

BETWEEN:

RADIO CORPORATION OF AMERICA . . . PLAINTIFF;

AND

PHILCO CORPORATION (DELAWARE) . . DEFENDANT.

1965
 Feb. 2-4
 Feb. 23

Patents—Conflict proceeding—Jurisdiction of the Exchequer Court—Limitation on scope of conflict proceeding—Review of provisions of the Patent Act—Patent Act, R.S.C. 1952, c. 203, ss. 10, 23, 29, 42, 43, 45 46 and 63—Exchequer Court Act R.S.C. 1952, c. 98, ss. 18(1)(c) and 21.

This is an application by the defendant for an order striking out certain parts of the Statement of Claim in the action which was commenced following the decision of the Commissioner of Patents with respect to certain claims in conflict between the respective applications of the parties hereto for patents for inventions relating to colour television.

The issue to be decided is whether or not the proceeding instituted in this Court must be confined to the claims in conflict before the Commissioner of Patents.

Held: That s. 21 of the *Exchequer Court Act* confers jurisdiction on the Court where a right to relief exists, in the classes of cases therein defined, by virtue of some other statutory provision, at common law or in equity, but it does not create a right to relief as well as confer jurisdiction on the Court.

2. That the Court has jurisdiction, in addition to that conferred by s. 21 of the *Exchequer Court Act*, wherever some statutory provision expressly imposes on the Court a duty to hear and determine some claim for relief in classes of cases not covered by s. 21.
3. That no right to obtain relief from a Court in respect to applications for patents of invention exists except where such right has been conferred expressly or impliedly by the *Patent Act*.
4. That proceedings under s. 45(8) of the *Patent Act* are restricted to a determination of the respective rights of the parties in respect of the subject matter of the claims put in conflict by the Commissioner of Patents.
5. That the paragraph in the Statement of Claim which is an attempt by the plaintiff to set up a contention that neither the plaintiff nor the defendant is entitled to a patent in respect of certain of the claims in conflict by virtue of the applications that have been put in conflict inasmuch as the subject matter of such claims was invented by a third person who has assigned his rights to the plaintiff should not be struck out.
6. That an order will go that, *inter alia*, certain paragraphs of the Statement of Claim be struck out.

APPLICATION to strike out parts of the Statement of Claim.

The application was heard by the Honourable Mr. Justice Jackett, President of the Court, at Ottawa.

R. S. Smart for plaintiff.

David Watson for defendant.

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JACKETT P. now (February 23, 1965) delivered the following decision:

This is an application by the defendant for an order striking out certain parts of the Statement of Claim. It raises important questions as to the ambit of relief that is available in an action in this Court following upon proceedings before the Commissioner of Patents concerning conflicting claims in respect of an invention.

As a background to considering the matters that have to be decided, it seems desirable to consider at some length the various provisions of the *Patent Act*, R.S.C. 1952, chapter 203, as amended, which indicate the general outline of the statutory scheme contained in that statute for creating and enforcing exclusive rights in respect of inventions as well as the provisions which relate particularly to conflicts between the claims of two or more persons to or in respect of the same invention.

The provisions which indicate the main features of the statutory scheme for creating and enforcing exclusive rights in respect of inventions are the following:

10. All specifications, drawings, models, disclaimers, judgments, returns, and other papers, except *caveats*, and except those filed in connection with applications for patents that are still pending or have been abandoned shall be open to the inspection of the public at the Patent Office, under such regulations as are adopted in that behalf.

* * *

28. (1) Subject to the subsequent provisions of this section, any inventor or legal representative of an inventor of an invention that was

- (a) not known or used by any other person before he invented it,
- (b) not described in any patent or in any publication printed in Canada or in any other country more than two years before presentation of the petition hereunder mentioned, and
- (c) not in public use or on sale in Canada for more than two years prior to his application in Canada,

may, on presentation to the Commissioner of a petition setting forth the facts (in this Act termed the filing of the application) and on compliance with all other requirements of this Act, obtain a patent granting to him an exclusive property in such invention.

* * *

29. (1) An application for a patent for an invention filed in Canada by any person entitled to protection under the terms of any treaty or convention relating to patents to which Canada is a party who has, or whose agent or other legal representative has, previously regularly filed an application for a patent for the same invention in any other country which by treaty, convention or law affords similar privilege to citizens of Canada, has the same force and effect as the same application would have if filed in Canada on the date on which the application for patent for the same invention was first filed in such other country, if the application in this

country is filed within twelve months from the earliest date on which any such application was filed in such other country or from the 13th day of June, 1923.

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(2) No patent shall be granted on an application for a patent for an invention that had been patented or described in a patent or publication printed in Canada or any other country more than two years before the date of the actual filing of the application in Canada, or had been in public use or on sale in Canada for more than two years prior to such filing.

* * *

35 The applicant shall, in his application for a patent, insert the title or name of the invention, and shall, with the application, send in a specification in duplicate of the invention and an additional or third copy of the claim or claims.

36. (1) The applicant shall in the specification correctly and fully describe the invention and its operation or use as contemplated by the inventor, and set forth 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 appertains, or with which it is most closely connected, to make, construct, compound or use it; in the case of a machine he shall explain the principle thereof and the best mode in which he has contemplated the application of that principle; in the case of a process he shall explain the necessary sequence, if any, of the various steps, so as to distinguish the invention from other inventions; he shall particularly indicate and distinctly claim the part, improvement or combination which he claims as his invention.

(2) The specification shall end with a claim or claims stating distinctly and in explicit terms the things or combinations that the applicant regards as new and in which he claims an exclusive property or privilege.

* * *

37. On each application for a patent a careful examination shall be made by competent examiners to be employed in the Patent Office for that purpose.

38. (1) A patent shall be granted for one invention only but in an action or other proceeding a patent shall not be deemed to be invalid by reason only that it has been granted for more than one invention.

* * *

42. Whenever the Commissioner is satisfied that the 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 such applicant of such refusal and of the ground or reason therefor.

* * *

44 Every person who has failed to obtain a patent by reason of a refusal or objection of the Commissioner to grant it may, at any time within six months after notice as provided for in sections 42 and 43 has been mailed, appeal from the decision of the Commissioner to the Exchequer Court and that Court has exclusive jurisdiction to hear and determine such appeal.

