

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20180413**

**Docket: A-91-17**

**Citation: 2018 FCA 77**

**CORAM: NADON J.A.  
WEBB J.A.  
GLEASON J.A.**

**BETWEEN:**

**BAYER CROPSCIENCE LP**

**Appellant**

**and**

**THE ATTORNEY GENERAL OF CANADA,  
AND THE COMMISSIONER OF PATENTS**

**Respondents**

Heard at Ottawa, Ontario, on November 29, 2017.

Judgment delivered at Ottawa, Ontario, on April 13, 2018.

**REASONS FOR JUDGMENT BY:**

**NADON J.A.**

**CONCURRED IN BY:**

**WEBB J.A.  
GLEASON J.A.**

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**REASONS FOR JUDGMENT**

**NADON J.A.**

**I. Introduction**

[1] This is an appeal of a decision of O'Reilly J. of the Federal Court (the Judge) dated February 13, 2017 (2017 FC 178), wherein he dismissed the appellant's judicial review application challenging a decision of the Commissioner of Patents (the Commissioner) rendered

on December 3, 2015. More particularly, the Judge concluded that the Commissioner had not erred in refusing to enter April 3, 2012, in lieu of April 19, 2012, as the claim date of Canadian Patent Application No. 2,907,271 (the '271 Application).

[2] For the reasons that follow, I would dismiss the appeal.

## II. The Patent Cooperation Treaty

[3] Before turning to the facts, a few words, at the outset, should be said concerning the *Patent Cooperation Treaty*, June 19, 1970 (PCT) so as to give meaning and context to the events which have led to the Commissioner's decision.

[4] Pursuant to the PCT, a multi-lateral treaty establishing a system of international cooperation, patentees are allowed to commence patent protection proceedings in more than one country by the filing of an international application (a PCT Application).

[5] Once a patentee has filed a PCT Application, it may then designate or elect in which of the signatory countries it intends to seek patent protection. There are two steps in the PCT process. The first one is the PCT Application and the second is the National Phase Application. It should be pointed out that the PCT Application does not lead to the issuance of a patent. That responsibility belongs to each of the signatory countries in which the patentee files a national application.

[6] The filing of a PCT Application is tantamount to the filing of an application in a signatory country of the PCT. In other words, as we shall shortly see, the date of the filing of a PCT Application is deemed to constitute the filing date of a National Phase Application in regard to the countries in which the patentee files a patent application.

[7] When and if a patentee files an application in Canada, it must satisfy the requirements of the *Patent Act*, R.S.C. 1985 c. P-4 (the Act) and of the *Patent Rules*, S.O.R./96-423 (the Rules), in order to successfully obtain a patent. It should be noted that the Rules, pursuant to subsection 12(2) of the Act, have the same authority as the provisions of the Act.

[8] The filing date of a patent application in Canada is the date on which the Commissioner receives the patent application, including all documents and information required by the Act and the Rules and the fees prescribed under the legislation. However, where the Canadian National Phase Application is filed pursuant to the PCT, the date of filing in Canada is, as I have already indicated, the PCT filing date and not the actual date of filing.

[9] Before turning to the facts, I should also mention that pursuant to paragraphs 28.1(1)(b) and (c) of the Act, the claim date of a Canadian Patent Application will be the date of the filing thereof unless the application is filed within twelve months of a “previously regularly filed application” (the previous application) and the applicant has requested priority on the basis of that previous application.

[10] The claim date is alternatively referred to as the “priority date” in the decision of the Federal Court, while the World Intellectual Property Organization (WIPO) documentation refers to the “priority claim”. Paragraph 28.1(1)(c) of the Act requires an applicant for a patent to request priority based upon a previously filed application, rather than a date. Subsection 28.1(2) of the Act provides that the “claim date” will be the filing date of the previously filed application.

### III. The Facts

[11] I now turn to the relevant facts in regard to which there is mostly no dispute.

[12] The appellant Bayer Cropsience LP (Bayer) submitted United States Patent Application No. 61/619,691 (the US ‘691 Application) on April 3, 2012 to the United States Patent and Trademark Office (USPTO). At that time, the USPTO requested from Bayer certain diagrams prior to the assignment of a filing date. Bayer filed the requested diagrams with the USPTO on April 19, 2012, and the USPTO assigned the US ‘691 Application a filing date of April 19, 2012.

[13] On March 15, 2013, Bayer filed PCT Patent Application PCT/US2013/031888 (the PCT ‘888 Application) with the International Bureau of WIPO claiming priority from the US ‘691 Application. More particularly, in the documents filed in support of its PCT ‘888 Application, Bayer indicated under the heading “PRIORITY CLAIM AND DOCUMENT” that the filing date of the US ‘691 Application was April 3, 2012 (Appeal Book, Vol. I, p. 151).

