

1959
Dec. 7, 8,
9, 10

BETWEEN:

GORDON JOHNSON COMPANY

AND GRAHAM METAL PROD-
UCTS LIMITED

APPELLANTS;

1960
July 7

AND

HAROLD CALLWOODRESPONDENT.

*Patent—Appeal from Commissioner of Patents—Abuse of patent rights—
Patent capable of being worked in Canada—Not worked on com-
mercial scale—No satisfactory reason given—Patent Act, R.S.C. 1952,
c. 203, ss. 2(j), 67(2)(a)(b)(d), 68, 73.*

The appellants appealed from a decision of the Commissioner of Patents ordering the grant to the respondent of a license under Patent No. 421,164 pursuant to s. 68 of the *Patent Act*, R.S.C. 1952, c. 203. The Commissioner found that the invention, a device for removing feathers from fowls, was one capable of being worked in Canada but was not being worked within the country on a commercial scale by the patentee or the owner of the equitable rights to the patent. That the working in this country was hindered by importation from abroad of the patented machine and fingers, and that the trade of certain persons was being prejudiced contrary to the public interest. He also found that the applicant possessed the necessary knowledge to work the patent in Canada.

Held: That although the Commissioner granted the application on the grounds that there had been an abuse within the meaning of paragraphs (a), (b) and (c) of s. 67(2) of the *Patent Act*, it was unnecessary to go beyond the provisions of paragraph (a) of s. 67(2), for on the evidence an abuse within the meaning of that paragraph clearly appeared and was by itself sufficient to warrant the exercise by the Commissioner of the powers conferred upon him by s. 68 of the Act.

2. That an abuse under s. 67(2) of the exclusive rights under the patent having been established, the Commissioner's decision to grant the license should be affirmed.

Celotex Corporation and Dominion Sound Equipment v. Donnacona Paper Co. Ltd. [1939] Ex. C.R. 128; *Brownie Wireless Co. Ltd. Application* (1929) 46 R.P.C. 457; *In re McKechnie Bros. Ltd. Application* (1934) 51 R.P.C. 461, referred to.

APPEAL from the decision of the Commissioner of Patents granting to respondent a license to manufacture and sell in Canada the invention covered by the Letters Patent in issue.

The appeal was heard before the Honourable Mr. Justice Thurlow at Ottawa.

M. B. K. Gordon, Q.C. and *J. Kokonis* for appellants.

R. W. MacQuarrie for respondent.

THURLLOW J. now (July 7, 1960) delivered the following judgment:

In these proceedings, the Gordon Johnson Company of Kansas City, Missouri, and Graham Metal Products Limited of Preston, Ontario, have appealed, first, from a decision of the Commissioner of Patents ordering the grant to the respondent, Harold Callwood, of a licence under Patent Number 421,064 pursuant to s. 68 of the *Patent Act*, R.S.C. 1952, c. 203, and, secondly, from the order by which the Commissioner settled the terms of the licence. The appeals were launched separately but were later consolidated by order of this Court and were heard together.

The patent in question relates to apparatus for removing feathers from fowls. The device described in the specification consists of a revolving drum from the outer surface of which protrude at an angle a number of flexible fingers by which, on being brought into contact with them, the feathers are removed without damaging the skin. The claims include the rotating device with the fingers secured thereto and the fingers, as well, with their particular design and characteristics and also the method of removing feathers from fowls by the application of the successive forces obtainable in using apparatus of the kind described. The use of the invention has greatly reduced the time required to remove feathers from fowls in commercial poultry processing. The machines and the fingers are sold as an item of poultry processing equipment generally by dealers carrying a line of such equipment.

The patent was granted on June 27, 1944, to George R. Hunt, and since 1955 has been registered in the names of several members of his family. It is not disputed, however, that since November, 1952 all equitable rights under the patent have belonged to the Gordon Johnson Company, one of the appellants, pursuant to assignments from the members of the Hunt family and from the Greenbriar Company, an Ohio corporation, the holder of an exclusive licence under the patent.