* * *

46. Every patent granted under this Act shall contain the title or name of the invention, with a reference to the specification, and shall, subject to the conditions in this Act prescribed, grant to the patentee and his legal representatives for the term therein mentioned, from the granting of the same, the exclusive right, privilege and liberty of making, constructing,

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using and vending to others to be used the said invention, subject to adjudication in respect thereof before any court of competent jurisdiction.

* * *

55. (1) A patent is void if any material allegation in the petition of the applicant in respect of such patent is untrue, or if the specification and drawings contain more or less than is necessary for obtaining the end for which they purport to be made, and such omission or addition is wilfully made for the purpose of misleading.

* * *

57. (1) Any person who infringes a patent is liable to the patentee and to all persons claiming under him for all damages sustained by the patentee or by any such person, by reason of such infringement.

* * *

62. (1) A patent or any claim in a patent may be declared invalid or void by the Exchequer Court at the instance of the Attorney General of Canada or at the instance of any interested person.

The Commissioner's authority to "refuse" an application is limited to cases where he "is satisfied that the applicant is not by law entitled to be granted a patent" (section 42). Presumably, in other cases, the Commissioner is bound to grant a patent. Patents will, therefore, be granted to persons not entitled thereto in cases where the Commissioner had not the necessary material on which to satisfy himself that the applicant was not entitled and in cases where the Commissioner, even though he had the material, did not reach the correct conclusion. Section 46 takes account of this situation when it provides that a patent shall grant to the patentee the exclusive right in respect of the invention "subject to adjudication in respect thereof before any court of competent jurisdiction".

Having regard to the conditions of secrecy under which an application for a patent is processed (section 10), it is impossible for the Commissioner to take steps that he might otherwise take to test the correctness of the applicant's contentions for the purpose of avoiding the issuance of patents to persons not entitled thereto.

Two sources of information that are available to the Commissioner are patents that have been issued and co-pending applications by other persons. This information makes possible the following:

- (1) if the invention claimed by an applicant was described in a patent more than two years before the applicant filed his application, the Commissioner can refuse the application because it does not comply with section 28(1)(b) which specifically requires

that the invention in respect to which an application may be filed must be an invention that was "not described in any patent . . . more than two years before presentation of the petition";

- (2) if the invention claimed by an applicant was described in a patent granted at any time after the commencement of that two-year period (whether or not the patent contains a claim for that invention) or is described in a co-pending application, a question will be raised in the Commissioner's mind as to whether some person other than the applicant is the first inventor (if the Commissioner is satisfied that some other person, and not the applicant, is the first inventor, the applicant's claim should be refused for failing to satisfy the requirement in section 28(1)(a).)

Certain provisions of the *Patent Act* that are apparently designed to enable the Commissioner to deal with at least some of the cases of doubt as to who is the first inventor in such a way as to avoid granting patents for the same invention to more than one person as he might otherwise be required to do by the provisions of the statute. These are:

43. Whenever it appears to the Commissioner that the invention to which an application relates has been, before the filing of the application, described in a patent granted in Canada or any other country, and such application was filed within two years after the date on which such patent was so granted and the Commissioner entertains doubts whether the patentee of such invention is, as between him and the applicant, the first inventor, the Commissioner shall, by registered letter addressed to the applicant or his registered agent, object to grant a patent on such application and state, with sufficient detail to enable the applicant, if he can, to answer, the ground or reason for such objection; the applicant has the right, within such period or extended period of time as the Commissioner may allow, to answer such objection and if it is not in due course answered to the satisfaction of the Commissioner he shall refuse the application.

* * *

- 45. (1) Conflict between two or more pending applications exists
 - (a) when each of them contains one or more claims defining substantially the same invention, or
 - (b) when one or more claims of one application describe the invention disclosed in the other application.

(2) When the Commissioner has before him two or more such applications he shall notify each of the applicants of the apparent conflict and transmit to each of them a copy of the conflicting claims, together with a copy of this section; the Commissioner shall give to each applicant the opportunity of inserting the same or similar claims in his application within a specified time.

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(3) Where each of two or more of such completed applications contains one or more claims describing as new, and claims an exclusive property or privilege in, things or combinations so nearly identical that, in the opinion of the Commissioner, separate patents to different patentees should not be granted, the Commissioner shall forthwith notify each of the applicants to that effect.

(4) Each of the applicants, within a time to be fixed by the Commissioner, shall either avoid the conflict by the amendment or cancellation of the conflicting claim or claims, or, if unable to make such claims owing to knowledge of prior art, may submit to the Commissioner such prior art alleged to anticipate the claims; thereupon each application shall be re-examined with reference to such prior art, and the Commissioner shall decide if the subject matter of such claims is patentable.

(5) Where the subject matter is found to be patentable and the conflicting claims are retained in the applications, the Commissioner shall require each applicant to file in the Patent Office, in a sealed envelope duly endorsed, within a time specified by him, an affidavit of the record of the invention; the affidavit shall declare:

- (a) the date at which the idea of the invention described in the conflicting claims was conceived;
- (b) the date upon which the first drawing of the invention was made;
- (c) the date when and the mode in which the first written or verbal disclosure of the invention was made; and
- (d) the dates and nature of the successive steps subsequently taken by the inventor to develop and perfect the said invention from time to time up to the date of the filing of the application for patent.

(6) No envelope containing any such affidavit as aforesaid shall be opened, nor shall the affidavit be permitted to be inspected, unless there continues to be a conflict between two or more applicants, in which event all the envelopes shall be opened at the same time by the Commissioner in the presence of the Assistant Commissioner or an examiner as witness thereto, and the date of such opening shall be endorsed upon the affidavits.

(7) The Commissioner, after examining the facts stated in the affidavits, shall determine which of the applicants is the prior inventor to whom he will allow the claims in conflict and shall forward to each applicant a copy of his decision; a copy of each affidavit shall be transmitted to the several applicants.

(8) The claims in conflict shall be rejected or allowed accordingly unless within a time to be fixed by the Commissioner and notified to the several applicants one of them commences proceedings in the Exchequer Court for the determination of their respective rights, in which event the Commissioner shall suspend further action on the applications in conflict until in such action it has been determined either

- (a) that there is in fact no conflict between the claims in question,
- (b) that none of the applicants is entitled to the issue of a patent containing the claims in conflict as applied for by him,
- (c) that a patent or patents, including substitute claims approved by the Court, may issue to one or more of the applicants, or
- (d) that one of the applicants is entitled as against the others to the issue of a patent including the claims in conflict as applied for by him.

(9) The Commissioner shall, upon the request of any of the parties to a proceeding under this section, transmit to the Exchequer Court the papers on file in the Patent Office relating to the applications in conflict.

