

BETWEEN:

KNAPSACK ACTIENGESELL-
SCHAFT

APPLICANT;

AND

THE DEPUTY ATTORNEY GEN-
ERAL OF CANADA

RESPONDENT.

Ottawa
1968
Jan. 30
Feb. 1

Post Office—Patents—Jurisdiction—Postal Services Interruption Relief Act, S. of C. 1967, c. 77—Failure to file patent application within year of foreign application—Waiver of time requirement of Patent Act, s. 29(1).

Held (dubitante), where an interruption of normal postal services in Canada prevents an applicant for a Canadian patent from filing his application until after the expiration of twelve months from the date he filed application for a foreign patent for the same invention a Judge of the Exchequer Court has authority under the *Postal Services Interruption Relief Act*, S. of C. 1967, c 77 (all other conditions thereof being met) to waive the twelve months requirement stipulated by s 29(1) of the *Patent Act* and to fix another time requirement therefor.

APPLICATION.

Donald A. Hill for applicant.

C. R. O. Munro, Q.C. for respondent.

JACKETT P.:—This is an application under the *Postal Services Interruption Act*, chapter 77 of the Statutes of 1967, for an order extending the time within which Canadian Patent Application Serial No. 938,112 should have been filed in order to claim the rights accorded by section 29 of the *Patent Act*, R.S.C. 1952, chapter 203, having regard to Application Serial No. K 53 701 IVb/120 filed August 8, 1964 in Western Germany.

On August 8, 1964, an application was filed under the law of Western Germany for a patent for a certain invention and on August 13, 1965, an application was filed for a patent for the same invention under the *Canadian Patent Act*.

I am satisfied that, had it not been for the interruption in normal Canadian postal services which occurred between July 22 and August 7, 1965, the Canadian application would have been filed prior to August 8, 1965. The result is that section 29(1) of the *Patent Act* (which

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provides that an application for a patent for an invention filed in Canada by a person entitled to treaty protection who has filed an application for the same invention in any one of certain other countries "has the same force and effect" as it would have had if it had been filed in Canada on the earliest date on which the foreign application was filed in the other country "if the application in this country is filed within twelve months" from such earliest date) does not apply to this Canadian application and the applicant is not entitled to the benefit of the date of the foreign application if that should ever turn out to be material.

On March 1, 1967, Royal assent was given to a statute of the Parliament of Canada (chapter 77 of 1967), reading in part as follows:

1. This Act may be cited as the *Postal Services Interruption Relief Act*.

2. Where as a result of the interruption of normal postal services which occurred between the 22nd day of July and the 7th day of August, 1965 or any subsequent interruption of normal postal services in Canada of more than forty-eight hours' duration however caused, a person has suffered loss or hardship by reason of his failure to comply with any time requirement or period of limitation contained in any law of Canada, he may, on fourteen days' notice in writing to the Deputy Attorney General of Canada and to any other person who he has reason to believe may be affected by any order made pursuant to section 3 as a result of an application by him under this section, apply to a judge of the Exchequer Court of Canada for relief.

3. If the judge to whom an application under section 2 is made is satisfied

- (a) that the applicant has suffered loss or hardship as a result of any interruption described in that section,
- (b) that the applicant took such reasonable steps as were open to him to comply with the time requirement or period of limitation without avail, and
- (c) that the application was made without undue delay, he may, after affording to any person who may be affected by any order made pursuant to this section as a result of the application an opportunity to be heard on the application or to make representations in connection therewith, and subject to such conditions, if any, as to him seem just,
 - (d) make an order waiving the time requirement or period of limitation in relation to the applicant and fixing such other time requirement or period of limitation in relation thereto as in his opinion the circumstances warrant, and
 - (e) make such further order as, in his opinion, is necessary to permit the applicant effectively to do any thing or exercise any right that he would have been able to do or exercise if he had not failed to comply with the time requirement or

period of limitation, including, where the time requirement or period of limitation with which the applicant failed to comply relates to the commencement or carrying on of any proceeding authorized or provided for under any law of Canada, such order as he considers necessary to enable the proceeding to be commenced and continued or to be carried on as though the applicant had not failed to comply with that time requirement or period of limitation.

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As indicated above, I am satisfied that, if it had not been for the interruption in postal service, the Canadian application would have been filed in time to have made section 29(1) applicable to it. I am satisfied that being deprived of whatever advantages that provision confers is a "hardship" within the meaning of the *Postal Services Interruption Relief Act*. I am also satisfied that the applicant took such reasonable steps as were open to it to file its Canadian application within the twelve month period referred to in section 29(1).

There are three matters, however, that I am not satisfied about or concerning which I have difficulty, *viz.*:

- (a) There is no material before me to establish that the application that I am considering was made without undue delay. (The applicant may have leave to file such material.)
- (b) I have doubts as to whether the twelve month period in section 29(1) of the *Patent Act* is a "time requirement or period of limitation" within the meaning of those words in the *Postal Services Interruption Relief Act*.
- (c) I have doubts as to whether section 3 of that Act authorizes the Court to make an order that waives a "time requirement" and substitutes as a "time requirement" a time that has already gone past, which is the type of order that the applicant seeks and, indeed, is the only type of order that will, apparently, give him the relief that he feels that he requires.

To me, the type of case to which the words "time requirement" in the *Postal Services Interruption Relief Act* obviously apply is where a statute authorizes something to be done within a fixed time. Such provisions as a provision authorizing an appeal or a legal proceeding to be launched, but only if it is launched within a fixed time, or

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authorizing an application to be made for something, but only if it is made within a fixed time, are clearly within the statute. Where an interruption in postal services has prevented such a proceeding being launched or such an application being made within the time fixed, the Court might under section 3(d) waive the time requirement and fix some other time requirement in relation to the bringing of the proceeding or the making of the application.

