

Federal Court



Cour fédérale

Date: 20110712

Docket: T-2158-09

Citation: 2011 FC 873

Toronto, Ontario, July 12, 2011

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

**ROBERT WILLIAM BARTLEY, ANN MARIE
BARTLEY AND REX IAN McKINNON,
TOGETHER AS TRUSTEES OF THE
R W B TRUST**

Applicants

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Commissioner of Patents dated December 4, 2009 in which she refused to grant a patent to the Applicants in respect of their Application Number 2,159,968. For the reasons that follow, I find that the application is allowed

with costs; the matter is returned to the Commissioner for redetermination bearing in mind these Reasons.

THE PARTIES

[2] It is not in dispute in these proceedings that the Applicants are the current successors in title to the applicant of Canadian Patent Application Number 2,159,968, the application at issue. Title to the application changed during prosecution but nothing turns on this so I will simply refer to the Applicants in these reasons.

[3] The Commissioner of Patents is the person charged with several duties under the *Patent Act*, RSC 1985, c. P-4, including the duty to issue and grant a patent in respect of an application filed with the Patent Office or to refuse to do so.

[4] The Attorney General of Canada has been named as Respondent to represent the Commissioner of Patents.

[5] Not named as parties, but relevant to this discussion, are the patent examiner and Patent Appeal Board. Section 6 of the *Patent Act* provides for the appointment of, among others, patent examiners who, as provided for in subsection 35(1) of the *Act*, are to examine applications for a patent. It is the Commissioner of Patents, however, who has the power under sections 4, 40 and 42 of the *Patent Act* to grant, or refuse to grant, a patent.

[6] The Patent Appeal Board is not an entity described in either the *Patent Act* or *Patent Rules*, SOR/96-423. It is an informal tribunal within the Patent Office whose function is to review certain

patent applications and make recommendations to the Commissioner of Patents to allow or reject patent applications. The decision to do so remains that of the Commissioner. The Manual of Patent Office Practice, section 21.05 as put in evidence, states as follows:

21.05 Patent Appeal Board

The Patent Appeal Board (PAB) consists of one or more senior members of the Patent Office who have not participated in the examination of the application under review. The Board reviews the grounds for rejection in final actions and holds hearings under section 30(6) of the Patent Rules when requested by applicants and advises the Commissioner on these matters.

THE EVIDENCE

[7] The Applicants filed as their evidence two affidavits of Kristina Sebastian, a litigation clerk in the offices of the Applicants' solicitors. Those affidavits serve to make of record the file history and related correspondence respecting the application at issue. There was no cross-examination upon either affidavit.

[8] The Respondents filed the affidavit of William B. (Barney) de Schneider, Assistant Commissioner of Patents, and for a period of time, Acting Commissioner of Patents. This affidavit made of record further material from the Patent Office files respecting the application at issue, and excerpts from the Manual of Patent Office Practice (MOPOP), current as of December 2009. This affidavit also addressed some general Patent Office practices and made reference to oral communications between a Patent Office examiner, the Applicants' patent agent and the Patent Appeal Board. There was no cross-examination upon this affidavit.

[9] At the hearing, for the first time, Applicants' Counsel raised an objection as to the admissibility of the de Schneider affidavit on the basis of relevance. I dismiss this application but will treat certain hearsay matters with caution.

THE PATENT APPLICATION

[10] The patent application at issue is Canadian Patent Application Number 2,159,968 entitled "Protective Member for a Vehicle". The application was filed in the Canadian Patent Office on October 5, 1995, which means that it is governed by the provisions of the "new" *Patent Act*, applicable to all applications filed after October 1, 1989. Among the pertinent provisions of the "new" *Patent Act* is the provision (section 44) that the term of the patent is limited to twenty (20) years from the filing date. While certain rights accrue before a patent is issued and granted, those rights and all other rights granted by the issuance of a patent can only be enforced after the date that a patent is granted. Thus, the longer it takes for a patent to be granted, the shorter the period in which rights may be enforced. The affidavit of de Schneider, paragraph 16, states that, typically, a patent is granted approximately fifty (50) months from the time that an applicant requests examination. Section 35 of the *Patent Act* provides that an application will be examined only after a request is received from the applicant. Subsection 96(1) of the *Patent Rules* provides that such a request must be made within five (5) years from the date of filing of the application. Subsection 28(1) of the *Patent Rules* provides for an accelerated examination in circumstances where the Commissioner is persuaded that the applicant's rights are likely to be prejudiced.

[11] This patent application describes the invention as being "...a device for protecting a vehicle from being damaged by minor external impacts". It is "...a protective device mounted to span a

section of the vehicle to be protected”. One illustration included is “...a protective member in the form of a replacement and strengthened vehicle bumper”.

HISTORY OF THE APPLICATION

[12] A chronology of some of the steps taken during the prosecution of the application, as revealed in the evidence, is required:

- October 5, 1995 the application was filed in the Canadian Patent Office.
- April 6, 1997 the application was laid open for public inspection.
- December 3, 2002 the Applicants requested examination on an expedited basis.
- December 19, 2002 the Commissioner ordered expedited examination.
- March 3, 2003 a patent examiner issued the first examination requisition.
- April 3, 2003 a patent agent acting for an undisclosed third party filed a protest (a sort of “poison pen” letter which the Patent Office simply acknowledges but does not permit that person to actively enter into the prosecution of the application) citing a substantial amount of prior art.

- July 2, 2003 the Applicants' patent agent responded to the requisition of March 3, 2003.
- October 17, 2003 a different patent examiner took over the file and issued a further requisition.
- November 14, 2003 another third party (Boodo) filed a protest, a copy of which was sent to the Applicants' patent agent on December 5, 2003.
- April 14, 2004 the Applicants' patent agent filed a response to the examiner's requisition of October 17, 2003.
- May 31, 2004 the patent examiner issued a further requisition.
- July 6, 2004 the patent agent filing the first protest filed a further protest citing more prior art some of which was subsequently raised by the examiner in a later requisition.
- November 24, 2004 the Applicants' patent agent filed a response.
- December 22, 2004 the patent examiner issued a further requisition.
- February 18, 2005 the Applicants' patent agent filed a response.

- August 1, 2005 the patent examiner issued a further requisition which concludes with a statement that if the objections are not overcome the application may be rejected in a Final Action.
- February 1, 2006 the Applicants' patent agent filed a response.
- March 22, 2006 the patent examiner issued a further requisition; no mention is made of a Final Action.
- The application became abandoned for failure to file a timely response (six (6) months as provided for by subsection 73(1) (a) of the *Patent Act*) and also for failure to pay maintenance fees (it could be reinstated six (6) months after the abandonment as provided by subsection 98(1) of the *Patent Rules*).
- January 10, 2007 the Applicants' patent agent filed a late response together with a request for reinstatement (which was granted) and asked that the patent examiner issue a Final Action.
- July 30, 2007 the patent examiner issued a Final Action.

[13] I pause in this chronology to discuss what is meant by a Final Action and what occurred in the present case. A Final Action is provided for in subsections 30(3) to (6) of the *Patent Rules* and essentially means that where the patent examiner and the applicant have reached a stalemate, the

matter is referred to the Commissioner, who shall review the matter and give the applicant an opportunity to be heard. In practice, the matter is referred to the Patent Appeal Board, which makes a recommendation to the Commissioner. Usually, that recommendation is followed. Sections 30(3) and 30(6) of the Patent Rules say:

30. (3) Where an applicant has replied in good faith to a requisition referred to in subsection (2) within the time provided but the examiner has reasonable grounds to believe that the application still does not comply with the Act or these Rules in respect of one or more of the defects referred to in the requisition and that the applicant will not amend the application to comply with the Act and these Rules, the examiner may reject the application.

...

30. (6) Where the rejection is not withdrawn pursuant to subsection (5), the rejection shall be reviewed by the Commissioner and the applicant shall be given an opportunity to be heard.

[14] In the present case, a closer examination of the events occurring at this time is necessary.

[15] In the response of February 1, 2006 the Applicants' patent agent inserted claims 1 to 6 into the application. They were directed to a shape of the protective member and a material from which it could be made. The patent examiner's requisition of March 22, 2006 refused to allow the claims on the basis that there was insufficient disclosure in the specification from which those claims could be supported ("reasonably inferred") and on the basis of prior art, a US patent filed by Coiner.

[16] The Applicants' patent agent's response of January 10, 2007 addressed both concerns raised by the patent examiner; that is, the "reasonably inferred" point, and the Coiner prior art. That response ended with a request that, if the patent examiner was unwilling to allow the case, a Final Action should be issued.

[17] A Final Action was issued by the patent examiner on July 30, 2007. It continued to reject the claims on the "reasonably inferred" basis and on the basis of the Coiner reference.

[18] On January 29, 2008 the Applicants' patent agent filed a detailed response to the Final Action. It begins with the statement:

"In the final action, the Examiner has withdrawn all prior art and non-statutory subject matter objections..."

[19] Thereafter, the outstanding matters are addressed, and the response concluded by stating:

"As there are no other outstanding objections to the present case, Applicant respectfully submits, that for the reasons set out above, the application is in condition for allowance and action toward that goal is respectfully requested."

[20] Some time after the Applicants' patent agent's response of January 29, 2008 was filed, a decision was apparently made by someone in the Patent Office to constitute a Patent Appeal Board to deal with the matter. Once that Board was constituted, it made a request of the patent examiner to provide some information as to the examiner's view of the history and status of the prosecution.