In July, 1950, the Greenbriar Company had granted to the Barker Poultry Equipment Company of Ottumna, Ohio, a non-exclusive sublicense under the patent, and by a document dated February 1, 1956 and consented to by the Gordon Johnson Company, the Barker Poultry Equipment

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Company extended to the Barker Poultry Equipment Company Limited of St. Boniface, Manitoba, its rights under the sublicense. In September, 1951 the Greenbriar Company had also granted to the Callwood Can Company Limited of St. Boniface, Manitoba, a limited, non-exclusive, non-transferable sublicense under the patent. The latter licence was cancelled by the Gordon Johnson Company early in 1955 for failure to make royalty payments as provided in the agreement therefor, and shortly afterwards, in March, 1955, the Gordon Johnson Company granted another similar licence to the other appellant, Graham Metal Products Limited.

In February and again in March of 1955, the respondent, Harold Callwood, who had been president of Callwood Can Company Limited from the time of its formation in 1947 until 1953 and had left it and commenced doing business in poultry processing equipment in Toronto, Ontario, under the name of The Callwood Company, asked the Gordon Johnson Company to consider giving him a licence under the patent, but this was refused. He thereupon applied for a compulsory licence pursuant to s. 68 of the *Patent Act* but was refused and, on an appeal to this Court from such refusal being dismissed, he launched a second application which, after a hearing at which the Gordon Johnson Company, the Barker Poultry Equipment Company Limited, and Graham Metal Products Limited were represented and heard in opposition thereto, resulted in the orders now under appeal.

Before turning to the reasons given by the Commissioner for ordering the grant of a licence, it will be convenient to refer to the substantive provisions of the statute under which the application was made to him. These are contained in a group of sections under the heading "Conditions". One of the sections is s. 67, s-s. (3) of which is as follows:

(3) It is declared with relation to every paragraph of subsection (2) that, for the purpose of determining whether there has been any abuse of the exclusive rights under a patent, it shall be taken that patents for new inventions are granted not only to encourage invention but to secure that new inventions shall so far as possible be worked on a commercial scale in Canada without undue delay.

By s-s. (1) of the same section, it is provided that the Attorney-General of Canada or any person interested may at any time after three years from the grant of a patent

apply to the Commissioner, alleging that there has been an abuse of the exclusive rights thereunder and asking for relief.

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Subsection (2) of the same section contains, *inter alia*, the following:

(2) The exclusive rights under a patent shall be deemed to have been abused in any of the following circumstances:

- (a) if the patented invention (being one capable of being worked within Canada) is not being worked within Canada on a commercial scale, and no satisfactory reason can be given for such non-working, but if an application is presented to the Commissioner on this ground, and the Commissioner is of opinion that the time that has elapsed since the grant of the patent has by reason of the nature of the invention or for any other cause been insufficient to enable the invention to be worked within Canada on a commercial scale, the Commissioner may make an order adjourning the application for such period as will in his opinion be sufficient for that purpose;
- (b) if the working of the invention within Canada on a commercial scale is being prevented or hindered by the importation from abroad of the patented article by the patentee or persons claiming under him, or by persons directly or indirectly purchasing from him, or by other persons against whom the patentee is not taking or has not taken any proceedings for infringement;

* * *

- (d) if, by reason of the refusal of the patentee to grant a licence or licences upon reasonable terms, the trade or industry of Canada or the trade of any person or class of persons trading in Canada, or the establishment of any new trade or industry in Canada, is prejudiced, and it is in the public interest that a licence or licences should be granted.

The expression "work on a commercial scale" is declared by s. 2(j) to mean

... the manufacture of the article or the carrying on of the process described and claimed in a specification for a patent, in or by means of a definite and substantial establishment or organization and on a scale that is adequate and reasonable under the circumstances.