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63. (1) No patent or claim in a patent shall be declared invalid or void on the ground that, before the invention therein defined was made by the inventor by whom the patent was applied for, it had already been known or used by some other person, unless it is established either that,

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- (a) before the date of the application for the patent such other person had disclosed or used the invention in such manner that it had become available to the public, or that
- (b) such other person had, before the issue of the patent, made an application for patent in Canada upon which conflict proceedings should have been directed, or that
- (c) such other person had at any time made an application in Canada which, by virtue of section 29, had the same force and effect as if it had been filed in Canada before the issue of the patent and upon which conflict proceedings should properly have been directed had it been so filed.

(2) Notwithstanding the provisions of section 43, an application for a patent for an invention for which a patent has already issued under this Act shall be rejected unless the applicant, within a time to be fixed by the Commissioner, commences an action to set aside the prior patent, so far as it covers the invention in question, but if such action is so commenced and diligently prosecuted, the application shall not be deemed to have been abandoned unless the applicant fails to proceed upon it within a reasonable time after the action has been finally disposed of.

(3) Where the application was filed within one year from the date of the filing of the application for the prior patent, the provisions of subsection (1) do not apply to the determination of the respective rights of the parties to such action.

In considering whether these provisions create a reasonably well coordinated scheme for dealing with conflicts, it is important to bear in mind that

- (a) the first inventor of an invention has, by virtue of section 28, a *prima facie* right to a patent conditioned upon his making application for a patent within two years of his invention being described in a patent or in some other publication or of his invention being in public use or on sale in Canada, whichever happened first;
- (b) the first inventor's *prima facie* right to a patent under section 28 may, in some cases, be defeated by a patent issued to a subsequent inventor before the first inventor filed his application unless the first inventor filed his application within one year from the date of filing of the application for that patent (see section 63); and

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(c) an application may describe or disclose an invention without making a claim for it and a patent may also describe or disclose an invention without granting an exclusive right in respect of that invention (compare the language of section 28(1)(b), section 45(1) and section 63(2)).

In an attempt to ascertain the effect of the conflict provisions set out above and to understand the reason for the differences between the different provisions, I propose to consider them from the point of view of different classes of conflicts between an application No. 1 (which will have described or disclosed an invention with or without making a claim therefor and which may or may not have matured into a patent which may have granted exclusive rights in respect of that invention or which may merely have described or disclosed that invention) and an application No. 2 for the same invention¹.

The first class is the case where application No. 2 was filed more than two years after application No. 1 matured into a patent which described or disclosed the invention, whether or not it contained claims for the invention. No special conflict provisions are needed for this class of conflict because application No. 2 is barred by virtue of section 28(1)(b)².

The second class is the case where application No. 2 is an application for an invention which is described or disclosed in application No. 1 and is filed within the period of two years commencing with the issue of a patent pursuant to application No. 1, or, by virtue of section 29, has force and effect as though it were filed within that period. (Hereafter, when I speak of an application filed during a certain period or at a certain time, I include in my reference an application that has the force and effect of being so filed by virtue of section 29.)

¹ For convenience, I may, on occasion, refer to the respective applicants as applicant No. 1 and applicant No. 2 and, if one of the applications has matured into a patent, I may refer to it as patent No. 1 or patent No. 2, as the case may be.

² Sections 28(1)(b) and 43 apply even where the disclosure is in a patent granted in some other country and applies whether or not there is a claim in the patent for the invention. I am restricting my analysis to the effect of these provisions in relation to conflicts arising under the Canadian statute. As far as Canadian patents are concerned, section 63(2) precludes the application of section 43 where there is a claim in the patent for the invention.

One subdivision of the second class is where the patent issued pursuant to application No. 1 merely discloses or describes, but does not contain a claim in respect of, the invention, in which event the Commissioner must, if he recognizes the conflict, proceed under section 43 and give applicant No. 2 an opportunity to satisfy him that he is the first inventor¹. If applicant No. 2 so satisfies the Commissioner or if the Commissioner does not recognize the conflict, a patent may issue to applicant No. 2 and he will then be the sole person, as between himself and applicant No. 1, having the exclusive right to use the invention.

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A second subdivision of the second class is where the Commissioner recognizes that the patent issued pursuant to application No. 1 contains a claim for the invention claimed by application No. 2 as well as disclosing it. Section 63(2) prevents the granting of application No. 2, where the Commissioner recognizes such a conflict, unless applicant No. 2 commences proceedings to set aside the patent issued pursuant to application No. 1 and, presumably, is successful in setting that patent aside.

It would seem that, in proceedings commenced pursuant to section 63(2) in a case where application No. 2 was filed within the two year period commencing with the issue of Patent No. 1 (my second class of conflicts):

- (a) if application No. 2 was filed within one year of the issue of Patent No. 1, he is, by virtue of section 63(3), not subject to the rule in section 63(1) and may attack the validity of Patent No. 1 on the ground that the inventor named therein is not the first inventor; and
- (b) if application No. 2 was filed during the second year of the two year period commencing with the issue of Patent No. 1, applicant No. 2 is subject to the rule in section 63(1) and, as he obviously cannot meet the requirements of paragraphs (b) or (c) of section 63(1), because his application was filed, or has force and effect as though it were filed, after and not before the issue of Patent No. 1, he must comply with paragraph (a) of section 63(1) by showing that, before the date of application No. 1, he had disclosed or used the invention in such

¹ See footnote No. 2 on page 204.

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manner that it had become available to the public, before he is entitled to attack the validity of Patent No. 1 on the ground that the inventor named therein is not the first inventor.

A third subdivision of the second class is where section 63(2) should have operated to prohibit the grant of a patent pursuant to application No. 2 made after the date of the patent issued pursuant to application No. 1 but did not so operate because the Commissioner did not realize that application No. 2 was for the same invention as that for which there was a claim in the patent issued pursuant to application No. 1. In such a case there may be two patents for the same invention. If that happens, paragraph (b) or (c) of section 63(1) would not be available to patentee No. 1 to enable him to attack Patent No. 2 on the ground that he was the first inventor but paragraph (a) of section 63(1) would be available to patentee No. 1 because his patent would have disclosed the invention in such manner that it had become available to the public when it was issued, and, therefore, before application No. 2 was filed. It is conceivable that patentee No. 2 might have made a disclosure meeting the requirement of section 63(1)(a) before the date of application No. 1, but it does not seem probable.

