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| RODI & WIENENBERGER } AKTIENGESELLSCHAFT } | | APPELLANT; | 1966 { *Feb. 24, 25 Apr. 26 |
| AND | | | |
| METALLIFLEX, LTD. RESPONDENT. | | | |

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Compulsory licence—Failure to work invention on a commercial scale—Whether abuse of exclusive rights—Whether satisfactory reasons advanced by patentee—Patent Act, R.S.C. 1952, c. 203, ss. 2(j), 46, 67, 68.

In 1954, the appellant was granted a patent relating to extensible watch bracelets. In 1961, the respondent applied for a compulsory licence under s. 67(1) of the *Patent Act*, R.S.C. 1952, c. 203, on the ground that there had been abuse of the exclusive rights under the patent. The Commissioner of Patents ordered the grant of a licence and fixed the royalty to be paid thereunder. On appeal, the Exchequer Court affirmed the granting of the licence but referred the matter back to the Commissioner to reconsider the question of royalty. The appeal to this Court was on the granting of the licence only.

Held: The appeal should be dismissed.

Per Curiam: Where an applicant for a compulsory licence under ss. 67 and 68 of the *Patent Act* has established that the patented invention is capable of being worked in Canada and that it has not been worked in Canada on a commercial scale by the end of the 3-year period allowed in s. 67(1), the onus of justifying the use he has made of his monopoly falls on the patentee. On the facts of this case, the appellant has failed to satisfy the onus thus placed on it, and, therefore, the compulsory licence was rightly granted.

Per Spence J.: The trial judge rightly rejected the main contention of the appellant that the infringement of its patent by many competitors, and particularly the respondent, provided a "satisfactory reason"

* PRESENT: Taschereau C.J. and Judson, Ritchie, Hall and Spence JJ.

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within s. 67(2)(a) of the *Patent Act*. The evidence in this case was a clear demonstration of the appellant's intent not to work the invention in Canada on a commercial scale.

Brevets—Licence obligatoire—Défaut d'exploiter l'invention sur une échelle commerciale—Abus des droits exclusifs—Justification du défaut d'exploitation—Loi sur les Brevets, S.R.C. 1952, c. 203, arts. 2(j), 46, 67, 68.

En 1954, un brevet se rapportant à des bracelets de montre extensibles fut émis à l'appelante. En 1961, l'intimée présenta une requête pour obtenir une licence obligatoire en vertu de l'art. 67(1) de la *Loi sur les Brevets*, S.R.C. 1952, c. 203, pour le motif qu'il y avait eu abus des droits exclusifs conférés par le brevet. Le Commissaire des Brevets a ordonné l'émission d'une licence et a fixé les droits à être payés. Sur appel, la Cour de l'Échiquier a confirmé l'émission de la licence mais a renvoyé l'affaire devant le Commissaire sur la question des droits. L'appel devant cette Cour ne concernait que la licence seulement.

Arrêt: L'appel doit être rejeté.

La Cour: Lorsque le requérant d'une licence obligatoire en vertu des arts. 67 et 68 de la *Loi sur les Brevets* a établi que l'invention brevetée est susceptible d'être exploitée au Canada et qu'elle n'a pas été exploitée sur une échelle commerciale au Canada à l'expiration de la période de trois ans requise par l'art. 67(1), le breveté a le fardeau de justifier l'usage qu'il a fait de son monopole. Les faits dans cette cause démontrent que l'appelante n'a pas réussi à satisfaire ce fardeau, et, en conséquence, l'émission de la licence était justifiée.

Le Juge Spence: Le juge au procès était justifié de rejeter la prétention principale de l'appelante à l'effet que la violation de son brevet par plusieurs concurrents, et particulièrement par l'intimée, était une justification en vertu de l'art. 67(2)(a) de la *Loi sur les Brevets*. La preuve dans cette cause démontrait clairement l'intention de l'appelante de ne pas exploiter l'invention sur une échelle commerciale au Canada.

APPEL d'un jugement du Juge Thurlow de la Cour de l'Échiquier du Canada¹, confirmant une décision du Commissaire des Brevets. Appel rejeté.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada¹, affirming a decision of the Commissioner of Patents. Appeal dismissed.

