

Federal Court



Cour fédérale

Date: 20200305

Docket: T-1564-19

Citation: 2020 FC 338

Ottawa, Ontario, March 5, 2020

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

INGURAN LLC DBA STGENETICS

Applicant

and

COMMISSIONER OF PATENTS

Respondent

JUDGMENT AND REASONS

I. Overview and summary

[1] This is an application pursuant to section 52 of the *Patent Act*, RSC, 1985, c P-4, in which the Applicant seeks to amend four Canadian Patents, Nos. 2,518,882, 2,752,218, 2,752,244, and 2,752,247 [Patents in Issue] to remove six individuals named as inventors, who the Applicant submits are not inventors.

[2] The Patents in Issue were prepared based upon Patent Cooperation Treaty [PCT] Application No. WO 2004/088283 as published, which named twelve inventors [named PCT inventors] and entered national phase in Canada as Canadian Patent Application No. 2,518,882 [CA 2,518,882].

[3] Following a division of CA 2,518,882 required by the Canadian Intellectual Property Office [CIPO], each of the named PCT inventors remained named as inventors in respect of all parent and divisional patent applications, including the Patents in Issue.

[4] Certain inventors named in the Patents in Issue namely David R. Helbing, Muhammad Anzar, Kathleen S. Crowley, Bradley Didion, Jeffrey A. Graham and Cindy L. Ludwig contributed to the subject-matter claimed in other divisional patents derived from CA 2,518,882.

[5] However, I have found on a balance of probabilities that these individuals did not contribute to the development of the claimed inventions that are the subject matter of the Patents in Issue, and that they were listed as inventors by inadvertence in the process of the division. Consequently, they should not be currently listed in CIPO's records as inventors of the Patents in Issue.

[6] The Applicant requests an order that the entry in the records of the Patent Office relating to the Patents in Issue be amended by removing the said David R. Helbing, Muhammad Anzar, Kathleen S. Crowley, Bradley Didion, Jeffrey A. Graham, and Cindy L. Ludwig as named inventors.

[7] The Application is granted for the following reasons.

[8] I should note that this Application was not opposed. The Commissioner of Patents was served but took no position. In the circumstances, I will review the facts and law as submitted by the Applicant making necessary findings during the course of the review.

II. Background

[9] PCT Application No. WO 2004/088283 entitled “Apparatus and Methods for Providing Sex-Sorted Animal Sperm” [PCT Application] entered Canadian national phase on September 9, 2005 as CA 2,518,882.

[10] The PCT Application claimed priority to United States Patent Application Nos. 60/458,607 and 60/458,731.

[11] On March 28, 2003, Monsanto Technology LLC [Monsanto], the Applicant’s predecessor in title to the patents and patent applications discussed herein, filed United States Patent Application No. 60/458,607 entitled “Apparatus and Methods for Sorting Particles,” naming eight inventors: Bradley Didion, Gary Durack, Jeremy Hatcher, Lon Westfall, David Helbling, Jeffrey Wallace, Gary Vandre and Niraj Nayak.

[12] Pursuant to their respective employment agreements at the time of the invention, seven of the eight named inventors in US 60/458,607 assigned their entire right, title and interest in and to US 60/458,607, including any related foreign applications based on said invention, in and throughout the United States and worldwide, to iCyt Visionary Bioscience, Inc. [iCyt].

[13] The remaining inventor in US 60/458,607, Bradley Didion, assigned his entire right, title and interest in and to US 60/458,607 including any related foreign applications based on said invention, to Monsanto.

[14] On September 3, 2004, Monsanto acquired iCyt's rights in and to US 60/458,607, including any foreign applications based on said invention.

[15] On March 28, 2003, Monsanto filed United States Application No. 60/458,731, entitled "Process for the staining of sperm," naming the following four inventors: Muhammad Anzar, Cindy L. Ludwig, Jeffrey A. Graham, and Jeannette A. Glaenzer.

[16] I am satisfied that the four named inventors in US 60/458,731 assigned their entire right, title and interest in and to US 60/458,731, including any foreign applications based on said invention, to Monsanto.

