

Federal Court



Cour fédérale

Date: 20240828

Docket: T-2716-22

Citation: 2024 FC 1331

Ottawa, Ontario, August 28, 2024

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

ANDREW OLKOWSKI

Applicant

and

**THE COLLEGE OF PATENT AGENTS
AND TRADEMARK AGENTS,
AND MR. TED YOO**

Respondents

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of the Investigations Committee [IC] of the College of Patent Agents and Trademark Agents [CPATA] dated November 25, 2022 [Decision], which dismissed the Applicant, Andrew Olkowski's [Olkowski] complaint [Compliant] against Edward (Ted) Yoo [Yoo], an Alberta lawyer and patent agent.

[2] In the Complaint, Olkowski asserted that Yoo acted as his patent agent in respect of Canadian Patent Application No. 2,839,348 [348 Application], and that Yoo misrepresented the applicant of the 348 Application before the Canadian Intellectual Property Office [CIPO], filed false or misleading documents with CIPO, breached fiduciary duties owed to Olkowski, and acted negligently in failing to file other relevant documents with CIPO that indicated his relationship with Yoo. As a result of these actions, Olkowski alleged that he lost control of the 348 Application of which he should have been named applicant in addition to inventor, that the named applicant and owner of the 348 Application was only a licensee of the technology and had been named incorrectly, and that the co-inventors identified on the 348 Application were also incorrectly named.

[3] Upon consideration of the information gathered during an investigation conducted pursuant to the *College of Patent Agents and Trademark Agents Act*, SC 2018, c 27, s 247 [CPATA Act], the IC concluded that the evidence did not demonstrate that Yoo engaged in professional misconduct or incompetence. Nor did the evidence support Olkowski being a client of Yoo, or that Yoo owed Olkowski duties as if he were a client. As the IC was nonetheless of the view that Yoo's interactions with Olkowski as an unrepresented individual did not follow best practices, it indicated that it would be providing Yoo with guidance for future practice.

[4] Olkowski asserts on this judicial review that the Decision was unreasonable as the IC failed to properly consider the relationship between Yoo and Olkowski and erred in its consideration of a power of attorney document [POA] that was signed in conjunction with the international patent application that served as the precursor to the 348 Application, which

appointed Yoo as agent for the related patent filings. He asserts that this POA was evidence that Olkowski had appointed Yoo as his agent.

[5] However, for the reasons that follow, I find that Olkowski has not demonstrated that the IC made a reviewable error in its Decision. As such, this Application is dismissed.

II. Background

[6] From 2005 to 2010, Olkowski was employed as a research scientist in the group of Bernard Laarveld [Laarveld] at the University of Saskatchewan. Sometime around 2007, Laarveld became involved in research and development at the Nano-Green Biorefineries Inc. [NBI] group of companies. Specifically, Laarveld was involved in investigating the use of technology (sometimes referred to as the “V catalyst” technology) for converting biomass to biofuel, which originated from Viktor Lesin [Lesin].

[7] Around 2010, Laarveld determined that Lesin’s technology was not suitable for NBI’s intended purposes. Laarveld knew Olkowski had developed a technology that could be applied to biomass and proposed that it be used for NBI’s work. In May 2010, Laarveld requested that Olkowski sign a non-disclosure agreement, after which Olkowski presented the technology and disclosed technical reports to NBI in late 2010.

[8] In and around the same time, Yoo was retained by NBI as their lawyer and patent agent.

[9] In January 2011, NBI sought a license from Olkowski for his technology. Olkowski asserts that he asked Laarveld to be a co-licensor, in recognition of his “leadership efforts in bringing Olkowski’s technology to rapid commercial application.” Olkowski relied on Laarveld to negotiate the terms of the agreement with NBI who was represented by Yoo.

[10] The initial draft agreement provided that Olkowski and Laarveld were owners of the technology. However, over the course of revisions, the document was changed and included “an assignment of the Intellectual Property, within Field of Use, to Nano-Green” that allowed NBI to patent the process and process improvements under the company’s name.

[11] In February 2011, the license agreement was executed and in June 2011, a US provisional patent application was filed covering Olkowski’s technology. The US provisional served as priority for a patent co-operation treaty [PCT] application which was filed in June 2012, from which the national phase 348 Application was filed on December 13, 2013. The named applicant and owner of the 348 Application is NBI. Olkowski, Laarveld, and another scientist, Norman Arrison [Arrison], are listed as co-inventors on the application.

