

1949
 {
 May 16-20
 23, 25, 26
 June 1, 2, 7,
 13, 14
 1950
 {
 Jan. 16-21
 1952
 {
 July 30

BETWEEN:
 GORDON C. WILSON SUPPLIANT,
 AND
 HIS MAJESTY THE KING RESPONDENT.

Crown—Petition of right—Claim for compensation for use by Crown of an alleged invention—Board of Invention established under the War Measures Act, R.S.C. 1927, c. 206—Term “suggestion” as defined in P.C. 9750 dated December 24, 1943—Motion to strike out alternative claim in a reply—Matter of compensation to be paid to patentee for use of his patent by the Crown considered in Exchequer Court only by way of appeal from decision of Commissioner of Patents—Use of invention prior to issue of patent—The Patent Act, 1935, S. of C. 1935, ss. 19 and 56—Discretionary powers of the Board of Invention—Idea of a practice bomb disclosed by suppliant without reservation of rights thereunder—Crown not responsible for tortious acts of its servant.

Alleging that he is the inventor of a practice bomb for use in aircraft; that he disclosed the details thereof to the R.C.A.F. and to the Invention Board established under the War Measures Act, R.S.C. 1927, c. 206; that the bomb was adopted and used by the R.C.A.F. and appropriated by respondent and that having received no compensation for the use thereof he appealed to the Minister of National Defence, who denied his claim, suppliant by his Petition of Right sought a reference to the Court for an assessment of his claim for compensation. On the evidence the Court found that suppliant was not the true inventor of the invention claimed but that his concept of the bomb as disclosed to the R.C.A.F. came within the term “suggestion” as defined in Order in Council P.C. 9750 dated December 24, 1943.

Held: That a motion made before trial to strike out an alternative claim in the reply would have been granted but leave would then have been given to suppliant to amend his petition of right so as to raise the alternative claim, when both the original and alternative claims arise from the same set of facts and each is based on the same Order in Council and where there is no prejudice created. *Hansen v. The King* [1933] Ex. C.R. 197 referred to.

2. That a claim for compensation to be paid to a patentee for the use of his patent by the Crown as provided by the Patent Act, 1935, S. of C.

1935, c. 32, s. 19, cannot be considered in the Exchequer Court except by way of an appeal from the decision of the Commissioner of Patents on the matter.

1954
 WILSON
 v.
 THE KING

3. That under the Patent Act, 1935, suppliant has no claim for any use of his invention made by the Crown prior to the issue of a patent.
4. That since under the discretionary powers conferred on it the Board of Invention declined to make any recommendation for compensation and Order in Council P.C. 9750 makes no provision for an appeal from or review of the exercise of the Board's power under s. 7(d) thereof, its decision is binding in the absence of any evidence that it was manifestly against sound and fundamental principles. *Pure Spring Co. v. Minister of National Revenue* [1946] Ex. C.R. 471 referred to and followed.
5. That assuming the decision in *The King v. Bradley* [1941] S.C.R. 270 is broad enough in its implication to apply to this case and the Court, therefore, has jurisdiction to deal with the matter and grant the relief claimed, if suppliant had property it consisted only in his idea of a practice type bomb and this idea was not acquired by the Crown under the provisions of any Orders in Council or any law of Canada or by virtue of any of its prerogatives, but was freely and voluntarily disclosed by suppliant to the R.C.A.F. without any reservation of his rights thereunder.
6. That the act of some official of the Crown in compelling suppliant to make an assignment of his "invention" to His Majesty, in the absence of any proof that the requirements of P.C. 9750, s. 15 had been fulfilled, can only be regarded as a tortious act by an officer of the Crown for which, in law, there is no remedy, the Crown not being responsible for such tortious acts.
7. In an action which is not an infringement action there is no assumption *prima facie* that the invention covered by letters patent is valid.

PETITION OF RIGHT by suppliant seeking a reference to the Court for an assessment of his claims for compensation for the use of his alleged invention by the Crown.

The action was tried before the Honourable Mr. Justice Cameron at Ottawa.

Gordon F. Henderson for suppliant.

Redmond Quain, K.C. and *T. R. Giles* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (July 30, 1952) delivered the following judgment:

In this petition of right the suppliant, a consulting chemist, claims to be the inventor of a cartridge type practice bomb for use in aircraft; that he disclosed the details thereof to the Royal Canadian Air Force and to the Inventions Board, established under the War Measures Act; that

1954
 WILSON
 v.
 THE KING
 Cameron J.

it was adopted and used by the R.C.A.F., and that it was appropriated by His Majesty. He alleges that having received no compensation in respect thereof he appealed to the Minister of National Defence, who denied his claim, and that he now appeals therefrom. He asks:

(a) a declaration that the suppliant's claim be referred to the Exchequer Court of Canada for assessment;

(b) a declaration from the Exchequer Court of Canada that a royalty of ten cents for each bomb used by His Majesty be payable to the suppliant, or such other compensation as shall be deemed fit;

(c) costs.