[17] On March 29, 2004, Monsanto filed the PCT Application, naming the following twelve inventors (these are the “named PCT Inventors”):

Bradley Didion	Gary Vandre
Gary Durack	Niraj Nayak
Jeremy Hatcher	Muhammad Anzar
Lon Westfall	Cindy L. Ludwig
David Helbling	Jeffrey A. Graham
Jeffrey Wallace	Kathleen S. Crowley

[18] On September 9, 2005, the PCT Application entered national phase in Canada as CA 2,518,882. CA 2,518,882 named every PCT Inventor as an inventor.

[19] On January 16, 2008, the Applicant acquired the rights from Monsanto to the invention that is the subject of CA 2,518,882, including all related patent rights. As such, no change in ownership rights of the Patents in Issue is requested in this Application. The assignment agreement between Monsanto and the Applicant provides:

Monsanto has agreed to and does hereby sell, assign and transfer unto Inguran, its successors and assigns, all of Monsanto’s right, title and interest in and throughout the world in and to the Applications listed on Exhibit A, including provisional, non-provisional, divisional, continuing, or reissue applications based in whole or in part on any and all inventions disclosed therein, and any and all patents which have been or may be granted on any of the Applications or on said inventions or any part thereof”.

[20] On January 24, 2011, the PCT Application for CA 2,518,882 faced an objection from CIPO on the ground the application was directed at a plurality of inventions. This objection

resulted in a division of CA 2,518,882 resulting in one parent application, CA 2,518,882, and the filing of several divisional applications, including Canadian Patent Application Nos. 2,752,218; 2,752,244; 2,752,247; 2,752,312; and 2,952,056.

[21] In the resulting filing of CA 2,518,882 and the divisional applications just mentioned, and as a result of what I find to have been an inadvertence, each of the parent application and the divisional applications was filed with each PCT Inventor named as an inventor.

[22] The applications for Canadian Patent Nos. 2,518,882, 2,752,218, 2,752,244, and 2,752,247 have since issued to patent as the Patents in Issue.

[23] Canadian Patent Application No. 2,752,312 issued to patent on June 19, 2018. The Applicant was able to make the necessary inventorship amendments in respect of CA 2,752,312 prior to the patent issuing. Canadian Patent Application No. 2,952,056 is still pending and, to date, has not involved any inventorship amendments.

[24] Based on the affidavit evidence before me, I am satisfied on a balance of probabilities that David R. Helbing, Muhammad Anzar, Kathleen S. Crowley, Bradley Didion, Jeffrey A. Graham, and Cindy L. Ludwig [Non-Inventors] did not contribute to the development of the claimed inventions that are the subject matter of the Patents in Issue. As a consequence they are not inventors. These Non-Inventors were incorrectly named in CIPO's records by inadvertence following the division of the parent patent application.

[25] At the time of the invention, the Non-Inventors were employed by Monsanto in various technical positions. Of the six Non-Inventors, three swore affidavits in support of this Application. Specifically, Non-Inventors Crowley, Graham and Ludwig consented to their removal as named inventors in respect of the Patents in Issue because they were not inventors. The Applicant could not locate Non-Inventors Anzar, Didion, and Helbling, who had assigned any right they had as inventors to predecessors in title of the Applicant.

[26] I find that the properly named inventors of the allowed claims in the Patents in Issue are Gary Durack, Jeremy T. Hatcher, Niraj Nayak, Gary P. Vandre, Jeffrey D. Wallace, and Lon. A. Westfall (the “Inventors”). Of these six Inventors, four have reviewed the Patents in Issue and provided affidavits attesting to the fact that the Inventors, not the Non-Inventors, contributed to the development of the claimed inventions that are the subject matter of the Patents in Issue. In my view, only the Inventors are properly named as inventors on the Patents in Issue.

[27] The PCT Application contained electro-mechanical subject-matter and biological subject-matter, while the issued claims of the Patents in Issue are directed solely to electro-mechanical subject matter. By contrast, claims in the divisional Canadian Patent Application No. 2,952,056 are specifically directed to biological subject matter. Therefore, as of the date of this Application, the Non-Inventors remain named as inventors for Canadian Patent Application No. 2,952,056.

[28] Inventors Durack, Vandre, Westfall and Nayak’s evidence is corroborated by the Non-Inventor Affidavits mentioned above whose evidence is that they are not inventors.