[12] During the course of the preparation of the US provisional and PCT application, Olkowski participated in conference calls with Yoo and NBI personnel. When drafts of the application were sent, Laarveld provided comments on behalf of himself and Olkowski.

[13] At the time of PCT application filing, Yoo provided NBI with a PCT POA to be executed by NBI, Laarveld and Olkowski, appointing Bennett Jones LLP as patent agent for the PCT

application and its related international filings. The executed POA was not filed with CIPO for the PCT application. Rather, Yoo's firm was appointed as agent through a different document, called a PCT Request form, which identified Olkowski and Laarveld as applicants and inventors for the US. The PCT POA, however, was kept for the US as proof of authority on behalf of the inventors.

[14] At some point thereafter, Olkowski became unhappy with NBI as it was believed NBI was failing to commercialize Olkowski's technology as desired. In July 2014, legal counsel for Olkowski and Laarveld sent a complaint letter to Yoo for response in his capacity as counsel for NBI. Olkowski also commenced an action in the Court of Queen's Bench of Alberta [Alberta action] for rescission of the License Agreement, naming NBI, Yoo and NBI in-house counsel, Lawrence Cunningham, as defendants. In 2016 after Yoo's examination for discovery in the Alberta action, Olkowski and Laarveld settled with Yoo and the Alberta action was discontinued against him.

[15] Later in 2016, acting for NBI, Yoo sought the addition of Arrison as an inventor of the 348 Application. When this was discovered, Olkowski unsuccessfully tried to alter the inventorship and revoke the appointment of Yoo and his law firm, Bennett Jones LLP, as agent on the 348 Application. It is during this period that Olkowski asserts he discovered the existence of a confirmatory assignment of rights from himself and Laarveld to NBI and a declaration of legal representative identifying NBI as the inventors' legal representative. Olkowski unsuccessfully tried to repudiate these documents before CIPO.

[16] Olkowski also wrote to the Patent Appeal Board and the Assistant Commissioner of Patents, asking that he be added as co-applicant in respect of the 348 Application. The Assistant Commissioner denied the request on the basis that Olkowski had already assigned his patent rights to NBI.

[17] Later in 2016, Olkowski filed a complaint against Yoo with the Law Society of Alberta. The complaint was ultimately closed based on the Law Society's determination that there was no solicitor-client relationship between Yoo and Olkowski.

[18] In January 2021, Olkowski filed the current Complaint with CIPO. The Complaint was transferred to CPATA in June 2021. An investigation of the Complaint was conducted culminating in an Investigation Report provided to the IC. On November 25, 2022, the IC dismissed the Complaint.

[19] In reaching its decision, the IC considered the two aspects of the definition of "client" found in the *Code of Professional Conduct for Patent Agents and Trademark Agents Regulations*, SOR/2021-165 [CPATA Code], namely that it is a person who: (a) consults an agent and on whose behalf the agent renders or agrees to render patent or trademark agent services; or (b) having consulted the agent, reasonably concludes that the agent has agreed to render patent or trademark agent services on his or her behalf. It also considered the foundational question of whether Olkowski was in fact Yoo's client, or whether he had a reasonable basis to believe Yoo agreed to represent him.

[20] However, the IC concluded there was no evidence that Yoo had provided patent agency services or legal representation on Olkowski's behalf, nor any evidence that there was an agreement to provide those services, or to represent Olkowski. While the IC acknowledged the POA appointing Yoo's firm as agent in respect of the PCT application and its international filings, the IC found that in view of the full scope of the evidence, Olkowski could not have reasonably concluded that Yoo had agreed to represent him.

III. Relevant Provisions

[21] The CPATA Act was enacted "to regulate patent agents and trademark agents in the public interest, in order to enhance the public's ability to secure the rights provided for under the *Patent Act* and *Trademarks Act*" (section 6).

[22] This is the first judicial review involving a decision of the IC who obtains their authority under the CPATA Act. Accordingly, I will provide some general discussion of those provisions of the CPATA Act that are relevant to the IC's review.

