



[2022] 1 F.C.R. D-15

PRACTICE

PLEADINGS

*Motion to strike*

*Related subject: Patents*

Motion by respondent seeking to strike appellant Attorney General of Canada's appeal — Respondent appealed two decisions from Commissioner of Patents to Federal Court (2022 FC 923) arguing that Commissioner had applied wrong test to question of what constitutes patentable subject matter — Attorney General consented to appeals being granted — Federal Court allowed appeals — Federal Court found that Commissioner had applied wrong legal test — Remitted matter to Commissioner for reconsideration — Tasked only with determining what instructions to provide to Commissioner upon remitting matter — Ultimately adopting Intellectual Property Institute of Canada (IPIC) proposed framework, reproducing framework in paragraph 3 of its judgment along with instruction that Commissioner apply revised test upon reconsideration of respondent's patent applications — Respondent arguing paragraph 3 of Federal Court's decision doing nothing more than directing Commissioner to re-examine respondent's two applications in accordance with Federal Court's reasons by applying correct legal framework — Commissioner, when re-examining applications, bound to do so whether paragraph 3 present or not — Respondent further arguing that *Federal Courts Act*, R.S.C., 1985, c. F-7 (Act), s. 27(1) providing for appeals to this Court against "judgment" of Federal Court, not against its reasons for judgment — Notice of appeal therefore improper because seeking to appeal, not Federal Court judgment itself, but Federal Court's reasons — Appellant contending that appeal should not be struck as it is in public interest that Court "provide clarity" on correct test for determining patentable subject matter — Whether appellant's appeal truly relating to Federal Court's judgment, or to its reasons for that judgment — Certain criteria developed by Court in effort to guide answer to that question — *Canada (Citizenship and Immigration) v. Yansane*, 2017 FCA 48, [2017] 3 F.C.R. D-12 holding that *general* references to reasons in formal judgment not forming part of judgment itself so as to give rise to right of appeal based on reasons — No reason why policy rationale articulated in *Yansane* should not apply to appeals in some circumstances — Requirement for precision in drafting of judgments underscored by several considerations — Reasons justifying order, when incorporated within formal judgment, not changing result of order — Notice of appeal having to be read in light of reasons, judgment, with view to determining whether appeal veiled attempt to keep benefit of judgment but realign reasons for judgment — Consistent with case law, specific direction in paragraph 3 forming part of judgment, uniquely binding Commissioner to particular test in way that reasons alone do not — Appeal accordingly within Court's jurisdiction under Act, s. 27(1) — Motion dismissed.

CANADA (ATTORNEY GENERAL) V. BENJAMIN MOORE & CO. (A-188-22, 2022 FCA 194, Rennie J.A., reasons for order dated November 10, 2022, 11 pp.)