[29] The Applicant has been unable to ascertain the whereabouts of Inventors Jeremy T. Hatcher and Jeffrey D. Wallace, despite inquiry. As noted previously, these two Inventors assigned their entire right, title and interest in and to US 60/458,607, including any related foreign applications based on said invention, in and throughout the United States and worldwide, to iCyt, which rights, title and interests iCyt subsequently assigned to Monsanto which is the Applicant's predecessor in title.

III. Issues

[30] At issue is whether CIPO's records relating to the Patents in Issue should be varied to correct the names of the inventors by removing the six Non-Inventors.

IV. Analysis

[31] Section 52 of the *Patent Act* provides exclusive jurisdiction to the Federal Court to vary entries relating to title of a patent, including inventorship:

Jurisdiction of Federal Court

52 The Federal Court has jurisdiction, on the application of the Commissioner or of any person interested, to order that any entry in the records of the Patent Office relating to the title to a patent be varied or expunged.

Jurisdiction de la Cour fédérale

52 La Cour fédérale est compétente, sur la demande du commissaire ou de toute personne intéressée, pour ordonner que toute inscription dans les registres du Bureau des brevets concernant le titre à un brevet soit modifiée ou radiée.

[32] I am satisfied the Applicant is the lawful owner of the Patents in Issue and is therefore a “person interested” pursuant to section 52 of the *Patent Act: Micromass UK Ltd v Canada (Commissioner of Patents)*, 2006 FC 117 per Layden-Stevenson J at para 14 [*Micromass*].

[33] It is well established that the powers conferred upon the Federal Court by section 52 of the *Patent Act* are broad. In this connection, the Court may direct that records be corrected to accomplish that which the Commissioner would have done had the change in inventorship been filed prior to the grant of the patent: *Micromass* at para 15, citing *Clopay v Metalix*, (1961) 34 CPR 232 (Ex Ct):

[15] The powers conferred on the Court under section 52 are very broad. In *Clopay*, Cameron J. described section 54 (now section 52) of the Act in the following manner:

...I think, therefore, that s. 54 was enacted so as to enable the rectification by the Court of the records in the Patent Office relating to title in order that the party or parties actually entitled to the grant or to be registered as to the assignees of the patent, might have their rights properly recorded (p. 235)

[...]

I am of the opinion, however, that the provisions of s. 54 of our Patent Act are by themselves sufficiently broad to encompass a situation such as the one before me, in which the grantee of the patent was dissolved prior to the grant, and that there is power in the Court to direct that the records be corrected to accomplish that which the Commissioner would have done had the two assignments now recorded been registered prior to the grant (p. 236).

[Emphasis added]

[34] It is also settled law that section 52 of the *Patent Act* authorizes the Federal Court to vary or expunge any entry in the record of the Patent Office, which includes changing the named inventors to identify the correct inventors. As sated in *Segatoys Co, Ltd. v. Canada (Attorney General)*, 2013 FC 98 per O’Keefe J at para 13 [*Segatoys*], citing *Micromass*:

[13] Moreover, the word “title” in section 52 of the *Patent Act* includes inventorship, which is the “root” of title. Section 52 confers “very broad” powers upon the Court so that it may accomplish what the Commissioner of Patents would have done (see *Micromass* above, at paragraphs 13 and 15).

[35] The Applicant submits and I agree that in an application under section 52 such as this, the Court may apply the tests set out for the Commissioner of Patents in subsections 31(3) and 31(4) of the *Patent Act*: *Pharma Inc v. Canada (Commissioner of Patents)*, 2019 FC 208, per Pentney J at para 5, *Gilead Sciences, Inc v Canada (Commissioner of Patents)*, 2019 FC 70, per Grammond J at para 2; *Qualcomm Inc v Canada (Commissioner of Patents)*, 2016 FC 1092, per Southcott J at para 11 [*Qualcomm 1092*]. These subsections provide:

Procedure when one joint applicant retires

(3) Where an application is filed by joint applicants and it subsequently appears that one or more of them has had no part in the invention, the prosecution of the application may be carried on by the remaining applicant or applicants on satisfying the Commissioner by affidavit that the remaining applicant or applicants is or are the sole inventor or inventors.

