Merck & Co. Inc. (*Appellant*) *v.* **Sherman & Ulster Ltd** (*Respondent*)

Jackett P.—Ottawa, July 2, 1970.

Patents—Parties—Practice—Appeal from grant of compulsory licence by Commissioner of Patents—Intervention by Attorney General—Patent Act, s. 41—Exchequer Court Rule 3E(2)(b).

On an appeal to the Exchequer Court from a decision of the Commissioner of Patents under s. 41 of the *Patent Act* granting a compulsory licence to use an invention for the preparation or production of food or medicine, the Attorney General of Canada should be granted leave to intervene as a party to represent the general public interest. The court has power to make such an order under Exchequer Court Rule 3E(2)(*b*). In view of the provisions of s. 5 of the *Department of Justice Act*, R.S.C. 1952, c. 71, it is more fitting that the matter be carried on in the name of the Attorney General rather than that of the Commissioner of Patents.

APPLICATION by Attorney General of Canada.

D. H. Aylen, Q.C. for applicant.

David Watson, contrâ.

JACKETT P.—In each of these appeals[1] under section 41 of the *Patent Act*, except the two in which the Commissioner of Patents was made a party, counsel for the Attorney General of Canada has applied for an order that the Commissioner of Patents be added as a respondent. By consent, the motion was turned into an application that the Attorney General of Canada be added as a party.

None of the persons presently shown as parties to the appeals raised any objection to counsel for the Attorney General of Canada being given leave to appear on the hearing of the respective appeals and to take part in the argument. Some of the parties did, however, object to either the Commissioner of Patents or the Attorney General of Canada being admitted as a party to the appeals. The practical difference is that, unless he is made a party, he would not be able to lead evidence, if that contingency should arise, and he would have no status to appeal from any decision that may be given.

Provisions of the *Patent Act* to which reference might be made in this connection include the following:

> 4. (1) The Governor in Council may appoint a Commissioner of Patents who shall, under the direction of the Minister, exercise and perform the powers and duties conferred and imposed upon that officer by or pursuant to this Act.
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> 17. In all cases where an appeal is provided from the decision of the Commissioner to the Exchequer Court under this Act, such appeal shall be had and taken pursuant to the provisions of the *Exchequer Court Act* and the rules and practice of that Court.
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> 25. In all proceedings before any court under this Act the costs of the Commissioner are in the discretion of the court, but the Commissioner shall not be ordered to pay the costs of any other of the parties.
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[1] There were twelve appeals in all, involving various parties.—ED.

41. (3) In the case of any patent for an invention intended or capable of being used for the preparation or production of food, the Commissioner shall, unless he sees good reason to the contrary, grant to any person applying for the same a licence limited to the use of the invention for the purposes of the preparation or production of food but not otherwise; and, in settling the terms of the licence and fixing the amount of royalty or other consideration payable, the Commissioner shall have regard to the desirability of making the food available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention.

(4) Where, in the case of any patent for an invention intended or capable of being used for medicine or for the preparation or production of medicine, an application is made by any person for a licence to do one or more of the following things as specified in the application, namely:

(*a*) where the invention is a process, to use the invention for the preparation or production of medicine, import any medicine in the preparation or production of which the invention has been used or sell any medicine in the preparation or production of which the invention has been used, or

(*b*) where the invention is other than a process, to import, make, use or sell the invention for medicine or for the preparation or production of medicine,

the Commissioner shall grant to the applicant a licence to do the things specified in the application except such, if any, of those things in respect of which he sees good reason not to grant such a licence; and, in settling the terms of the licence and fixing the amount of royalty or other consideration payable, the Commissioner shall have regard to the desirability of making the medicine available to the public at the lowest possible price consistent with giving to the patentee due reward for the research leading to the invention and for such other factors as may be prescribed.

* * *

(11) Any decision of the Commissioner under this section is subject to appeal to the Exchequer Court, except that a decision of the Commissioner with respect to an interim licence is final for all purposes and is not subject to appeal or to review by any court.