The third class is where application No. 1 and application No. 2 were co-pending for some period of time, no matter how short, before application No. 1 matured into a patent which described or disclosed the invention, whether or not that patent contained claims for the invention. This class breaks into two sub-classes. The first subclass is where the Commissioner recognizes the conflict and puts the claims in conflict under section 45. If that happens, the conflict is presumably resolved at one of the stages contemplated by section 45. The second subclass is where the Commissioner does not recognize the conflict and, for that reason, the conflict is not resolved in the manner contemplated by that section.

Where two applications containing claims for the same invention are pending at the same time (either in fact or, by virtue of section 29, are deemed to have been) and where the Commissioner does not recognize that there is

a conflict, the result probably will be that two patents will issue to two different persons for the same invention. In such event, either patentee, by virtue of paragraph (b) or (c) of subsection (1) of section 63, even if he cannot satisfy the requirements of paragraph (a) of that subsection, may attack the validity of the other's patent on the ground that the attacker is the first inventor.

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In this analysis of the scheme of the *Patent Act* in relation to conflicting claims, I have been attempting only to appreciate the general scheme of the legislation and I must not be taken to have expressed an opinion on any of the questions that may arise as to the application of the various provisions to specific problems.

However, while, for the purpose of my analysis, I have assumed the correctness of the decision of this Court in *re Fry*¹, I cannot refrain from saying that, if it were not for that decision, I should have reached the opposite conclusion. In that case, it was decided that the rule in section 63(2) is not applicable to "an application for a patent for an invention for which a patent has already issued" unless the patent had issued before the subsequent application was filed. In other words, according to *re Fry*, section 63(2) does not apply if the two applications were ever co-pending. In my view, the subsection should be read as applying to any application for an invention for which a patent has already issued at the time that the Commissioner is having to decide whether the application should "be rejected". Certainly, it would seem that the public interest would be served if the Commissioner were required to apply the rule in section 63(2) wherever he recognizes that there is an existing patent for the invention claimed so as to avoid the co-existence of two patents for the same invention wherever possible. It was suggested to me in the course of argument that, as section 43 was brought into operation only when an application was filed after the issue of a patent describing the invention to which the application relates, section 63(2), which refers to section 43, should be read subject to a similar limitation. While the two sections, *prima facie*, apply to overlapping situations, in my view, they deal with quite different problems. Conceivably, after a patent issues either in Canada or elsewhere, some person might "steal"

¹ [1940] 1 D.L.R. 361.

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the invention described therein and make it the subject of an application for a patent. Section 43 deals with that possibility which, by reason of section 28(1)(b) and the secrecy of patent matters until the patent issues, only arises in connection with applications filed during the two year period *after* a patent issues, by empowering the Commissioner to put the applicant to the proof of his claim that he is the prior inventor. Section 63(2) deals with quite a different problem, that of avoiding, where possible, the co-existence of two patents under the *Patent Act* for the same invention. That sub-section prohibits the issue of a patent for an invention for which a patent has already issued under the Canadian Act until the prior patent has been successfully attacked in the Courts. This rule obviously applies to some of the cases to which section 43 applies and it is expressed to apply notwithstanding that section. There is no reason why the rule in section 63(2) should be restricted to an application made after the patent was issued and the subsection does not contain such a limitation expressly. The fact that section 43 contains such a limitation expressly and that section 63(2) does not confirms me in my view that it is not to be implied in section 63(2).

I come now to the proceedings that gave rise to the present application.

On October 17, 1950, Clarence Weston Hansell filed an application in respect of an invention for colour television (No. 606,877). Hansell's rights are now vested in the plaintiff. On December 29, 1950, Wilson P. Boothroyd and Edgar M. Creamer, Jr., filed an application for an invention for colour television (No. 609,764). Their rights are now vested in the defendant. There are nineteen claims at the end of the specification in the plaintiff's application and there are ninety claims at the end of the specification in the defendant's application. In September, 1961, the Commissioner sent notices of apparent conflict to the applicants under subsection (2) of section 45 and, after going through the procedure contemplated by subsections (3) and (4), there were twelve identical claims retained in the two applications, which claims had been given the numbers C1 to C12, inclusive, for the purposes of section 45. On December 13, 1963, the Commissioner rendered his decision under subsection (7) of section 45 holding that, with reference to

Claims C1 to C4, inclusive, C. W. Hansell in application No. 606,877 was the prior inventor in view of the date of August 18, 1949, established by affidavits and exhibits and that, with reference to Claims C5 to C12 inclusive, W. P. Boothroyd and E. M. Creamer, Jr., in application No. 609,764, were the prior inventors in view of the date of March, 1949, established by affidavits and exhibits. By the letters advising the parties of his decision, the Commissioner also advised them "that, unless within three months from this date action is taken in accordance with subsection (8) of section 45 of the *Patent Act* . . . the prosecution will be resumed having regard to the Commissioner's decision in respect of the conflicting claims of the above outline".

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By statement of claim filed on March 12, 1964, the plaintiff instituted proceedings against the defendant in this Court seeking a declaration that Hansell and not Boothroyd and Creamer was the first inventor of the patentable subject matter of Claims C5 to C12 inclusive. In April, 1964, the defendant filed a statement of defence and counter claim, claiming, in effect, an adjudication that Boothroyd and Creamer were the first inventors of all of Claims C1 to C12, inclusive.

On November 23, 1964, the plaintiff made a minor amendment to paragraph 9 of its statement of claim, which amendment is not relevant in this application because the defendant has not asked for any relief with regard thereto. In addition, the plaintiff, on that day, amended its statement of claim by adding new paragraphs 10 to 19, reading as follows:

10. Claims C1 and C2 correspond respectively to claims 32 and 34 of application 609,764; claims C3-C7 inclusive correspond to claims 36-40 respectively of application 609,764; claims C8, C9 and C10 correspond respectively to claims 44, 45 and 46 of the said application; claim C11 corresponds to claim 35 of the said application and claim C12 corresponds to claim 90 of the said application. The said application also contains claims numbered 1-31 inclusive, 33, 41-43 inclusive, and 47-89 inclusive.

11. Conflict exists between applications 608,877 and 609,764 with respect to claims 1-13 inclusive of application 609,764 by virtue of the disclosure in application 608,877 of the subject matter of the said claims and the plaintiff alleges and the fact is that as between the parties Clarence W. Hansell and not W. P. Boothroyd and E. M. Creamer, Jr. is the prior inventor of the subject matter of the said claims.