Christopher Robinson, Q.C., and Samuel Godinsky, Q.C., for the appellant.

¹ [1963] Ex. C.R. 232, 23 Fox Pat. C. 45, 40 C.P.R. 52.

Gordon F. Henderson, Q.C., and R. G. McClenahan, for the respondent.

The judgment of Taschereau C.J. and Judson, Ritchie and Hall JJ. was delivered by

HALL J.:—The appellant was granted Canadian Patent No. 505676 on September 7, 1954. It was for an expandable wrist watch bracelet consisting of a number of metal sleeves, leaf springs and U-bows with the addition of two end pieces for coupling the bracelet to the watch. Apart from the manufacture of suitable materials and tools with which to make the parts, the production of these bracelets consists of the relatively commonplace operation of stamping out the required parts by means of presses, the assembling of the parts into bracelets and the cleaning, polishing and mounting or packaging for sale of the end product. The assembly portion of the operation is one which can be carried out by men or women after a comparatively short period of training and practice.

On January 3, 1961, the respondent applied to the Commissioner of Patents for a compulsory licence under s. 67(1) of the *Patent Act*, R.S.C. 1952, c. 203, which reads:

67.(1) The Attorney General of Canada or any person interested may at any time after the expiration of three years from the date of the grant of a patent apply to the Commissioner alleging in the case of that patent that there has been an abuse of the exclusive rights thereunder and asking for relief under this Act.

The Commissioner ordered the grant of a licence on April 26, 1962, in the following terms:

My conclusion is that a compulsory licence is to be granted. The licence is to be effective as of the date of this decision. The licence is non-exclusive and is valid in favour of the licensee, Metalliflex Ltd. for the manufacture in Canada of bracelets incorporating any of the features of the patent and according to my concept of manufacture as set out in this decision.

I have given a great deal of thought to the basis of and the amount of royalty. In this particular case I have decided that a royalty based on manufacturing cost or sales price with all the appendages of discounts and returns would unnecessarily complicate accounting and reports. A straight royalty on pieces sold by the manufacturer and accepted by the purchaser would be much easier to compile and account for. I therefore set the royalty at ten cents per piece manufactured, and sold by the manufacturer.

The parties will have sixty days within which to agree on the terms of the licence and present a draft to me for acceptance. If the parties fail to do so within the time set, I shall draft the licence upon my own terms.

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The parties were not able to agree on the terms of the licence and the Commissioner on July 31, 1962, settled the form of the licence in part as follows:

1. The said Metalliflex shall have the right to manufacture and sell in Canada extensible watch bracelets embodying the features of the invention claimed in Canadian Patent No. 505,676 from and after the 26th day of April 1962, the date of my decision, up to the expiration of the term for which the said patent has been granted.

2. Metalliflex shall pay to Rodi a royalty of ten cents (.10c) for each such bracelet manufactured and sold by it; this royalty to be paid on all sales made subsequent to the 26th day of April 1962, the date of my decision.

The licence contained provisions for the keeping of accurate records and furnishing by the respondent to the appellant of all information necessary for the computation and payment of the royalty, including the right of the respondent to inspect and take copies of all records pertaining to the manufacture of watch bracelets under the patent in question.

The appellant appealed to the Exchequer Court of Canada¹ from the decision of the Commissioner. The appeal was heard by Thurlow J. who gave judgment on November 16, 1962, dismissing the appeal as to the granting of the licence but directing that:

... the royalty to be paid by the Respondent on bracelets made pursuant to the said licence other than the Respondent's "Bandmaster" bracelets be and the same is hereby referred back to the Commissioner of Patents for consideration.

The appellant now appeals from the order granting the licence. The matter of the royalty payable was not an issue in this Court.

The parts of s. 67 of the *Patent Act* relevant to this appeal read:

67.(1) The Attorney General of Canada or any person interested may at any time after the expiration of three years from the date of the grant of a patent apply to the Commissioner alleging in the case of that patent that there has been an abuse of the exclusive rights thereunder and asking for relief under this Act.