There is no record as to when such a request was made, or by whom, or what precisely was requested. The Applicants' patent agent was not kept informed at the time as to this activity.

[21] There is in the Patent Office file a document entitled "Summary of Reasons". It is unclear who wrote the document or what its purpose was. It bears, in handwriting, two sets of initials and a date, 04/07/08. This document was apparently not sent to the Applicants' patent agent at the time. It may be that the document was sent at a later time to the Applicants' patent agent, around November 28, 2008. The Patent Appeal Board's reasons make reference to the sending of this memo to the Applicants' patent agent at this time but there is nothing in the record before me to substantiate that this was done.

[22] From the Applicants' point of view, maintenance fees were paid by its patent agent on October 6, 2008 so as to keep the application in good standing. The Applicants' patent agent sent a letter on July 31, 2008 and again on November 21, 2008, enquiring as to the status of the matter.

[23] The Patent Office file contains a document entitled "Patent Appeal Board Memo" dated December 23, 2008 from the patent examiner to the Board in which the examiner provides answers to certain questions that are described as "hypothetical". That Memo says:

Re: Final Action of July 30, 2007 and Summary of Reasons of April 7, 2008

The Patent Appeal Board (PAB) has asked the examiner what his position would be, hypothetically speaking, with regard to prosecution should the PAB decide with respect to the objections raised in the Final Action that:

- A) *the alleged new subject matter is indeed ‘new’ and contrary to Section 38.2 of the Patent Act, **OR***
- B) *the alleged new subject matter is not ‘new’ and the amendment dated February 1, 2006, containing claims 1-6 is in compliance with Section 38.2 of the Patent Act and to thereby enter the amendment for further prosecution by the examiner.*

Considering hypothetical situation A), should the examiner be presented claims of the same or similar scope as those submitted February 18, 2005, i.e. before the alleged new subject matter objection, the office action that would follow would most likely be substantially the same as the action issued on August 1, 2005 in regards to prior art objections, i.e. paragraph 28.2(1)(b), section 28.3 of the Patent Act, as well as indefiniteness objections based on subsection 27(4) of the Patent Act.

*Considering hypothetical situation B), the examiner will not comment directly with respect to alleged new matter claim set 1-6 submitted February 1, 2006. However, since the scope of said claim set is similar to those submitted February 18, 2005, one could expect similar objections as those found in the examiner report of August 1, 2005 **and** most probably additional prior art and jurisprudence objections that may apply.*

In either case A) or B), Commissioner’s Decision #80 may apply.

[24] No copy of this Memo was provided at the time to the Applicants’ patent agent. On January 23, 2009, a member of the Patent Appeal Board sent a copy to the Applicants’ patent agent with a letter that stated:

Further to our telephone conversation regarding the status of the abovementioned case, enclosed is a memo forwarded to the Patent Appeal Board by the examiner in charge of the application, discussing the objections which have been held in abeyance pending resolution of the new matter issue outlined in the Final Action.

I trust that this information will clarify the situation. As I indicated during our conversation, we will be treating this case as a high priority given the objections which may be outstanding.

You will be contacted shortly regarding further steps to be taken in the process. Any further inquiries in relation to this case may be directed to the undersigned.

[25] The Patent Appeal Board provided its version of these events at the third page of its reasons:

... Upon a preliminary review of the case by the Board, it was not clear to us, based on the record, what the status was of the previous objections made by the Examiner. The Examiner informed the Board that the other objections had been held in abeyance pending resolution of the new matter issue.

[4] *Based on the prosecution record, especially the Applicant's response to the Final Action where it was stated:*

In the Final Action, the Examiner has withdrawn all prior art and non-statutory subject matter objections and bases his remaining objections on lack of support in the disclosure for...

we did not believe that the Applicant understood that there were still other possible and outstanding objections based on novelty, obviousness, etc., which would need to be dealt with after this review by the Commissioner.

[5] *The Applicant was therefore contacted by the Board and confirmed that they were not aware of the possibility of further objections. In order to attempt to clarify the situation, the Examiner was asked to provide a memo to the Board to outline his position. This memo, which was forwarded to the Applicant on January 23, 2009, indicated that indeed the Examiner believed that upon completion of the review by the Commissioner, there would still be other objections to be applied, including the possibility of additional prior art. In view of this, the Board felt it necessary to act on this case as soon as possible.*

[26] Mr. de Schneider, Assistant and sometimes Acting Commissioner of Patents, described these events at paragraphs 7 and 8 of his Affidavit.

7. *I have been advised by Stephen MacNeil, a member of the Patent Appeal Board, (the “Board”) that reviewed the Examiner’s Final Action, that because it was not clear how the Examiner was dealing with the previous objections, he contacted the Examiner on or around December 4, 2008 to clarify the Examiner’s position. The Examiner confirmed that he was holding the other objections in abeyance until the new matter issue was resolved. I am further advised by Mr. MacNeil that he contacted the Applicant’s agent, on or around December 17, 2008 to ensure that the Applicant was aware of the Examiner’s position.*

8. *I am advised by Mr. MacNeil, that after the Examiner sent written confirmation of his position to the Board on or around January 12, 2009, (which was subsequently forwarded to the Applicant on January 23, 2009) the Board conducted a preliminary analysis of the case and decided that it would recommend to the commissioner that the Examiner’s finding regarding new subject matter should be reversed and that the Application should be returned to the Examiner to address any outstanding issues. I am advised by Mr. MacNeil that he phoned the Applicants’ patent agent on or around February 6, 2009 to advise the Applicant of the Board’s recommendation. I am further advised by Mr. MacNeil that while the Applicants’ patent agent was not pleased that the Board was going to recommend that the Application be returned to the Examiner, he did not request the opportunity to make submissions on this point.*

[27] There is nothing in the record to indicate that Mr. MacNeil was unavailable to give evidence directly rather than the hearsay as provided by Mr. de Schneider. Mr. de Schneider was not cross-examined. The Applicants provided no evidence as to what, from their point of view, took place at this time. At the hearing before me Applicants’ Counsel stated that the Applicants did not dispute what is set out in these paragraphs as far as they go.

[28] The Board, in its reasons, recommended that the rejection made by the examiner was not justified and that the rejection be reversed. The Board did *not* hold a hearing. It summarized its findings at paragraph 6 of its reasons:

(b) Findings

[6] After a preliminary review of the Examiner's objections under ss. 38.2(2), and the Applicant's responses thereto, it was clear that the rejection of the application was not justified. The Applicant was informed on February 6, 2009 that neither further submissions nor a hearing was necessary. The following discussion outlines our reasons for recommending that the Examiner's rejection be reversed.

[29] At paragraph 49 of its reasons, the Board recommended that the rejection be reversed and that the application be returned to the examiner “to address any outstanding defects which have been held in abeyance...”:

[49] In summary, the Board recommends that:

the Examiner's rejection of claims 1-6 of the specification as containing new matter be reversed, and that the application be returned to the Examiner to address any outstanding defects which have been held in abeyance pending resolution of the new matter issue.

[30] At paragraph 50 of the reasons, the Commissioner of Patents concurred and returned the matter to the examiner “for consideration of any outstanding defects which have been held in abeyance...”:

[50] I concur with the findings and recommendation of the Patent Appeal Board that the Examiner's rejection of the claims be reversed, and return the application to the Examiner for consideration of any outstanding defects which have been held in abeyance pending resolution of the new matter issue. As this

application was granted Special Order status in 2002, any subsequent action by the Examiner, including actions in response to amendments by the Applicant, should be taken within the usual 30 working day period.

[31] What I conclude from this evidence, some of which is hearsay and much of which would have benefited from evidence from the Applicants or their patent agents, is as follows:

- the Applicants' patent agent responded to the patent examiner's Final Action on January 29, 2008; it appears that the agent was of the belief that the examiner had raised all the objections that were to be raised;
- after that time, a Patent Appeal Board was constituted; that Board had undisclosed discussions with the examiner, who provided at least one, and possibly two memoranda as to the examiner's view as to the status of the application;
- the memoranda were ultimately disclosed by the Board to the Applicants' patent agent following one or two telephone conversations between a Board member and the Applicants' patent agent; the substance of those telephone conversations is unclear;
- the Board, at some time during this process, formed the opinion that even if it reversed the examiner, there were other matters outstanding that the examiner wished to deal with;

- the Board decided, on its own initiative, not to hold a hearing or otherwise give the Applicants’ or their patent agent an opportunity to be heard;
- the recommendation of the Board, as accepted by the Commissioner, was to reverse the examiner’s rejection but, nonetheless, return the matter to the examiner to deal with other “outstanding defects”.

[32] The Commissioner’s decision was sent to the Applicants’ patent agent on June 18, 2009.

[33] On July 23, 2009, the patent examiner issued a new requisition raising two matters. The first of these was simply a reassertion of several pieces of prior art that had been subsumed and disposed of by the Final Action and the decision of the Commissioner/Patent Appeal Board. The second was to raise a piece of prior art (Popov) that had never before been raised.

[34] The Applicants’ patent agent responded on September 15, 2009 by writing directly to the Commissioner of Patents a letter entitled “Petition for Relief” (for which there is no provision in the *Patent Act or Rules*) raising the decision of this Court in *Belzberg v. Commissioner of Patents, 2009 FC 657*, stating *inter alia*:

Petition for Relief

Applicant respectfully submits that the Commissioner, and hence the Examiner, is without jurisdiction to issue the purported requisition dated July 23, 2009, and hence such purported requisition is a nullity.