12. Claims 14-31 of application 609,764 are the same claims as claims 1-8 inclusive, 10-14 inclusive, and 16-20 inclusive of Canadian Patent 529,494 covering an invention of R. C. Ballard, of which the plaintiff is the owner. Application 609,764 and application 604,461 which matured to Canadian

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Patent 529,494 were copending in the Canadian Patent Office and conflict proceedings should have been directed thereupon. The plaintiff alleges and the fact is that R. C. Ballard and not W. P. Boothroyd and E. M. Creamer, Jr. was the first inventor of the subject matter of the said claims and as between the parties the defendant is not entitled to a patent containing the said claims.

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13. Conflict exists between application 609,764 and 608,877 in respect of claim 33 of application 609,764 by virtue of the disclosure in application 606,877 of the subject matter of the said claim. The plaintiff alleges and the fact is that as between the parties C. W. Hansell and not W. P. Boothroyd and E. W. Creamer, Jr. was the prior inventor of the subject matter of the said claim and the plaintiff and not the defendant is entitled to the issue of a patent containing the said claim.

(References in the above paragraph to application 608,877 are apparently intended to be to application 606,877.)

14. Claims 54, 55, 57, 58, 60, 64, 65, 67 and 68 of application 609,764 are the same claims respectively as claims 2, 3, 5, 7, 10, 12, 13, 14 and 16 of Canadian Patent 553,388 for an invention of Alda V. Bedford and owned by the Plaintiff. Claims 59, 62 and 63 of application 609,764 are the same as claims 2, 5, and 6 of Canadian Patent 553,389 on an invention of Alda V. Bedford and owned by the Plaintiff. Claims 47-53 and 56, 61 and 66 of application 609,764 are for subject matter disclosed in said patents 553,388 and 553,389. Application Nos. 611,076 and 712,616 which matured respectively to patents 553,388 and 553,389 were copending with application 609,764 and conflict proceedings should have been directed thereon. The plaintiff alleges and the fact is that as between the parties Alda V. Bedford and not W. P. Boothroyd and E. M. Creamer, Jr. was the first inventor of the subject matter of claims 47-68 inclusive of application 609,764 and the defendant is not entitled to a patent containing the said claims

15. Claims 69-78 inclusive of application 609,764 are for subject matter which was known or used by G. C. Sziklai before it was invented by W. P. Boothroyd and E. M. Creamer, Jr., if in fact it was ever invented by W. P. Boothroyd and E. M. Creamer, Jr. which is not admitted but denied. The said G. C. Sziklai had knowledge of the said subject matter at least as early as July 1949 and made the same available to the public before the date of application 609,764 by disclosing the same to the United States Federal Communications Commission and to the defendant in September 1949 in exhibit 209 to the plaintiff's submission to the Federal Communications Commission, a copy of which was supplied to the defendant. The plaintiff therefore alleges that the defendant is not entitled to a patent containing claims 69-78 inclusive of application 609,764.

16. Conflict exists in respect of claims 81, 82, 85, 86, 87, 88 and 89 between application 609,764 and application 606,877 by virtue of the disclosure in application 606,877 of the subject matter of the said claims. The plaintiff alleges and the fact is that C. W. Hansell and not W. P. Boothroyd and E. M. Creamer, Jr. was the prior inventor of the subject matter of the said claims and the plaintiff and not the defendant is entitled to a patent containing the same.

17. Claims 41, 42, 43, 79, 80, 83 and 84 of application 609,764 are for subject matter disclosed in Canadian patent 602,209 on an invention of John Evans, the said patent being owned by the plaintiff. Application 600,681 which matured to Canadian Patent 602,209 was copending with application 609,764 and conflict proceedings should have been directed

thereon. The plaintiff alleges and the fact is that John Evans and not W. P. Boothroyd and E. M. Creamer, Jr. was the first inventor of the subject matter of the said claims and the defendant is not entitled to a patent containing the same.

18. Claims C5, C6, C7, C8, C9 and C10 are for subject matter described in both application 606,877 and application 600,681 which matured to Canadian patent 602,209. Until recently the plaintiff mistakenly believed that C. W. Hansell was the first inventor of the said subject matter but on discovering that in fact John Evans was the first inventor of the said subject matter, the plaintiff made application to the Commissioner of Patents on the 1st day of April, 1964 to reissue Patent No. 602,209 with the said claims. The said application bears Serial No. 899,329 and is currently pending before the Canadian Patent Office. Conflict exists between the said application Serial No. 899,329 and application 609,764 by virtue of the inclusion in both applications of the said claims. The plaintiff alleges and the fact is that John Evans and not W. P. Boothroyd and E. M. Creamer, Jr. was the prior inventor of the subject matter of the said claims and as between the parties the plaintiff in application 899,329 and not the defendant is entitled to a patent containing the said claims.

19. The plaintiff alleges and the fact is that the subject matter of none of claims 1-90 of application 609,764 is adequately supported by the disclosure of that application or reasonably to be inferred from the disclosure of said application as filed and the defendant is not entitled to a patent containing any of the said claims.

At the same time, the plaintiff amended its prayer for relief by substituting a new paragraph (a) asking that it be ordered and adjudged as follows:

1. As between the parties, C. W. Hansell and not W. P. Boothroyd and E. M. Creamer, Jr. was the prior inventor of the subject matter of claims 1-13 inclusive, 33, 81, 82 and 85-89 inclusive, of application 609,764 and claims C11 and C12 and that the plaintiff is the person entitled to a patent containing the said claims or substitute claims approved by the Court.
2. As between the parties R. C. Ballard and not W. P. Boothroyd and E. M. Creamer, Jr. was the prior inventor of the subject matter of claims 14-31 inclusive of application 609,764 and that the defendant is not entitled to a patent containing the said claims.
3. As between the parties Alda V. Bedford and not W. P. Boothroyd and E. M. Creamer, Jr. was the prior inventor of the subject matter of claims 47-68 inclusive of application 609,764 and the defendant is not entitled to a patent containing the said claims.
4. As between the parties G. C. Sziklai and not W. P. Boothroyd and E. M. Creamer, Jr. was the prior inventor in respect of the subject matter of claims 69-78 of application 609,764 and the defendant is not entitled to a patent containing the said claims.
5. As between the parties John Evans and not W. P. Boothroyd and E. M. Creamer, Jr. was the prior inventor of the subject matter of claims C5-C10 inclusive and claims 41, 42, 43, 79, 80, 83 and 84 of application 609,764 and that the plaintiff in application 899,329 and not the defendant is entitled to a patent containing the said claims.

