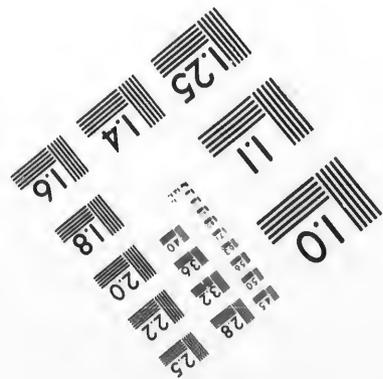
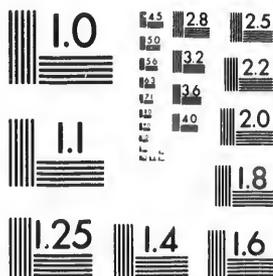


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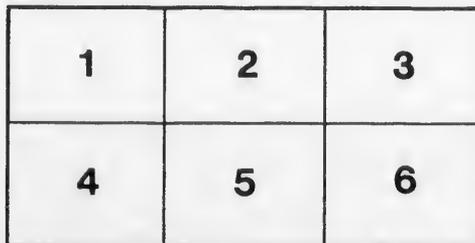
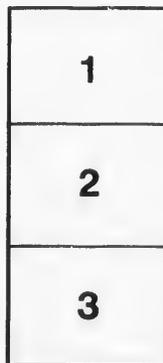
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THE
MANUFACTURING CLAUSE
— OF THE —
CANADIAN PATENT LAW.

AN ARGUMENT AND ADVICE TO PATENTEES

— BY —

A. HARVEY, C.E.,
SOLICITOR OF PATENTS,
AND COUNSEL IN PATENT CAUSES,
OTTAWA, CANADA.

PRICE 25 CENTS.

Entered according to Act of Parliament of Canada in the year 1884 by A. Harvey,
in the Office of the Minister of Agriculture.

Ottawa :

PRINTED BY C. W. MITCHELL, PROPRIETOR OF THE "FREE PRESS."

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INTRODUCTION.

Experience shows that many patentees overlook Section 28, which is printed upon each patent, and remain therefore in ignorance of the same until, perhaps, when the two years have nearly expired, they receive a circular from a patent solicitor drawing their attention to it. To my certain knowledge a local solicitor used to send such a circular, quoting the section in full and advising the procuration of a delay, while another local man, with "virtuous indignation," has been or is sending the following Post Card:

☞ Please keep this Card for future reference.

"As a false copy of the 28th Section of the Patent Act is circulated for the purpose of obtaining a fee, under the pretence that to keep a Patent valid, the invention must be manufactured in Canada within Two Years from the date of the Patent, or an extension of the period be obtained from the Commissioner of Patents; and you are hereby informed that such information is untrue. The meaning of the Law, as decided by the Commissioner of Patents is, that for two years the Patentee has the privilege of refusing to allow any person to manufacture, who offers him a reasonable price, but after that period the privilege ceases. If the Patentee has no demand for his invention, he is not required to manufacture or sell it to keep his Patent valid; nor is it necessary to obtain an extension of the period of Two Years if the Patentee will sell the right to manufacture in Canada at a reasonable price. No patent has been declared invalid under the 28th Section of the Act since its enactment.

"A copy of the Law, and Pamphlet expounding the same with respect to manufacture and importation, will be sent on receipt of One Dollar."*

At these conflicting statements patentees became naturally much perplexed and a good deal of uncertainty prevails upon the subject.

By far the greatest number of patentees who are unable to manufacture within the time limited by the law, now avail themselves of the provision of sub-section 2, and obtain grants of delay, and it is therefore the more advisable for every patentee to place his patent on an equal footing.

The present pages are intended to present a fair statement of both sides of the question, to throw additional light upon it, and to give my own individual opinion, for which I have usually charged a higher fee, more fully, and at a nominal cost.

I hope, therefore, that this pamphlet will help those who are in doubt to come to a definite decision without difficulty.

A. H.

OTTAWA, Canada, 1st August, 1884.

* This pamphlet was no other than the report of the case of *Barter vs. Smith*, distributed gratis by the Patent Office.

