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FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE	
FILED	AOUT AUG 17 2023
DONYA MIRI	
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TORONTO, ON	- 1 -

Court File No. A- 203-23
(T-1534-20)

FEDERAL COURT OF APPEAL

BETWEEN:

CANADIAN ENERGY SERVICES L.P. AND
JOHN EWANEK

Appellants

-and-

SECURE ENERGY (DRILLING SERVICES) INC

Respondent

-and-

THE ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellants. The relief claimed by the appellants appears below.

THIS APPEAL will be heard by the Federal Court of Appeal at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellants. The appellants request that this appeal be heard at Toronto.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor or, if the appellant is self-represented, on the appellant, WITHIN 10 DAYS after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN
IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

August 17, 2023

**DONYA MIRI
REGISTRY OFFICER
AGENT DU GREFFE**

Issued by:

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Solicitors for the Respondent

APPEAL

THE APPELLANTS APPEAL to the Federal Court of Appeal from the Judgment and Reasons of The Honourable Mr. Justice Zinn dated June 28, 2023 in Federal Court File No. T-1534-20, declaring, *inter alia*, that Simon Levey is the sole true and proper inventor of the invention disclosed in Canadian Patent 2,624,834 and that Secure Energy (Drilling Services) Inc. (“Secure”) is the true and proper owner of the invention disclosed in Canadian Patent 2,624,834.

THE APPELLANTS ASK that the Federal Court of Appeal:

1. allow the appeal;
2. set aside the judgment;
3. dismiss the application;
4. award the Appellants their costs of both the appeal and the application before the Federal Court; and
5. grant such further and other relief as counsel may advise and this Honourable Court may deem just.

THE GROUNDS OF APPEAL are as follows:

1. The Application Judge erred in law by failing to apply the doctrines of *res judicata*, issue estoppel and abuse of process, with respect to the findings of the Alberta Court of King’s Bench, upheld by the majority of the Alberta Court of Appeal, namely that Secure’s claims to ownership of the 834 Patent were precluded by limitation period and a contractual release. In particular, the Application Judge erred in law by finding that the Alberta Courts did not make any decision on ownership of the 834 Patent when, to the contrary, the Alberta Courts granted summary judgment in Canadian Energy Services (“CES”) favour dismissing Secure’s counterclaims and defence to ownership of the 834 Patent. The Application Judge further erred by finding that the Alberta Courts specifically excluded ownership of the 834 Patent from their judgments.

2. The Application Judge erred in finding that Mr. Levey was the inventor, and sole inventor, of the subject matter of the 834 Patent. The Application Judge erred in mixed fact and law in finding that the testing performed by Mr. Levey demonstrated that anionic and non-ionic polymers were “substantially effective” in preventing accretion and established the utility of the invention of the 834 Patent. The Application Judge further erred in finding that Mr. Levey’s testing was a sufficient basis for Mr. Levey to be the inventor of the 834 Patent.

3. The Application Judge erred in mixed fact and law by finding “it is reasonable to infer that it is probable” that Mr. Levey communicated to Mr. Ewanek when anionic polymers “passed” and this was sufficient as a matter of law, without any findings of reliance, to make Mr. Levey an inventor of the subject matter of the 834 Patent filed years later based on separate work conducted by Mr. Ewanek. Mr. Levey’s testing of non-ionic polymers gave inconsistent results and failed to provide an understanding of when an anionic polymer will or will not prevent accretion. The Application Judge erred by drawing inferences and making findings of credibility, contrary to the direct evidence, despite the witnesses not appearing to testify in person.

4. The Application Judge erred in law in failing to find that Mr. Ewanek was the inventor of at least the use of non-ionic polymers to prevent accretion. Mr. Levey conducted only a single non-ionic test using a single non-ionic polymer for anti-accretion, which Mr. Levey recorded as “failed”. Mr. Levey didn’t perform any further anti-accretion testing with non-ionic polymers to demonstrate any utility or allow for a conclusion that non-ionic polymers were substantially effective in preventing accretion. The Application Judge did not make any finding that Mr. Ewanek was aware of Mr. Levey’s single “failed” test of a non-ionic polymer. Absent any such awareness of, or reliance upon, Mr. Levey’s failed test, Mr. Ewanek is the true and proper inventor of the use of non-ionic polymers to prevent accretion, having arrived at that idea independently while at Mud King and demonstrated its utility.

5. Even if the Application Judge did not err in finding that Mr. Levey was the sole and true inventor of the subject matter of the 834 Patent, the Application Judge erred

by stating in his reasons that Secure is the proper owner of the 834 Patent and declaring that Secure is the true and proper owner of the invention disclosed in the 834 Patent. In doing so, the Application Judge made the following errors:

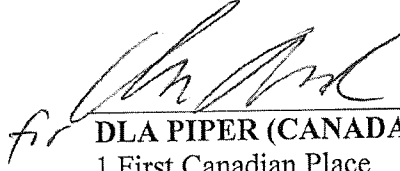
- (a) The Application Judge erred in law in finding that no limitation period applies to Secure's claim to ownership of the 834 Patent. The Application Judge erred in law by finding that the relief sought by Secure was declaratory in nature rather than a cause of action or remedial order.
- (b) The Application Judge erred in law in failing to find that the release precluded Secure's claim to ownership of the 834 Patent. The Application Judge erred in law in finding that Secure's application does not fall within the phrase "all manner of actions, causes of actions, suits, contracts, claims, demands, and damages of any kind whatsoever ... against John Ewanek in respect of any matter, cause or thing existing up to the present date". The Application Judge further erred in finding that the release was only successfully raised in Alberta in response to the allegation that Mr. Ewanek had misappropriated and misused confidential information, when the Alberta Courts found as a matter of law that the release precluded Secure's claims to ownership of the 834 Patent.
- (c) The Application Judge erred in law in finding that Secure was a successor in title to any rights that Mr. Levey possessed in the 834 Patent. In particular, the Application Judge erred in law in finding that Secure's claimed title to the 834 Patent was *res judicata* based on *Secure v. Canadian Energy Services*, 2021 FC 1169 ["*Secure FC*"]. Secure's ownership of the 339 Patent was not in dispute in *Secure FC* as Secure was already the registered owner of the 339 Patent. Mr. Levey assigned his rights in the 339 Patent to Genesis and those rights were expressly conveyed to Secure's predecessor through an asset purchase

agreement. The Application judge erred by failing to consider the chain of title of the 834 Patent, for which no assignments existed, and whether any rights in the 834 Patent existed at the time of the asset purchase and whether those rights were conveyed. Mr. Levey and his employer, Genesis, had the opportunity to file a patent application for any subject matter of the 834 Patent that Mr. Levey had invented but declined to do so and should not benefit from the 834 Patent that was later filed by Mr. Ewanek and his employer Mud King.

6. The Appellants rely on such further and other grounds as counsel may advise and this Honourable Court may permit.

7. The Appellants propose that the Appeal be heard in Toronto, Ontario.

August 17, 2023


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