

EDWARD A. RUSSELL.....APPELLANT;
 AND
 THE COMMISSIONER OF PATENTS...RESPONDENT.

1924
 Oct. 18.

Patents—Foreign Patent—Delay to apply in Canada—Subsection 1 of section 8, 13-14 Geo. V, c. 23

R. applied for a patent in the United States of America in May, 1922, and more than one year later applied for the same patent for Canada. His application was refused here on the ground that more than one year had elapsed since his application for the same in the United States, under the provisions of subsection 1 of section 8 of the Patent Act, 13-14 Geo. V, c. 23.

Held, that the said subsection has no applicability to the present case, inasmuch as such subsection deals only with a case where a foreign patent has actually been taken out.

2 *Held* also that the following words in such subsection “elects to obtain” imply the actual issue of the patent and should be taken to be equivalent to the words “chooses to obtain.”

Reporter’s Note: The effect of article 4 of the International Convention for the Protection of Industrial Property upon the construction of subsection 2 of section 8 of the Patent Act, 1923, considered.

APPEAL from the decision of the Commissioner of Patents by applicant for patent under the provisions of the Patent Act of 1923.

October 14, 1924.

Appeal heard before the Honourable Mr. Justice Audette at Ottawa.

Harold Fisher, K.C. and *R. S. Smart* for the appellant.

O. M. Biggar, K.C. for the Commissioner of Patents.

The facts are stated in the reasons for judgment.

AUDETTE J., now this 18th October, 1924, delivered judgment.

1924
 RUSSELL
 v.
 THE COM-
 MISSIONER
 OF PATENTS.
 Audette J.

This is an appeal, under the provisions of section 21 of *The Patent Act* (13-14 Geo. V, ch. 23) wherein the appellant failed to obtain a patent by reason of the objection of the Commissioner—as set forth in the motion by way of appeal—that the appellant had already filed an application for a similar patent in the United States Patent Office, on the 1st May, 1922, more than one year prior to the receipt of the application for a Canadian Patent.

The Patent Act, 13-14 Geo. V, ch. 23, came into force, under proclamation, as provided by section 70 thereof, on the 1st September, 1923.

The whole controversy rests upon the interpretation of sections 7 and 8 of the Act, which sections read as follows: (His Lordship here cites the sections verbatim.)

The application for a patent in the United States was made on the 1st May, 1922. The application for a Canadian patent was made on the 11th September, 1924, and refused by the Canadian Commissioner.

Under the provisions of section 7, set out above in full, *any person* who has invented anything as mentioned therein, has two years within which to make his application for a patent under the circumstances and conditions stated in the section.

By subsection 1 of section 8 he is limited to one year, under the conditions mentioned in said paragraph, and the Commissioner seems to have relied upon the same to refuse to entertain the application, because it was not presented within one year of the date of the American application.

To put such a construction upon the said subsection, is erroneous; because this paragraph which deals with a case where a foreign patent has been taken out, does not apply to the present case where no foreign patent has been issued, but where only an application for the same has been made.

Indeed, that view is the only one that can be arrived at when we examine the natural and grammatical meaning of the wording of the section, which starts by saying: *Any inventor who elects to obtain a patent*. That is to say any inventor who chooses to obtain a foreign patent before obtaining a Canadian Patent.

We are not concerned in this case with a person who has chosen to obtain a foreign patent, but with one who has only filed an application for a foreign patent. The first paragraph of section 8 has no application in the present instance and must be eliminated from consideration in arriving at a final conclusion.

Moreover, if the marginal note may be referred to we find it qualifies the meaning of that subsection 1 of section 8, by stating: "Inventions for which foreign patents *have been taken out*" and not the case where only an application for the same has been made.

In thus referring to the marginal note I am not unmindful of what is said about such note in the latest edition of Craies on Statute Law, at p. 177 and I do not base my reading of the section in question on the marginal note. I refer to it merely to show that it coincides with the meaning I am impelled to give the enactment.

However, in the present case, sections 7 and 8 appear to be mutually repugnant. It cannot be denied that the phraseology used could be improved; but that is only to declare, as I have already had occasion to say in *The King v. Dominion Cartridge Co.* (1) that it is another illustration of the ineptitude and want of care that beset the modern method of drawing our statutes. Another anomaly or irregularity will be found in section 37 with respect to the courts of Alberta and Saskatchewan.

Before dealing with subsection 2 of section 8, it is well to mention that under the *International Convention for the Protection of Industrial Property* signed at Washington, U.S., on 2nd June, 1911—Great Britain, including its Dominions, and the United States of America being parties thereto—it is provided as follows, by Article 4, viz:

(His Lordship here cites article 4, paragraphs (a) to (e) inclusive verbatim.)

That is in order to preserve priority, but priority only, and not the substantive right to obtain a patent, the inventor must make his application, as set forth in Article 4, within twelve months.

Now subsection 2 of section 8, begins by adverting to this Convention and to give effect thereto, and enacts that the

1924
 RUSSELL
 v.
 THE COM-
 MISSIONER
 OF PATENTS.
 Audette J.

(1) [1923] Ex. C.R. 93, at p. 102.

1924
 RUSSELL
 v.
 THE COM-
 MISSIONER
 OF PATENTS.
 Audette J.

application must be made within one year, i.e. the delay of 12 months mentioned in Article 4; but that part of subsection 2 of section 8 must necessarily and impliedly deal with the question of priority mentioned in Article 4 since it adds, after referring to the Convention and establishing the required delay therein mentioned, *and priority only*:

But no patent shall be granted on an application for patent for an invention which has been patented or described in a patent or printed publication in this or any foreign country more than *two years* before the date of the actual filing of the application in Canada, etc., etc.

This last clause which is in direct conflict with section 8 is absolutely in accord with the general principles enunciated in section 7, respecting this delay of *two years*.

It is the duty of a court to make, if possible, such construction of a statute as shall suppress mischief and advance remedy. And in its endeavour to find the true intent, meaning and spirit of the legislator (section 15 Interpretation Act, R.S.C. 1906, ch. 1) when the apparent meaning of the language seems to fall short of the real object of the legislator, a more extended meaning may be attributed to the words, if fairly susceptible of it. Maxwell on Statute, 6th ed. 123.

And when the legislator has expressed his mind clearly in one section, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it.

It would be irrational for a legislative body to enact a law by one section of an Act, and at the very same time destroy it by the following section. In such cases, is not the function of the court to endeavour to reconcile them? And it is a cardinal principle (Craies, 2nd, 216) in the interpretation of a statute, that if there are two inconsistent enactments, it must be seen if one cannot be read as a qualification of the other.

When one regards the history and the object of subsection 2 of section 8 and the manner in which that delay of one year finds its way into the Act, qualified by the final enactment retaining the two years delay, and enacted as a general principle in section 7,—the matter becomes clarified and the blundering manner in which that part of the statute has been drafted is overcome, thereby reconciling the obvious repugnancy and inconsistency which exist be-

tween two sections following one another.

Therefore, there will be judgment, maintaining the appeal and allowing the appellant to file, within two years, his application for a Canadian Patent, to be dealt with upon its merits.

And taking all the circumstances of the case into consideration and more especially as the question before the court is one involving the construction of new legislation, I am of opinion that each party shall bear his own costs. *The Skipwith* (1).

Judgment accordingly.

Solicitors for appellant: *Murphy, Fisher, Sherwood & Clarke.*

Solicitor for respondent: *O. M. Biggar, K.C.*

1924
 RUSSELL
 v.
 THE COM-
 MISSIONER
 OF PATENTS.
 Audette J.