By the amended statement of defence the respondent either does not admit or specifically denies all the allegations in the petition of right; and after pleading that the petition does not disclose any claim for which a petition of right will lie, he alleges that the subject matter of the alleged invention was not patentable, that the suppliant invented nothing, that the alleged invention was at all relevant dates in common knowledge, was not new, that the suppliant was not the inventor and that the said invention had been previously published not only in certain specified patents, but in other printed publications, as well as by specified bombs and cartridges.

Paragraph 9 of the statement of defence is as follows:

The suppliant conceived, at some time unknown to the Respondent, certain ideas which did not constitute invention and which did not constitute property, and which did not constitute any thing which could be the subject of compensation by the Crown, in respect of improvements, in practice bombs, which in common with others he, as was his duty, as a member of the Royal Canadian Air Force, sought to improve and to have incorporated in practice bombs and to have used by the Royal Canadian Air Force, the whole under such circumstances as do not entitle the Suppliant to any compensation.

In his reply, the suppliant pleaded in the alternative that if the subject-matter disclosed by him did not constitute invention, then, under P.C. 9750, it constituted a "suggestion" for which he was entitled to be compensated. At the trial, counsel for the respondent submitted that this alternative claim was not made in the petition of right, that it constituted a new and substantive cause of action; that the Court had no power to deal with such a cause of action until a new fiat had been granted in respect thereof; and

that in any event, an alternative claim could not be set up in a reply, but could only be secured by a motion to amend the petition of right.

1954
 WILSON
 v.
 THE KING
 —
 Cameron J.
 —

The respondent did not move to strike out that part of the reply which contained the alternative claim. Had such a motion been made before me, prior to the trial, it would have been granted, but I would have given the suppliant the right to amend his petition of right so as to raise the alternative claim. Both the original and alternative claims arise from the same set of facts and each is based on the same Order-in-Council—P.C. 9750. (*Hansen v. The King*, (1)). I think it highly desirable that the entire dispute should be disposed of at one trial. The respondent has not been prejudiced in any manner by the fact that the alternative claim has been raised in the reply. I propose, therefore, to consider the case as though the alternative claim had in fact been made in the petition of right.

It may be noted at this point that on March 29, 1949, a patent (No. 455476) issued from the Patent Office in the name of the suppliant, the application thereafter being dated November 12, 1947. While the suppliant submits that the practice bomb therein described embodies the principles of the "invention" which he claims to have disclosed to the R.C.A.F. and the Inventions Board, and while the respondent admits that it has used very large quantities of practice bombs embodying the principles stated in the patent, the suppliant advances no claim as the holder of the patent, the reasons for which will later appear. In any event, he could not do so in these proceedings by reason of the provisions of section 19 of the Patent Act, 1935, which permits the Government of Canada at any time to use any patented invention, paying to the patentee such sums as the Commissioner of Patents reports to be a reasonable compensation for the use thereof, and with a right of appeal to this Court from any such decision of the Commissioner. No application has been made by the suppliant to the Commissioner for any such compensation under the Patent Act. For that reason I am of the opinion that any claim the suppliant may have against the respondent for the use of the patented invention after at least March 29, 1949, cannot be considered in these proceedings.

(1) [1933] Ex. C.R. 197.

1954
 WILSON
 v.
 THE KING
 Cameron J.

Moreover, section 56 of the Patent Act clearly provides that under the circumstances of this case, the suppliant could have no claim *under that Act* for any use of the "invention" made by the respondent prior to the issue of the patent.

Before discussing those matters concerning which the parties are not in agreement—namely, the nature of the suppliant's disclosure, and the extent to which he assisted in the development of the bomb actually put into use—I think it would be useful to give a brief chronological summary of certain facts and a statement of certain conclusions which are either admitted or clearly established to my satisfaction.

[Here the learned Judge gives a brief summary of the facts that were admitted or clearly established and continues]:

In any event, it is clear that under the discretionary powers conferred on it the Board declined to make any recommendation for compensation. Now it will be noted that the Order in Council makes no provision for an appeal from or a review of the exercise of the Board's power under section 7(d). That being the case, I think its decision is binding in the absence of any evidence that it was manifestly against sound and fundamental principles. The principles to be applied were considered by the President of this Court in *Pure Spring Co. v. Minister of National Revenue* (1). Therein, he referred to many cases, including *Spackman v. Plumstead Board of Works* (2), where the Earl of Selborne, L.C. said at page 235:

If the legislature says that a certain authority is to decide, and makes no provision for a repetition of the enquiry into the same matter, or for a review of the decision by another tribunal, prima facie, especially when it forms, as here, part of the definition of the case provided for, that would be binding.