Applicant respectfully submits that, having received a favourable decision on Final Action, this application is already allowed as a matter of law and hereby requests that a Notice of Allowance issue immediately, and that immediately thereafter the final fee of \$300.00 be deducted from our Deposit Account No. 600000401, with the instant application issue to patent forthwith.

[35] The Commissioner responded by letter dated December 4, 2009 denying its request. She wrote:

*This letter is in response to your petition dated September 15, 2009, wherein you request that I immediately issue a Notice of Allowance with respect to patent application 2,159,968 entitled “Protective Member for a Vehicle”. You contend that the recent decision of the Federal Court in *Belzberg v. Commissioner of Patents* ([2009] FC 657) (hereinafter referred to as “Belzberg”) stands for the proposition that the instant application must be considered to have already been allowed as a matter of law.*

*I consider that the facts of the present case are distinguishable from those considered by the Court in *Belzberg*. Notably, it was made clear to the applicant that certain grounds for objection had been held in abeyance until the question of compliance with section 38.2 of the Patent Act could be resolved.*

This is reflected further in Decision 1293, where the examiner was given clear direction to consider these outstanding defects. This distinguishes the present case from Commissioner’s Decision 1274, wherein explicit direction as to the specific nature of the further examination was absent.

After careful consideration, I have determined that your request cannot be granted.

As your correspondence dated September 15, 2009 did not address any of the objections raised in the examiner’s report dated July 23, 2009, please note that the requisition to which you must respond by January 25, 2010 (January 23 being a Saturday) remains outstanding. The advanced examination status of the application remains in effect.

[36] It is the decision of the Commissioner as set out in this letter of December 4, 2009 that is the subject of this judicial review.

ISSUES AND RELIEF SOUGHT

[37] Each of the parties has submitted issues for determination, which issues, in turn, require consideration of related matters. Some of those matters have been raised in the memoranda of argument of the parties, but at the hearing were dropped or not strenuously relied upon.

[38] The issues, as stated in the Applicants' memorandum, are:

- i. *Do the Patent Act and the Patent Rules permit an Examiner to withhold certain grounds of rejection from a Final Action?*
- ii. *Can the Commissioner refer a patent application for further substantive examination based on previously known objections after reversing all grounds of rejection present in a final action, or is the Commissioner then required to grant the patent?*
- iii. *Did the Examiner's withholding of objections from the Final Action deny the Applicants a fair hearing in the determination of their rights in respect of the Patent Application in accordance with the principles of fundamental justice, and if so, what remedy should be granted?*

[39] The Respondent submits the following issues:

1. *Whether this application for judicial review should be dismissed because it was brought outside the requisite time limit established by section 18.1(2) of the Federal Courts Act?*

2. *Whether, if this application is not dismissed for the above reason,*
 - a. *the Commissioner has the authority in the specific circumstances of this case to send the Application back to the Examiner for further examination?*
 - b. *the process used by the Patent Office in this case was procedurally fair?*
 - c. *the remedies requested by the Applicants can be granted by this Court in the specific circumstances of this case?*

[40] The Applicants sought a number of remedies in their Notice of Application and memorandum, some of which, such as extending the term of patent monopoly or back-dating the grant of the patent, have been abandoned. The relief sought by the Applicants as ultimately expressed at the hearing was to allow this application and to return the matter to the Commissioner with a direction to issue a patent forthwith.

[41] The Respondent submits that this application be dismissed as being brought out of time, or, additionally or in the alternative, on its merits. The Respondent submits that if this application were to be allowed, the matter should simply be returned to the Commissioner for further prosecution in the Patent Office.

[42] Each party seeks costs. They are agreed that if I were to award costs, they should be fixed in the sum of \$4,000.00.

THE PATENT ACT, THE PATENT RULES AND MOPOP

[43] Before addressing the particular issues in this case, a review of the *Patent Act*, RSC 1985, c. P-4; the *Patent Rules*, SOR/96-423, as amended; SOR/2007-90, s. 7 and the Manual of Patent Office Practice (MOPOP), the relevant portions of which were last reviewed in March 1998, will be made.

[44] The *Patent Act* is the principal piece of legislation respecting patents and applications for patents in Canada. The *Patent Rules* are regulations made in accordance with that *Act* as provided in section 12(1) of the *Act*. Curiously, subsection 12(2) of the *Act* provides that the *Rules* have the same force and effect as if they were in the *Act*, it provides:

12. (2) Any rule or regulation made by the Governor in Council has the same force and effect as if it had been enacted herein.

12. (2) Toute règle ou tout règlement pris par le gouverneur en conseil a la même force et le même effet que s'il avait été édicté aux présentes.

[45] The Manual of Patent Office Practice (MOPOP) is a set of guidelines prepared by the Patent Office and made available to patent agents and the general public. It provides guidance as to the practice followed by the Patent Office and which is expected to be followed by patent agents and others. It is not law, it is at best “soft law” as some Courts and legal scholars have described such guidelines. Where MOPOP conflicts with the *Patent Act* or *Rules*, it must give way.

[46] The *Patent Act* provides, in subsection 27(1), a mandatory direction to the Commissioner of Patents; the Commissioner *shall* grant a patent, *provided* a proper application has been filed *and* all other requirements of the *Act* (which subsection 12(2) deems to include the *Rules*) have been met:

Commissioner may grant patents

27. (1) The Commissioner shall grant a patent for an invention to the inventor or the inventor's legal representative if an application for the patent in Canada is filed in accordance with this Act and all other requirements for the issuance of a patent under this Act are met.

Délivrance de brevet

27. (1) Le commissaire accorde un brevet d'invention à l'inventeur ou à son représentant légal si la demande de brevet est déposée conformément à la présente loi et si les autres conditions de celle-ci sont remplies.

[47] Section 35 of the Patent Act provides for the examination of a patent application either at the request of the applicant or upon request of the Commissioner:

Request for examination

35. (1) The Commissioner shall, on the request of any person made in such manner as may be prescribed and on payment of a prescribed fee, cause an application for a patent to be examined by competent examiners to be employed in the Patent Office for that purpose.

Required examination

(2) The Commissioner may by notice require an applicant

Requête d'examen

35. (1) Sur requête à lui faite en la forme réglementaire et sur paiement de la taxe réglementaire, le commissaire fait examiner la demande de brevet par tel examinateur compétent recruté par le Bureau des brevets.

Examen requis

(2) Le commissaire peut, par avis, exiger que le demandeur d'un brevet fasse

<p><i>for a patent to make a request for examination pursuant to subsection (1) or to pay the prescribed fee within the time specified in the notice, but the specified time may not exceed the time provided by the regulations for making the request and paying the fee.</i></p>	<p><i>la requête d'examen visée au paragraphe (1) ou paie la taxe réglementaire dans le délai mentionné dans l'avis, qui ne peut être plus long que celui déterminé pour le paiement de la taxe.</i></p>
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[48] The *Patent Rules* and MOPOP deal extensively with the examination process and will be discussed in more detail following this review of the *Patent Act*.

[49] Section 38.2 of the *Patent Act* provides for amendments to a patent application before a patent is issued, but only if the amendments can be “reasonably inferred” from what is already there:

<p><i>Amendments to specifications and drawings</i></p> <p>38.2 (1) <i>Subject to subsections (2) and (3) and the regulations, the specification and any drawings furnished as part of an application for a patent in Canada may be amended before the patent is issued.</i></p> <p><i>Restriction on amendments to specifications</i></p> <p>(2) <i>The specification may not be amended to describe matter not reasonably to be inferred from the specification or drawings as originally filed, except in so far as it is admitted in the specification</i></p>	<p><i>Modification du mémoire descriptif et des dessins</i></p> <p>38.2 (1) <i>Sous réserve des paragraphes (2) et (3) et des règlements, le mémoire descriptif et les dessins faisant partie de la demande de brevet peuvent être modifiés avant la délivrance du brevet.</i></p> <p><i>Limite</i></p> <p>(2) <i>Le mémoire descriptif ne peut être modifié pour décrire des éléments qui ne peuvent raisonnablement s'inférer de celui-ci ou des dessins faisant partie de la demande, sauf dans la mesure où il est mentionné dans le</i></p>
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that the matter is prior art with respect to the application.

mémoire qu'il s'agit d'une invention ou découverte antérieure.

Restriction on amendments to drawings

Idem

(3) Drawings may not be amended to add matter not reasonably to be inferred from the specification or drawings as originally filed, except in so far as it is admitted in the specification that the matter is prior art with respect to the application.

(3) Les dessins ne peuvent être modifiés pour y ajouter des éléments qui ne peuvent raisonnablement s'inférer de ceux-ci ou du mémoire descriptif faisant partie de la demande, sauf dans la mesure où il est mentionné dans le mémoire qu'il s'agit d'une invention ou découverte antérieure.

[50] Section 8 of the *Patent Act* provides that the Commissioner may authorize corrections of clerical errors at any time.

[51] Section 40 of the *Patent Act* provides that the Commissioner may refuse a patent application, in which case a notice must be sent to the applicant. Section 41 provides for an appeal to the Federal Court from such refusal. It is to be noted that such an appeal lies only from a refusal, and not from other actions taken or not taken by the Commissioner.

Refusal by Commissioner

Le commissaire peut refuser le brevet

40. Whenever the Commissioner is satisfied that an applicant is not by law entitled to be granted a patent, he shall refuse the application and, by registered letter addressed to the applicant or his registered agent, notify the

40. Chaque fois que le commissaire s'est assuré que le demandeur n'est pas fondé en droit à obtenir la concession d'un brevet, il rejette la demande et, par courrier recommandé adressé

applicant of the refusal and of the ground or reason therefor.

au demandeur ou à son agent enregistré, notifié à ce demandeur le rejet de la demande, ainsi que les motifs ou raisons du rejet.