Procédure quand un codemandeur se retire

(3) Lorsqu’une demande est déposée par des codemandeurs et qu’il apparaît par la suite que l’un ou plusieurs d’entre eux n’ont pas participé à l’invention, la poursuite de cette demande peut être conduite par le ou les demandeurs qui restent, à la condition de démontrer par affidavit au commissaire que le ou les derniers demandeurs sont les seuls inventeurs.

Joining applicants

(4) Where an application is filed by one or more applicants and it subsequently appears that one or more further applicants should have been joined, the further applicant or applicants may be joined on satisfying the Commissioner that he or they should be so joined, and that the omission of the further applicant or applicants had been by inadvertence or mistake and was not for the purpose of delay.

Codemandeurs

(4) Lorsque la demande est déposée par un ou plusieurs demandeurs et qu'il apparaît par la suite qu'un autre ou plusieurs autres demandeurs auraient dû se joindre à la demande, cet autre ou ces autres demandeurs peuvent se joindre à la demande, à la condition de démontrer au commissaire qu'ils doivent y être joints, et que leur omission s'est produite par inadvertance ou par erreur, et non pas dans le dessein de causer un délai.

[36] In *Apotex Inc v Wellcome Foundation Ltd*, 2002 SCC 77 [*Apotex*], per Binnie J for the Court, the Supreme Court of Canada held that the “ultimate question” for inventorship is “who is responsible for the inventive concept?” By contrast, a person whose only contribution is to “help the invention to completion” rather than conception is not an inventor. See *Apotex* at paras 96 to 99:

[96] Inventorship is not defined in the Act, and it must therefore be inferred from various sections. From the definition of “invention” in s. 2 for example, we infer that the inventor is the person or persons who conceived of the “new and useful” art, process, machine, manufacture or composition of matter, or any “new and useful” improvement thereto. The ultimate question must therefore be: who is responsible for the inventive concept?

[97] Section 34(1) requires that at least at the time the patent application is filed, the specification “correctly and fully describe the invention . . . to enable any person skilled in the art or science to which it appertains . . . to . . . use it”. It is therefore not enough to have a good idea (or, as was said in *Christiani*, supra, at p. 454, “for a man to say that an idea floated through his brain”); the ingenious idea must be “reduced . . . to a definite and practical shape” (*ibid.*). Of course, in the steps leading from conception to patentability, the inventor(s) may utilize the services of others,

who may be highly skilled, but those others will not be co-inventors unless they participated in the conception as opposed to its verification. As Jenkins J. notes in *May & Baker Ltd. v. Ciba Ltd.* (1948), 65 R.P.C. 255 (Ch. D.), at p. 281, the requisite “useful qualities” of an invention, “must be the inventor’s own discovery as opposed to mere verification by him of previous predictions”.

[98] More recently, in *Henry Brothers (Magherafelt) Ltd. v. Ministry of Defence and the Northern Ireland Office*, [1997] R.P.C. 693 (Pat. Ct.), in response to a submission that an invention could be divided into contributed elements and patents awarded accordingly, Jacob J. stated, at p. 706:

I do not think it is right to divide up the claim for an invention which consists of a combination of elements and then to seek to identify who contributed which element. I think the inquiry is more fundamental than that. One must seek to identify who in substance made the combination. Who was responsible for the inventive concept, namely the combination? [Emphasis added.]

[99] The distinction between conception and verification is consistent with the Canadian authorities, including *Fox, supra*, at p. 225; *Kellogg Co. v. Kellogg*, [1942] Ex. C.R. 87, at p. 97; *Ernest Scragg & Sons Ltd., supra*, at pp. 676-77; H. Fisher and R. S. Smart, *Canadian Patent Law and Practice* (1914), at pp. 27-29. The line is perhaps blurred in *Gerrard Wire Tying Machines Co. of Canada v. Cary Manufacturing Co.*, [1926] Ex. C.R. 170, where the U.S. text *Walker on Patents* is quoted at p. 186:

Nor is a patent to joint inventors invalidated by the fact that one of them only first perceived the crude form of the elements and the possibility of their adaptation to complete the result desired. In fact the conception of the entire device may be attributed to one, but if the other makes suggestions of practical value, which assist in working out the main idea and making it operative, or contributes an independent part of the entire invention which helps to create the whole, he is a joint inventor even though his contribution be of minor importance.