In my opinion, under the circumstances I have mentioned, this Court has no power to review the decision of the Board or to substitute its opinion for that of the Board.


Has the suppliant a claim under the War Measures Act, R.S.C. 1927, chapter 206? By section 3 thereof, certain wartime powers are conferred on the Governor in Council

(1) [1946] Ex. C.R. 471.

(2) [1885] A.C. 229.

to do and authorize certain acts and things and to make certain orders and regulations, including the following:

(f) Appropriation, control, forfeiture and disposition of property and of the use thereof.

1954

 WILSON *
 v.
 THE KING
 Cameron J.

Then under the heading "Procedure", section 7 provides:

7. Whenever any property or the use thereof has been appropriated by His Majesty under the provisions of this Act, or any order in council, order or regulation made thereunder, and compensation is to be made therefor and has not been agreed upon, the claim shall be referred by the Minister of Justice to the Exchequer Court, or to a superior or county court of the province within which the claim arises, or to a judge of any such court.

In section 11 of P.C. 9750, after providing that the appropriate Minister may authorize payment of the whole or any part of such compensation as the Board may have recommended, there are the words "subject, however, to any right the member of the Forces may have under section 7 of the War Measures Act, c. 206, Revised Statutes of Canada, 1927, to have the question of remuneration or reward determined as therein provided". That provision was doubtless added as a result of the opinion of the Supreme Court of Canada rendered in "*Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto*" (1). Inasmuch, however, as I have found that the suppliant has not brought himself within the provisions of sections 15 and 11, of P.C. 9750, I need not further consider this matter under that Order in Council.

It is submitted, however, that the suppliant's concept of the practice bomb was property, that it was acquired by the Crown and that therefore compensation is payable to the suppliant. The Minister of Justice has not referred the claim to this Court as required by section 7. But it is shown that the suppliant's solicitor, by letter dated February 10, 1947 (Exhibit 63), requested the Department of Justice to refer the matter to this Court for determination of the compensation to be paid him, and that in reply (Exhibit 64), the Deputy Minister of Justice stated that as the Department of National Defence did not admit that any invention made by Wilson had been used by the R.C.A.F., it was not a proper case for reference to the Court under the

(1) [1943] S.C.R. 1.

1954
 WILSON
 v.
 THE KING
 Cameron J.

War Measures Act; and he declined to make such a reference, but suggested that if Wilson considered that he had any claim, consideration should be given to proceeding by way of petition of right. Counsel for the suppliant submits that by way of a petition of right the Court may be asked for a declaration that this is the type of case which should have been referred by the Minister of Justice, and a declaration as to the amount of compensation to which the suppliant is entitled. He agrees, however, that only a declaratory order could be made and that thereafter the suppliant would have to rely on the good faith of the Crown to give effect to such declaratory order.

Counsel for the respondent, on the other hand, contends that in the absence of a reference, the Court has no jurisdiction to determine any matter arising under the War Measures Act. He submits that it is only in cases where it is admitted by the Crown that a claimant has a right to compensation because his property has been acquired under the War Measures Act (and no such admission is here made) that the provisions of section 7 apply; and that upon such a reference to the Court, the only question for determination is that of quantum, the right having been previously acknowledged. In support of that contention, he cites the opinion of Mignault, J. in *Quinlan v. The King* (1), as follows:

Section 7 deals with the case where compensation is to be made but the amount has not been agreed upon. It does not create the right to compensation but provides a mode whereby the amount, where the right to compensation is admitted, may be determined. Otherwise, the imperative provision, requiring the Minister of Justice to refer the claim to the Exchequer Court or to a Superior or County Court, would not be easily comprehensible. Such a requirement, on the contrary, is quite conceivable where the Crown admits that the claimant is entitled to compensation but disputes the amount of his claim.

While the opinion of Mignault, J. is probably obiter, it is entitled to great respect and I am in accord with the views so expressed. Nevertheless, for the purposes of this case, I am prepared to assume—but without deciding the point—that the case cited by counsel for the suppliant (*The King v. Bradley* (2)) is broad enough in its implication to apply to the instant case. I would point out, however, that that

(1) [1924] S.C.R. 236 at 245.

(2) [1941] S.C.R. 270.

decision had to do with the Patent Act and not with the War Measures Act where different considerations might apply.