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(13) Where an application is made pursuant to subsection (4) or a request is made pursuant to subsection (5), the Commissioner shall forthwith give notice of such application or request to the Department of National Health and Welfare and to any other prescribed department or agency of the Government of Canada.

(14) The Governor in Council may make rules or regulations

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(*e*) providing for the making of representations to the Commissioner on behalf of the Government of Canada with respect to any application or request referred to in subsection (13); and

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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.

* * *

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.

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73. All orders and decisions of the Commissioner under sections 67 to 72 are subject to appeal to the Exchequer Court, and on any such appeal the Attorney General of Canada or such counsel as he may appoint is entitled to appear and be heard.

Reference may also be made to sections 22 and 23 of the *Exchequer Court Act,* which read as follows:

22. (1) Every applicant for a patent under the *Patent Act* who has failed to obtain a patent by reason of the objection of the Commissioner of Patents as in the said Act provided may, at any time within six months after notice thereof has been mailed, by registered letter, addressed to him or his agent, appeal from the decision of the said Commissioner to the Exchequer Court.

(2) The Exchequer Court has exclusive jurisdiction to hear and determine any such appeal.

23. (1) The Commissioner of Patents is entitled to appear on behalf of the Crown and as representing the interests of the public and be heard by counsel on the hearing of an appeal made under section 22.

(2) The Commissioner of Patents acting in the said capacity is entitled to appeal to the Supreme Court of Canada from the judgment of the Exchequer Court of Canada in any such appeal by filing within thirty days from the day upon which such judgment was given, with the Registrar of the Supreme Court of Canada, a notice stating that the Commissioner of Patents is dissatisfied with such judgment, and such notice shall be in lieu of a deposit by way of security for costs.

(3) The further proceedings in the said appeal shall be governed by the existing practice relating to appeals from judgments of the Exchequer Court.

My attention has not been drawn to any statutory provision or rule of court laying down any specific rule as to who are to be parties in appeals from the Commissioner of Patents under the *Patent Act.*

In the absence of any more specific rule, I am of opinion that the matter falls to be determined under Rule 3E of the Rules of this Court, which reads in part as follows:

(1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party; and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

(2) At any stage of the proceedings in any cause or matter, the Court may, on such terms as it thinks just and either of its own motion or on application,

(*a*) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party; or

(*b*) order any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, to be added as a party;

but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.

Having regard to such decisions as *Westminster Bank v. National Bank,*[2] it may well be that, as I understood Mr. Watson to contend, in an ordinary

[2] (1969) 3 W.L.R. 468.

action between parties, no third person should be admitted as a party, in the absence of express statutory authority, unless that person's rights or obligations may be directly affected by the judgment determining the issues raised by the action. Indeed, ordinarily, I should have thought it clear that the parties to a dispute are entitled to have their dispute settled in the manner provided by the Rules as quickly and as cheaply as possible and have a right not to have third parties intervene to use their action as a vehicle for some other object with the almost inevitable result of additional delay, expense and complication of issues. Assuming that conflict proceedings under section 45 of the *Patent Act* are, from this point of view, ordinary actions, the decision of the Supreme Court of Canada in *International Minerals and Chemical Corp. v. Potash Co. of America*,[3] as I read it, is consistent with this view but does not determine that the Court has no discretion to permit an intervention by a public officer in a proper case to protect the public interest in a more general sense.

In my view, however, whatever the position may be with regard to conflict proceedings, these appeals are not appeals in the course of ordinary legal proceedings between parties. They are special statutory proceedings and, as there is nothing in the statute that determines who are to be the parties, the Court may, under Rule 3E(2)(*a*), order that any person who has been improperly or unnecessarily made a party cease to be a party and may, under Rule 3E(2)(*b*), order any person whose presence before the Court is necessary to ensure that all matters in dispute in the matter may be effectually and completely determined and adjudicated upon to be "added as a party".