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This is a motion to strike out the amendments so made on the following grounds:

- (a) This Court has no jurisdiction to consider issues raised by the amendments since such issues do not relate to the conflict in respect of which the proceedings were brought.
- (b) The Plaintiff is seeking relief outside the terms of Section 45(8).
- (c) The action relating to the new claims sought to be added was instituted beyond the time limit set by the Commissioner of Patents.
- (d) The Plaintiff has no status with respect to the issues sought to be raised by the amendments.

I must first deal with the application to strike out paragraphs 10 to 19, inclusive, of the Statement of Claim. Disposition of the application as far as the prayer for relief is concerned will depend upon the disposition of the application in so far as the body of the Statement of Claim is concerned except, it should be noted, that counsel for the plaintiff conceded during the course of argument that he could not support retention of the last two and one-half lines of subparagraph (5) of paragraph (a) of the amended prayer for relief.

In so far as the body of the Statement of Claim is concerned, counsel for the plaintiff conceded that paragraph 19 in its present form can only be supported if he is permitted to retain paragraphs 11 to 17 inclusive of his amended Statement of Claim. Paragraph 18 of the Statement of Claim is also a special problem in that it is an allegation by the plaintiff that neither the plaintiff nor the defendant is entitled to certain of the claims that were put in conflict by the Commissioner by virtue of the applications in conflict but that, on the other hand, the true first inventor in respect of such claim was one John Evans in respect of whose invention the plaintiff now holds a patent which describes the invention but does not contain the claims in question. (It further alleges that it has applied to add these claims to the Evans patent by way of a re-issue patent.) If this allegation is well founded, it would be a basis for a declaration under section 45(8)(b) that neither the plaintiff nor the defendant is entitled to the issue of a patent containing the claims in conflict by virtue of the applications that have been put in conflict under section 45.

Paragraph 10 of the Statement of Claim is an explanatory allegation which will follow the fate of paragraphs

11 to 17. Paragraphs 11 to 17 have this in common that each of them makes an attack on some of the 78 claims in the defendant's application which were not put in conflict under section 45 by the Commissioner. It may also be noted that all 78 of the claims in the defendant's application that were not put in conflict by the Commissioner are attacked by one or other of paragraphs 11 to 17. The respective attacks so made on the claims in the defendant's application that were not put in conflict by the Commissioner may be classified as follows:

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- (1) paragraphs 11, 13 and 16 allege that certain of the 78 claims are in conflict with the plaintiff's application by virtue of the disclosure in the plaintiff's application (the plaintiff says that Hansell and not Boothroyd and Creamer is the prior inventor of the subject matter of those claims);
- (2) paragraph 12 and part of paragraph 14 attack certain of the 78 claims on the ground that they are the same as some of those for which two patents belonging to the plaintiff were issued (one patent was for an invention by a man by the name of Bedford and the other for an invention by a man by the name of Ballard); and the plaintiff says that the applications upon which these patents were based were, at one time, co-pending with the defendant's application and that the claims in question should therefore have been put in conflict under section 45;
- (3) the remainder of paragraph 14 and paragraph 17 attack certain of the 78 claims in the defendant's application on the ground that they are for subject matter disclosed in patents belonging to the plaintiff which were issued pursuant to applications which were co-pending with the defendant's application and the plaintiff says that conflict proceedings should have been directed with regard thereto (the plaintiff says that, in the case of one of the patents, Bedford was the first inventor and not Boothroyd and Creamer and, in the case of the other patent, Evans was the first inventor and not Boothroyd and Creamer);
- (4) the remainder of the 78 claims not put in conflict by the Commissioner are attacked by paragraph 15

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of the Statement of Claim on the ground that they are for subject matter which was known or used by one Sziklai before it was invented by Boothroyd and Creamer and that Sziklai had knowledge of the said subject matter at least as early as July 1949 and made the same available to the public before the date of the defendant's application.

Before proceeding to outline the arguments with regard to paragraphs 11 to 17 inclusive, I should revert to the grounds set out in the defendant's Notice of Motion which, it will be recalled, are:

- (a) This Court has no jurisdiction to consider issues raised by the amendments since such issues do not relate to the conflict in respect of which the proceedings were brought.
- (b) The Plaintiff is seeking relief outside the terms of Section 45(8).
- (c) The action relating to the new claims sought to be added was instituted beyond the time limit set by the Commissioner of Patents.
- (d) The Plaintiff has no status with respect to the issues sought to be raised by the amendments.

While I recognize that the jurisdiction conferred on this Court by section 21 of the *Exchequer Court Act*, R.S.C. 1952, chapter 98, may not extend to such parts of paragraphs 11 to 17 as do not form the basis for a claim in respect of conflicting applications, I am of opinion that what I have to decide is not to be determined by reference to that section. In my view, section 21 confers jurisdiction on the Court where a right to relief exists, in the classes of cases therein defined, by virtue of some other statutory provision, at common law or in equity. (Unlike section 18(1)(c), section 21 does not create a right to relief as well as confer jurisdiction on the Court). In addition to the jurisdiction conferred by section 21, the Court has jurisdiction wherever some statutory provision expressly imposes on the Court a duty to hear and determine some claim for relief in classes of cases not covered by section 21. Applications for patents of invention are creatures of the *Patent Act*. No right to obtain relief from a Court in respect thereto exists except where such right has been conferred expressly or impliedly by some statute and, as far as I am aware, the only statute that deals with such applications is the *Patent Act* itself. The only provision in the *Patent Act* upon which the plaintiff has attempted to found the claims for relief contemplated by paragraphs

11 to 17 is section 45. In my view, those paragraphs must be struck out unless section 45 confers on the plaintiff a right to seek the relief contemplated thereby in this Court. The defendant's application to strike out, in such event, is sufficiently covered by the grounds contained in paragraphs (b) and (d) of the Notice of Motion.

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As the plaintiff's right to attack claims in the defendant's application that the Commissioner did not put into conflict must depend upon the correct interpretation of section 45 of the *Patent Act*, it is desirable that I review the provisions of that section as a preliminary to stating the plaintiff's argument as fairly as I can:

(a) *Subsection (1)*: This subsection reads as follows:

- (1) Conflict between two or more pending applications exists
 - (a) when each of them contains one or more claims defining substantially the same invention, or
 - (b) when one or more claims of one application describe the invention disclosed in the other application.