(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

¹ [1963] Ex. C.R. 232, 23 Fox Pat. C. 45, 40 C.P.R. 52.

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;

(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.

Work on a commercial scale is defined in s. 2(j) as follows:

- (j) "work 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 or by means of a definite and substantial establishment or organization and on a scale that is adequate and reasonable under the circumstances.

Section 68 reads in part:

68. On being satisfied that a case of abuse of the exclusive rights under a patent has been established, the Commissioner may exercise any of the following powers as he may deem expedient in the circumstances:

- (a) he may order the grant to the applicant of a licence on such terms as the Commissioner may think expedient, including a term precluding the licensee from importing into Canada any goods the importation of which, if made by persons other than the patentee or persons claiming under him would be an infringement of the patent, and in such case the patentee and all licensees for the time being shall be deemed to have mutually covenanted against such importation; a licensee under this paragraph is entitled to call upon the patentee to take proceedings to prevent infringement of the patent, and if the patentee refuses, or neglects to do so within two months after being so called upon, the licensee may institute proceedings for infringement in his own name as though he were the patentee, making the patentee a defendant; a patentee so added as defendant is not liable for any costs unless he enters an appearance and takes part in the proceedings; service on the patentee may be effected by leaving the writ at his address or at the address of his representative for service as appearing in

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the records of the Patent Office; 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

The appellant's patent was at all times by s. 46 of the Act "subject to the conditions in this Act prescribed;"

It will be seen that the decision of the Commissioner and upheld by Thurlow J. was essentially one of fact and the question to be determined was whether there had been an abuse of the exclusive rights within the meaning of s. 67(2) above.

Once an applicant for a compulsory licence under ss. 67 and 68 has established that the patented invention is capable of being worked in Canada and that it was not being worked in Canada on a commercial scale by the end of the three-year period allowed in s. 67(1) the onus of justifying the use he has made of his monopoly; the onus of proving, in order to resist the granting of a compulsory licence, that his patented process is carried on, or his patented article manufactured to an adequate extent in Canada or of giving a satisfactory reason why it is not so carried on or manufactured is imposed on the patentee. Parker J. in the *Hatschek's Patents*¹ and Luxmore J. in *McKechnie's case*².

In the present case it was established beyond question that at the time of the filing of the respondent's application, namely January 3, 1961, manufacture of the invention in Canada was virtually non-existent. Thurlow J. said in his judgment at p. 238:

The facts with respect to the working of the invention in Canada are first that there was no working at all in the first three years following the grant of the patent except that in 1956 the respondent made some 2,200 bracelets and parts for several thousand more according to a patent which it held, but was prevented from going into full production and putting them on the market by an interlocutory injunction granted in an action brought by the appellant for infringement of the patent here in question. In November of the following year shortly after the filing by Watchstraps Inc. of an application to the Commissioner alleging abuse of the patent and asking for a compulsory licence to manufacture under it in Canada

¹ [1909] 26 R.P.C. 228 at 239, [1909] 2 Ch. 68.

² (1934), 51 R.P.C. 461 at 467.

the appellant organized a Canadian subsidiary company known as Rowi Limited which at some point thereafter in 1957 or in 1958 began assembling bracelets of the patented type from parts made by the appellant in Germany. The evidence does not clearly show what facilities Rowi Limited had at the time other than an office or how many employees it had engaged in assembling bracelets. Nor is there satisfactory evidence as to the extent to which the bracelets were assembled from parts as opposed to the mere attaching of end pieces made in Germany to bracelets made and otherwise assembled in Germany. It is conceded that the mere attaching in Canada of end pieces to bracelets otherwise assembled in Germany could not be regarded as manufacture of the bracelets in Canada. In 1958 Henry Amsell, who carried on business in Montreal under the firm name of Amsell Brothers, also began assembling bracelets of the patented type for Rowi Limited and installed in the cellar of his premises several machines which had been sent by the appellant to Rowi Limited. These were presses which could be used to make the parts for the bracelets but they were not put in use. There is evidence which I think is corroborated by the course of events which followed and which I would regard as credible that the machines were in fact brought to Canada and installed in the premises of Amsell Brothers not for the purpose of producing parts but as a camouflage in the hope of making it appear whenever necessary that the patented bracelets were being manufactured in Canada.