[14] On April 26, 2013, WIPO sent to Bayer an “invitation to correct priority claim”. The reason given by WIPO for the invitation to correct was “inconsistency with regard to the filing date of the earlier application”. More particularly, WIPO brought to Bayer’s attention that its request for a priority date of April 3, 2012, was in conflict with the filing date of the US ‘691 Application, *i.e.* April 19, 2012 (Appeal Book, Vol. 1, pp. 154-155).

[15] On May 12, 2013, Bayer responded to WIPO’s invitation to correct by requesting that the priority date be corrected to read April 19, 2012.

[16] On May 16, 2013, WIPO informed Bayer that its priority claim based on the US ‘691 Application had been corrected to read April 19, 2012.

[17] On February 16, 2015, Bayer petitioned the USPTO to accord a filing date of April 3, 2012, to the US ‘691 Application on the grounds that its request for certain diagrams, in April 2012, had been an error. On April 14, 2015, the USPTO, acknowledging its error, changed the filing date of the US ‘691 Application from April 19, 2012, to April 3, 2012.

[18] By petition dated June 26, 2015, sent to the USPTO, acting in its capacity of PCT Legal Administrator, Bayer sought to correct the date of the priority claim of its PCT ‘888 Application to the US ‘691 Application from April 19, 2012, to April 3, 2012. On July 27, 2015, the USPTO refused to change the priority date of the PCT ‘888 Application. Hence, the priority date of the

PCT '888 Application remained April 19, 2012. The relevant part of the USPTO's decision reads as follows:

However, correction of a priority claim in a PCT application is governed by PCT Rule 26bis. A petition under 37 CFR 1.182 is for questions not specifically provided for. PCT Rule 26bis.1(a) sets a time period of 16 months from priority for correction or addition of a priority claim. That period has expired. There is no fee for a priority claim correction request under PCT Rule 26bis. The petition fee for this request will be refunded. [my emphasis].

(Appeal Book, Vol. 1. p. 199)

[19] By letter and accompanying application dated August 7, 2015, Bayer requested entry of the PCT '888 Application into the Canadian National Phase and requested a claim date based upon the US '691 Application. By a separate letter, also dated August 7, 2015, in which it explained to the Commissioner the difficulties encountered with respect to the filing of the US '691 Application, Bayer requested the Commissioner to enter April 3, 2012, as the claim date for its Canadian National Phase Application. On August 12, 2015, Bayer's Canadian Application was assigned number 2,907,271 (the '271 Application).

[20] I should point out that Bayer's PCT '888 Application initially entered the Canadian National Phase on October 16, 2014, and that this application was assigned Canadian Patent Application number 2,870,724 (the '724 Application). As appears from the records of the Canadian Intellectual Property Office (CIPO), the '724 Application sought a claim date of April

19, 2012, based on the US '691 Application. On August 4, 2015, Bayer requested the withdrawal of its '724 Application.

[21] On December 3, 2015, the Commissioner refused to enter April 3, 2012, as the claim date of the '271 Application. The relevant part of the Commissioner's letter to Bayer reads as follows:

This letter is in response to your letter of August 7, 2015 wherein you request, pursuant to section 88 of the *Patent Rules*, that the priority date be entered as April 3, 2012 as opposed to April 19, 2012.

The Office has reviewed your file and is unable, pursuant to section 88 of the *Patent Rules*, to recognize the priority date as of April 3, 2012.

According to paragraph 88(1)(b) of the *Patent Rules*, in order to claim priority, it must be done '*before the expiry of the sixteen-month period after the date of filing of that application*'. That application, US Application 61/619,691, was filed on April 19, 2012, and the expiry of the sixteen-month period was August 19, 2014. Therefore, upon national entry in Canada on August 7, 2015, it was too late to record the US priority as April 3, 2012.

The office will record a priority date as provided for in the international application, namely April 19, 2012.

(Appeal Book, Vol. 1, p. 263)

[22] As a result of the Commissioner's decision, Bayer commenced judicial review proceedings in the Federal Court. As I have already indicated, those proceedings were dismissed by the Judge on February 13, 2017.



IV. Federal Court decision

[23] After setting out the chronology of the events leading to the Commissioner's decision, the Judge turned to the question of whether the Commissioner's decision was correct, pointing out that Bayer had argued that the Commissioner had misapplied section 88 of the Rules and that she had failed to ensure that the records of CIPO did not contain any errors.

[24] The Judge began with Bayer's first submission. In his view, the Commissioner had correctly interpreted the Rules in concluding that Bayer's request to have her enter April 3, 2012, as the priority date of the '271 Application had been made beyond the time allowed by the Rules.