By s. 68, the Commissioner, on being satisfied that a case of abuse of the exclusive rights under the patent has been established, is given a number of powers, including a power to order the grant to the applicant of a licence on such terms as the Commissioner may think expedient. The power of the Commissioner to order the grant of such a licence is thus in the first instance dependent on his having been satisfied that a case of abuse has been established. By s. 73, however, all such orders and decisions of the Commissioner are made subject to appeal to this Court and, there being

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no limitation on such appeal expressed in the statute, it devolves on the Court to review the matter both on the facts and the law. *Vide Brownie Wireless Company Limited case*¹, where Luxmoore J. said at p. 478:

In the course of the argument a great deal was said with regard to the position of the *Comptroller*. It was said that the legislature had on three separate occasions altered the Tribunal to which the decision of the question of the grant of compulsory licences should be committed, and that in finally selecting the *Comptroller*, special reliance was placed on his admittedly wide experience and knowledge. For this reason it was suggested that the Court should be very careful before deciding to alter any decision come to by the *Comptroller*, and ought only to consider whether the decision involved any mistake of law. I am well aware of the *Comptroller's* great experience, and I recognise the care and anxiety he has brought to bear in the decision of this case, but the legislature has provided that the decision of the *Comptroller* in such cases as the present is subject to an appeal to the Court. The appeal is not limited to questions of law, and it is plainly the duty of the Court to consider the decision not only with regard to the questions of law which arise, but also on the facts.

The legislative background of the provisions mentioned above was commented on as follows by MacLean P. in *Celotex Corporation and Dominion Sound Equipment v. Donnacona Paper Co. Ltd.*² at p. 129:

Before referring to the provisions of the *Patent Act* relevant to the issues here, which are sections 65 to 70 inclusive, I might observe that prior to the enactment of such sections, the *Patent Act* provided that any person might apply to the Commissioner, at any time after three years from the date of a patent, for the revocation of such patent on the ground that the patented articles or process was manufactured or carried on exclusively or mainly outside Canada, to supply the Canadian market with the invention covered by the patent. The Commissioner, in the absence of satisfactory reasons as to why the article or process was not manufactured or carried on in Canada, was empowered to make an order revoking the patent forthwith, or after a reasonable interval. This provision was enacted with a view to establishing new industries in this country, but it was evidently found at times impractical, or oppressive, and it was superseded by the provisions of the *Patent Act* to which I am about to turn, which are almost identical with section 27 of the English *Patent Act*.

The development of the corresponding provisions of the English Patent Act is traced by Luxmoore J. in the *Brownie Wireless* case (*supra*) at pp. 469 to 472, a case which turned on the English provision corresponding to s. 67(2)(d) of the *Patent Act*. The earlier English cases must, in my opinion, be read with caution in view of the differences between the statutes applicable when they arose and the present provisions of the *Patent Act*.

¹ (1929) 46 R.P.C. 457.

² [1939] Ex. C.R. 128.

In his reasons for granting the respondent's application, the Commissioner, after reviewing the facts, found as follows:

In resume, I find that the invention is one capable of being worked in Canada, that it is not worked within the Country on a commercial scale by the patentee or by the party which we have agreed to call the owner of the equitable rights to the patent, that the working in this Country is still hindered by a considerable importation from abroad of the patented machine and fingers and that the trade of certain persons is being prejudiced contrary to public interest. I also find that the applicant possesses the necessary knowledge and competence to work the patent in Canada.

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It will be observed that the Commissioner in effect found that there had been abuse within the meaning of all three of the above-quoted paragraphs of s. 67. For the purposes of this appeal, however, it is, in my opinion, unnecessary to go beyond the provisions of paragraph (a) for, in my view, an abuse within the meaning of that paragraph clearly appears and is by itself sufficient to warrant the exercise of the powers conferred by s. 68.

Under paragraph (a) of s. 67(2) (omitting what is not material to the present discussion), the exclusive rights under the patent are to be deemed to have been abused if (a) the patented invention is one capable of being worked within Canada, (b) it is not being worked within Canada on a commercial scale, and (c) no satisfactory reason can be given for such non-working. That the invention in question is one capable of being worked in Canada is, in my view, clear, for it appears from the evidence that some, if not all, sizes of the machines have been made in Canada, and that the fingers can also be made in Canada.

Turning to the second of the elements mentioned, the expression "work on a commercial scale" and the English equivalent of the statutory definition were discussed as follows by Luxmoore J. in *McKechnie Bros. Ltd.* application¹ at p. 468:

The question therefore arises, What is the meaning of the phrase "working on a commercial scale"? In ordinary parlance the phrase is used in contradistinction to research work, or work in the laboratory, but in the Section under consideration the words "worked on a commercial scale" must be read in the light of the statutory definition contained in Section 93 of the Consolidated Acts. The definition is in these words: "Working on a commercial scale" means the manufacture of the article or the carrying on of the process described and claimed in a specification for a patent in

¹(1934) 51 R.P.C. 461.

