent Act*, it stands as a complete statutory scheme regarding patents (*Commissioner of Patents v. Fabwerks Hoechst Aktiengesellschaft Vormals Meister Lucius & Bruning* (1963), [1964] S.C.R. 49 at p. 57, 41 C.P.R. 9 (QL); *Apotex Inc. v. Sanofi-Synthelabo Canada Inc. v. Apotex Inc.*, 2008 SCC 61, [2008] 3 S.C.R. 265 at para. 12; *Sanofi-Aventis v. Apotex Inc.*, 2013 FCA 186, [2015] 2 F.C.R. 644 at para. 34). The Commissioner of Patents has no discretion to not grant a patent if all the requirements set forth under the *Patent Act* are met.

Subsection 27(1) of the *Patent Act* is clear to that effect:

27. (1) The Commissioner shall grant a patent for an invention to the inventor or the inventor's legal representative if an application for the patent in Canada is filed in accordance with this Act and all other requirements for the issuance of a patent under this Act are met.

27. (1) Le commissaire accorde un brevet d'invention à l'inventeur ou à son représentant légal si la demande de brevet est déposée conformément à la présente loi et si les autres conditions de celle-ci sont remplies.

[39] Subsection 27(2) of the *Patent Act* sets out the content of a patent application which must contain a petition and a specification of the invention:

27. (2) The prescribed application fee must be paid and the application must be filed in accordance with the regulations by the inventor or the inventor's legal representative and the application must contain a petition and a specification of the invention.

27. (2) L'inventeur ou son représentant légal doit déposer, en la forme réglementaire, une demande accompagnée d'une pétition et du mémoire descriptif de l'invention et payer les taxes réglementaires.

[40] The regulations referred to in subsection 27(2) of the *Patent Act* are found in the *Patent Rules*, S.O.R./96-423.

[41] In connection with the petition required by subsection 27(2) of the *Patent Act*, Rule 77 of the *Patent Rules* provides that it "shall follow the form and the instructions for its completion set out in Form 3 of Schedule 1 ...". Form 3 is entitled "Petition for Grant of Patent" and specifically refers to subsection 27(2) of the *Patent Act*. In the present case, the appellant, Mr. Brown, used this form on the advice of his patent agent when he filed his application for the '748 Patent. Neither Form 3, nor its instructions, indicates that an individual filing a patent application has an obligation to disclose his or her public servant status. Form 3 and its instructions are entirely silent in this respect.

[42] However, the *Public Servants Inventions Regulations*, C.R.C., c. 1332 set forth a number of forms which have to be used by a public servant filing an application for a patent, more particularly forms 4 to 7. As a public servant, Mr. Brown would have had to make use of these forms to fulfil his obligation pursuant to subsection 4(1) of the PSIA when he applied for the '748 Patent, as per section 11 of the *Public Servants Inventions Regulations*.

[43] A comparison of the forms under the *Patent Rules* and the forms under the *Public Servants Inventions Regulations* reveal a lack of consistency and hence a conflict regarding the required forms. Indeed, Rule 77 and Form 3 of the *Patent Rules* do not refer to the obligation to disclose a public servant status, whereas Forms 4 to 7 of the *Public Servants Inventions Regulations* expressly requires that one's public servant status be disclosed.

[44] Against this apparent conflict and lack of consistency between the *Patent Rules* and the *Public Servants Inventions Regulations*, a closer look at their effect is required. Significantly, a distinction must be drawn between the *Patent Rules* on the one hand and the *Public Servants Inventions Regulations* on the other. Pursuant to subsection 12(2) of the *Patent Act*, the former have the same force and effect as if they had been enacted in the *Patent Act* itself:

12. (2) Any rule or regulation made by the Governor in Council has the same force and effect as if it had been enacted herein.

12. (2) Toute règle ou tout règlement pris par le gouverneur en conseil a la même force et le même effet que s'il avait été édicté aux présentes.