In my view, all appeals under section 41 are reviews of an exercise of a statutory discretion in which the questions involved are such that the Court requires the assistance of some person, other than the patentee and licencee, who will ensure that the interests of the general public are properly placed before the Court. Section 41(3) clearly has as one of its main objects that the interest of the general public be safeguarded in what is done under that subsection. This runs through the subsection and comes out explicitly in the requirement that, in settling the terms of the licence and fixing the consideration, the Commissioner shall have regard to the desirability of making the food available to the public at the lowest possible price consistent with due reward to the inventor. So far as subsection (4) applications are concerned, there is explicit recognition in section 41(14)(*e*) of the possibility that the issues involved require representations for the benefit of the general public.

There is nothing novel about having a public authority made a party to proceedings to review decisions of modern statutory authorities. Compare *Labour Relations Board, Sask. v. Dominion Fire Brick and Clay Products Ltd*[4] and *Labour Relations Board of New Brunswick v. Eastern Bakeries Ltd et al.*[5] Indeed, it is noteworthy that in the *International Minerals* case,

[3] [1965] S.C.R. 3.
[4] [1947] S.C.R. 336.
[5] [1961] S.C.R. 72.

supra, Cartwright, J. (as he then was), in delivering the judgment of the Supreme Court of Canada, commented on the fact that in the conflict proceedings there in question the Commissioner of Patents was "taking no part in the Action". While it may be that, in some cases, the right of the tribunal appealed from to appear as a party may be limited to a case "where its jurisdiction is in question", in my view, where, as here, a public officer has had a duty imposed on him to have regard to the public interest in making a decision, the Court should have the aid of some party representing the public interest when that decision is attacked.

It may well be that, having regard to the decisions and past practice, it would be proper in the circumstances to permit the Commissioner of Patents to become a party. In my view, however, it would be more in accordance with law and good practice, and less incongruous, to grant the Attorney General of Canada leave to intervene as a party to represent the general public interest.

The relevant statutory provision is section 5 of the *Department of Justice Act,* R.S.C. 1952, chapter 71, which reads, in part:

> 5. The Attorney General of Canada shall
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> (*a*) be entrusted with the powers and charged with the duties that belong to the office of the Attorney General of England by law or usage, so far as those powers and duties are applicable to Canada, and also with the powers and duties that, by the laws of the several provinces, belonged to the office of attorney general of each province up to the time when the *British North America Act 1867,* came into effect, so far as those laws under the provisions of the said Act are to be administered and carried into effect by the Government of Canada;
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> (*d*) have the regulation and conduct of all litigation for or against the Crown or any public department, in respect of any subject within the authority or jurisdiction of Canada;

In my view, the role that I contemplate the Attorney General of Canada playing in these appeals is a logical development of the historical role of the Attorney General of England. In any event, to the extent that the Commissioner of Patents would be an appropriate party, as he is an officer who performs his duties and exercises his powers under the direction of a Minister of the Crown (section 4(1) of the *Patent Act*), it is more fitting that the matter be carried on in the name of the Attorney General of Canada under section 5(*d*) of the *Department of Justice Act.* Compare *McGuire v. McGuire.*[6]

I have not overlooked the fact that there are special statutory provisions conferring on the Commissioner of Patents or the Attorney General of Canada rights of participation in certain proceedings under the *Patent Act.* In my view, when these are considered in the context of the *Patent Act* as a whole, they do not impliedly limit the authority of the Court under Rule 3E. What it comes to is that, in certain cases, Parliament has provided that a public authority must have the right to intervene to protect the public interest. This

[6] [1953] O.R. 328.

is a right that could not be limited by the Rules of Court but, subject to the requirement of giving due effect to such provisions, the matter is left to be regulated by the Rules of Court.

There will be an order in each of these appeals, except *Pfizer v. Sterilab,* No. B-3708, and *Pfizer v. Novopharm,* No. B-3709, that the Attorney General of Canada be added as a party and that the style of cause be amended to show him as "Intervenant".

In *Pfizer v. Sterilab* and *Pfizer v. Novopharm,* there will be an order, by consent, that the Commissioner of Patents cease to be a party, that the Attorney General of Canada be added as an intervenant, and that the style of cause be amended accordingly.