[25] The Judge began by explaining the impact of section 28.1 of the Act on the filing date of a Canadian Patent Application. He said that that date was the actual date of filing unless, in accordance with paragraphs 28.1(1)(b) and (c) of the Act, the patentee had filed a patent application elsewhere, had requested priority on the basis of that previous application and that its Canadian Patent Application had been filed within twelve months of the previous application.

[26] The Judge then pointed out that the patentee's request for priority under paragraph 28.1(1)(c) had to have been made, as per paragraph 88(1)(b) of the Rules, within sixteen months of the filing of the previous application. In addition, the Judge explained that when, as here, a PCT Application had been filed, the applicant could claim a prior filing date based on a previous application, in this case the US '691 Application.

[27] The Judge further explained that the filing date the Canadian filing date was deemed to be the filing date of a PCT Application when the patent entered the National Phase in Canada. Thus, in his view, the filing date of the '271 Application was March 15, 2013. Consequently, as March 15, 2013 was within twelve months of the filing date of the US '691 Application, whether that was April 3, 2012, or April 19, 2012, Bayer was entitled to the claim date of the US '691 Application. For the Judge, the only question at issue was whether Bayer was entitled to April 3, 2012, or April 19, 2012, as its priority date.

[28] First, he indicated that the filing date of the US '691 Application, at the time of the filing of the PCT '888 Application, was April 19, 2012. Thus, as of March 15, 2013, the April 19, 2012 date was the filing date recorded by the USPTO.

[29] Second, the Judge referred to Bayer's letter of August 7, 2015, to the Commissioner wherein it requested that the Commissioner enter April 3, 2012, as the priority date for the '271 Application and noted the Commissioner's response to the effect that Bayer's request was out of time and could not be considered because the request had not been made within the prescribed time limit of sixteen months from the date of filing of the US '691 Application.

[30] In dealing with Bayer's argument that the Commissioner's approach was wrong in that she ought to have considered that its request for the US priority date of April 3, 2012, had been

made on March 15, 2013, when it filed the PCT '888 Application, the Judge made it clear that he could not subscribe to that view.

[31] In his opinion, although Bayer had initially requested April 3, 2012, as the priority date of its PCT '888 Application, it had subsequently “conceded that the correct date was April 19, 2012” (Judge’s Reasons at paragraph 14). Consequently, in the Judge’s view, when Bayer made its request for the April 3, 2012 date on March 15, 2013, it had no legal basis to do so as the US '691 Application was only corrected on April 14, 2015.

[32] The Judge also noted that the filing date of the PCT '888 Application had never been “successfully amended” (Judge’s Reasons at paragraph 14).

[33] Additionally, the Judge indicated his agreement with the Commissioner’s view that pursuant to subsection 88(1)(b) of the Rules, any request for a priority date had to be made within sixteen months of the filing date of the previous application in respect of which priority was sought. Thus, as Bayer’s request had to be made no later than August 19, 2013, the Judge was satisfied that Bayer’s request of August 7, 2015, was outside the prescribed time limit.

[34] The Judge then turned to Bayer’s second submission that the Commissioner had a duty to correct the records of CIPO in case of error. In the Judge’s view, that submission was without merit as he was satisfied that the records of CIPO, in respect of Bayer’s '271 Application, were not “inaccurate” (Judge’s Reasons at paragraph 16).

[35] More particularly, in the Judge's view, the April 19, 2012 date was the filing date of the US '691 Application until it was corrected by the USPTO on April 14, 2015. As a result, the Judge found that the Commissioner had correctly determined that Bayer's request for a priority date of April 3, 2012, had been made out of time and that the Commissioner was under no duty to amend the records of CIPO to reflect the April 3, 2012 date.

## V. The Legislation

[36] Subsections 4(1) and (2), paragraphs 28.1(1)(a), (b), (c), subsection 28.1(2), and subsection 28.4(2) of the Act are relevant and I hereby reproduce them:

**4 (1)** The Governor in Council may appoint a Commissioner of Patents who shall, under the direction of the Minister, exercise the powers and perform the duties conferred and imposed on that officer by or pursuant to this Act.

**4 (1)** Le gouverneur en conseil peut nommer un commissaire aux brevets. Sous la direction du ministre, celui-ci exerce les pouvoirs et fonctions qui lui sont attribués en conformité avec la présente loi.

**4 (2)** The Commissioner shall receive all applications, fees, papers, documents and models for patents, shall perform and do all acts and things requisite for the granting and issuing of patents of invention, shall have the charge and custody of the books, records, papers, models, machines and other things belonging to the Patent Office and shall have, for the purposes of this Act, all the powers that are or may be given by the Inquiries Act to a commissioner appointed under Part II of that Act.