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or by means of a definite and substantial establishment or organization, and on a scale which is adequate and reasonable in all the circumstances". I am not going to attempt any delimitation of the necessary scale beyond pointing out that it must have a definite relation to all the circumstances of the particular case. It must be adequate with reference to some particular circumstances. "Adequate" is a word imputing equality or sufficiency in a proportionate sense. In ordinary circumstances, where there is no difficulty in the way of working an invention in this country and there are no other circumstances to be considered, "adequate" would, I think, suggest a reasonably close relationship to the demand for the particular article in this country.

In Celotex Corporation and Dominion Sound Equipment v. Donnacona Paper Co. Ltd. (supra), MacLean P. said at p. 136:

It is essential to the working of the patents in Canada, in my opinion, that the formation of perforations, apertures, or surface openings, in the acoustical board should be carried out in Canada, because such is the essence of the inventions;

At p. 138 he also said:

Sec. 65, ss. (3) of the Act declares that in an application of this nature it shall be taken that patents for new inventions are granted not only to encourage inventions but to secure that new inventions shall, as far as possible, be worked on a commercial scale in Canada, without undue delay; that is, and always has been, the spirit of the several Patent Acts in force in this country, at least for a long time. The present *Patent Act* is more liberal to patentees than former Acts. If a patentee has claimed a wholly new invention, a machine, an acoustical board, he must manufacture it in this country or run the risk of coming within the provisions of s. 65 of the Act. Each case must, of course, be determined on its merits, and in each case it will have to be determined on a proper construction of the patentee's specification, what the invention really is, and what are its essential features. In this case the essential feature of the inventions of Trader and Mazer, as I have already stated, is the manufacture of a suitable acoustical board or material according to the manner described in such patents. That is a new manufacture. The patentee must, in such cases make an effort to create a demand for the monopoly, and the establishment of an industry will in itself frequently help to create a demand for the article or process in question. And regard must be had to the possible export trade with countries in which the importer would not be liable to actions for infringement, as well as the demand for domestic consumption. It may be that the demand in Canada for the acoustical board produced by Celotex is limited, and that Celotex has adequately met Canadian demands for that board by importations of such board, but that is not a working of the patents as contemplated by the *Patent Act*.

In interpreting the provisions of the section 67 it is, I think, not without importance to observe that, while in effect conceding that patents are granted to "encourage" inventions, s-s. (3) declares that they are granted to "secure" that new inventions shall so far as possible be

worked on a commercial scale in Canada without undue delay. Patent rights are thus granted not merely to encourage working on a commercial scale but to secure this, and the tribunal is required to bear this in mind in determining whether there has been abuse within the meaning of the several paragraphs of s-s. (2). It is the responsibility of one holding rights under the patent law of this country to see that commercial working of the patent in Canada within the limits indicated is secured, and if he fails to secure it and finds as a result that the powers of s. 68 are exercised with respect to his patent he has none but himself to blame for he holds the patent not alone for his own enrichment but for the purposes as well of the policy declared by the statute. It is also to be noted that, under paragraph (a) of s-s. (2) and the definition in s. 2(j), the working of an invention on a commercial scale in Canada requires both a definite and substantial organization in or by means of which the manufacture of the patented article or the carrying on of the patented process is carried out in this country and that the working be on a scale that is adequate and reasonable under the circumstances.