THE MANUFACTURING CLAUSE OF THE CANADIAN PATENT LAW.

The Patent Act of 1872, contains the following section, which is printed upon every patent issued and which all patentees may read for themselves in their own patent deed:

“ 28. Every patent granted under this Act shall be subject and expressed to be subject to the condition that such patent and all the rights and privileges thereby granted shall cease and determine, and the patent shall be null and void, at the end of two years from the date thereof, unless the patentee, or his assignee or assignees shall, within that period, have commenced, and shall, after such commencement, continuously carry on in Canada the construction or manufacture of the invention or discovery patented, in such manner that any person desiring to use it may obtain it, or cause it to be made for him at a reasonable price, at some manufactory or establishment for making or constructing it in Canada; and that such patent shall be void if after the expiration of twelve months from the granting thereof, the patentee, or his assignee or assignees, for the whole or part of his interest in the patent, imports, or causes to be imported into Canada, the invention for which the patent is granted; and provided always, that in case disputes should arise as to whether a patent has or has not become null and void under the provisions of this section, such disputes shall be settled by the Minister of Agriculture or his Deputy,—whose decision shall be final.

“ 2. Whenever a patentee has been unable to carry on the construction or manufacture of his invention within the two years hereinbefore mentioned, the Commissioner may, at any time not more than three months before the expiration of that period, grant to the patentee a further delay on his adducing proof to the satisfaction of the Commissioner that he was, for reasons beyond his control, prevented from complying with the above mentioned condition.*

“ 3. The Commissioner may grant to the patentee or his assignee or assignees for the whole or any part of the patent, an extension for a further period of time, not exceeding one year beyond the twelve months limited by the first paragraph of this section, during which he may import or cause to be imported into Canada the invention for which the patent is granted: Provided, that the patentee or his assignee or assignees for the whole or any part of the patent, shall show cause satisfactory to the Commissioner to warrant the granting of such extension; but no extension shall be granted, unless application be made to the Commissioner at some time within three months before the expiry of the twelve months aforesaid or any extension thereof.”†

*38]Victoria, Chap. 14, An Act still further to amend the Patent Act of 1872, assented to April, 1875.
†45 Victoria, Chap. 22, An Act to further amend the Patent Act of 1872, assented to 18th May, 1882.

Thus it will be seen each Canadian patent is granted subject to certain conditions. One of the conditions practically is this: The subject of the patent shall be manufactured in Canada within two years, otherwise the patent shall "cease and determine" and the patent shall be "null and void."

The primary object of the legislator was undoubtedly to protect home industry and home labor, but this was not necessarily the only and sole object. In the light of the patent law of other countries it may reasonably be assumed that it was also intended to guard against what have been termed "dormant" patents, *i.e.*, patents which the patentee does not desire to use or be used. Such patents have been known to exist often enough, and cases have been freely referred to in debates on patent law, when manufacturing or license clauses were under discussion. The new British Patent Act (1883) exemplifies this by its compulsory license clause. But after all, it signifies really but little what the intentions of the legislator were if he has not embodied them in words. Words cannot be made to mean everything else but what they express and the administration of a law must be according to its words, it is only when the purport is doubtful that an interpretation may be influenced by the probable object of the legislator.

Now, the meaning of the 28th section is not at all doubtful; it plainly says your patent shall cease and determine unless you carry it out in practice within two years. This plain statement is made stronger still by the prohibition to import after a specified time, and by the subsections giving the option to obtain permission for delay if a patentee cannot possibly comply with the Act.

It will be seen that the section in question also appoints the Minister of Agriculture or his Deputy the sole and final tribunal for deciding cases of disputes arising under it. A case in point was brought before this tribunal and decided 15th of February, 1877, by Dr. Taché, then as now, Deputy Minister of Agriculture.*

In this case it was alleged that the defendant Smith had not manufactured within the specified time, but had actually imported middling purifiers under certain Canadian patents. The fact that he had not manufactured in Canada was not denied, but it was not proved that the importation had taken place with his consent or knowledge and a decision was given in his favor. Among other conclusions drawn, upon which the decision was based, were the following:

* * * * *

"The patent might be for a process, for an object to be used in conjunction with something else or for an improvement on another patent still in existence; it might be for a railway bridge, switch or spike; it might be for a mail bag, and in all these cases it does lie within the

* *BARTER V SMITH*. A report of the case in full is distributed by the Patent Office gratis, and a copy of it will be mailed by the author to any address upon application. This is the identical publication which a local solicitor has for years past offered to mail for \$1.00 as a "pamphlet expounding the law."

power of others than the patentee to say whether the invention shall or shall not be used at a given time or at any time.