Appeal to Federal Court

Appel à la Cour fédérale

41. Every person who has failed to obtain a patent by reason of a refusal of the Commissioner to grant it may, at any time within six months after notice as provided for in section 40 has been mailed, appeal from the decision of the Commissioner to the Federal Court and that Court has exclusive jurisdiction to hear and determine the appeal.

41. Dans les six mois suivant la mise à la poste de l'avis, celui qui n'a pas réussi à obtenir un brevet en raison du refus ou de l'opposition du commissaire peut interjeter appel de la décision du commissaire à la Cour fédérale qui, à l'exclusion de toute autre juridiction, peut s'en saisir et en décider.

[52] There are no express provisions in the *Patent Act* as to what happens when a patent application is allowed. Subsections 30(1) and 30(5) of the *Patent Rules*, as further explained in sections 13.10 to 13.12 of MOPOP (copy attached as Schedule A) provide that a Notice of Allowance is sent to the applicant. The applicant, but not the examiner or Commissioner, can make amendments, most of which trigger further examination. If there are no amendments, a patent will issue. As explained by Dubé J. of this Court in *Monsanto Co. v Canada (Commissioner of Patents)*, (1999), 1 CPR (4th) 500, a Notice of Allowance is not a “decision” of the Commissioner. The issuance of the patent is the decision. He wrote at paragraph 27:

27 In my view, a Notice of Allowance is not a "decision" contemplated by section 18.1 of the Act. It is merely an administrative step taken by the Commissioner leading to the possible issuance of a patent under subsection 30(1) of the Patent Rules. Under subsection 30(7) of the Patent Rules, the Commissioner may after he has sent the notice in accordance with

subsection (1), but before a patent is issued, decide that the application does not comply with the Act or the Rules and return the application to the Examiner for further examination. Thus, the decision of the Commissioner under attack in the proposed judicial review is not the final step. The final step is the issuance by the Commissioner of the Letters Patent.

[53] Dubé J. further explained that if an applicant fails to get a patent, an appeal may be taken. If a third party wishes to attack a patent application, a protest may be filed during the application phase, or an impeachment action may be taken once the patent is granted. He wrote at paragraphs 28 and 30:

28 A person who has failed to obtain a patent from the Commissioner may appeal from the Commissioner's decision to the Federal Court under section 41 of the Patent Act. Should a patent be issued by the Commissioner, a third party who wishes to attack it may do so by launching an action in this Court under section 60 of the Patent Act. That is the scheme of the Patent Act and the Patent Rules. There is no jurisprudence to the effect that a Notice of Allowance has ever been challenged by way of judicial review.

...

30 What can a person do within the scheme of the Patent Act and the Patent Rules with reference to another party's patent application? That person may file a protest under section 10 of the Patent Rules, or make a filing of prior art under section 34.1 of the Patent Act, or, after the patent has issued, launch an action before the Federal Court under section 60 of the Patent Act to have the patent declared invalid or void. At the trial stage, all the grounds of invalidity can be brought before the Court including anticipation, prior art, obviousness and ambiguity. The scheme of the Patent Act and the Patent Rules constitutes a complete code in the sense that a party may not launch a Judicial Review Application against an intermediate administrative act as it would create a judicially sanctioned parallel procedure to the scheme set out by Parliament.

EXAMINATION OF THE PATENT APPLICATION

[54] The procedure respecting the examination of a patent application is provided for in the *Patent Rules*, particularly sections 30 through 33, a copy of which is set out in Schedule B and supplemented by MOPOP, parts of which, including Chapter 21, are set out in Schedule C.

Because of their length, I will not repeat these provisions in these Reasons.

[55] Subsection 30(1) of the *Rules* provides for circumstances where the examiner finds that the application is in good shape and is passed on for allowance. Subsection 30(2) provides that where the examiner finds that the application does not comply with the *Act* or *Rules*, a requisition (often called an office action) is to be sent to the applicant requiring amendment or arguments as to compliance. Subsection 30(3) provides for the circumstances where the examiner finds that the amendments or arguments fail to overcome the objections the examiner may reject the application. This rejection triggers subsection 30(4) of the *Rules*, which provides that a “Final Action” or “Décision Finale” notice shall be sent to the applicant giving the applicant one last chance to comply or provide good arguments to overcome the objections. Subsection 30(5) provides that where the applicant successfully deals with the “Final Action” objections, the application can proceed to allowance. Subsections 30(7) to 30(11) provide for circumstances where, after a notice of allowance has been sent, the applicant may make further amendments or the Commissioner, if he or she “*has reasonable grounds to believe that the application does not comply with the Act*”, may withdraw the allowance and require further examination.

[56] Rules 31 through 33 provide for amendment of the application after withdrawal of a rejection and in some other circumstances.

[57] Subsection 30(6) of the *Rules* provides for the circumstance where a rejection has not been withdrawn. In that case, the Commissioner *shall* review the matter and the applicant *shall* be given an opportunity to be heard. I repeat that subsection:

30. (6) Where the rejection is not withdrawn pursuant to subsection (5), the rejection shall be reviewed by the Commissioner and the applicant shall be given an opportunity to be heard.

30. (6) Lorsque le refus n'est pas annulé selon le paragraphe (5), le commissaire en fait la révision et le demandeur se voit donner la possibilité de se faire entendre.

[58] MOPOP addresses the Final Action procedure in more detail. Section 21.02, third paragraph, provides that no action shall be made final unless the grounds of objection have been previously raised by the examiner. If new objections are made, the action is not final.

21.02 The Final Action report

A final action is issued under the provisions of subsection 30(4) of the Patent Rules and the action must bear the notation "Final Action" or "Décision Finale".

The report must indicate the outstanding defects and must requisition the applicant to amend the application in order to comply with the Patent Act and the Rules or to provide arguments as to why the application does comply, within the six-month period after the requisition is made or within any shorter period established by the Commissioner in accordance with paragraph 73(1)(a) of the Patent Rules.

A final action is not written unless the examiner has made a previous requisition on the same grounds. If, in addition to the earlier objections, new objections on fresh grounds are being made, the action is not made final.

The report identifies which claims are allowable and indicates clearly what is objectionable in the application. If the rejection is based on prior art, the examiner will clearly indicate which claims are considered to lack novelty or are rendered obvious by the references cited in the action. The report deals with any differences between the claims and the teaching of the prior art and indicate why the invention claimed fails to show any advance of an inventive nature over the applied art and common general knowledge in the art.

If the rejection is based on any other contravention of the Patent Act or Rules, the report clearly identifies the sections of the Patent Act and Rules which have been contravened and gives the reasons therefor.

The final action report must be comprehensive and deal with every grounds for which the application is considered to be defective. The appeal process is restricted to the particular issues discussed in the final action and there is no further opportunity for the examiner to make objections which may have been missed in the final action. Similarly there is no opportunity for the applicant to amend the application other than to make any revisions required by a Commissioner's decision on the patentability of the case.

All final actions are posted by registered mail.

[59] Section 21.03 of MOPOP states that the Final Action must be comprehensive and deal with every ground upon which the application is considered to be defective:

21.03 Satisfactory Responses

Where in accordance with subsection 30(4) of the Patent Rules the applicant amends the application or provides arguments and the examiner has reasonable grounds to believe that the application complies with the Patent Act and the Patent Rules, the Commissioner notifies the applicant that the rejection is withdrawn and that the application has been found allowable (subsection 30(5) of the Patent Rules).

[60] If the applicant fails to deal with the Final Action registration satisfactorily, sections 21.04 and 21.05 of MOPOP provide that the matter is sent to the Patent Appeal Board and the “applicant is given an opportunity to be heard” (section 21.04) or the Board holds hearings “when requested by the applicant” (section 21.05).

[61] Section 21.06 of MOPOP deals with the review by the Patent Appeal Board:

21.06 Review by PAB

In any instance when the examiner decides that a response to a final action does not overcome the grounds of the action, in whole or in part, the application is forwarded to the PAB. The examiner prepares a summary of the reasons why the response does not overcome the rejection for the Board's consideration. The PAB informs the applicant that the application has been submitted for its consideration. The PAB advises the applicant that applicant may request a hearing to develop a fuller statement of the reasons for contending that the application is not open to objection on the grounds stated by the examiner. At this stage, the applicant is not entitled to submit further amendments to the application (section 31 of the Patent Rules) and must restrict any arguments to the issues raised in the final action and any amendment which was submitted to the examiner in response to that action. After reviewing the facts, the PAB presents its findings to the Commissioner.

[62] Section 21.07 provides for steps which the Commissioner may take after a review of the Board's findings:

THE CIRCUMSTANCES OF THIS CASE -“NEW MATTER”

[63] In the circumstances of this case, the Patent Appeal Board did not hold a hearing, the Commissioner accepted the Board's recommendation that the rejection on the grounds stated by the

examiner in the Final Action was not justified, and she returned the application to the examiner “*to address any outstanding defects which have been held in abeyance pending resolution of the new matter issue*”.

[64] The “*new matter issue*” is a shorthand way of referring to the objections raised by the examiner in the Final Action; namely, that the claims as presented in the application were broader in scope than what was set out in the description. As an example, one claim provided for a strengthened bumper made of aluminium, whereas the description referred only to a metal alloy.