In the present case, the salient facts with respect to the working of the patent in Canada are broadly that there was no working of it at all for the first seven years from June 27, 1944, when the patent was granted, until the Callwood Can Company Limited began working it under the licence from the Greenbriar Company dated September 9, 1951. From that time until its licence was cancelled at the end of 1954, the Callwood Can Company Limited paid royalty on 20 machines which it manufactured and sold at a total selling price of \$24,562.20. In the period between the cancellation of that licence and the end of 1956, the Graham Metal Products Limited under its licence manufactured and sold 55 machines at a total selling price of \$12,444.60. Thus, in the five years 1952 to 1956 inclusive there were 75 machines manufactured and sold in Canada at a total selling price of \$37,006.80. In 1953 and 1954, two of the years in which the Callwood Can Company Limited held its licence, the Gordon Johnson Foreign Company, which handles the sales made by the Gordon Johnson Company in countries other than the United States, exported to Canada 69 machines having a total selling price of \$61,023.92. In the years 1955

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and 1956, during which the Graham Metal Products Limited held its licence, the same company exported to Canada 48 machines having a total selling price of \$43,453.57. In 1956 alone, the year in which the smallest number of machines were exported to Canada, there were 12 machines exported with a selling value of \$13,929.52, this being more than the total selling price of machines manufactured and sold in 1955 and 1956 by the Graham Metal Products Limited. In fact, what the Graham Metal Products Limited appears to be manufacturing is merely three or four models of the smaller machines which, while accounting for a considerable number of individual sales, by no means represent the bulk of the business in both small and large machines available in the Canadian market in value or in economic importance, and particularly so in view of a trend in the poultry processing industry to the use of larger machines.

In totals for the five years mentioned, the machines manufactured and sold in Canada by the Callwood Can Company Limited and the Graham Metal Products Limited compare with the Gordon Johnson Company exportations to Canada as follows:

	<i>No. of Machines</i>	<i>Total Selling Price</i>
Canadian-made	75	\$ 37,006.80
U.S.-made	107	\$104,477.49

In addition, the supply to the Canadian market of rubber fingers for the machines has been entirely by importation from the United States. For these there is a steady demand in Canada both for new machines and for replacements. Graham Metal Products Limited alone in 1955 and 1956 imported and sold in Canada about 96,000 fingers at a selling price in excess of \$44,000, and the Barker Poultry Equipment Company Limited imported about 15,000 in the year preceding the hearing.

Turning to the other licencees, the Barker Poultry Equipment Company manufactured neither machines nor fingers in Canada in the years from 1950 to the time of the hearing before the Commissioner in February, 1957, and no figures were given in evidence as to the extent of its exports of the patented articles to Canada. Its namesake, the Barker Poultry Equipment Company Limited of St. Boniface, Manitoba, however, following the extension to it of the

rights under the licence, in a shop where two workmen were employed, commenced working on three machines none of which had by the time of the hearing been completed, and it also arranged for the construction by another company of a fourth machine, which had been sold. Up to the time of the hearing, it had imported and sold five Barker machines and had imported two others. In November, 1956 it obtained from the Dominion Rubber Company Limited a quotation for the manufacture of four types of rubber fingers and in December of that year placed an order for 5,000 of one of the four types. An acknowledgment of the order by the Dominion Rubber Company Limited was put in evidence, as well as a sample finger said to have been made by that company. Whether in fact the order was ever filled does not appear and, bearing in mind the time when it occurred in relation to the proceedings before the Commissioner, I would give the transaction no weight whatever as evidence of manufacture of the fingers in Canada or of any *bona fide* intention to secure their manufacture in Canada on a commercial scale within the meaning of the statute.

Applying the test suggested by Luxmoore J. in the passage above quoted from *In Re McKechnie Bros.' Application*, in my opinion it is clear on the evidence that there is no reasonably close relationship between the manufacture of the patented articles in Canada and the demand which is shown to have been supplied in Canada, nor is there anything to indicate that there ever was any real difficulty in the way of working this invention in Canada or any special or other circumstances to be considered. Up to the time of the hearing, nearly 13 years after the grant of the patent the Canadian market had been supplied with fingers entirely by imports from the United States and less than half of the Canadian market had been supplied with Canadian-made machines while, so far as appears, no Canadian-made machines had moved into the United States market or the market of any other country. I am accordingly of the opinion that the scale of working in Canada was not at any time up to the time of the hearing before the Commissioner "adequate" within the meaning of s. 2(j) or sufficient to constitute working on a commercial scale within the meaning of that definition.