"Therefore, the real meaning of the law is that the patentee must be ready either to furnish the article himself or to license the right of using, on reasonable terms, to *any person desiring to use it*. But again, that desire on the part of such a person, is not intended by the law to mean a mere operation or motion of the mind, or of the tongue; but in effect a *bona fide* serious and substantial proposal, the offer of a fair bargain accompanied with payment. As long as the patentee has been in a position to hear an acquiesce to such demand and has not refused such a fair bargain proposed to him, he has not forfeited his rights.

* * * * *

"The conclusion is, that the Respondent having refused no one the use of his inventions, and that the importation assented to by him to be made, being inconsiderable, having inflicted no injury on Canadian manufacturers and having been so countenanced, not in defiance of the law, but evidently as a means to create a demand for the said inventions, which the patentee intended to manufacture and did, in fact, offer to manufacture in Canada, he has not forfeited his patents.

Now, I contend that this decision was wrong, that it was contrary to law, although, perhaps, strictly speaking, not exactly opposed to the "facts" of the case as proved by the evidence.

Now, if it were correct to construe the section to mean that a patentee must be ready to furnish the article himself or to license the right of using it on fair terms to *any person desiring to use it*, it would be equally correct to say that for the first two years of the life of the patent the patentee has the right to refuse to let any person use his patent on fair terms. Surely that would be absurd, because the sub-section 2 says in effect, if a patentee has been unable to commence manufacturing *for reasons beyond his control*, he may have further time granted. It is plain no person can refuse the use of his patent on fair terms "for reasons beyond his control" as it can never be beyond anyone's control to accept a fair remuneration for anything intended for the public.

Is it not fair to assume therefore that if the legislator had meant to express what the act is construed to convey in the above decision that he would have said plainly: For two years the patentee shall be at liberty to refuse the use of his patented inventions to the public?

On the contrary, the sub-section 2, in my opinion, says plainly that if a patentee during the first two years has had a fair offer he is after that deprived of any good reasons for asking for further delay, because he has had the opportunity to have the manufacture commenced under his patent, but has refused it. And if notwithstanding such an offer a delay is obtained, the grant of the delay would, I think, be invalid and ought to be declared so by the Commissioner of Patents, if conclusive evidence of such an offer were proved.

It is well that a patent law should be construed liberally in favor of

the patentee, but it is unfair that the law should be turned up side down and made to mean anything you wish it, even the very contrary to what it plainly expresses. Such construction is manifestly unfair to the general body to whom the law applies.

Talk about the objects of the legislator! Why it could never be that the patentee should be able to play the dog-in-the-manger by withholding his patent from the public for two years, and at the end of that time be able to obtain permission to do so still longer, yet, the above argument amounts to as much. It cannot therefore be the meaning of the law that the patentee for two years shall have the right of refusing a fair offer. Section two says distinctly *if for reasons beyond his control* the patentee has been unable to manufacture within two years the time may be extended in his favor. No patentee could refuse a fair offer "for reasons beyond his control," therefore it cannot mean that, and the section does not say so. On the contrary the very existence of section 2 proves that no exception is to be made if a patentee has to deal with—what for the purpose of this section may be called—an impracticable subject such as a process, a railway bridge, or I might add, an ironclad, he is only to be granted an exemption from its operation by applying for and obtaining a respite at the end of the two years until there shall be an opportunity to carry his inventions into practice. This answers the argument which is so often heard, that if a person patents an ironclad, would the patentee be expected to construct one and keep it on sale. Why, certainly not, but unless he does so and wishes to keep his patent alive he is bound to maintain his rights by means of sub-section 2 and obtain a delay until such time as he can carry his invention into practice.