**4 (2)** Le commissaire reçoit les demandes, taxes, pièces écrites, documents et modèles pour brevets, fait et exécute tous les actes et choses nécessaires pour la concession et la délivrance des brevets ; il assure la direction et la garde des livres, archives, pièces écrites, modèles, machines et autres choses appartenant au Bureau des brevets, et, pour l'application de la présente loi, est revêtu de tous les pouvoirs conférés ou qui peuvent être conférés par la Loi sur les enquêtes à un commissaire nommé en vertu de la partie II de cette loi.

**28.1 (1)** The date of a claim in an application for a patent in Canada (the

**28.1 (1)** La date de la revendication d'une demande de brevet est la date de

“pending application”) is the filing date of the application, unless

**(a)** the pending application is filed by

**(i)** a person who has, or whose agent, legal representative or predecessor in title has, previously regularly filed in or for Canada an application for a patent disclosing the subject-matter defined by the claim, or

**(ii)** a person who is entitled to protection under the terms of any treaty or convention relating to patents to which Canada is a party and who has, or whose agent, legal representative or predecessor in title has, previously regularly filed in or for any other country that by treaty, convention or law affords similar protection to citizens of Canada an application for a patent disclosing the subject-matter defined by the claim;

**(b)** the filing date of the pending application is within twelve months after the filing date of the previously regularly filed application; and

**(c)** the applicant has made a request for priority on the basis of the previously regularly filed application.

**28.1(2)** In the circumstances described in paragraphs (1)(a) to (c), the claim date is the filing date of the previously regularly filed application.

dépôt de celle-ci, sauf si :

**a)** la demande est déposée, selon le cas :

**(i)** par une personne qui a antérieurement déposé de façon régulière, au Canada ou pour le Canada, ou dont l’agent, le représentant légal ou le prédécesseur en droit l’a fait, une demande de brevet divulguant l’objet que définit la revendication,

**(ii)** par une personne qui a antérieurement déposé de façon régulière, dans un autre pays ou pour un autre pays, ou dont l’agent, le représentant légal ou le prédécesseur en droit l’a fait, une demande de brevet divulguant l’objet que définit la revendication, dans le cas où ce pays protège les droits de cette personne par traité ou convention, relatif aux brevets, auquel le Canada est partie, et accorde par traité, convention ou loi une protection similaire aux citoyens du Canada ;

**b)** elle est déposée dans les douze mois de la date de dépôt de la demande déposée antérieurement ;

**c)** le demandeur a présenté, à l’égard de sa demande, une demande de priorité fondée sur la demande déposée antérieurement.

**28.1(2)** Dans le cas où les alinéas (1)a) à c) s’appliquent, la date de la revendication est la date de dépôt de la demande antérieurement déposée de façon régulière.

**28.4(2)** The request for priority must be made in accordance with the regulations and the applicant must inform the Commissioner of the filing date, country or office of filing and number of each previously regularly filed application on which the request is based.

**28.4(2)** Le demandeur la présente selon les modalités réglementaires; il doit aussi informer le commissaire du nom du pays ou du bureau où a été déposée toute demande de brevet sur laquelle la demande de priorité est fondée, ainsi que de la date de dépôt et du numéro de cette demande de brevet.

[37] Paragraphs 59.2(1)(a), (b), subsections 64(1) and (2), and paragraphs 88(1)(a) and (b) of the Rules are also relevant and I thus also reproduce them:

**59.2 (1)** For greater certainty, in respect of an international application that has become a PCT national phase application, for the purposes of the Act and these Rules,

**59.2 (1)** Il est entendu que, dans le cas d'une demande internationale qui est devenue une demande PCT à la phase nationale, pour l'application de la Loi et des présentes règles :

**(a)** information or notices included in the international application as filed shall be considered to have been received by the Commissioner on the filing date accorded to the application by a receiving Office pursuant to Article 11 of the Patent Cooperation Treaty; and

**a)** les renseignements ou les avis inclus dans la demande internationale telle qu'elle est déposée sont réputés avoir été reçus par le commissaire à la date de dépôt accordée à la demande par un office récepteur en conformité avec l'article 11 du Traité de coopération en matière de brevets;

**(b)** information or notices furnished in accordance with the requirements of the Patent Cooperation Treaty before the application has become a PCT national phase application shall be considered to have been received by the Commissioner on the date that they were so furnished.

**b)** les renseignements ou les avis fournis en conformité avec les exigences du Traité de coopération en matière de brevets avant que la demande ne devienne une demande PCT à la phase nationale sont réputés avoir été reçus par le commissaire à la date à laquelle ils ont été fournis.

**64 (1)** Section 28 of the Act does not apply to a PCT national phase application.

**64 (1)** L'article 28 de la Loi ne s'applique pas aux demandes PCT à la phase nationale.

**64 (2)** The filing date of a PCT national phase application shall be considered to be the date accorded by a receiving Office pursuant to Article 11 of the Patent Cooperation Treaty.