[65] Strictly speaking, this is not a question of “new matter”, it is a question as to whether what is claimed is broader than or adequately supported by what is set out in the description. Section 38.2 of the *Patent Act* previously referred to permits amendments to the “specification” only in respect of matter that can be “reasonably inferred” from what is already there. A claim may be amended at any time up to when a patent is allowed, provided it is supported by what is in the description. While subsection 27(4) of the *Patent Act* provides that a specification shall end with claims, the claims are separate from the specification. I wrote about this distinction in *Merck & Co. v Pharmascience Inc.*, (2010), 85 CPR (4th) 179, 2010 FC 510 at paragraphs 43 to 70. I repeat paragraphs 43, 44 and 70:

43 *The Canadian Patent Act, R.S.C.1985, c. P-4, in the "new" version applicable to applications for a patent filed after October 1, 1989 and patents maturing from such applications, requires that a patent contain both a specification which describes the invention and claims which define the monopoly claimed by the patentee. Sections 27(3) and (4) of that Act provide:*

27(3) *The specification of an invention must*

(a) *correctly and fully describe the invention and its operation or use as contemplated by the inventor;*

(b) *set out clearly the various steps in a process, or the method of constructing, making, compounding or using a machine, manufacture or composition of matter, in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it pertains, or with which it is most closely connected, to make, construct, compound or use it;*

(c) *in the case of a machine, explain the principle of the machine and the best mode in which the inventor has contemplated the application of that principle; and*

(d) *in the case of a process, explain the necessary sequence, if any, of the various steps, so as to distinguish the invention from other inventions.*

27(4) *The specification must end with a claim or claims defining distinctly and in explicit terms the subject-matter of the invention for which an exclusive privilege or property is claimed.*

44 *The function of the specification is to describe the invention so that a person skilled in the art can understand what the invention is and, when the patent expires, put it into practice. The function of the claims is to define the monopoly that the patentee is asserting. Dr. Fox, in his textbook The Canadian Law and Practice Relating to Letters Patent for Inventions 4th ed., 1969, Carswell, Toronto, expressed the nature of the claims at pages 193-4 as follows:*

II. THE CLAIMS

History: *Although not required at common law, claims gradually came to be recognized as an effective means of defining and delimiting the ambit of the grant, and are now an essential part of the statutory consideration for the grant. As Lord Russell of Killowen pointed out in *Electric and Musical Industries Ltd. et al. v. Lissen Ltd. et al.*: "...the patentee is under a statutory obligation to state in the claims clearly and distinctly what is the invention which he desires to protect." The function of the claims was succinctly stated*

by him in the same case: "A patentee who describes an invention in the body of a specification obtains no monopoly unless it is claimed in the claims."

A claim is a portion of the specification that fulfils a separate and distinct function. The forbidden field must be found in the language of the claim and not elsewhere. It and it alone defines the monopoly; and the patentee is under a statutory obligation to state in the claims clearly and distinctly what is the invention that he desires to protect. The nature of the invention must be ascertained from the claims. They should be so distinct as to enable the public to ascertain what is protected by the patent without referring to the body of the specification, but they should not go beyond the invention.

Claim is a Limitation: *The claim is not, therefore, an added description of the invention, but a limitation of the description of the invention contained in the body of the specification.*

...

70 *Thus, claims construction today in the Canadian Courts is an easier task than in earlier days, because the function of the claims has been made clearer by statute. That function is to define distinctly and in explicit terms what the claimed monopoly is. To the extent that the claim is now to be "construed", that is the function of the Court alone. Experts may assist in two ways; first, they may inform the Court as to the knowledge that a person skilled in the art would have had at the relevant time, so as to bring that knowledge to bear reading both the description and the claims; second, an expert may assist in explaining any technical terms not within the experience expected of a Court. Thus, while construction is for a Court alone, the Court may have to make certain factual findings as to the knowledge of a person skilled in the art. The findings of the Court in this respect may best be considered as findings of mixed fact and law.*

[66] In this case, the point is more than an exercise in pedantics. An amendment to the description (specification) to add new matter can trigger objections as to prior art if the new matter is considered by the examiner to be disclosed in prior art that was not raised by the examiner before. On the other hand, an amendment only to a claim simply requires an examiner to determine whether

what is claimed is fairly based on what has already been disclosed in the description as it stands.

The examiner is not required to seek out new prior art.

RETURNING AN APPLICATION FOR FURTHER PROSECUTION

[67] In the present case, the Commissioner reversed the Final Action rejection, yet returned the matter to the examiner “*to address any outstanding defects which have been held in abeyance pending resolution of the new matter issue*”. What the examiner did was, in a further requisition, restate old objections and raise a new piece of prior art. Following that further requisition, the Commissioner was asked by the Applicants’ patent agent to ignore the requisition and to direct that the application be allowed. The Commissioner refused to do so. This judicial review is the result.

[68] The present circumstances are similar to those considered by this Court in *Belzberg v Canada (Commissioner of Patents)*, (2009), 75 CPR (4th) 283, 2009 FC 657. The Federal Court of Appeal refused a stay of the matter (78 CPR (4th) 81, 2009 FCA 275). An appeal on the merits, although filed by the Commissioner, was, for unexplained reasons, never pursued.

[69] In *Belzberg*, a Final Action was issued; the matter was considered by the Patent Appeal Board, who recommended that the rejection be reversed and the matter returned to the examiner for further prosecution consistent with its (the Board’s) recommendation. The Commissioner concurred and returned the matter for further prosecution consistent with the Board’s recommendations. The examiner issued a further requisition rejecting the application. An application for judicial review was made in this Court. Justice Simpson allowed the application and set aside the further requisition

and directed that the Commissioner grant the patent. Her Order (wrongly attributed to Justice Shore in some reports) reads:

ORDER

UPON hearing the submissions of counsel for both parties in Toronto on Thursday, November 20, 2008;

AND UPON considering the written submissions of the Applicant dated June 2, 2009 and the Respondent dated June 5, 2009;

THIS COURT ORDERS that, for the reasons given above,

1. *This application for judicial review is allowed and the Commissioner's Decision dated January 25, 2007 is hereby set aside.*
2. *The Post Decision Reports and Requisitions are hereby set aside and the Patent Application is hereby reinstated as an active application. This means that the Respondent's submissions about outstanding fees and deemed abandonment of the Patent Application are moot.*
3. *The Commissioner is to forthwith make a decision granting the Patent Application under section 27 of the Act as it was amended by the Applicant in the Voluntary Amendment.*
4. *Costs are to the Applicant, pursuant to Rule 400 of the Federal Courts Rules. If not agreed, those costs should be assessed based on the midpoint of Column III on the table in Tariff B of the Federal Courts Rules.*

"Sandra J. Simpson"

[70] In her Reasons, Justice Simpson reviewed the arguments of the parties and wrote at paragraphs 41 to 44:

41 The Respondent argued that the phrase "outstanding defects" as it is used in subsection 30(3) of the Rules cannot be read as "all outstanding defects" as such an interpretation would go against the spirit of the Act. However, I do not find that a requirement that final actions detail "all" outstanding defects is unduly onerous or contrary to the spirit and intent of the patent regime. The Canadian patent application process can be quite lengthy and uncertain, as evidenced by the present case. It seems sensible to me in that context to give the word "final" its ordinary meaning. At the point when a requisition is issued that potentially triggers a hearing, it is reasonable to conclude that all outstanding issues would be before the PAB.

42 The Applicant highlighted the fact that the phrase "outstanding defects" was a recent addition to the Rules, absent from the provision relating to final actions in force prior to October 1, 1996. Section 47(2) of the former Patent Rules, C.R.C. 1878, c. 1250, stated:

A notice to the applicant of any final action shall bear the notation "Final Action" and shall prescribe the time within which the applicant may amend the application as required by the examiner or lodge a request that that the action by the examiner be reviewed by the Commissioner.

43 I view the word "outstanding" in the amended provision as indicating that the defects identified in a final action are comprehensive rather than a mere selection. This interpretation is not only harmonious with the object and intention of the scheme, but also gives meaning to the amendment.

44 In my view, the MOPOP, the language of section 30, the scheme of the Act and the amendment to the provision regarding "Final Actions", make it clear that a final action is to dispose of a patent application. In other words, following a PAB hearing the Commissioner is to make one of two decisions:

- i) *refuse the patent application under section 40 of the Act if the PAB has found alleged defects to be justified; or*
- ii) *grant the patent application under section 27 of the Act.*

[71] She found, as set out in paragraph 43, that a “Final Action” must be final. All objections must be raised, not just a mere selection. Justice Simpson, at paragraphs 19 to 25 of her Reasons found the Commissioner’s decision and the Board’s recommendations to be “bizarre”, as there was no basis for returning the application for further prosecution. She wrote:

19 On January 25, 2007, the Commissioner issued a decision. Its cover page describes the document as one which includes both the findings of the PAB and the Commissioner's decision (the Decision).

20 Regarding the PAB's finding, the document says:

In summary, the Board finds that the invention is disclosed in sufficient detail and is claimed sufficiently clearly to allow an ordinary worker who is skilled in the art to implement the invention. The claimed invention is not obvious in view of the prior art and the application is directed to subject matter which falls under the definition of invention.

This Board therefore recommends that the examiner's rejection of the application be reversed and that the application be returned to the examiner for further prosecution consistent with these recommendations (the Recommendation).

21 Immediately following the PAB's Recommendation is the Decision, which consists of one paragraph. It reads:

I concur with the recommendation of the Board that the Examiner's rejection of the application be reversed and return the application to the Examiner for further prosecution consistent with the Board's recommendation.