To the extent this suggests that an individual who contributes to the inventive concept may be a co-inventor without being the prime originator, I agree with it. To the extent, however, that it can be read to include as inventors those who help the invention to

completion, but whose ingenuity is directed to verification rather than the original inventive concept, I respectfully, for the reasons already given, disagree.

[Emphasis added]

[37] In *Imperial Oil Resources Ltd v Canada (Attorney General)*, 2015 FC 1218, per Leblanc J [*Imperial Oil*], this Court outlines two criteria for the removal of named inventors set out by subsection 31(3):

[15] Subsection 31(3) of the Act sets out two criteria for the removal of named inventors:

- i. does it appear that one or more of the named inventors have no part in the invention?; and
- ii. has an affidavit been provided to satisfy the Court that the remaining inventors are the sole inventors?

[38] The Applicant points to previous jurisprudence and I agree that uncontested evidence from inventors and non-inventors attesting to their role in the allowed claims may be sufficient to satisfy the test in section 31(3). As stated in *Segatoys* at paras 14-18:

[14] Subsection 31(3) of the Patent Act relates to the removal of the listed inventors. It sets out two criteria:

1. Does it appear that one or more of the named inventors had no part in the invention?

[15] In the present case, although the listed inventors were responsible for the appearance of the finished product, they had no part in conceiving or developing the '539 Patent. This is uncontested by either the real inventors or the listed inventor, Wataru Sato, who provided a declaration. As noted above, the other listed inventor, Noriyoshi Matsumura, could not be contacted.

2. Has an affidavit been provided to satisfy the Court that the remaining inventors are the sole inventors?

[16] Mr. Yamada and Mr. Nobata have provided notarized declarations establishing that they are the co-inventors of the '539 Patent. This is corroborated by a declaration from Mr. Arai, manager of intellectual property for Sega.

[17] Moreover, as noted above, one of the listed inventors provided a declaration stating that neither he nor the other listed inventor (who could not be contacted) had any part in inventing the '539 Patent.

[18] Although these declarations are not referred to as affidavits (which is the wording used in subsection 31(3) of the *Patent Act*), they are notarized. In my view, the declarations thus fulfill the same function as an affidavit and it would be overly formalistic to reject them on the basis of their labelling.

[39] It is also the case that where an inventor is sought to be removed because he or she had no part in making the invention, this Court does not require an affidavit from all interested parties deposing that the remaining inventors were the sole inventors as required by subsection 31(3). This is seen in *Segatoys* at para 17, as well as in *Qualcomm Incorporated v Canada (Commissioner of Patents)*, 2016 FC 499 per Simpson J at paras 7-11 [*Qualcomm 499*]:

[7] I am satisfied that the first part of the test in the Section is relevant and has been met; Mr. Palanki clearly had no part in the invention described in the 309 Patent. However, the second part of the test described in the Section is not met because the affidavits described above do not clearly state that the remaining co-inventors listed in the 309 Patent are the sole inventors.

[8] In these circumstances, I must decide whether an affidavit is required.

[9] In my view, the affidavit mentioned in the Section is essentially a housekeeping requirement to promote the efficient processing of pending patent applications in the Patent Office. It makes sense that, if a patent applicant has made an error in a pending application, the Commissioner would want to ensure that the application was correct once it was amended. This was accomplished by requiring applicants to consider the inventor(s) and confirm in an affidavit that they were accurately listed.

[10] However, these considerations are not relevant when an issued patent is being considered by the Court under section 52 of the Act.

[11] Accordingly, the application will be granted notwithstanding the fact that the Applicant did not provide the affidavit mentioned in the Section stating that the remaining co-inventors listed in the 309 Patent are the sole inventors.

[40] See also *Qualcomm 1092* at paras 12-15:

[12] The Applicant points out that Justice Simpson also held in *Qualcomm* that, although section 31(3) of the Act requires affidavit evidence that the remaining inventor or inventors are the sole inventor or inventors, this was not required when an issued patent was being considered by the Court under section 52 of the Act. Nevertheless, in the present case, Mr. Rychlik has sworn an affidavit confirming that he is the sole inventor of the invention that is the subject of the 594 Patent and that his whole right, title and interest in and to the invention has been assigned to the Applicant. Mr. Rychlik also states that he consents to being named as the sole inventor in respect of the 594 Patent.