In effect, subsection (1) defines what is meant by a "conflict between two or more pending applications". There is a conflict between pending applications when each of them contains one or more claims defining substantially the same invention or when one or more claims of one application describe the invention disclosed in the other application.

(b) *Subsection (2)*: This subsection reads as follows:

(2) When the Commissioner has before him two or more such applications he shall notify each of the applicants of the apparent conflict and transmit to each of them a copy of the conflicting claims, together with a copy of this section; the Commissioner shall give to each applicant the opportunity of inserting the same or similar claims in his application within a specified time.

There is a point, which may well be academic, as to whether this subsection imposes an obligation on the Commissioner to notify each of the applicants whenever a conflict exists or only when a conflict is "apparent" to him. Upon consideration, I am inclined to think that the point is academic. It must be clear that, regardless of what construction is put upon subsection (2), the Commissioner can, in fact, only send out a notification pursuant to subsection (2), when a conflict is apparent to him.

(c) *Subsection (3)*: This subsection reads as follows:

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(3) Where each of two or more of such completed applications contains one or more claims describing as new, and claims an exclusive property or privilege in, things or combinations so nearly identical that, in the opinion of the Commissioner, separate patents to different patentees should not be granted, the Commissioner shall forthwith notify each of the applicants to that effect.

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What the Commissioner is to notify the claimants under subsection (3) is that one or more claims in the two or more applications claims an exclusive property in things or combinations "so nearly identical" that, in the opinion of the Commissioner, separate patents to different patentees should not be granted. This notice has to do with specific conflicting claims.

(d) *Subsection (4)*: This subsection reads as follows:

(4) Each of the applicants, within a time to be fixed by the Commissioner, shall either avoid the conflict by the amendment or cancellation of the conflicting claim or claims, or, if unable to make such claims owing to knowledge of prior art, may submit to the Commissioner such prior art alleged to anticipate the claims; thereupon each application shall be re-examined with reference to such prior art, and the Commissioner shall decide if the subject matter of such claims is patentable.

It is clear that this subsection only deals with the "conflicting claim or claims" that were the subject matter of the notice under subsection (3).

(e) *Subsection (5)*: This subsection reads as follows:

(5) Where the subject matter is found to be patentable and the conflicting claims are retained in the applications, the Commissioner shall require each applicant to file in the Patent Office, in a sealed envelope duly endorsed, within a time specified by him, an affidavit of the record of the invention; the affidavit shall declare:

- (a) the date at which the idea of the invention described in the conflicting claims was conceived;
- (b) the date upon which the first drawing of the invention was made;
- (c) the date when and the mode in which the first written or verbal disclosure of the invention was made; and
- (d) the dates and nature of the successive steps subsequently taken by the inventor to develop and perfect the said invention from time to time up to the date of the filing of the application for patent.

Clearly, this subsection only applies to the conflicting claims concerning which the Commissioner has found the subject matter to be patentable under the concluding portion of subsection (4). It is only in that case that the Commissioner can require an applicant to file the material specified in a sealed envelope.

(f) *Subsection (6)*: This subsection reads as follows:

(6) No envelope containing any such affidavit as aforesaid shall be opened, nor shall the affidavit be permitted to be inspected, unless there

continues to be a conflict between two or more applicants, in which event all the envelopes shall be opened at the same time by the Commissioner in the presence of the Assistant Commissioner or an examiner as witness thereto, and the date of such opening shall be endorsed upon the affidavits.

This subsection clearly refers to the envelope to be filed under subsection (5) and to the affidavits to be put in the envelope under that subsection.

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(g) *Subsection (7)*: This subsection reads as follows:

(7) The Commissioner, after examining the facts stated in the affidavits, shall determine which of the applicants is the prior inventor to whom he will allow the claims in conflict and shall forward to each applicant a copy of his decision; a copy of each affidavit shall be transmitted to the several applicants.

The affidavits that the Commissioner is to study are the affidavits referred to in subsections (5) and (6) and therefore must relate to the claims which are the subject matter of the notices sent out under subsection (3) which are, of course, the "claims in conflict" referred to in subsection (7). It is only in reference to such claims that the Commissioner makes his decision under subsection (7).

(h) *Subsection (8)*: This subsection reads as follows:

(8) The claims in conflict shall be rejected or allowed accordingly unless within a time to be fixed by the Commissioner and notified to the several applicants one of them commences proceedings in the Exchequer Court for the determination of their respective rights, in which event the Commissioner shall suspend further action on the applications in conflict until in such action it has been determined either

- (a) that there is in fact no conflict between the claims in question,
- (b) that none of the applicants is entitled to the issue of a patent containing the claims in conflict as applied for by him,
- (c) that a patent or patents, including substitute claims approved by the Court, may issue to one or more of the applicants, or
- (d) that one of the applicants is entitled as against the others to the issue of a patent including the claims in conflict as applied for by him.

Here again it is quite clear that the "claims in conflict" which are to be rejected or allowed are those which were the subject matter of action under the earlier subsections and with which the Commissioner dealt under subsection (7). (The question that arises in this case is whether the proceedings which one of the several applicants is impliedly authorized to commence "for the determination of their respective rights" are restricted to proceedings for the determination of their respective rights in respect of the "claims in conflict" or whether such proceedings may also

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extend to "their respective rights" regarding some larger class of matter.)

(i) *Subsection (9)*: This subsection reads as follows:

(9) The Commissioner shall, upon the request of any of the parties to a proceeding under this section, transmit to the Exchequer Court the papers on file in the Patent Office relating to the applications in conflict.

It is to be noted that the Commissioner may be required to send to the Exchequer Court the papers on file in the Patent Office "relating to the applications in conflict" and not merely to the claims that have been put in conflict. If it were not so, the present problem might have never arisen because the plaintiff might never have learned of the 78 claims in the defendant's application that were not put in conflict.

The position taken by counsel for the defendant in moving to strike out paragraphs 10 to 17, inclusive, of the plaintiff's application is that the proceedings contemplated by subsection (8) of section 45 are restricted to proceedings to determine the respective rights of the applicants in respect of the claims that have, in fact, been put in conflict by the Commissioner under the earlier subsections of section 45. The plaintiff's position, if I correctly understand its counsel, is that, in addition to the respective rights of the parties in relation to the claims that were put in conflict, those proceedings may not only deal with "the respective rights" of the applicants with respect to other conflicts that the Commissioner should have recognized as existing between the two applications and should have put in conflict¹, but may also deal with their respective rights with regard to any of the claims in either of the applications in respect of which there is a dispute between the two applicants even though that dispute may arise by virtue of facts that are entirely extraneous to the conflicting applications.