22 The Decision adopts the final paragraph of the PAB's Recommendation without reasons. Accordingly, the PAB's findings may be regarded as the reasons for the Commissioner's decision.

23 Both the PAB's Recommendation and the Decision appear bizarre. The PAB made no recommendations for further prosecution. This means there was no basis for returning the Patent Application to an Examiner for further prosecution. The Commissioner used the same meaningless language when he returned the Patent Application for further prosecution consistent with the PAB's Recommendation when, in fact, no such recommendation existed.

24 The MOPOP, described above, sheds some light on the language used by the PAB and the Commissioner. It indicates that this disposition is a longstanding formulation which actually means in the circumstances of this case that the Applicant is given a final chance to amend the Patent Application before it is approved.

25 The MOPOP makes it clear that the Final Action Report does lead to a disposition of the Patent Application and not to further examination based on concerns which were not raised in the Final Action Report.

[72] What, then, are the circumstances of this present case now before the Court that may differentiate it from *Belzberg*, or make it more or less the same. In the present case:

- the Final Action did not state that there were any “outstanding matters”;
- the Applicants in their response stated that there were no outstanding matters and the Patent Appeal Board agreed, as set out in paragraph 4 of its recommendations, that the Applicant did not understand that there were any other possible and outstanding objections;

- a member of the Board contacted the examiner, without notifying the Applicants and, as set out in paragraph 5 of the Board's recommendations, concluded that the examiner believed that there would still be other objections to be applied, including prior art. This conclusion cannot be supported by either of the memoranda in the record, neither the "Summary of reasons" nor the "Patent Appeal Board Memo". The first says nothing of this, the second purports only to answer "hypothetical" questions;
- the same member of the Board telephoned the Applicants' patent agent. The substance of the conversation is unclear. It is not known whether the Applicants were advised that a hearing could be held, and if so advised, that they declined the opportunity;
- no hearing was held;
- there is nothing in the record indicating that, as of the date of the Board's recommendation or the Commissioner's decision, any "outstanding matters" had been identified in any way, let alone clearly identified;
- when the application was returned to the examiner, the examiner raised old prior art objections that had been subsumed by the Final Action and Commissioner's decision, as well as a new piece of prior art never before raised;

- the Commissioner was asked to step in, set aside the examiner's latest objections, and issue a patent. She refused.

[73] I find that the Board's inquiries and recommendations as to outstanding matters to be completely unsatisfactory and lacking in due process. First, it is evident from the record that there were no "outstanding matters". Second, a belief gathered by one Board member in a private conversation with the examiner is a completely improper way to gather relevant evidence. Third, the failure explicitly to present the Applicants' patent agent with the Board's view that there were "outstanding matters" without clearly and expressly offering the Applicants an opportunity to be heard was contrary to *Patent Rule* 30(6). I do not need to go to the Applicants' arguments as to the *Bill of Rights* in this regard.

[74] Therefore, whether the matter is considered on the basis of lack of procedural fairness or correctness having regard to the Subrule 30(6) or reasonableness having regard to the factual history, the decision of the Commissioner, inasmuch as it states that the examiner must consider "outstanding matters", is wrong.

[75] The Applicants did not seek judicial review of the Commissioner's decision. They sought judicial review of a later decision in which the Commissioner refused to direct that the examiner allow the application.

IS THIS APPLICATION FOR JUDICIAL REVIEW TIMELY?

[76] Respondent's Counsel argues that the application for judicial review really seeks to attack the Commissioner's decision to return the application for prosecution of "outstanding matters" rather than the later decision to refuse to set aside the examiner's subsequent rejection and allow the application. There is no dispute that the present application was filed within the time limits of the later decision, but several months after the earlier.

[77] I find that, since the Commissioner did not "refuse" the application, no appeal could be taken under section 41 or any other provision of the *Patent Act*. A judicial review, not an appeal, is the proper way to proceed.

[78] I find that the present application for judicial review was filed in a timely manner. In *Belzberg, supra*, the application for judicial review was taken in respect of a similar decision taken by the Commissioner, after a subsequent rejection by the examiner. No objection as to timeliness was apparently taken in *Belzberg*.

[79] In considering the timeliness of this application, as well as what relief might be appropriate, I return to the earlier decision of the Commissioner to reverse the examiner on the Final Action issues and to return the application to deal with "outstanding matters". What the examiner did was recycle old issues and raise a brand new one.

[80] I find, as Justice Simpson did in *Belzberg, supra*, that a Final Action is meant to be just that, final. There is an obligation upon the examiner to put everything on the table that requires the

applicants, and, if necessary, the Board and the Commissioner, to deal with. There is no provision to reserve upon or keep certain matters “outstanding”.

[81] Even if there were provisions for keeping matters outstanding, the record in this case fails to demonstrate clearly that there were “outstanding” matters or, if so, what they were.

[82] Since the application was returned to the examiner, the only matter to be dealt with, clerical corrections aside, was any review of changes to the description or claims as may be submitted by the Applicants. If there are no such changes, then, since all “outstanding” matters have been subsumed in the Final Action as subsequently reversed by the Commissioner, there cannot be grounds left for a further substantive requisition. Allowance must follow as a consequence, leaving the issued patent to be challenged, if appropriate, by third parties in the Courts.

RELIEF

[83] There remains the question as to what relief is appropriate since the application for judicial review of the decision of the Commissioner of December 4, 2009 will be allowed.

[84] It is appropriate to return the matter to the Commissioner for reconsideration of the request of September 15, 2009, (the so-called “Petition for Relief”) bearing in mind the following:

- the Board’s recommendation that there were “outstanding matters” was in error;
- nothing on the record indicates that there were “outstanding matters”;

- in view of *Belzberg*, the reservation of matters from a Final Action is a questionable, if not improper, procedure;

- the examiner, in reviewing the application after the Commissioner's decision, did not address "outstanding matters", the examiner only addressed old matters already dealt with and raised a brand new one;

[85] The most appropriate action would be to allow the application and let the rest of the world, if so advised, challenge the validity of the resulting patent.

[86] The Applicants have been successful and I award them costs fixed at \$4,000.00.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT'S JUDGMENT is that:

1. The application is allowed;
2. The decision of the Commissioner of Patents dated December 4, 2009 respecting Patent Application Number 2,159,968, is set aside;
3. The matter is returned to the Commissioner for re-determination, bearing in mind the Reasons herein;
4. The Applicants are entitled to costs fixed in the sum of \$4,000.00.

"Roger T. Hughes"

Judge

SCHEDULE A

13.10 Allowance and notice of allowance

Subsections 30(1) and 30(5) of the *Patent Rules* provide that where an examiner has reasonable grounds to believe that an application complies with the *Patent Act* and *Patent Rules*, the Commissioner shall notify the applicant that the application has been found allowable.²²

The process within the Office is that an examiner approves an application for allowance. Patent Operations then checks the application to ensure certain formal requirements are met, and subsequently issues a notice of allowance requisitioning payment of the applicable final fee set out in item 6 of Schedule II within six months.

The application is “allowed” on the date at which the notice of allowance is sent.

Once an application is allowed, prosecution before the examiner has technically ceased. Amendments after allowance are, in accordance with subsection 32(2) of the *Patent Rules*, not permitted if they would require a further search by the examiner or if they would make the application not comply with the *Patent Act* and *Patent Rules*. Further, in accordance with subsection 32(1) of the *Patent Rules* an amendment after allowance may only be made upon payment of the fee set out in item 5 of Schedule II unless the amendment is to correct a clerical error that is obvious on the face of the application.

Failure to pay the final fee will result in abandonment in accordance with paragraph 73(1)(f) of the *Patent Act*. An application that has been reinstated after being abandoned for failure to pay the final fee may be amended, and is subject to further searching and examination before a new notice of allowance is sent.

Note that where an application is abandoned for failure to pay the final fee, paragraph 30(10)(a) of the *Patent Rules* provides that upon reinstatement the previous notice of allowance is deemed never to have been sent. In accordance with paragraph 30(10)(b) of the *Patent Rules*, a further notice of allowance will not requisition payment of the final fee unless the final fee submitted to effect reinstatement has been refunded or was not, in view of amendments changing the number of pages in the allowed application, sufficient.

13.11 Withdrawal from allowance

Subsection 30(7) of the *Patent Rules* provides that if, after a notice of allowance is sent but before a patent is issued, the Commissioner has reasonable grounds to believe that the application does not comply with the *Patent Act* or *Patent Rules*, the Commissioner shall notify the applicant of that fact, withdraw the notice of allowance, refund the final

fee (if it has been paid), and return the application to the examiner for further examination.

The notice of allowance is deemed never to have been sent, nor (if applicable) the final fee to have been paid, and the provisions of sections 32 and 33 of the *Patent Rules* do not apply.

An application may be withdrawn from allowance, for example, in view of applicable prior art identified in a protest or in a filing of prior art under section 34.1 of the *Patent Act*.

13.12 Issuance of a patent

Upon payment of the final fee referred to in 13.10, the Office will process the application to grant, and will generally issue the patent on a Tuesday approximately nine weeks after payment of the final fee. The patent will issue in the name(s) of the inventor(s), or to the legal representative(s) on the basis of appropriate documentation such as assignments received no later than the day on which the final fee is paid.