[23] Pursuant to subsection 38.1(1), when a complaint is made to CPATA it first comes before the Registrar who must either consider the complaint and decide whether it should be dismissed, or refer it to the IC:

Dismissal or Referral

38.1(1) The Registrar must consider all complaints received by the College relating to professional misconduct or incompetence by a licensee and may, subject to and in accordance with the

Rejet ou renvoi

38.1 (1) Le registraire étudie les plaintes reçues par le Collège portant sur un manquement professionnel commis par un titulaire de permis ou sur l'incompétence d'un titulaire de permis et

by-laws, dismiss any complaint, in whole or in part, for any of the reasons set out in the regulations, but if they do not dismiss the complaint the Registrar must refer it to the Investigations Committee for consideration.

peut, sous réserve des règlements administratifs et conformément à ceux-ci, rejeter toute plainte, en tout ou en partie, pour toute raison prévue par règlement. S'il ne la rejette pas, il la renvoie au comité d'enquête pour étude.

[24] Sections 37 and 39 outline the duty and role of the IC to investigate and consider complaints for misconduct or incompetence by a licensee (patent agent):

Investigate

37 The Investigations Committee must, on the basis of a complaint or on its own initiative, conduct an investigation into a licensee's conduct and activities if it has reasonable grounds to believe that the licensee has committed professional misconduct or was incompetent.

[...]

Role of Investigations Committee

39 The Investigations Committee must consider all complaints that are referred to it by the Registrar and make a determination in respect of all appeals requested under subsection 38.1(4).

Enquête

37 Le comité d'enquête mène, sur la base d'une plainte ou de son propre chef, une enquête sur la conduite et les actes de tout titulaire de permis à l'égard duquel il a des motifs raisonnables de croire qu'il a commis un manquement professionnel ou a fait preuve d'incompétence.

[...]

Rôle du comité d'enquête

39 Le comité d'enquête étudie les plaintes qui lui sont envoyées par le registraire et statue sur les appels portés devant lui au titre du paragraphe 38.1(4).

[25] Subsection 40(1) provides the conditions under which the IC must dismiss a complaint, and the obligation on the IC to notify the complainant in writing of any dismissal:

Conclusion on consideration

40 (1) If, after considering a complaint, the Investigations Committee does not have reasonable grounds to believe that the licensee has committed professional misconduct or was incompetent, the Committee must dismiss the complaint and notify the complainant in writing of the dismissal and the reasons for it.

Conclusion de l'étude

40 (1) Si, à la conclusion de l'étude de la plainte, le comité d'enquête n'a pas de motifs raisonnables de croire que le titulaire de permis a commis un manquement professionnel ou a fait preuve d'incompétence, il rejette la plainte, avise par écrit le plaignant et joint ses motifs à l'avis.

[26] If the IC is satisfied that the licensee has committed professional misconduct or was incompetent, the next step is to apply to the Discipline Committee for a decision:

Application or dismissal

49 (1) If, at the conclusion of an investigation, the Investigations Committee is satisfied that there is sufficient evidence that the licensee has committed professional misconduct or was incompetent, the Committee must apply to the Discipline Committee for a decision as to whether the licensee committed professional misconduct or was incompetent. Otherwise, the Investigations Committee must dismiss the matter.

Demande ou rejet

49 (1) Si, à la conclusion de l'enquête, le comité d'enquête est convaincu qu'il y a suffisamment d'éléments de preuve pour conclure que le titulaire de permis a commis un manquement professionnel ou a fait preuve d'incompétence, il demande au comité de discipline de trancher la question de savoir si le titulaire de permis a commis un manquement professionnel ou s'il a fait preuve d'incompétence. Dans le cas contraire, le comité d'enquête clôt l'affaire.

[27] Section 59 of the CPATA Act outlines a party's ability to appeal a decision of the Discipline Committee:

Appeal to the Federal Court Appel à la Cour fédérale

59 A party to an application may appeal a decision of the Discipline Committee made under section 57 to the Federal Court within 30 days after the day on which the decision is made.

59 Toute partie à la demande peut appeler de la décision du comité de discipline rendue au titre de l'article 57 devant la Cour fédérale dans les trente jours suivant la date de la décision.

[28] The party's right to appeal a decision of the IC is not set out in the CPATA Act.

However, I consider the IC to be a "federal board, commission or other tribunal" such that sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 apply. I note that none of the parties challenged the jurisdiction of the Court to hear this matter.