[45] The PSIA contains no similar provision and its regulations are therefore to be considered subordinate legislation. It follows that despite the apparent conflict and lack of consistency between the *Patent Rules* and the *Public Servants Inventions Regulations*, the former carry greater weight and therefore prevail over the later. This supports the conclusion that the failure to disclose one's status as a public servant does not invalidate a patent given that such disclosure is not required under either the *Patent Act* or its Rules.

[46] Looking back to past amendments to the *Patent Act* and the PSIA also supports the conclusion that Parliament did not intend that a patent could be void for a failure to disclose public servant status.

[47] For instance, section 47 of the *Patent Act* in the Revised Statutes of 1952 under the heading “Inventions by Servants” addressed the rights and obligations of both public servant inventors and the Crown. At that time, no obligation was placed upon a public servant applying for a patent to disclose his or her public servant status.

[48] In 1954, section 47 of the *Patent Act (1952)* was repealed altogether and the PSIA was enacted. In so doing, Parliament also enacted specific penalties under the PSIA in relation to the failure to disclose public servant status, including fines and/or imprisonment. Such penalties are not expressed as relating to or in any way impacting upon the validity of a patent issued if a public servant-inventor failed to comply with the PSIA. It is equally worthy of note that the *Patent Act*, likewise, does not impose any penalties for a failure to disclose public servant status.

[49] As a result, this review of the interaction between the PSIA and the *Patent Act* leads me to the following conclusion. Mr. Brown had the obligation to disclose his public servant status under subsection 4(2) of the PSIA and, in failing to do so, he became subject to penalties under section 11 of the PSIA. However, he had no such obligation under the *Patent Act* when he filed his application for the '748 Patent. Mr. Brown met the requirement under the *Patent Act* and the *Patent Rules* and disclosed an invention that was determined by the Patent Office to be new, not obvious and useful. The *Patent Act*, as a complete statutory scheme, does not in any way require

that an applicant disclose public servant status, nor does it set forth any penalties for not doing so. The PSIA itself does not even refer to the invalidation of a patent as a consequence of failing to disclose public servant status.

[50] It was thus an error for the Judge to conclude that Mr. Brown's failure to disclose his public servant status at the time he filed his application for the '748 Patent was an untrue and material allegation pursuant to subsection 53(1) of the *Patent Act* and cannot affect the validity of the '748 Patent. Regardless of the disclosure obligations under the PSIA, since Mr. Brown complied with section 27 of the *Patent Act*, more specifically with the *Patent Rules* and its Forms, section 53 could not be triggered in the circumstances. However, the question as to whether the invention and the ownership of the '748 Patent intellectual property rights are vested in Her Majesty pursuant to subsections 4(1) and 4(2) of the PSIA, remains open.

[51] I would allow the appeal with costs before this Court and the Federal Court and I would dismiss the Crown's cross-appeal with costs. I would set aside the Judge's judgment and, rendering the judgment that the Judge should have rendered, I would dismiss the Crown's motion for summary judgment in its entirety.

“Richard Boivin”

J.A.

“I agree
Wyman W. Webb J.A.”

“I agree
Yves de Montigny J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-419-14

(APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE KANE OF THE FEDERAL COURT OF CANADA DATED AUGUST 29, 2014, DOCKET NUMBER T-806-12.)

STYLE OF CAUSE:

LOUIS BROWN, 2202240
ONTARIO INC. d/b/a, NOR
ENVIRONMENTAL
INTERNATIONAL v. HER
MAJESTY THE QUEEN IN
RIGHT OF CANADA, and, HDT
TACTICAL SYSTEMS, INC. d/b/a,
HDT ENGINEERED
TECHNOLOGIES AND
INTELLECTUAL PROPERTY
INSTITUTE OF CANADA/
INSTITUT DE LA PROPRIÉTÉ
INTELLECTUELLE DU CANADA

PLACE OF HEARING:

TORONTO, ONTARIO

DATE OF HEARING:

DECEMBER 10, 2015

REASONS FOR JUDGMENT BY:

BOIVIN J.A.

CONCURRED IN BY:

WEBB J.A.
DE MONTIGNY J.A.

DATED:

FEBRUARY 5, 2016

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Jacqueline Dais-Visca
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