In accordance with subsection 33(1) of the *Patent Rules*, where the final fee has been paid on an allowed application and has not been refunded, no amendment may be made to the application except where the final fee was paid to reinstate an application previously abandoned in accordance with paragraph 73(1)(f) of the *Patent Act* for failure to pay that final fee, and prior to a new notice of allowance being sent.

Under paragraph 4(10)(b) of the *Patent Rules*, a final fee may be refunded if the request for refund is received before the technical preparations for issue are begun.²³

Where a patent issues from an application filed prior to October 1, 1989, it will receive a patent number in the 1,000,000 series. For applications having an application number in the 2,000,000 series, the issued patent will bear the same number as the application.

SCHEDULE B

30. (1) Where an examiner, after examining an application, has reasonable grounds to believe that the application complies with the Act and these Rules, the Commissioner shall notify the applicant that the application has been found allowable and shall requisition the payment of the applicable final fee set out in paragraph 6(a) or (b) of Schedule II within the six-month period after the date of the notice.

(2) Where an examiner examining an application in accordance with section 35 of the Act or the Act as it read immediately before October 1, 1989 has reasonable grounds to believe that an application does not comply with the Act or these Rules, the examiner shall inform the applicant of the application's defects and shall requisition the applicant to amend the application in order to comply or to provide arguments as to why the application does comply, within the six-month period after the requisition is made or, except in respect of Part V, within any shorter period established by the Commissioner in accordance with paragraph 73(1)(a) of the Act.

(3) Where an applicant has replied in good faith to a

30. (1) Lorsque l'examineur qui a examiné une demande a des motifs raisonnables de croire que celle-ci est conforme à la Loi et aux présentes règles, le commissaire avise le demandeur que sa demande a été jugée acceptable et lui demande de verser la taxe finale applicable prévue aux alinéas 6a) ou b) de l'annexe II dans les six mois suivant la date de l'avis.

(2) Lorsque l'examineur chargé de l'examen d'une demande conformément à l'article 35 de la Loi ou de la Loi dans sa version antérieure au 1^{er} octobre 1989 a des motifs raisonnables de croire que celle-ci n'est pas conforme à la Loi et aux présentes règles, il informe le demandeur des irrégularités de la demande et lui demande de modifier sa demande en conséquence ou de lui faire parvenir ses arguments justifiant le contraire, dans les six mois suivant la demande de l'examineur ou, sauf pour l'application de la partie V, dans le délai plus court déterminé par le commissaire en application de l'alinéa 73(1)a) de la Loi.

(3) Lorsque le demandeur a répondu de bonne foi à la demande de l'examineur

requisition referred to in subsection (2) within the time provided but the examiner has reasonable grounds to believe that the application still does not comply with the Act or these Rules in respect of one or more of the defects referred to in the requisition and that the applicant will not amend the application to comply with the Act and these Rules, the examiner may reject the application.

(4) Where an examiner rejects an application, the notice shall bear the notation “Final Action” or “Décision finale”, shall indicate the outstanding defects and shall requisition the applicant to amend the application in order to comply with the Act and these Rules or to provide arguments as to why the application does comply, within the six-month period after the requisition is made or, except in respect of Part V, within any shorter period established by the Commissioner in accordance with paragraph 73(1)(a) of the Act.

(5) Where in accordance with subsection 30(4) the applicant amends the application or provides arguments and the examiner has reasonable grounds to believe that the application complies with the Act and these Rules, the Commissioner shall notify the applicant that

visée au paragraphe (2) dans le délai prévu, celui-ci peut refuser la demande s’il a des motifs raisonnables de croire qu’elle n’est toujours pas conforme à la Loi et aux présentes règles en raison des irrégularités signalées et que le demandeur ne la modifiera pas pour la rendre conforme à la Loi et aux présentes règles.

(4) En cas de refus, l’avis donné porte la mention « Décision finale » ou « Final Action », signale les irrégularités non corrigées et exige que le demandeur modifie la demande pour la rendre conforme à la Loi et aux présentes règles ou fasse parvenir des arguments justifiant le contraire, dans les six mois qui suivent ou, sauf pour l’application de la partie V, dans le délai plus court déterminé par le commissaire en application de l’alinéa 73(1)a) de la Loi.

(5) Lorsque, conformément au paragraphe 30(4), le demandeur modifie la demande ou fait parvenir des arguments et que l’examineur a des motifs raisonnables de croire qu’elle est conforme à la Loi et aux présentes règles, le commissaire avise le demandeur que le refus est annulé et que la demande a été jugée acceptable et lui demande de verser la taxe finale applicable prévue aux alinéas 6a) ou b) de l’annexe II

the rejection is withdrawn and that the application has been found allowable and shall requisition the payment of the applicable final fee set out in paragraph 6(a) or (b) of Schedule II within the six-month period after the date of the notice.

(6) Where the rejection is not withdrawn pursuant to subsection (5), the rejection shall be reviewed by the Commissioner and the applicant shall be given an opportunity to be heard.

(7) If after a notice is sent in accordance with subsection (1) or (5) but before a patent is issued the Commissioner has reasonable grounds to believe that the application does not comply with the Act or these Rules, the Commissioner shall

(a) notify the applicant of that fact;

(b) notify the applicant that the notice is withdrawn;

(c) return the application to the examiner for further examination; and

(d) if the final fee has been paid, refund it.

(8) Subsection (7) does not apply in respect of an application that has been deemed to be abandoned under section 73 of the Act unless the application has been

dans les six mois suivant la date de l'avis.

(6) Lorsque le refus n'est pas annulé selon le paragraphe (5), le commissaire en fait la révision et le demandeur se voit donner la possibilité de se faire entendre.

(7) Lorsque, après l'envoi de l'avis visé aux paragraphes (1) ou (5) mais avant la délivrance d'un brevet, il a des motifs raisonnables de croire que la demande n'est pas conforme à la Loi et aux présentes règles, le commissaire :

a) en avise le demandeur;

b) avise le demandeur que l'avis est retiré;

c) renvoie la demande à l'examineur pour qu'il en poursuive l'examen;

d) si la taxe finale a été versée, la rembourse.

(8) Le paragraphe (7) ne s'applique à l'égard d'une demande considérée comme abandonnée en vertu de l'article 73 de la Loi que si la demande est rétablie à l'égard de chaque omission visée au paragraphe 73(1) de la Loi ou aux articles 97 ou 151.

(9) L'avis adressé au demandeur conformément au paragraphe (7) a les conséquences suivantes :

reinstated in respect of each failure to take an action referred to in subsection 73(1) of the Act or section 97 or 151 of these Rules.

(9) After a notice is sent to the applicant in accordance with subsection (7),

(a) the notice that was sent in accordance with subsection (1) or (5) is deemed never to have been sent; and

(b) sections 32 and 33 do not apply unless a further notice is sent to the applicant in accordance with subsection (1) or (5).

(10) If an application has been abandoned under paragraph 73(1)(f) of the Act and reinstated,

(a) for the purposes of this section and section 32, any previous notice that was sent in accordance with subsection (1) or (5) is deemed never to have been sent; and

(b) if the final fee has already been paid and has not been refunded, any further notice sent in accordance with subsection (1) or (5) shall not requisition payment of the final fee.

(11) Subsection 26(1) does not apply in respect of the

a) l'avis envoyé conformément aux paragraphes (1) ou (5) est réputé n'avoir jamais été envoyé;

b) les articles 32 et 33 ne s'appliquent que si un nouvel avis est envoyé au demandeur conformément aux paragraphes (1) ou (5).

(10) Le rétablissement de la demande considérée comme abandonnée en application de l'alinéa 73(1)f) de la Loi a les conséquences suivantes :

a) tout avis antérieur envoyé au titre des paragraphes (1) ou (5) est réputé n'avoir jamais été envoyé pour l'application des articles 30 et 32;

b) si la taxe finale a déjà été payée et n'a pas été remboursée, un nouvel avis envoyé au titre des paragraphes (1) ou (5) ne demande pas le paiement de la taxe finale.

(11) Le paragraphe 26(1) ne s'applique pas à l'égard des délais prévus aux paragraphes (1) et (5).

MODIFICATIONS

31. La demande qui a été refusée par l'examineur ne peut être modifiée après l'expiration du délai pour obtempérer à la demande de

times set out in subsections (1) and (5).

l'examineur en application du paragraphe 30(4), sauf dans les cas suivants :

AMENDMENTS

31. An application that has been rejected by an examiner shall not be amended after the expiry of the time for responding to the examiner's requisition, made pursuant to subsection 30(4), except

(a) where the rejection is withdrawn in accordance with subsection 30(5);

(b) where the Commissioner is satisfied after review that the rejection is not justified and the applicant has been so informed;

(c) where the Commissioner has informed the applicant that the amendment is necessary for compliance with the Act and these Rules; or

(d) by order of the Federal Court or the Supreme Court of Canada.

32. (1) Except as otherwise provided by the Act or these Rules, after the applicant is sent a notice pursuant to subsection 30(1) or (5), no amendment, other than an amendment to correct a clerical error that is obvious on the face of the application, may be made to the application

a) le refus est annulé en application du paragraphe 30(5);

b) le commissaire est convaincu, après révision, que le refus est injustifié et il en a informé le demandeur;

c) le commissaire a informé le demandeur que la modification est nécessaire pour que la demande soit conforme à la Loi et aux présentes règles;

d) la Cour fédérale ou la Cour suprême du Canada l'ordonne.

32. (1) Sauf disposition contraire de la Loi ou des présentes règles, après l'expédition d'un avis au demandeur conformément aux paragraphes 30(1) ou (5), aucune modification, autre que celle visant à corriger une erreur d'écriture évidente au vu de la demande, ne peut être apportée à la demande sans que la taxe prévue à l'article 5 de l'annexe II ait été versée.