**64 (2)** La date de dépôt de la demande PCT à la phase nationale est réputée être la date accordée par l'office récepteur en conformité avec l'article 11 du Traité de coopération en matière de brevets.

**88 (1)** For the purposes of subsection 28.4(2) of the Act,

**88 (1)** Pour l'application du paragraphe 28.4(2) de la Loi :

*(a)* a request for priority may be made in the petition or in a separate document;

*a)* la demande de priorité peut être incluse dans la pétition ou dans un document distinct;

*(b)* where a request for priority is based on one previously regularly filed application, the request must be made, and the applicant must inform the Commissioner of the filing date, country of filing and application number of the previously regularly filed application, before the expiry of the sixteen-month period after the date of filing of that application; and

*b)* lorsque la demande de priorité est fondée sur une seule demande de brevet antérieurement déposée de façon régulière, le demandeur la présente et communique au commissaire la date du dépôt, le nom du pays du dépôt et le numéro de la demande de brevet antérieurement déposée de façon régulière, dans les seize mois suivant la date du dépôt de cette demande de brevet;

## VI. The Issues

[38] This appeal gives rise to the following issues:

1. Did the Judge err in concluding that the Commissioner made no error in refusing to enter April 3, 2012, as the claim date for the '271 Application?
2. Did the Judge err in concluding that the Commissioner was under no duty to enter April 3, 2012 as the claim date for the '271 Application? In other words, did the Judge err in finding that the Commissioner did not have a statutory obligation to amend or correct the claim date after the expiry of the limitation period?

[39] Before turning to the issues, I should set out the arguments put forward by Bayer in support of its position that we should allow its appeal.

[40] Bayer begins by saying that the Judge misinterpreted section 88 of the Rules. First, Bayer says that it is clear that its PCT '888 Application, and by extension its '271 Application, was in full compliance with subsection 88(1) of the Rules so as to claim a priority date of April 3, 2012.

[41] In making this argument, Bayer points to the fact that in its PCT '888 Application, it claimed priority on the basis of the US '691 Application filing date, that it identified the claim date as April 3, 2012, the United States as the country of filing of the application, the number of its US Patent Application and finally that its request for priority as per the PCT '888 Application, having been made on March 15, 2013, was clearly within the sixteen-month period during which the request could be made.

[42] Hence, since by reason of subsection 59.2(1) of the Rules, the aforementioned information is deemed to have been received by the Commissioner on March 15, 2013, Bayer says that April 3, 2012, was clearly sought by it in respect of the '271 Application.

[43] Then, Bayer addresses the finding made by the Judge at paragraph 11 of his reasons to the effect that as of March 15, 2013, the filing date of the US '691 Application was April 19,



2013, and that “[i]n the absence of a specific request for a different priority date, the Canada ‘271 Application should be given a priority date of April 19, 2012.”

[44] Bayer says that the Judge was wrong to so conclude. It argues that it did make a request for April 3, 2012, which was the correct filing date of the US ‘691 Application.

[45] Bayer goes on to say that when the PCT ‘888 Application entered the National Phase in Canada, *i.e.* on August 7, 2015, through the ‘271 Application, it requested the Commissioner to enter April 3, 2012, as the claim date for its ‘271 Application, that date being the correct filing date of the US ‘691 Application.

[46] In response to the Judge’s opinion that in making its request of August 7, 2015, it was asking the Commissioner to amend the claim date, Bayer argues that it was not seeking any change to the claim date but rather the entry of the correct date of filing of the US ‘691 Application.

[47] Bayer also disputes the Judge’s finding, found at paragraph 14 of his reasons, that when it requested April 3, 2012, as its claim date on March 15, 2013, “it had no basis for that request.” In Bayer’s view, it clearly had a basis to request April 3, 2012, as its claim date on March 15, 2013, as there is no dispute that it did file the US ‘691 Application on April 3, 2012. While recognizing that the US ‘691 Application had been given the incorrect date of April 19, 2012, that error, in Bayer’s submission, was subsequently recognized and corrected by the USPTO when on April

14, 2015, it changed the filing date of the US '691 Application from April 19, 2012, to April 3, 2012.

[48] Bayer then disputes the Judge's finding, also found at paragraph 14 of his reasons, that Bayer had conceded that April 19, 2012, was the correct filing date for the US '691 Application. Bayer says that the date was changed from April 3, 2012 to April 19, 2012 at WIPO's request.

[49] Bayer then takes issue with the Judge's finding, again found at paragraph 14 of his reasons, that the filing date of the PCT '888 Application had never been "successfully amended." In its view, the fact that the PCT '888 Application was never amended is an irrelevant consideration since the '271 Application stands to be determined in accordance with the Act and the Rules and not under the PCT or the *Regulations under the Patent Cooperation Treaty*. Bayer says that as of March 15, 2013, the requirements of both the Act and the Rules were met when it filed the PCT '888 Application.