and at p. 240:

In fact what was happening in the years 1958, 1959 and 1960 was that the appellant and Rowi Limited were both selling to Canadian customers. In 1958 and part of 1959 while the appellant's prices were somewhat lower than those of Rowi and in addition the appellant allowed a 5 per cent quantity discount which Rowi could not offer the differences were apparently not of enough significance to greatly outweigh the advantage which Rowi possessed of being able to deliver more promptly and sales by Rowi increased to the point where in 1959 they were somewhat higher than those made in Canada by the appellant. In September 1959, however, the prices of bracelets sold by Rowi Limited were raised by 20 per cent while those of the appellant remained the same and this gave the bracelets supplied by the appellant a marked advantage. Thereafter sales by Rowi Limited declined sharply while those of the appellant increased. This price policy remained in effect until March of 1961, when following the presentation of the respondents petition, and the change in the management personnel of Rowi Limited and its sales representation and that of the appellant in Canada, arrangements were made to divert to Rowi Limited all Canadian orders for patented bracelets of the kinds which the appellant and Rowi Limited had theretofore sold on the Canadian market, all of which carried the trade mark "Fixoflex", and the prices therefore were reduced to the point where they were lower than any previous Rowi prices and only slightly above those at which the same articles had been supplied by the appellant from Germany. About the middle of March 1961 Rowi Limited acquired from another bracelet manufacturer a plant in Montreal which included several machines and shortly afterwards the machinery formerly installed in the premises of Amsell Brothers was moved to the new location and installed there. An automatic feeding device for one of these machines was then obtained, in Montreal, and commencing in July it and the machines acquired from the other bracelet manufacturer were used to make parts for the production of the patented bracelets. In the period from the change-over to the end of November

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1961, Rowi Limited sold 76,904 of the patented bracelets. In the same period, together with about three weeks of December, 1961, it produced a total of 38,954 bracelets some from parts which it had made and some from German made parts and it imported from Germany some 25,992 bracelets complete except for the attachment of end pieces which were attached in Montreal. During the same period, but commencing in June, 1961, the appellant also sold in Canada under the trade mark "Supra Fixoflex" some 13,986 bracelets of a new and more attractive type. None of this type of bracelet had been made or assembled in Canada up to the time of the hearing and there was no evidence of so much as plans to manufacture it in Canada.

and at p. 242:

Leaving aside the question whether the assembly of bracelets in Canada from parts made in Germany should be regarded as manufacture of the patented invention in Canada within the meaning of the definition of s. 2(j) it is to my mind apparent that up to the time of the filing of the respondent's petition for a compulsory licence there never had been anything in the way of working the invention in Canada that could be characterized as proportionate to or as bearing any reasonably close relationship to the demand for the patented article in this country and that while the situation changed somewhat after mid-February 1961, and particularly in the latter half of that year, even then the production of the patented bracelets in Canada whether assembled from parts made in Canada or from parts made in Germany was only 38,354 against a total market enjoyed for the period of 90,890 and that even in the months of September, October and November when production was at something of a peak, it still amounted in each month to less than half of the total quantities of patented bracelets sold on the Canadian market and also to considerably less than the quantities of Fixoflex bracelets sold in Canada.

It was submitted that by some time in November production of bracelets by Rowi Limited had reached 2,150 per week which multiplied by 52 would yield a number sufficient to meet the yearly Canadian market then available to the appellant and that accordingly at the time of the hearing the scale of manufacture by Rowi was adequate within the meaning of the definition. As to this it may first be observed that the production figures show that if the scale actually reached 2,150 in a week in November it was not maintained for the whole month, though it may have been maintained for the first three weeks of December. I do not think however that the problem is to be resolved by directing attention to a scale of production over so short a period if working for a short period were sufficient it would be just as logical to say that the scale was adequate because on the day or in the last hour or minute before the hearing so many articles were produced, which to my mind would be absurd. Capacity to manufacture on an adequate scale is one thing. Actual manufacture is quite a different thing. The evidence that in the last three or four weeks before the hearing Rowi had produced on a scale of 2,150 per week may well indicate that at the time of hearing it had the capacity to produce on a scale sufficient to supply the available Canadian market for a year. But though Rowi had been in existence for upwards of four years it had never operated for a year on anything approaching such a scale and it is only if the expectations of the production manager of Rowi Limited, who was not a policy maker, are taken as fact (an assumption which on the evidence I would not regard as justified) that one could be led to think that Rowi's production was in fact on a scale approximately