[29] In addition to these provisions of the CPATA Act, subsection 33(1) of the CPATA Act requires that the Minister, by regulation, establish a code of professional conduct for licensees.

[30] As relevant to this application, the CPATA Code defines "client" as follows:

client means a person who consults an agent and on whose behalf the agent provides or agrees to provide representation under section 27 or 30 of the Act or who, having consulted an agent, reasonably concludes that the agent has agreed to provide representation on their behalf. It includes a client of a firm of which the agent is a partner or associate, whether or not the

client Toute personne qui consulte un agent et que l'agent accepte de représenter en vertu de l'article 27 ou 30 de la Loi ou qui, après avoir consulté un agent, conclut raisonnable -ment que celui-ci a accepté de le représenter. Il peut s'agir notamment d'un client d'un cabinet dont l'agent est un associé, que l'agent gère ou non le travail du client. (client)

agent handles the client's work. (*client*)

[31] Rule 8 of the CPATA Code also includes the following provision relating to an agent's dealings with unrepresented individuals:

3 When an agent deals on a client's behalf with an unrepresented person, the agent must

3 L'agent qui s'adresse, au nom de son client, à une personne qui n'est pas représentée prend les mesures suivantes :

(a) advise the unrepresented person to seek independent representation;

a) il conseille à cette personne de faire appel à une représentation indépendante;

(b) take care to see that the unrepresented person is not proceeding under the impression that their interests will be protected by the agent;

b) il veille à ne pas lui donner l'impression qu'il se chargera de protéger ses intérêts;

(c) make it clear to the unrepresented person that the agent is acting exclusively in the interests of the client; and

c) il lui fait bien comprendre qu'il agit uniquement dans l'intérêt du client;

(d) extend the same courtesy and good faith to the unrepresented person as they extend to other agents or agents in training.

d) il fait preuve envers elle de la même courtoisie et de la même bonne foi qu'envers les autres agents ou les agents en formation.

IV. Issues and Standard of Review

[32] There were two preliminary issues raised by the Respondents.

[33] First, the Respondent College of Patent and Trademark Agents requests that the style of cause be amended to remove the IC as a named Respondent in accordance with Rule 303(1)(a) of the *Federal Courts Rules*. There was no objection to this proposed amendment.

[34] Second, the Respondents note that Olkowski has sought to lead new evidence before the Court. They raise as a preliminary issue for determination whether his affidavit, sworn January 23, 2023 [Olkowski Affidavit] is admissible.

[35] Substantively, Olkowski raises a number of proposed “issues” in his application materials, which seek to attack the reasonableness of the IC’s determination that Olkowski was not a client of Yoo, and that Yoo did not otherwise owe him a duty of care. These were argued by Olkowski under two main umbrella issues:

- A. Did the IC err by failing to conduct a thorough analysis of the evidence before concluding that Olkowski was not a client of Yoo?
- B. Did the IC err in its consideration of the PCT POA?

[36] The parties agree that the presumptive standard of review for the substantive issues is reasonableness and that there is no basis to rebut this presumption: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at paras 16-17, 25.

[37] A reasonable decision is one that is “based on an internally coherent and rational chain of analysis” that is “justified in relation to the facts and law that constrain the decision maker”: *Vavilov* at paras 85-86; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31. A decision will be reasonable if when read as a whole and taking into account the

administrative setting, it bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at paras 91-95, 99-100.

V. Is the Olkowski Affidavit Admissible?

[38] The Respondents argue that the Olkowski Affidavit provides additional evidence and argument addressing the merits of the application and why, in Olkowski's view, the Decision was wrongly decided. They assert that the whole of the Olkowski Affidavit is accordingly inadmissible.

[39] In general, evidence that was not before the decision maker and that goes to the merits of a matter is not admissible in an application for judicial review, subject to limited exceptions: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] at para 17; *Dowe v Canada (Attorney General)*, 2022 FC 245 at para 36.

[40] The recognized exceptions to this general rule include evidence that: (1) provides general background in circumstances where that information might assist the Court in understanding the issues relevant to the judicial review, but does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision maker; (2) brings to the attention of the reviewing Court procedural defects that cannot be found in the evidentiary record of the administrative decision maker so that the Court can fulfill its role of review for procedural unfairness; or, (3) highlights the complete absence of evidence before the administrative decision maker when it made a particular finding: *Namgis First Nation v Canada*

(Fisheries and Oceans), 2019 FCA 149 at paras 4, 7-10; *Access Copyright* at para 20; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 19-25 ; *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 45 .