The decision in question has been the only one rendered under the section and has been looked up to ever since as *the* authority. It is true the same question was also raised as a sort of side issue, in the suit of Smith *versus* Goldie & McCulloch, which case went to the Supreme Court* but the court declined to enter into the matter because the jurisdiction is clearly vested in the Minister of Agriculture and in no other tribunal. That the law was construed too liberally in the decision in question there can be no doubt, and my object is to warn patentees from resting in a fool's paradise. It is questionable whether, if another case came before the same individual who constituted the tribunal at the time, the decision would not be more strictly in accordance with the letter of the law, and it is still more certain that if another individual should form the tribunal, a patent would be declared null and void unless manufacture under it had commenced and continued before the expiration of two years.

My advice to all patentees is, if your patent is nearly two years old and you have been unable to commence manufacturing and see no chance of doing so before the time expires, by all means secure a delay under

* The Ottawa Free Press of July 7th contains an able review of this case.

sub-section 2. Usually a year is granted. At the end of that year you may get another year and so on until you are in a position to manufacture in Canada yourselves, have it manufactured for you, or sell the patent. Even on the grounds of expediency it will be wise to apply for delay, because, supposing even that the above decision was sound, and that a new case was not likely to be decided the opposite way, you would still secure a valuable immunity from the risk and annoyance of being involved in a similar suit to the above by which you would be certain to lose time and money even if you gained the verdict.

It should be noted that in order to obtain a grant of delay, application for it must be made within the three months preceding the end of the term during which manufacture may remain in abeyance.

Application is made by petition to the Commissioner of Patents stating the reasons why a delay is desired. If the delay is granted the patent is endorsed accordingly, hence the patent must be sent for that purpose.

It is often asked whether the manufacturing clause is complied with if the various parts or some of the parts composing a patented article are imported and put together in Canada. The answer is no, the law is not satisfied with this, it be then that the putting together constituted the essential part of the patent or that the parts so imported could not possibly be obtained in Canada.

A few words, and only a few, may also be said about importation. The Amendment Act of 1872, forming sub-section 3 of section 28, even strengthens what I consider to be the correct reading of the section. For one year you may import with impunity. After that you may have, or may expect to have, a demand in Canada for your patented goods, but not sufficient to warrant just then the commencement of manufacturing, or you may not have the means or opportunity to do it. Then you may obtain leave to import for a period not exceeding another year. By that time the legal time has expired when you should commence manufacturing and now, if you want to work your patent at all you must manufacture or let your patent lie dormant, since permission to delay manufacture would be of no practical value to you except in cases of want of capital or time, since you could not supply any demand for your goods without manufacturing. It will be seen that by sub-section 3 the time to import may be made equal to the time during which you need not manufacture, and although you may have the time for non-manufacture extended you cannot have the time extended for importation also beyond that point. The patent is therefore practically lying dormant because if there is no manufacture there cannot be a sale and importation would kill the patent. This sub-section 3 is a valuable one. Few patentees are ready to manufacture at the end of the first year of the patent and by obtaining extension of time for importing they may be able to test the market and ascertain whether manufacturing would be sufficiently remunerative to warrant further expenditure of time or

capital or both, and a patent is also more easily sold when local manufacturers or capitalists have palpable evidence of the profit to be derived from it. It has been held that the importation in certain cases of single articles as models or patterns is not a violation of the law, but even this ruling is to my mind liable to be upset if a tribunal should construe the Act strictly.

These importation privileges are obtained in a similar manner to those for manufacturing, but the patent office is much more chary in granting them.

If Patentees who are doubtful whether they could obtain a grant of delay will send me a statement of their case and the first fee of \$5.00, I will examine the same, and if there is no probability of success I will advise them to that effect and no further cost will be incurred. When the case is promising I shall prepare the necessary papers and send them to the patentee for signature, and return to me with the balance of fee of \$5.00. The patent should be sent along with the first instructions, if possible, but if this cannot be done it need not delay proceeding as it may be furnished afterwards, or if the patent is not available at all, an official letter will be procured and sent to the applicant which will answer the same purpose.



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