equal to the available Canadian market. The cold facts are that in no year and in no month or season for which figures were given in the whole four-year history of Rowi had its scale of production equalled or even approached the market for that year or that month or that season.

In view of these facts and having regard also to the nature of the invention, the comparatively short time required to establish a plant for the manufacture of it in Canada, and to the time which had elapsed since the grant of the patent as well as to the size of the Canadian market which is shown to have been available to the appellant during that period, I am of the opinion that it has been established that the invention was not being worked on a scale that was adequate in the circumstances within the meaning of s. 2(j) either before or at the time of the presentation of the respondent's application or at the time of the hearing.

The appellant sought to satisfy the onus which was thus placed on it by leading evidence to the effect that from the time the patent was obtained it was harassed by illegal importations and by infringers (including the respondent) and it was involved in litigation with the respondent challenging the validity of the patent which was not brought to a successful conclusion until the appeal in *Metalliflex Limited v. Rodi & Wienerberger Aktiengesellschaft*¹ was decided in this Court on December 19, 1960, and by evidence of the quantities of the bracelet it had assembled or manufactured in Canada either by itself or by its subsidiary Rowi Limited.

Thurlow J., after referring to a prior application for a compulsory licence in October 1957 by Watchstraps Inc., dealt with these submissions as follows at p. 244:

There is on the evidence no reason to doubt that not long after the grant of the patent imported bracelets which infringed the patent made their appearance on the Canadian market and though the situation improved to some extent after a number of infringement actions had been brought by the appellant, in three of which interlocutory injunctions effective in the Province of Quebec were obtained, in general it continued throughout the period to the end of 1960 and reached a high point in 1958 and 1959. None of the actions had, however, come to trial when in October 1957 Watchstraps Inc., one of the parties against whom an injunction had been obtained, filed an application alleging abuses of the patent under clauses (a), (b) and (d) of s. 67(2) and asking for a compulsory licence. In April 1958 the action against Watchstraps Inc. as well as that brought against the respondent came to trial but judgment was reserved and had not been delivered when in July 1958 the appellant filed its counterstatement opposing the application for a compulsory licence.

He then discusses the contents of the counterstatement opposing Watchstraps Inc.'s application for a compulsory licence and continues at p. 245:

The statement went on to say that the appellant had asserted its patent against the sale by the applicant of watchstraps alleged to embody the

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¹ [1961] S.C.R. 117, 21 Fox Pat. C. 95, 35 C.P.R. 49.

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invention of a patent of which the applicant claimed to be the owner, and that the appellant was awaiting the judgment of the Superior Court of the Province of Quebec in the action which had been tried at Montreal in April 1958, but nowhere in the statement is there any suggestion whatever that either infringing imports or challenges to the validity of the appellant's patent had anything to do with the failure to work the invention in Canada on a commercial scale within the meaning of the statutory definition. Nor was any explanation offered as to why there had been nothing in the way of working the invention in Canada or of preparation for such working in the three-year period from the grant of the patent in September 1954 to November 7, 1957.

* * *

In September 1958 judgments were given in the actions tried in April 1958 and by these it was held that claims 1 and 2 of the appellant's patent were invalid and that while claim 3 was valid, it had not been infringed except by certain of the bracelets sold by Watchstraps Inc. The appellant thereupon appealed to the Court of Queen's Bench in both cases and the interlocutory injunctions were continued in effect but apparently following the trial judgment competition from infringing imports increased. In June of the following year the judgment in the case of the respondent was reversed and claims 1 and 2 were held to be valid and infringed by a bracelet made according to a patent held by the respondent. Shortly after this success, in September 1958, the price difference which had already been referred to was established. The customers were advised that the increase in the price of bracelets assembled in Canada was due to "augmentation of costs for wages, manufacturing improvements (installation of modern automatic machinery), general overhead, advertising, etc., which price increase was long since due to appear." That these were in fact the reasons for the increase was not established. On the contrary the evidence shows that they were not the reasons. At that time the policy being followed was to divert the orders as far as possible to the appellant and the establishment of the price difference was one of the ways adopted to carry the policy into effect.