Counsel for the plaintiff contended that, if subsection (8) of section 45 is not given a wider scope for which he contends, an applicant who, in fact, is the first inventor, may well be put at a serious disadvantage in relation to

¹ The plaintiff's counsel made a submission that section 45(2) created an inchoate right to adjudication of any conflict in fact existing between co-pending applications which right matures into an active right in respect of all conflicts whenever section 45(8) comes into play with reference to any conflict. I do not appreciate the cogency of this argument. In any event, it does not support the full breadth of the plaintiff's contention.

the other applicant who, in fact, is not the first inventor but whose claims may be processed and mature into patents if the first applicant does not have a right to an adjudication with regard to the conflict at the application stage. It is not, of course, for the Court to attempt to improve upon the scheme which Parliament has established for the determination of conflicting claims between applicants who each claim to be first inventor.

There is, as I understand it, no dispute between the parties regarding the situation that would exist if the Commissioner had not recognized that there was some conflict and brought the defendant's application into conflict proceedings. If the Commissioner had taken no action under section 45, not only would the plaintiff not be in a position to know of the existence or the contents of the defendant's application for a patent, but there is no provision in the statute under which the plaintiff could institute proceedings in this or any other Court to obtain an adjudication, before the issue of a patent to the defendant, as to whether the defendant was entitled to a patent in respect of any of the claims in its pending application.

In these circumstances, the question is whether the very special provision impliedly made by subsection (8) of section 45 for proceedings in this Court to determine the respective rights of the parties whose applications are in conflict is restricted to the respective rights in respect of the claims in conflict as dealt with by the Commissioner or whether that very special provision opens the door to an attack by either of the applicants on any of the claims set out in the other party's application no matter what the basis for that attack may be and no matter how remote such claims may be from the subject matter of the claims put in conflict by the Commissioner.

I am of opinion that proceedings under section 45(8) are restricted to a determination of the respective rights of the parties in respect of the subject matter of the claims put in conflict by the Commissioner. Giving the best consideration that I can to section 45 as a whole and reading it in relation to the other provisions of the Act, I cannot read subsection (8) as applying to anything except the claims that have been dealt with pursuant to subsections (3) to (7) inclusive.

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While, from some points of view, it might be more convenient to have all the potential disputes involving either or both of these two applications adjudicated by the Court at this time, nevertheless, as indicated above, I am of opinion that Parliament has, by the other provisions of the *Patent Act*, indicated at what stage of proceedings and in what manner conflicting claims of inventors are to be resolved, and I do not think that subsection (8) of section 45 can be interpreted in the manner proposed by the plaintiff even if that interpretation would result in a more equitable determination of the matters in dispute.

I come now to paragraph 18 of the Statement of Claim which, as it will be recalled, is an attempt by the plaintiff to set up a contention that neither the plaintiff nor the defendant is entitled to a patent in respect of certain of the claims in conflict by virtue of the applications that have been put in conflict inasmuch as the subject matter of such claims was invented by a third person who has assigned his rights to the plaintiff.

I am of the opinion that paragraph 18 of the Statement of Claim should not be struck out. In *International Mineral and Chemical Corporation v. Potash Company of America and Duval Potash and Sulphur Company*¹, the Supreme Court of Canada upheld a decision by President Thorson that a third party be admitted as a party to conflict proceedings under subsection (8) of section 45 for the purpose of seeking an adjudication under paragraph (b) of subsection (8) that none of the applicants was entitled to the issue of a patent containing the claim in conflict "as applied for by him". The status of the intervening party in that case, according to the judgment of the Supreme Court of Canada, was that the grant to one of the parties to the conflict of the exclusive right to use the process which the intervening party had been using for years would "affect the legal right" of the intervening party "to continue to carry on its business". That being so, it is at least arguable that the plaintiff in this case has a status to attack the particular claims that have been put in conflict on the grounds that they belong to it by virtue of an invention in respect of which it has a pending claim for a patent. I appreciate that there is force in the defendant's contention that the result of the plea in paragraph 18 is to remove the

¹ (1964) 47 D.L.R. (2d) 324.

claims in question from the conflict as between the conflicting applications. See *Aktiengesellschaft Fuer Stickstoff-duenger v. Shawinigan Chemicals Limited*¹. Whether this argument should prevail must be left to be decided at trial.

An order will go, therefore, that paragraphs 10 to 17, inclusive, and paragraph 19 of the Statement of Claim be struck out and that paragraph (a) of the Prayer for Relief be struck out with leave to the plaintiff to restore paragraph (a) as it was before the amendments of November 23, 1964, and also to restore the substance of subparagraph (5) of paragraph (a) in its amended form with the deletion of any reference to the plaintiff's application 899,329. The defendant will have the costs of the application, which I hereby fix at \$400, in any event of the cause.

I should say something with reference to the plaintiff's submission that I should not strike out any part of its Statement of Claim unless I am satisfied that the portion of the Statement of Claim being struck out does not admit of plausible argument. See *City of London v. Horner*² per Cozens-Hardy, M. R. Notwithstanding the fact that I have gone to considerable lengths in these reasons to examine the scheme of the *Patent Act* and to analyze the portions of the Statement of Claim which the defendant has sought to have struck out, I am of opinion that, when it is properly understood and put in perspective, the question as to whether the plaintiff is entitled to seek the relief covered by the portions of the Statement of Claim that I am striking out "is one which does not admit of plausible argument". In any event, this is not a case, such as *London v. Horner* was, where the question was whether the plaintiff had alleged facts which made out a cause of action. The question here is whether the statute provides any right to the plaintiff to seek relief of the kind here being sought. The question does not in any way depend upon the facts that may be proved at trial. If the plaintiff is not entitled to seek the relief and is nevertheless permitted to retain the allegations in question in its Statement of Claim, the number of issues which will have to be dealt with at trial will be improperly multiplied many times. In these circumstances, in my view, it is preferable that the question

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¹ [1936] Ex. C.R. 56 at 70.

² [1914] 111 L.T. 512.

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should be decided at the inception of the proceedings and, if necessary, finally determined by way of appeal before trial, so as to avoid the possibility of what may well be a long and complicated trial with reference to claims for relief which the Court has no right to grant.