[41] Olkowski submits a lengthy affidavit in support of this application, which reviews evidence tendered before the IC and admittedly seeks to argue over issues raised by the IC. As stated at paragraphs 5 and 6 of the Olkowski Affidavit:

5. In a nutshell, the crux of the Alberta Action is about revocation of the License for limited field of use of my technology granted to Nano-Green. Events that prompted me to initiate the disciplinary proceedings against Mr. Yoo are described in detail in my Affidavit sworn on September 27, 2021, submitted to CPATA. For brevity, my submission to CPATA is not referenced in this Affidavit but will be included in my Records. However, herein I will reiterate key facts relied upon, in chronological order, when they are relevant in the context of my application for Judicial Review.

6. In its reasoning justifying dismissal of my complaint, the Committee asserted that I did not have any written or oral communication with Mr. Yoo. As evidence that there was written and verbal communication, I will provide this Honorable Court with proper narrative in the ensuing paragraphs.

[Emphasis added]

[42] At paragraphs 1 through 6, Olkowski provides personal background and sets out his objectives for the judicial review, at paragraphs 7 through 25, Olkowski repeats, recasts and expands on background facts and information contained in the materials he filed with the IC. He then goes on at paragraphs 26 to 49 to address the IC's Decision and argue why in his view it is incorrect. The Affidavit attaches 19 exhibits all of which were before the IC.

[43] In my view, the majority of the text of the Olkowski Affidavit offends the general principles set out in *Access Copyright*, and does not fall within the permissible exceptions. It includes extensive argument that goes to the merits of the application and expands beyond the evidence that was before the decision-maker. Paragraphs 3 to 6 and 26 to 49 are clearly inadmissible as they go to the merits of the application. It is difficult to parse through the text of the background paragraphs (paragraphs 2, 7 through 25) to separate out those aspects that reformulate the facts that were before the IC. I note that the text of the affidavits that were filed with the decision-maker are already included in the Applicant's record. While I agree that the exhibits that are attached to the Affidavit should remain in the Applicant's Record, it is my view that the text of the whole of the Olkowski Affidavit should be rendered inadmissible.

VI. Analysis

A. *Did the IC err by failing to conduct a thorough analysis of the evidence before concluding that Olkowski was not a client of Yoo?*

[44] Olkowski asserts that the IC erred by failing to conduct a thorough analysis of the evidence before concluding that Olkowski was not a client of Yoo. He argues that the IC placed too much emphasis on the fact that he did not have a written retainer agreement with Yoo. He asserts that Yoo indicated that a formal retainer was not necessary and that Yoo was verbally appointed to act on Olkowski's behalf (and on behalf of Laarveld) during an early phone conference where the prosecution strategy for Olkowski's technology was discussed. Olkowski asserts that the verbal appointment of Yoo as his agent was formalized in July 2012 when he signed the POA and was also consistent with the licensing agreement and the communications between the parties.

[45] As an overriding point, at the outset of the Decision, the IC specifically noted that it had reviewed all of the evidence filed by the parties in connection with the Complaint, including the three submissions filed by Olkowski (affidavit dated September 27, 2021, affidavit dated March 14, 2022, response letter dated March 20, 2022) and the two submissions filed by Yoo in response (response letter dated January 28, 2022 and further response letter dated June 8, 2022), and that all evidence and allegations were considered. It noted that it was also aided by a detailed investigation report prepared by the appointed investigator who considered the affidavits, supporting documentation, response letters, documentation and patent application file histories that were filed with CIPO and the World Intellectual Property Organization in association with the PCT application. However, it reasonably focussed its analysis on the matters within its jurisdiction and the key foundational question of whether Olkowski was Yoo's client, or had a reasonable basis to believe that Yoo had agreed to represent him.

[46] While the fact that Olkowski and Yoo did not have a written retainer agreement was noted in the Decision, it was not determinative of the IC's analysis. Rather, the IC concentrated its analysis on two areas stemming from the definition of "client" in the CPATA Code, namely: 1) whether Olkowski had consulted with Yoo and Yoo had rendered, or agreed to render, patent agent services for Olkowski personally; or 2) after consulting with Yoo, it was reasonable for Olkowski to conclude that Yoo had agreed to render patent agent services on his behalf.