[50] With respect to the issue of whether the Commissioner had a duty to "correct" the records of CIPO, Bayer says that in addition to having erred in refusing to enter the correct claim date of April 3, 2012, the Commissioner made a second error in refusing to correct the claim date for the '271 Application following its request to her to do so. In making this argument, Bayer relies on the Federal Court's decision in *Procter & Gamble Company v. Commissioner of Patents*, 2006 FC 976, [2007] 2 F.C.R. 542 [*Procter & Gamble*] where the Court, at paragraph 25, made the point that the Commissioner was under a duty to maintain accurate records regarding the granting and issuing of patents.

[51] Bayer argues that pursuant to subsection 4(2) of the Act, the Commissioner was bound to correct the date of April 19, 2012, because that date was inaccurate. Bayer seeks to bolster its position by pointing out that the Commissioner has assigned a claim date to the '271 Application which it says is non-existent as the US '691 Application was not filed on April 19, 2012. Thus, the records maintained by the Commissioner will be inconsistent with those of the USPTO which has given to its United States Patent Application No. 14/391,972 (US '972 Application), that application being the US National Phase of the PCT '888 Application, a claim date of April 3, 2012, based on the US '691 Application.

## VII. Analysis

[52] Before addressing the first issue, a few words concerning the standard of review are necessary.

[53] When hearing an appeal from a decision of the Federal Court, in the context of judicial review proceedings, it is the role of this Court to ascertain whether the court below selected the appropriate standard of review and whether that standard was correctly applied (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 [2013] 2 S.C.R. 559) [*Agraira*]. In doing so, this Court will “step into the shoes” of the reviewing court and focus upon the underlying decision (*Agraira* at paragraph 46).

[54] The parties are in agreement that the standard of review that should be applied to the Commissioner's decision is that of correctness and that this was the standard applied by the Judge. I see no basis to disagree with the parties' nor with the Judge's view on this matter.

A. *First Issue: Did the Judge err in concluding that the Commissioner made no error in refusing to enter April 3, 2012, as the claim date for the '271 Application?*

[55] The first issue seeks an answer to the question of what is the correct claim date for the '271 Application? Perhaps I should say, by quoting from Bayer's Memorandum of Fact and Law, why Bayer is fighting so hard for what amounts to a mere sixteen days. At paragraphs 33 and 34 of its Memorandum, Bayer provides the following explanation:

33. In Canada, the effect of a priority claim is to set the "claim date" of certain claims of a patent or application to be the same date as the filing date of the priority application, as opposed to the filing date of the Canadian application.

34. The claim date of a patent application or patent is of particular significance in the assessment of novelty and obviousness, two of the primary requirements for patentability. Notably, the claim date establishes the cut-off date for disclosures by third parties (i.e. by parties other than the applicant, or persons who obtained knowledge directly or indirectly from the applicant), which may be considered for the purposes of assessing novelty and obviousness in respect of a patent or application. The claim date also establishes whether a patent application or patent may be considered for the purposes assessing novelty of third party patents or applications having later claim dates.

[56] Pursuant to subsection 64(2) of the Rules, the filing date of the '271 Application is the date of filing of the PCT '888 Application, *i.e.* March 15, 2013. Further, by reason of paragraphs 59.2(1)(a) and (b) of the Rules, any information or notices provided by Bayer in filing the PCT '888 Application are deemed to have been received by the Commissioner in Canada on March 15, 2013, as part of the '271 Application.

[57] As to the claim date of the '271 Application, it is subject to the provisions of section 28.1 of the Act. In the present instance, as the Judge found, there can be no doubt that Bayer meets the

requirements of paragraph 28.1(1)(b) in that the date of filing of the '271 Application, by reason of the PCT '888 Application, is within 12 months of the filing of the US '691 Application, whether that date be April 3, 2012 or April 19, 2012. There can also be no doubt that Bayer meets the requirements of paragraph 28.1(1)(c), which requires it to have made a request for priority on the basis of a previous application. The Judge found, and he was right to do so, that on March 15, 2013, when filing its PCT '888 Application, Bayer requested priority on the basis of the US '691 Application.

[58] Subsection 28.4(2) of the Act requires an applicant for a patent, when making a request for an earlier claim date, to provide the following information to the Commissioner, namely the date of the filing of the previous application, the country of filing of the previous application and the number of that application. Subsection 28.4(2) of the Act also incorporates subsection 88(1) of the Rules, which provides that an applicant must provide to the Commissioner the information required under subsection 28.4(2) "before the expiry of the sixteen-month period after the date of filing of [the previous] application".