This is not such a case. In this case there was no limitation period imposed by the statute in respect of the filing of the application, which has, I understand, been filed and has been dealt with by the Commissioner to the point where a patent may be expected to issue before long. In this case, filing the application within the specified twelve month period is a condition precedent to the operation of the substantive rule contained in section 29(1) of the *Patent Act* in respect of this application (that is, there is, in one sense of the words, a "time requirement" with respect to the applicant having the advantage of the foreign filing date), and the question is whether such a condition precedent to the operation of a substantive rule framed by reference to a period of time is a "time requirement" within the meaning of the *Postal Services Interruption Relief Act*. (It seems clear to me that the English expression "period of limitation" refers to the sort of period established by an act concerning "Limitation of Actions". See, for example, "The Canadian Abridgement".)

The question as to whether the words "time requirement" must be restricted to a "time requirement" for doing something (as opposed to a time element in a condition precedent to the operation of a substantive rule of law) cannot be considered completely divorced from the further question, to which I have already referred, as to the nature of the relief that the Court can order.

In the first place, when one looks at section 3(d), one sees that the Court may make an order "waiving the time requirement" and "fixing such other time requirement" as the circumstances warrant. This would seem to point, most directly at any event, to fixing a new "time requirement" so that the applicant can do something following the Court order that he is unable to do without a Court order by reason of the original "time requirement" that operates as

a bar.¹ What I am asked to do in this case, however, is to make an order waiving “the time requirement prescribed by section 29(1) . . . within which Canadian Patent Application Serial No. 938,112 should have been filed in order to claim the rights accorded by the said Section”, and fixing August 14, 1965 (a day that will have preceded the Court’s order) as the day “on or before which the said application is to be filed in order to comply with the time requirement of section 29(1)”.² I have a little difficulty in regarding the fixing of a past day as the day before which something must have been done as the fixing of a “time requirement”.

This difficulty is, if anything, underlined when I look at section 3(e) by which the Court, having made the order contemplated by section 3(d) is authorized, in addition, to make a further order

“to permit the applicant effectively to do any thing or exercise any right that he would have been able to do or exercise if he had not failed to comply with the time requirement,” . . .

Certainly, if Parliament had had in mind, when it enacted the *Postal Services Interruption Relief Act*, only the sort of case where a substantive rule was to be allowed to operate notwithstanding failure to comply with a condition precedent containing a time element, one would have expected that the relieving statute would have merely provided generally for a modification of all such conditions precedent accordingly so that the Court having occasion to apply the substantive rule could consider the matter in the light of the particular rule as so modified. In other words there would, I should have thought, have been a general statute which, when applied to section 29(1), would, on proof of the conditions precedent spelled out in the statute, cause the words in section 29(1)—“if the application . . . is filed within twelve months”—to read, “if the application . . . is filed within twelve months or such extended period as is reasonable having regard to the interruption in postal

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¹ Strictly speaking this would be giving the legislation prospective, not retrospective, force.

² To do this, it is necessary to construe the statute as authorizing the Court to make an order with retrospective effect. It will give past acts an effect that they did not have when they were done.

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service". There would be no need for a special application in such a case. The only reason for a special application such as is contemplated by the Act would appear to be to enable the applicant to do some thing, or exercise some right, that he would otherwise be prevented from doing or exercising.

I recognize, however, that giving the widest possible sense to the language employed, it may have been intended to apply the statute to both classes of case. I realize also that, from a practical point of view, there are advantages in permitting an application in a case such as that raised by section 29(1). I am also apprehensive that a judge acting under this statute is *persona designata* and that there may be no appeal from a refusal to make an order sought under the statute. I propose, therefore, notwithstanding my very considerable doubts, to interpret the statute in the widest possible manner.

In coming to this conclusion, I am conscious that I am construing the statute without the advantage of argument by counsel for a party who may be adversely affected and that such an argument might put the operation of the statute into quite a different perspective. In the circumstances, I think I should indicate that, in the event of being met with such an argument in some other case in the future, I shall not regard myself as bound by this decision.

Upon the applicant filing material that satisfies me as to the requirement in section 3(c), I will be prepared to grant an order under the statute which, as it seems to me, might be framed somewhat as follows:

Upon application . . .

It having been made to appear

- (a) that Canadian Patent Application Serial No. 938,112 was filed on August 13, 1965 and, except for the interruption in Canadian postal services which occurred between July 22 and August 7, 1965, would have been filed prior to August 8, 1965;
- (b) that the person by whom such application was filed also filed an application under Western German patent law for a patent for the same invention on August 8, 1964;
- (c) that the applicant took such reasonable steps as were open to him to comply with the time requirement

contained in section 29(1) of the *Patent Act* in relation to the application aforesaid without avail; and

- (d) that the application to this Court was made without undue delay;

It is hereby declared that the undersigned judge of the Exchequer Court of Canada is satisfied that the applicant has suffered loss or hardship as a result of the aforesaid interruption of normal postal service;

And it is hereby ordered that the time requirement contained in section 29(1) of the *Patent Act* within which Canadian Patent Application Serial No. 938,112 should have been filed in order that the provision contained in such statutory provision should apply to such application be waived and that the 14th day of August, 1965 be and is hereby fixed as the day on or before which the said application should have been filed in order to comply with the time requirement of the aforesaid section 29(1).

As indicated above, material may be filed on the question of undue delay and the application brought on for further hearing at which time I shall be glad to hear submissions as to the form of the order.

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