* * *

On the evidence the failure to work appears to me to have been entirely a matter of choice on the part of the appellant for as I view it there was never any real difficulty in obtaining a substantial market or in organizing manufacture in Canada and the fact that the appellant when spurred by an application for a compulsory licence sent machinery to Canada and in its counter-statement opposing the application referred to plans to manufacture on a scale sufficient to meet the whole Canadian market appears to me to indicate that it recognized at the time that it had no satisfactory reason for not working the invention on a scale to supply the market available to it. Moreover, while the judgment of the Quebec Superior Court in September 1958 holding claims 1 and 2 of the patent invalid may have afforded some reason for not immediately pursuing the plans which had been set out in the counter-statement, if indeed such plans ever existed, on the evidence there was no justification following the reversal of that judgment in June 1959 either for failure to proceed with the plans or for the appellant's conduct in so raising the price of Rowi produced bracelets as to make it impossible for them to compete on the Canadian market with those made by the appellant in Germany.

* * *

On the facts disclosed and having regard to s. 67(3) I am of the opinion that no satisfactory reason for failure to work the invention in

Canada on a commercial scale has been established and that the case is one in which abuse within the meaning of s. 67(2)(a) is shown to have existed both before and at the time of the presentation of the respondent's application and to have persisted, though alleviated to some extent in the meantime, up to the time of the hearing.

All of these findings and conclusions are amply supported by the evidence which the Commissioner and Thurlow J. had before them.

The appeal should accordingly be dismissed with costs payable by the appellant.

SPENCE J.:—I have had the privilege of reading the reasons of my brother Hall and I agree with those reasons and with his conclusions. I desire, however, to add a few words in reference to the main contention of the appellant in this Court which was that the infringement of its patent by many competitors including, particularly, the respondent provided to the appellant a "satisfactory reason" within s. 67(2)(a) of the *Patent Act* excusing it from failure to work the invention in Canada on a commercial scale.

I am of the opinion that there may well be cases where such infringement might provide such "satisfactory reason", and particularly where it would appear that the patent which the patentee held might be found to be invalid in Canada. Thurlow J. in his reasons has rejected the alleged excuse as a "satisfactory reason" and my brother Hall has agreed with that rejection. I am of the opinion that such rejection is proper in view of the evidence in this case and particularly in view of two facts which were there established.

Firstly, in the three-year period which followed the grant of the patent there was, to all intents and purposes, no working of the patent by the patentee in Canada. As both Thurlow J. and my brother Hall have pointed out, it was quite feasible that the patent should be worked in Canada and, in fact, outside of the assembly of proper tools and materials, the process of manufacture was quite simple and a staff could be trained and in operation in a very short time indeed.

Secondly, when the appellant's patent had been declared valid by the judgment of the Court of Queen's Bench (Appeal Side) in the Province of Quebec, one would have expected the appellant, freed of the worry of those infringe-

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ments, to have proceeded apace at working its invention in Canada. Instead, the appellant took the exact opposite course and by increasing the price at which its solely owned subsidiary, Rodi Ltd., sold in Canada, and at the same time holding fast its own sale price in Canada, it contrived to turn all purchases to its own foreign-manufactured articles. It continued that course until March of 1961, following the presentation of this respondent's application for compulsory licence.

In my view, that evidence is a clear demonstration of the appellant's intent not to work the invention in Canada on a commercial scale, an intention which was only abandoned when it became apparent that such a course would result inevitably in the compulsory licence being granted.

For these reasons, I concur in the dismissal of the appeal.

Appeal dismissed with costs.

Solicitors for the appellant: Smart & Biggar, Ottawa.

*Solicitors for the respondent: Gowling, MacTavish,
Osborne & Henderson, Ottawa.*