[59] Given that Bayer's request was made within the time limitation, the requirements of section 88 have been met. This means that Bayer's request is in accordance with the Rules, meeting the requirements of section 28.4 of the Act. Therefore, as provided in subsection 28.1(2) "the claim date is the filing date of the previously filed application." The question, then, is at what time does the Commissioner look at the previous application to determine the filing date?

[60] At paragraphs [41] to [53] of these reasons, I have set out Bayer's submissions as to why we should intervene. I therefore need not repeat them other than to say that the thrust of Bayer's argument is that on March 15, 2013, it made a request claiming priority based on the US '691 Application and indicated in that request that the filing date of that application was April 3, 2012. As a result of that request Bayer asserts that the '271 Application should have April 3, 2012 as its claim date. In my view, the factual reality of the file does not support Bayer's contention.

[61] When assessing the correct claim date what is determinative is the filing date of the previously filed application, not the date indicated in the request.

[62] When Bayer filed its PCT '888 Application on March 15, 2013, it requested April 3, 2012 as the claim date of its application, based on the filing of the US '691 Application. However, there was a problem with the April 3, 2012 date and that problem was raised by WIPO when, on April 26, 2013, it invited Bayer to correct its priority date because April 19, 2012, and not April 3, 2012, was the filing date of the US '691 Application at that time.

[63] In response to WIPO's invitation, Bayer informed WIPO, on May 16, 2013, that the filing date of its US '691 Application was April 19, 2012. In other words, Bayer recognized that April 3, 2012 was not the filing date of the US '691 Application. As of May 16, 2013, based on the records of the USPTO, it is difficult to see how Bayer could take the position that April 3, 2012 was the claim date.

[64] Bayer's response to WIPO, by reason of paragraph 59.2(1)(b) of the Rules, constitutes information that is deemed to have been received by the Commissioner on the date it was provided, namely May 16, 2013. Thus, on that date, the Commissioner was deemed to have been informed by Bayer that the claim date of the '271 Application, was April 19, 2012.

[65] Bayer succeeded in having the USPTO correct the US '691 Application on April 14, 2015 to reflect the April 3, 2012 filing date. There was however, no change between May 16, 2013 and April 14, 2015 to the US '691 Application. Hence, in my respectful opinion, when the sixteen-month period for priority claims relating to the '271 Application lapsed, on either August 3 or August 19, 2013, there could be no doubt that the filing date of the US '691 Application was April 19, 2012.

[66] Thus, Bayer can only succeed if it is open to the Commissioner to assess the filing date of the US '691 Application, for the purpose of subsection 28.1(2) of the Act, after the expiry of the sixteen-month period on August 19, 2013. In my view, it is not.

[67] There is only one approach to statutory interpretation. This is the unified textual, contextual, and purposive approach, as enunciated in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at paragraph 10. In *Tran v. Canada*, 2017 SCC 50, [2017] 2 S.C.R. 289, at paragraph 23, the Supreme Court reiterated the principle as follows:

The modern principle of statutory interpretation is that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87).

[68] The text of subsection 28.1(2) of the Act provides no instruction as to the point in time the record must be read in order to determine the filing date of the previous application. The context and purpose are more helpful. Subsection 28.1(2), read in conjunction with subsection 28.4(2) of the Act and paragraph 88(1)(b) of the Rules, provides that this benefit is available to an applicant if claimed within sixteen months of the previous application. Consequently, it is my view that the Commissioner, in addressing Bayer's request for priority based upon the US '691 Application, must assess the record as it existed up until sixteen months from the filing date of the previous application, that is August 19, 2013.

[69] On that view, the answer must necessarily be that the claim date of the '271 Application is April 19, 2012. The filing date of the US '691 Application was constant throughout the limitation period. It was not until after the expiration of the sixteen-month limitation period that the records of the USPTO were amended to reflect April 3, 2012 as the filing date. One can only conclude otherwise if one completely disregards the limitation period set by Parliament.

[70] As the respondents point out, both in their written and oral submissions, Bayer was made aware that there was a problem with the filing date of the US '691 Application when WIPO, on April 26, 2013, raised the issue with Bayer in sending the invitation to correct the filing date. In response to WIPO's invitation to correct, Bayer did not insist nor ask that April 3, 2012, be kept as its filing date, but, to the contrary, it advised WIPO on May 16, 2013, that it accepted, as the filing date to the US '691 Application, the date of April 19, 2012.



[71] As I indicated earlier, Bayer took steps to correct the filing date of the US '691 Application on April 14, 2015, *i.e.* three years after the filing of the US '691 Application. As I also indicated earlier, Bayer initially entered the Canadian National Phase of the PCT '888 Application in October 2014 and at that time claimed April 19, 2012, as the claim date of its Canadian application.

[72] Thus, the record simply does not support the submission that the filing date of the US '691 Application was April 3, 2012 for the purpose of the application of subsection 28.1(2) of the Act to the determination of the claim date of the '271 Application.