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This brings me to the third of the questions arising on s. 67(2) (a), that of whether any *satisfactory* reason for non-working in Canada on a commercial scale within the meaning of the definition has been given.

On this question, it may first be noted that no explanation of any kind has been given by the members of the Hunt family, in whose name the patent is registered. Nor has any explanation been given as to why the patent was not worked in Canada in the first seven years after it was granted. Mr. Gordon Johnson, whose company acquired the equitable interest in the patent in 1952, in the course of his evidence referred to the many technical aspects of the business and the knowledge necessary to make satisfactory equipment, to the desirability of one engaged in the supply of such equipment furnishing an educational and service program to those engaged in the industry, and to the fact that it is difficult to manufacture a line of such equipment in the quantities required and at satisfactory costs, having regard to the rapidity of changes in the equipment and the demands for it. He did not suggest, however, that his company was not at all times qualified in all necessary respects, and I would conclude from his evidence that the reason his company did not commence and carry on the working of the patent in Canada was that, with the United States market to supply, it was more practical and desirable to supply the much smaller Canadian market or at least a considerable part of it by export from the United States. This view of his evidence is, I think, borne out by some of the reasons he gave for refusing the respondent's request for a licence. He said:

Yes. I just recited this morning some of the requirements we felt necessary for our licensee, that is to grant a licence. One is whether it was needed. We had an arrangement with the Graham Metal Company that we knew would develop into a licence, which it did, and felt they were sufficiently experienced. We were selling in this country, some of our other licensees, including Barker, were selling in this country and we realized the volume of business was not great enough to make it practical from a business standpoint to have too many people supplying the equipment. That was one of the reasons.

Whether or not, from the point of view of the business of his company and of realizing profit from the patent, the policy thus indicated is the most practical and reasonable one to follow is a question which I do not have to pass upon.

Here the question is whether this affords a satisfactory explanation within the meaning of s. 67(2) (a) for not working the patent on a commercial scale in Canada, and in my opinion it does not.

An abuse under s. 67(2) (a) of the exclusive rights under the patent having been thus established, the Commissioner was empowered under s. 68 to grant a licence to the respondent if he saw fit so to do. At the hearing before him, as well as in the course of the argument on the appeal to this Court, much was said about the respondent's financial ability and technical qualifications or his lack of them, and it was urged that he was not a proper person to have a licence. On this point it should be noted that the statute prescribes no necessary financial or other qualifications for an applicant for the grant of a compulsory licence. The right to apply is given to "any person interested", and when an abuse has been established the Commissioner is authorized in his discretion to grant a licence to that person. The legislature, in conferring that discretion, has not seen fit to fetter or limit its exercise, and it would, I think, be quite wrong to read into it limitations which Parliament has not prescribed. On the other hand, in exercising the discretion the Commissioner can, no doubt, properly take into account the lack of financial and other qualifications of the particular applicant, and if, on that account, in a close case he should exercise his discretion in favour of refusing the licence the Court on an appeal would not be likely to interfere with his decision. What the Commissioner should, I think, in all cases take into account in exercising the discretion is the whole of the circumstances, including the nature and extent of the abuse shown to have occurred, as well as the financial and other qualifications of the applicant to work the patent, and where that has been done even the lack of financial ability or technical qualifications in the applicant would not necessarily or in all situations lead to a reversal of his decision to grant a licence.

In the present case, the respondent, being engaged in the business of poultry processing equipment, is undoubtedly a person interested within the meaning of s. 67(1) and, while he may not know as much about all the technical aspects of that business as some others, on the evidence I agree with the Commissioner's finding that he possesses the

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necessary knowledge and competence to work the patent in Canada. Moreover, despite the history of his financial troubles prior to 1953, I am not satisfied either that such history would in the circumstances afford a sufficient reason for refusing his application or that he is not presently in possession of sufficient financial resources to enable him to work the patent.

The Commissioner's decision to grant the licence to the respondent will, accordingly, be affirmed.