(2) Sauf disposition contraire de la Loi ou des présentes règles, après l'expédition d'un avis au demandeur conformément aux paragraphes 30(1) ou (5), il ne

unless the fee set out in item 5 of Schedule II is paid.

(2) Except as otherwise provided by the Act or these Rules, after the applicant is sent a notice pursuant to subsection 30(1) or (5), no amendment may be made to the application that would necessitate a further search by the examiner in respect of the application or that would make the application not comply with the Act or these Rules.

33. (1) Except as otherwise provided by the Act or these Rules, no amendment may be made to an application after payment of the final fee referred to in subsection 30(1) or (5).

(2) If an application has been abandoned under paragraph 73(1)(f) of the Act and reinstated,

(a) subsection (1) does not apply; and

(b) no amendment may be made to an application after a new notice is sent in accordance with subsection 30(1) or (5).

peut être apporté à la demande aucune modification qui obligerait l'examineur à effectuer un complément de recherche à l'égard de la demande ou qui rendrait la demande non conforme à la Loi et aux présentes règles.

33. (1) Sauf disposition contraire de la Loi ou des présentes règles, aucune modification ne peut être apportée à la demande après le versement de la taxe finale visée aux paragraphes 30(1) ou (5).

(2) Le rétablissement de la demande considérée comme abandonnée en application de l'alinéa 73(1)f) de la Loi a les conséquences suivantes :

a) le paragraphe (1) ne s'applique pas;

b) aucune modification ne peut être apportée à la demande après l'expédition d'un nouvel avis conformément aux paragraphes 30(1) ou (5).

SCHEDULE C

21.01

Introduction

When the prosecution of a patent application has progressed to the point where the examiner has reasonable grounds to believe that the application does not comply with the *Patent Act* or the Rules in respect to one or more of the defects referred to in previous requisitions and that the applicant will not amend the application to comply with the *Patent Act* and the Rules, the examiner may reject the application in a Final Action. Section 30 of the *Patent Rules*, as it appears in Part 1 of the Regulations defines the final action requirements and applies to all pending applications regardless of their filing date.

21.02

The Final Action report

A final action is issued under the provisions of subsection 30(4) of the *Patent Rules* and the action must bear the notation "Final Action" or "Décision Finale".

The report must indicate the outstanding defects and must requisition the applicant to amend the application in order to comply with the *Patent Act* and the Rules or to provide arguments as to why the application does comply, within the six-month period after the requisition is made or within any shorter period established by the Commissioner in accordance with paragraph 73(1)(a) of the *Patent Rules*.

A final action is not written unless the examiner has made a previous requisition on the same grounds. If, in addition to the earlier objections, new objections on fresh grounds are being made, the action is not made final.

The report identifies which claims are allowable and indicates clearly what is objectionable in the application. If the rejection is based on prior art, the examiner will clearly indicate which claims are considered to lack novelty or are rendered obvious by the references cited in the action. The report deals with any differences between the claims and the teaching of the prior art and indicate why the invention claimed fails to show any advance of an inventive nature over the applied art and common general knowledge in the art.

If the rejection is based on any other contravention of the *Patent Act* or Rules, the report clearly identifies the sections of the *Patent Act* and Rules which have been contravened and gives the reasons therefor.

The final action report must be comprehensive and deal with every grounds for which the application is considered to be defective. The appeal process is restricted to the particular issues discussed in the final action and there is no further opportunity for the examiner to make objections which may have been missed in the final action. Similarly there is no opportunity for the applicant to amend the application other than to make any revisions required by a Commissioner's decision on the patentability of the case.

All final actions are posted by registered mail.

21.03

Satisfactory Responses

Where in accordance with subsection 30(4) of the *Patent Rules* the applicant amends the application or provides arguments and the examiner has reasonable grounds to believe that the application complies with the *Patent Act* and the *Patent Rules*, the Commissioner notifies the applicant that the rejection is withdrawn and that the application has been found allowable (subsection 30(5) of the *Patent Rules*).

21.04

Unsatisfactory Responses

Where the rejection is not withdrawn pursuant to subsection 30(5) of the *Patent Rules* because the examiner is not satisfied that an amendment and/or argument submitted in the applicant's response is sufficient to overcome the rejection, the application is forwarded to the Patent Appeal Board (PAB) to be reviewed and the applicant is given the opportunity to be heard.

21.05

Patent Appeal Board

The Patent Appeal Board (PAB) consists of one or more senior members of the Patent Office who have not participated in the examination of the application under review. The Board reviews the grounds for rejection in final actions and holds hearings under section 30(6) of the *Patent Rules* when requested by applicants and advises the Commissioner on these matters.

21.06

Review by PAB

In any instance when the examiner decides that a response to a final action does not overcome the grounds of the action, in whole or in part, the application is forwarded to the PAB. The examiner prepares a summary of the reasons why the response does not overcome the rejection for the Board's consideration. The PAB informs the applicant that the application has been submitted for its consideration. The PAB advises the applicant that applicant may request a hearing to develop a fuller statement of the reasons for contending that the application is not open to objection on the grounds stated by the examiner. At this stage, the applicant is not entitled to submit further amendments to the application (section 31 of the *Patent Rules*) and must restrict any arguments to the issues raised in the final action and any amendment which was submitted to the examiner in response to that action. After reviewing the facts, the PAB presents its findings to the Commissioner.

21.07

Commissioner's Decision

The Commissioner reviews the findings of the PAB and if satisfied that:

1. there is no patentable subject matter in the application, will refuse the application under section 40 of the Patent Act and will inform the applicant of the reasons therefor;

2. the examiner's rejection was not justified, the application will be returned to the examiner for further prosecution (subsection 31(b) of the *Patent Rules*, or
3. certain amendments are necessary for compliance with the *Patent Act* or the *Patent Rules*, the applicant will be informed of the required amendments and the reasons therefor and will be given a three month period to effect the changes. Should the applicant not amend the application accordingly it will be refused under section 40 of the *Patent Act*.

The Commissioner's decision will provide the reasons why he arrived at that particular decision and will justify his findings with respect to the *Patent Act*, *Patent Rules* and pertinent jurisprudence. Such decisions form Patent Office policy and provide precedence for the guidance of applicants and patent examiners. The original signed copy of the decision is sent by registered mail to the applicant or agent. A Commissioner's decision becomes part of the prosecution file and therefore is open to public inspection. Commissioner's decisions (CD), grouped according to the grounds of objection in the Final Action, are available in the Patent Office. A notice of every CD will be published in the CPOR along with a summary except for applications filed prior to October 1, 1989 that were subsequently refused by the Commissioner. Such CD's may be published with the permission of the applicant.

21.08

Amendments subsequent to a Final Action

A rejected application may not be amended after the expiry of the time for responding to the examiner's requisition made pursuant to subsection 30(4) of the *Patent Rules* except

1. where the rejection is withdrawn in accordance with subsection 30(5) of the *Patent Rules*;
2. where the Commissioner is satisfied after review that the rejection is not justified and the applicant has been so informed; or
3. where the Commissioner has informed the applicant that the amendment is necessary for compliance with the *Patent Act* or the Rules; or
4. by order of the Federal Court or the Supreme Court of Canada.

In the case of (a) above, where the examiner withdraws the final action under subsection 30(5) of the *Patent Rules*, the normal prosecution resumes and the application is allowed by the examiner, the grounds for rejection having been overcome. Any further amendment of the application by the applicant must take the form of an amendment after allowance and is subject to the conditions set forth for such amendments in 19.08.06 of this Manual.

In the case of (b) above, where the Commissioner is satisfied that the rejection was not justified, the applicant is so notified and the application is returned to the examiner and normal prosecution resumes. The application is normally allowed at this stage but may be amended voluntarily by the applicant (subsection 31(b) of the *Patent Rules*).

In the case of (c) above, where the Commissioner has informed the applicant that an amendment of the application is necessary for compliance with the *Patent Act* or the *Patent Rules*, the

applicant must make the amendment required by the Commissioner but no further amendment will be accepted (subsection 31(c) of the *Patent Rules*).

In the case of (d) above where the applicant has appealed a Commissioner's refusal of an application under section 40 of the *Patent Act* to the Federal Court or the Supreme Court of Canada, the application may be amended in accordance with the decisions of those Courts (subsection 31(d) of the *Patent Rules*).

21.09

Appeals

If the Commissioner refuses an application under section 40 of the *Patent Act*, the applicant in accordance with section 41 of the *Patent Act*, may appeal the refusal to the Federal Court Trial Division. The Federal Court Trial Division may in turn, be appealed to the Federal Court of Appeal and, with leave, the Supreme Court of Canada.

Whenever an appeal to the Federal Court is lodged, the applicant must serve Notice of Appeal on the Commissioner. The original Notice is placed in the Patent Office file of the application. Since the Federal Court Trial Division's decision may be further appealed, no further action is taken in the Patent Office until it has been verified that the appeal process has been terminated.

21.10

Prosecution after Court proceedings

The examiner takes action in accordance with the final judgment of the courts.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-2158-09

STYLE OF CAUSE: ROBERT WILLIAM BARTLEY et al. v.
COMMISSIONER OF PATENTS, et al.

PLACE OF HEARING: TORONTO, ONTARIO

DATES OF HEARING: JUNE 28-29, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** HUGHES J.

DATED: July 12, 2011

APPEARANCES:

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