B. *Second Issue. Did the Judge err in finding that the Commissioner did not have a statutory obligation to amend or correct the claim date after the expiry of the limitation period?*

[73] I now turn to Bayer's second argument, which can be summarized as follows. Bayer says that since the true filing date of the US '691 Application, as it now appears from the records of the USPTO, is April 3, 2012, it is incumbent upon the Commissioner to enter that date as the claim date of the '271 Application. It says that the Commissioner has assigned as the claim date of the '271 Application a date which does not exist and in support of that assertion, Bayer refers us to the records of the USPTO concerning the US '691 Application. Bayer further says that the records of CIPO will be inconsistent with those of the USPTO where the US '972 Application, which is the US National Phase entry of the PCT '888 Application, shows April 3, 2012, as the filing date of the US '691 Application.

[74] Because the information which appears in the records of the CIPO is obviously incorrect, according to Bayer, the Commissioner is duty bound, pursuant to subsection 4(2) of the Act, to make the appropriate changes and to enter April 3, 2012, as the claim date of the '271 Application. Consequently, in refusing to intervene and to order the Commissioner to make the required change, Bayer says that the Judge erred in law.

[75] In my respectful opinion, Bayer's argument cannot succeed.

[76] Bayer's position is quite straightforward. In effect, it says that because April 3, 2012 is, in fact, the true date of filing of the US '691 Application, the Commissioner is duty bound to enter that date as the claim date of the '271 Application. Failing to do so, according to Bayer, would cause a record of the CIPO to be inaccurate in that April 19, 2012 is a date which does not exist.

[77] On the record before us, the difficulty with Bayer's position is, in my respectful view, the following. On the rationale put forward by Bayer, the Commissioner, if requested by Bayer in ten years from now or for that matter, in twenty years, would have to make the change requested by Bayer because the records of the USPTO show April 3, 2012, as the filing date of the US '691 Application. In other words, if one is to accept Bayer's argument, one is to completely disregard the sixteen-month period prescribed by paragraph 88(1)(b) of the Rules. That simply cannot be.

[78] In support of its position, Bayer relies on the Federal Court's decision in *Proctor & Gamble* where the Court ordered the Commissioner to correct errors in the record. In my view,

that case does not help Bayer in the present circumstances. In *Proctor & Gamble* the Commissioner, in determining on what date a patent had issued, made an error in interpreting the Act. Barnes J. concluded that the Commissioner had erred in her interpretation of the relevant statutory provisions which had led her to enter June 11, 1996 as the date of issuance instead of June 18, 1996. Consequently, Barnes J. ordered the Commissioner to correct the record and to enter June 18, 1996 as the date of issuance of the patent, which was the correct date at law. It is on that set of circumstances that the Commissioner had an obligation under section 4 of the Act to correct her records.

[79] However, in the present matter, the correct date at law, in my respectful opinion, for the claim date of the '271 Application, is April 19, 2012, for the reasons which I have explained. Consequently, there is no error for the Commissioner to correct.

[80] As the respondents correctly point out in their written submissions, Bayer is not asking the Commissioner to correct a factual inaccuracy resulting from a mistake made by the Commissioner but to undue the legal consequences which arise by reason of Bayer's actions in regard to the filing of the US '691 Application.

[81] That the US '691 Application was, in fact, filed with USPTO on April 3, 2012 appears to be factually accurate but, in my respectful opinion, that date does not constitute the claim date of the '271 Application unless the requirements of the Act and the Rules are met.

[82] In my view, as I have explained above, the requirements of the Act and the Rules have not been met in regard to April 3, 2012.

[83] Bayer argued that the result of a April 19, 2012 claim date has an artificiality to it, in that all the parties acknowledge that the physical filing of the US '691 Application occurred on April 3, 2012. No doubt it is the case that the April 19, 2012 date is artificial. However, this is the consequence of a variety of deeming provisions and limitation periods. The impact of these provisions is that, for example, a document read by the Commissioner in 2015 for the first time, was deemed to have been received by her on March 15, 2013.

[84] In the end, I am satisfied that once the sixteen-month limitation period elapsed on August 19, 2013, third parties became entitled to conclude that no further priority requests would be granted in relation to the '271 Application. Allowing Bayer to make changes to the claim date more than three years after the filing of the US '691 Application would, in my respectful opinion, undo the intended outcome of paragraph 88(1)(b) of the Rules and would result in unacceptable uncertainty in the applicable regime.

VIII. Conclusion

[85] For these reasons, I would dismiss Bayer's appeal with costs.

"M Nadon"

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J.A.

"I agree.

Wyman W. Webb J.A."

"I agree.

Mary J.L. Gleason J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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**CONCURRED IN BY:** WEBB J.A.  
GLEASON J.A.

**DATED:** APRIL 13, 2018

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