[13] Each of Mr. Babbar and Mr. Kapoor has sworn an affidavit confirming that he is not an inventor of the invention that is the subject of the 594 Patent and that he consents to his removal as a named inventor.

[14] The Applicant has also filed an affidavit of Paul Holdaway, its Senior Patent Counsel, which swears that the incorrect naming of inventors was by inadvertence or mistake and was not for the purpose of delay. Mr. Holdaway's affidavit explains how the error occurred, as detailed above in the "Background" section of these Reasons, which evidence supports his assertion that the error resulted from inadvertence or mistake and was not for the purpose of delay.

[15] It is therefore my conclusion that the affidavits provided by the Applicant satisfy the relevant requirements of sections 31(3) and (4) of the Act. Accordingly, the records of the Patent Office relating to the 594 Patent should be amended as requested to add Bohuslav Rychlik as an inventor and delete Uppinder Singh Babbar and Rohit Kapoor as inventors.

[41] In this connection, I also note that in *Copperhead Industrial Inc v Canada (Attorney General)*, 2018 FC 311, Gleeson J held that while affidavit evidence from all interested parties is commonly provided, the jurisprudence does not establish this as an evidentiary standard that an applicant must meet:

[23] I have reviewed each of the cases the intervener relies upon and acknowledge that affidavit evidence from all interested parties is commonly provided, and is of assistance to the Court. However, I am unable to conclude that the jurisprudence establishes this as an evidentiary standard that an applicant must meet.

[24] In *Segatoys* one of two inventors to be removed from patent records could not be located. This situation did not prevent the court from finding the uncontradicted evidence of other affiants to be sufficient in granting the relief sought. In *Qualcomm Inc v Canada (Commissioner of Patents)*, 2016 FC 499, Justice Sandra Simpson held at para 11 that affidavit evidence of all parties was not required in a section 52 application where the court was otherwise satisfied that the relief should be granted.

[25] I also do not accept the intervener's view that granting the application in this case lowers the evidentiary bar or invites mischief. That argument is speculative and assumes the Court will rubber stamp applications without a probing examination of the evidence.

[42] In this case, the Inventors who filed affidavits deposed (1) that they contributed to the development of the claimed inventions that are the subject matter of the Patents in Issue, and (2) that the Non-Inventors did not contribute to the development of the claimed inventions that are the subject matter of the Patents in Issue. The Non-Inventors who filed affidavits deposed that they were not inventors of the claimed inventions that are the subjects of the Patents in Issue.

[43] In my respectful view, this evidence satisfies the tests set in *Apotex* and comports with the jurisprudence of this Court just referred to regarding the manner and form respecting evidence under section 52.

[44] It should be noted there are no other parties directly affected by the order sought other than the Commissioner of Patents, who takes no position. In addition, the Court was advised by counsel for the Applicant that there is no pending litigation relating to the Patents in Issue.

V. Conclusion

[45] Therefore, the test for inventorship set out in *Apotex* is met with the result that the six Non Inventors should be removed as inventors in the Patents in Issue; they are not properly named as inventors. They were inadvertently named inventors. They should have been removed at that time of the division of the parent application, and I am persuaded the Commissioner would have done so had this been brought to his or her attention at the time. Therefore the records of the Patent Office relating to the Patents in Issue should be amended to effect their removal under section 52, and judgment will be issued accordingly.

VI. Costs

[46] This is not a case for costs.

JUDGMENT in T-1564-19

THIS COURT'S JUDGMENT is and it is ordered that:

1. The Commissioner of Patents shall vary all entries in the records of the Patent Office with respect to the inventorship of each of the below-listed issued Canadian patents by removing David R. Helbing, Muhammad Anzar, Kathleen S. Crowley, Bradley Didion, Jeffrey A. Graham, and Cindy L. Ludwig as inventors:
 - a. Canadian Patent No. 2,518,882;
 - b. Canadian Patent No. 2,752,218;
 - c. Canadian Patent No. 2,752,244; and
 - d. Canadian Patent No. 2,752,247.

2. The whole without costs.

"Henry S. Brown"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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COMMISSIONER OF PATENTS

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