[47] In respect of the first issue, the IC concluded that there was no evidence that Yoo had provided patent agency services or legal representation to Olkowski, or that he had agreed to provide those services. The IC based this determination on two findings. First, that there was no

evidence to establish that Yoo had direct discussions with Olkowski, either in writing or orally, concerning patent services or representation. Second, the IC relied on Olkowski's acknowledgement that he had not entered into a retainer agreement with Yoo and that he had not, on his own, directly communicated with Yoo about his patent interests.

[48] While it was acknowledged in the Decision that Olkowski had been involved, along with Laarveld and NBI, in communications with Yoo in relation to the US provisional and PCT application, a fair reading of the Decision indicates that these communications were considered by the IC to be for the benefit of NBI in accordance with the terms of the license agreement.

[49] As set out in the license agreement, Olkowski and Laarveld assigned the Intellectual Property within the Field of Use to NBI and authorized NBI to "patent the process and process improvement under the company's name" (paragraph 2(1)(e)). NBI was responsible for the preparation, filing and prosecution of patent applications, while Olkowski and Laarveld were obliged to "cooperate with and provide reasonable assistance to NBI in the protection of the Licensed Technology" (subsections 10(1) and 10(2)).

[50] While Olkowski sought to argue in his Complaint that NBI was only a licensee of the technology, this matter was not a matter that was within the jurisdiction of the IC for determination. As such, the IC was required to take the license agreement as written.

[51] In oral argument, Olkowski sought to restrict the effect of the licensing agreement, focussing on the limitation of the rights to the technology within the “Field of Use,” which were defined in the licensing agreement as:

The Field of Use does not restrict, in any way, the applications or use of the end products from lignocellulosic delignification, depolymerization or biorefining arising from the Process Technology. Excluded is the application of the Process Technology for the production of derivatives of cellulose and crystalline forms of cellulose for use in human and animal nutrition, pharmaceutical and health applications, and; the improvement of inherent nutritional value or characteristics of food and feed through processing. For further clarity, this exclusion does not, in any way, apply to the end products resulting from the Field of Use contemplated herin [*sic*].

[52] Olkowski argued that the “Field of Use” exclusion indicated that there would be subject-matter that would be applied for jointly and that would require joint representation, and that a joint application is what was intended for the PCT application.

[53] However, I cannot accept this argument. First, this is not an argument that was before the IC and therefore cannot properly be raised in this judicial review: *Alberta (Information and Privacy Commissioner) v Alberta Teacher’s Association*, 2011 SCC 61 at paras 22-26. Second, it is not an argument that was raised in Olkowski’s written argument and therefore is also improper as a matter of procedural fairness: *Idoko v Canada (Citizenship and Immigration)*, 2022 FC 1756 at para 9, citing to *Altiparmak v Canada (Citizenship and Immigration)*, 2018 FC 776 at para 11. Third, this interpretation is inconsistent with the provisions of the license agreement and the balance of the evidence, which supports a view that the communications that followed the licensing agreement were in furtherance of patent objectives based on NBI’s rights within the Field of Use, and that Olkowski and Laarveld were involved as inventors only. Indeed, the patent

filings were done on the instructions of NBI alone. Although Olkowski had input as to the technical content of the applications, admittedly in line with the license agreement, he was not responsible for the expenses or the fees associated with obtaining the patent rights.

[54] Based on the status of the evidence and the acknowledgment made by Olkowski, it is my view that it was reasonable for the IC to conclude that Olkowski was not a client of Yoo.

[55] While not referring to every piece of evidence submitted, which is not required for an administrative decision, a fair reading of the whole of the Decision establishes that the IC conducted a full review of the evidence in arriving at this conclusion.

B. *Did the IC err in its consideration of the PCT POA?*

[56] With respect to the second issue before the IC – *i.e.*, whether after consulting with Yoo, it was reasonable for Olkowski to conclude that Yoo had agreed to render patent agent services on his behalf, I will turn to the issue of whether the IC erred in its consideration of the PCT POA.