The several objections of the appellant to the terms of the licence were dealt with at the hearing of the appeal, except that relating to the royalty. By s. 68(a) of the Act, it is provided that

. . . in settling the terms of a licence under this paragraph the Commissioner shall be guided as far as may be by the following considerations:

- (i) he shall, on the one hand, endeavour to secure the widest possible user of the invention in Canada consistent with the patentee deriving a reasonable advantage from his patent rights,
- (ii) he shall, on the other hand, endeavour to secure to the patentee the maximum advantage consistent with the invention being worked by the licensee at a reasonable profit in Canada, and
- (iii) he shall also endeavour to secure equality of advantage among the several licensees, and for this purpose may, on due cause being shown, reduce the royalties or other payments accruing to the patentee under any licence previously granted, and in considering the question of equality of advantage, the Commissioner shall take into account any work done or outlay incurred by any previous licensee with a view to testing the commercial value of the invention or to securing the working thereof on a commercial scale in Canada.

In the present case, the Commissioner set the royalty at 10 per cent of the net sales price of each machine sold by the respondent but provided that the royalty on fingers sold as replacements should be two cents per finger. No reasons were given for arriving at these figures. The evidence indicates that, for most if not all varieties of fingers, two cents would be less than ten per cent on the selling price. In the case of the Callwood Can Company Limited licence, the royalty provided was 10 per cent of the net sales price of each machine and of all replacements including fingers, provided that the royalty should not be less than \$10 for each machine nor less than six per cent of the advertised list price of such machine, nor less than two cents per finger on replacement fingers. The agreement also provided for payment of minimum royalty of \$3,600 per year.

The licence given by the Greenbriar Company to the Barker Poultry Equipment Company provided for a royalty of five per cent on the retail price of automatic machines and six per cent on replacement fingers and for ten per cent on the retail price of manual machines and replacement parts therefor, including fingers, with a minimum of \$10 per machine and not less than two cents per finger on replacement fingers and with a further provision that the royalty on each machine should not be less than six per cent of the advertised list price of the machine. There was, however, no provision for a minimum annual royalty.

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The royalty provided for in the agreement between the Gordon Johnson Company and Graham Metal Products Limited is similar to that in the Callwood Can Company Limited licence, and there is a provision for minimum annual royalties of \$3,600 commencing January 1, 1956. The agreement may be terminated on 90 days' notice by either party. When asking for a licence prior to making the first of his applications for a compulsory licence, the respondent stated that he would be willing to pay a royalty of 10 per cent even though he understood licensees in the United States pay at a lower percentage.

The appellants' objections to the royalty provided in the licence as settled by the Commissioner were that the royalty on replacement fingers should be 10 per cent, with a minimum of two cents per finger, and that there should be a provision requiring the respondent to pay minimum annual royalties. It will be noted that the royalty provisions in the Barker licensing agreement differ quite materially from those in the Callwood Can and Graham Metals agreements, the provisions in the Barker agreement, of which the Barker Poultry Equipment Company Limited has the benefit, being much less onerous than those in the other agreements. They are also less onerous than what Callwood himself offered. Having regard to the duty of the Commissioner under s. 68(a)(iii) to endeavour to secure equality of advantage among the several licensees, and to the provisions of the Barker licence, I do not think that he can be said to have been wrong in not providing for a minimum annual royalty and, having regard to the non-exclusive nature of the licence and to the ability of the Graham Metal Products Limited to cancel its agreement on a short-term notice, I

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would not alter the Commissioner's order in this respect. With respect to the royalty on replacement fingers, while it may turn out that the cost of Canadian-made fingers will be higher than those made in the United States and thus make it somewhat unfair to the respondent to be required to pay a similar percentage based on such higher price, two cents per finger is, I think, materially lower than the 10 per cent offered by the respondent and the royalty provided for in the Graham licence and, on the whole, I think the royalty on fingers should be set on the terms contained in the Barker licence; that is to say, six per cent on replacement fingers for automatic machines and 10 per cent on replacement fingers for manual machines, with, in the latter case, a two-cent per finger minimum. The royalty will be modified accordingly, and the other terms of the licence will be amended as indicated at the hearing.

The appeal from the grant of the licence will be dismissed and that from the terms of the licence will be allowed to the extent indicated. The respondent will have the general costs of the appeal, against which the appellants may tax and set off any costs which are related exclusively to the appeal against the terms of the licence.

Judgment accordingly.