Assuming, therefore, that the Court has jurisdiction to deal with the matter and to grant the relief claimed, the suppliant in order to succeed must establish that his property or the use thereof was *appropriated* by His Majesty under the provisions of the War Measures Act, or under any Order in Council, order or regulation made thereunder. Apart from the Orders in Council establishing the Inventions Board, it is abundantly clear that the respondent acquired no property of the suppliant under the War Measures Act. If the suppliant had property, it consisted only in his idea of the practice type bomb. That idea of the practice type bomb was not acquired by the respondent under the provisions of any of such Orders in Council or any law of Canada or by virtue of any prerogative of the Crown. On the contrary, such idea as he had was freely and voluntarily disclosed by the suppliant himself to the officials of the Royal Canadian Air Force on the understanding that it would be fully tested and developed, and if found suitable, would be put into use at once. In making such disclosure, the suppliant did not attempt to reserve any rights thereunder or state that his disclosure was confidential, or intimate in any way to the Royal Canadian Air Force authorities that he proposed to make any claim in respect thereof to the Inventions Board, or that he had had any contact whatever with that Board.

In my opinion, the respondent neither appropriated nor acquired any property of the suppliant under the War Measures Act or any Order in Council or order or regulation made thereunder. In reaching that conclusion, I have not overlooked the assignment of his "invention" to His Majesty on February 22, 1944 (Exhibit 54), and the drawing and explanations thereof (Exhibit 55). It is true that that assignment was said to be "pursuant to the provisions ofP.C. 9750". I do not know why Wilson was asked to make that assignment and I can only assume that it was desired by someone that he should make no use of the concept of the practice bomb which was then in use. It was no doubt a high-handed method adopted by some official to deprive Wilson of its use. But in the absence of any proof

1954
 WILSON
 v.
 THE KING
 —
 Cameron J.
 —

1954
 WILSON
 v.
 THE KING
 Cameron J.

that the requirements of section 15 of P.C. 9750 had been fulfilled (as I have above noted), I can only regard it as a tortious act by an official of the Crown for which in law there is no remedy, the Crown not being responsible for such tortious acts. In any event, the Crown thereby did not acquire any knowledge of Wilson's concept of a practice bomb, that having been communicated some two or three years earlier. It is not shown that any use was made of the assignment or the information then supplied; in fact it was quite unnecessary to do so for the new bomb was already in use.

There is no monopoly in any idea or suggestion, or in any invention less than a patented invention. In the absence of any contract—and there is none here—the suppliant could not recover from the Crown any compensation for any use the Crown might make of his idea or suggestion or unpatented invention except under the provisions of the various Orders in Council which I have referred to, and to the benefit of which I have found he was not entitled. The common law right to use an unpatented invention is now stated in statutory form in section 56 of the Patent Act, 1935, as follows:

56. Every person who, before the issuing of a patent has purchased, constructed or acquired any invention for which a patent is afterwards obtained under this Act, shall have the right of using and vending to others the specific article, machine, manufacture or composition of matter patented and so purchased, constructed or acquired before the issue of the patent therefor, without being liable to the patentee or his legal representatives for so doing; . . .

Under that section (and apart from the various Orders in Council), the suppliant could assert no claim against any person, including the Crown, for the use of his invention prior to March 29, 1949, when the patent was issued; and thereafter he would have a claim against the Crown only by invoking the provisions of section 19 of the Patent Act, which he has not done.

The above considerations are sufficient to dispose of the case. In reaching the conclusion that the petition of right must be dismissed, I have not found it necessary to consider certain other defences raised by the Crown, such as that under section 46 of the Patent Act, it being pleaded that if

the suppliant's concept amounted to invention it was made while he was employed in the public service of Canada and on a matter relating to the nature of his employment.

1954
 WILSON
 v.
 THE KING
 Cameron J.

In case the matter should go further, I think it advisable to state my conclusions as to whether Wilson's concept was an invention or a suggestion, or neither.

The evidence is extremely lengthy and in some cases conflicting and confusing. I shall not attempt to analyse it in great detail, but merely to refer to those portions which I consider essential in reaching my conclusions.

[Here the learned Judge reviews the evidence and continues:]

I think it is important, therefore, to look first at the patent. It is not contended that any of the elements in the patent are new, but that *in combination* the elements constitute an "invention". This is not an infringement action and I shall therefore not assume that *prima facie* the "invention" is valid.

[Here the learned Judge further reviews the evidence and continues:]

The suppliant's claim will therefore be dismissed and there will be a finding that he is not entitled to any of the relief claimed in the petition of right. Under all the circumstances, however, and in the exercise of my discretion, and also on the ground that at the trial certain amendments to the pleadings were made by the respondent which have affected the outcome of the case, there will be no order as to costs.

Judgment accordingly.