[57] At the time of filing the PCT application, the evidence indicates that Yoo provided a POA to NBI to be executed by Olkowski, Laarveld and NBI and that the POA was executed on June 29, 2012. The POA stated that NBI, Laarveld and Olkowski appointed Bennett Jones LLP as agent to represent them before “all the competent International Authorities” in connection with the PCT application filed with CIPO.

[58] It is not disputed that the POA was never filed with CIPO in respect of the PCT application. Rather, a PCT Request form was filed instead. The PCT Request was not signed by any of the applicants, but was signed by Yoo. It identified Yoo and Bennett Jones LLP as the agent to act on behalf of the applicants before the competent International Authorities. In the document, Olkowski and Laarveld are each identified as both an applicant and an inventor for the US only. NBI is identified as the applicant for all designated States except the US.

[59] In the US, Yoo filed a separate POA that was signed by Olkowski, identifying Yoo by Attorney Docket Number as the agent handling that application.

[60] In the Decision, the IC considered the PCT POA and provided the following comments:

When the PCT application was filed on June 29, 2012, in accordance with the requirements of US law at the time, you and Dr. Laarveld, having been identified as the inventors, were identified in the PCT Request as applicants for the US only. NBI was identified as the applicant for all remaining countries.

[...] We note that this Power of Attorney was not required by WIPO for the purpose of the PCT application, since Mr. Yoo's firm was appointed as agent in the PCT Request, and the identity of the applicants is determined by the PCT Request, not the Power of Attorney. US law at the time required patent applications to be authorized to be made by the inventor. While this evidence did not have to be in writing, obtaining the executed PCT Power of Attorney would provide evidence of the inventor's authorization.

[61] Olkowski takes issue with the IC's statement that "the Power of Attorney was not required by WIPO for the purpose of the PCT application" and that "the identity of the applicants is determined by the PCT Request." He asserts that it was unreasonable for the IC to treat the POA as a superfluous document, merely executed to provide evidence of the inventor's authorization to file a patent application in the US.

[62] Olkowski points to the PCT Applicant's Guide, sections 5.088 and 5.089, which indicate that an international application must be signed in Box No. X of the PCT Request by the applicant or, where there are two or more applicants, by all of them. The PCT Request can be signed by the agent on behalf of the applicants, but in such a case the agent must be appointed in a POA by the applicants on whose behalf the agent signs the application. The PCT Request filed by Yoo was not signed by the applicants. Instead, it was signed only by Yoo, who would only have the authority to sign on behalf of the applicants if he had been appointed to act on their collective behalf.

[63] While the IC did not refer to sections 5.088 and 5.089 of the PCT Applicant's Guide, in my view the statements made about the POA and PCT Request align with sections 5.088 and 5.089, and were reasonable.

[64] In this case, as a consequence of US law, Olkowski as co-inventor of the subject-matter of the patent application, had to be named as an applicant for the US, along with Laarveld the other co-inventor. The PCT forms were clear that the authorization given by Olkowski was in respect of his authority as applicant and inventor for the US only. With respect to all other jurisdictions, including Canada, the name of the applicant, reflected the ownership of the patent rights, and was in the name of NBI.

[65] Thus, even if I were to accept that Yoo became Olkowski's agent upon execution of the POA, that agency only extended to the US, where as a matter of law Olkowski and Laarveld had to be identified not only as inventors but also as the applicants on any patent filing. All

ownership rights to the intellectual property covered by the technology in the Field of Use on which the PCT application was based had already been assigned to NBI by the time the PCT POA was signed. This included the rights to any subsequent national phase patent application filing. Thus, the ultimate control over those patent rights remained with NBI as per the terms of the license agreement, and any belief Olkowski held that he was a client of Yoo's in respect of the PCT application or 348 Application because of the POA, as noted by the IC, was a mistaken belief.

[66] The IC also turned its mind to whether it was reasonable for Olkowski to have the belief that he was Yoo's client because of the POA. The IC acknowledged that when viewed in isolation, the POA on its face identified Olkowski as "an applicant" appointing Yoo's firm as agent and that this may have supported a belief by Olkowski that he had appointed Yoo to represent him personally by executing the document. However, it found that any such belief was not ultimately reasonable or consistent in view of the balance of the evidence. There was no evidence that Olkowski had "consulted" with Yoo during the PCT application period after December 13, 2013, or any time. Nor did Yoo provide or agree to provide patent services or representation to Olkowski.

[67] While Olkowski takes issue with the IC's finding that there was no evidence that he consulted with Yoo in the period after December 13, 2013, or at any time, I do not find this argument persuasive. As noted earlier, all correspondence with Olkowski relating to the PCT application included NBI personnel. Further, once the PCT application was filed, the only communication Olkowski had involving Yoo was his participation in a conference call in 2013,

along with Laarveld and NBI representatives, relating to the issuance of a PCT preliminary examination report on patentability. There was no communication after this point and the communication that had taken place remained in line with that contemplated by the license agreement.

[68] When Olkowski formed the opinion that NBI was failing to commercialize Olkowski's technology, instead of going to Yoo directly as a client would with their representative, Olkowski retained his own counsel and corresponded with Yoo in his capacity as "Nano-Green's lawyer." This correspondence does not demonstrate a belief that Yoo was acting for Olkowski.

[69] Further, as noted by the IC, there was no evidence that Olkowski had tried to contact Yoo concerning the 348 Application or any patent application even after discovering the addition of Arrison as an inventor. Rather, he treated Yoo as a person adverse in interest.

[70] While brief, in my view, the IC has set out a rational chain of analysis as to why it concluded that it was not reasonable for Olkowski to view himself as Yoo's client and why it instituted the relief that it did and as such, Olkowski has not demonstrated a reviewable error.

[71] It is important to note that the relief the IC could grant with respect to this Complaint was limited. Although Olkowski raises concerns with the assignment made in the license agreement, it was not the role of the IC to evaluate this document. As noted earlier, this was the subject of the Alberta action.

[72] The available rights to the 348 Application were also not a matter to be determined by the IC. In any event, as noted in the Investigation Report the “Licensee’s Counsel indicated by email dated August 9, 2022 that NBI was ‘no longer prosecuting’ the Canadian application” and that Olkowski confirmed by email dated August 14, 2022 that he “had received notification in June 2022 from NBI of their intended abandonment of the application.” It is unclear if there remain any rights pending in the 348 Application as the current status of the application was not put into evidence before me.

[73] The only matters to be determined by the IC related to the conduct of Yoo. As noted in the Decision, while the IC found that Olkowski was not a client of Yoo and that Olkowski did not have a reasonable basis for believing that he was Yoo’s client, the IC recognized that Yoo should have advised Olkowski as an unrepresented person, to seek independent legal advice with respect to his interests as the inventor of the technology. The IC also concluded that Yoo should have made it clear that he would not protect those interests as he was acting exclusively in the interests of NBI. In view of the jurisdiction of the IC and the remedies available to it, in my view, the Decision and this outcome was reasonable.

VII. Conclusion

[74] For all of these reasons, the application is dismissed.

[75] As this is the first time a matter has been before this Court under the CPATA Act and in view of the fact that it involves a self-represented litigant, there shall be no order as to costs.

JUDGMENT IN T-2716-22

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended with immediate effect to remove the Investigations Committee as a named Respondent.
2. The application for judicial review is dismissed.
3. There shall be no order as to costs.

"Angela Furlanetto"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2716-22

STYLE OF CAUSE: ANDREW OLKOWSKI v THE COLLEGE OF
PATENT AGENTS AND TRADEMARK AGENTS,
AND MR. TED YOO

PLACE OF HEARING: HEARD BY VIDEOCONFERENCE

DATE OF HEARING: APRIL 3, 2024

JUDGMENT AND REASONS: FURLANETTO J.

DATED: AUGUST 28, 2024

APPEARANCES:

Andrew Olkowski	FOR THE APPLICANT
Edward W. Halt, K.C. Christopher M. Darwish	FOR THE RESPONDENT MR. TED YOO
Bernard C. LeBlanc Justine Wong	FOR THE RESPONDENT THE COLLEGE OF PATENT AGENTS AND TRADEMARK AGENTS

SOLICITORS OF RECORD:

Peacock Linder Halt & Mack LLP Barristers and Solicitors Calgary, Alberta	FOR THE RESPONDENT MR. TED YOO
Steinecke Maciura Leblanc Barristers and Solicitors Toronto, Ontario	FOR THE RESPONDENT THE COLLEGE OF PATENT AGENTS AND TRADEMARK AGENTS