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In the course of delivering a learned and scholarly judgment in the United States Circuit Court of Appeals,<sup>1</sup> which considered with much care and thought certain suggested reforms in the patent system of the United States, Judge Frank made the pungent observation: "We should not throw out the baby with the bathwater". The learned judge, in pointing out that a statutory revision of the patent system should not be too drastic, stated:

To denounce patents merely because they create monopolies is to indulge in superficial thinking . . . patent monopolies may still be socially useful: they may, indeed, . . . foster competition.

In general, there are two approaches to the patent system, each diametrically opposed to the other. Inventors, patentees, men of business who, either personally or through the corporations they represent, are owners of patents, and those few lawyers who have any knowledge and experience of the subject regard the patent system as a necessary and beneficial adjunct to the progress of science and the expansion of industry, contributing, in a steadily increasing flow, to the solution of problems and the supply of the new and useful with resultant additions to the amenities, conveniences and luxuries of human life and civilization. Those, on the other hand, whose thought-processes are either limited by lack of capacity, knowledge or experience or are warped by their philosophy or their self-interest—the socialist and the demagogue pandering to the untutored desires of the mob to become the idol of a transient day—are prone to use the patent system as the whipping-boy of our present order. In their appeals to passion they have a ready tool. An attack on the patent system is usually well received if accompanied by some mention of "vested interests" and some vilification of "big business". The *profanum vulgus*

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<sup>1</sup> *Picard v. United Aircraft Corporation* (1942), 53 USPQ 563, at p. 573.

fall easy victims of this cynical prejudice. They are simple prey to the persuasive oratory and facilely indulge in the superficial thinking—if they think at all—that patents, as Judge Frank said, are to be denounced because they create monopolies.

But patents do not, to take issue with Judge Frank, create monopolies. They merely confirm in exclusive possession that which has already been created as property. However, conceding the point that patents are monopolies in the sense that ownership of all forms of property creates monopoly, one must always take some care to distinguish between the type of monopoly that takes away from the public something previously in its possession and the type of monopoly that takes nothing from the public but gives it something which has been newly brought into being. The essence of the monopolies conferred by patent and copyright is based upon original production and creation. The subject matter is property, the ownership of which is vested in its creators by the highest moral title. Its ownership is so vested without any act on the part of the state. In return for the assistance of the state in maintaining that property exclusively for a very limited term the owners are induced to disclose and publish to the world what they have discovered or produced, and, in effect, to surrender their legal title in fee simple, in return for an equitable interest. Without the incentive of the patent and copyright systems there would be little if any inducement for the making of those disclosures and the general public would be the losers.

Notwithstanding this obvious truth there still persist among us, to plague us with their diatribes, those who want to “throw out the baby with the bathwater”. Because patents are, on rare occasions, the subject of abuse these shallow minds question the advisability of continuing the patent system in existence. During the recent sitting of Parliament a bill was passed<sup>2</sup> amending the Combines Investigation Act<sup>3</sup> by inserting a section<sup>4</sup> which will enable proceedings to be brought against the owners of patents and trademarks which are used to restrain or injure trade or commerce. In the course of the debate on the bill, one of the members of the Senate observed:

Sometimes one may well wonder whether we should not be better off without any patent laws at all than we are now with these restrictions gathered into the hands of very large operators of capital who use them to exact unwarranted price increases. It is a grave question whether the impetus that invention is supposed to receive from the granting

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<sup>2</sup> Statutes of 1946, c. 44.

<sup>3</sup> R.S.C., 1927, c. 26.

<sup>4</sup> S. 30.

of patent rights is as beneficial in the encouragement of investors [*Sic*] as it is harmful in placing oppressive power in the hands of international cartels and combines.<sup>5</sup>

From the time the patent system had its beginning with the grant by Edward VI in 1552 of a patent to Edward Smyth for the manufacture of Normandy glass<sup>6</sup> and crystallized in the Statute of Monopolies of 1624<sup>7</sup> up to the present day, only one country has acted according to that suggestion and repealed its patent statute. The Netherlands once made the experiment. The patent law of that country was repealed in 1869. This proved to be a definite step backward, for, after the repeal, Dutch industry resorted mainly to imitations, which naturally resulted in a total loss of personal initiative on account of the only too well-founded apprehension that as a rule any novel invention would be imitated slavishly by third parties. Inventive ingenuity dried up at the source and technical advance ceased. When the patent system was re-established in 1912, all the slavish copying disappeared and industry recommenced progress.<sup>8</sup> After all, despite the "grave question" propounded by the Honourable Senator, there is no civilized country in the world today that does not have a patent system which is the direct descendant of the English Statute of Monopolies. Even in Russia, the inventors of the new and useful are compensated by a system of graduated rewards and honours, payable out of state funds. It would seem only reasonable to suppose that a system which has been accepted by every legislature in the world must be possessed of somewhat more merit than was apparent to the perceptions of the Honourable Senator.

In its second interim report the Departmental Committee appointed by the British Board of Trade to consider the British patent system,<sup>9</sup> after long and patient hearings and exhaustive consideration of evidence and briefs submitted, stated: "No conceivable reform of the patent system, nor even its total abolition would, by itself, solve the problem of monopoly in modern industry". Coming from so authoritative a source this statement is entitled to considerable respect. But its final authority rests, as it must necessarily rest, upon its accuracy and commonsense. It is, in fact, rather an obvious statement if it is carefully examined by an inquiring and impartial mind.

<sup>5</sup> Debates of the Senate of Canada, July 25th, 1946, p. 564.

<sup>6</sup> Patent Rolls, 6 Edw. VI, p. 5.

<sup>7</sup> 21 Jac. 1, c. 3.

<sup>8</sup> See "Patents and Monopoly"; University of Chicago Round Table, No. 385, Aug. 5th, 1945, p. 5.

<sup>9</sup> April 1946, p. 7.

The report goes on to say that "it is wrong in principle that a patent should be used to establish a monopoly wider in scope and longer in duration than that conferred by a patent in itself". This is a point with which no issue can properly be taken. But the corollary is also true and this, I venture to think, ought to be recognized as properly within the valid ambit of exclusive privilege accorded by a patent grant: That it is wrong in principle to attack a patent which is used to establish a monopoly which is only as wide in scope and as long in duration as that conferred by the patent itself. When such an attack is made the patent system is in jeopardy. Some time ago we opened this attack and made some inroads on the effectiveness of the patent system by the enactment of those sections of our Patent Act<sup>10</sup> which provide against abuse of exclusive rights and for the issue of compulsory licences. We have now made a further onslaught by the enactment of the new section 30 of the Combines Investigation Act. It is to be hoped that some caution will be exercised in the administration of the section, or we shall find ourselves in the position of Holland after 1869. For it is not necessary to repeal a patent statute to defeat its purposes. It may be so emasculated that inventors and industry will prefer secret use and secret process to the bedevilment of the witch-hunt against monopoly. It is not without significance that, amid all the thunder and vituperation of the "trust-busters" in the United States, that stronghold of democracy and private enterprise has not yet seen any necessity to enact comparable laws to stultify its patent system.

It seems proper, in the light of the foregoing remarks, to examine the legislation in question. The history of the section is of some interest to the discussion and the matter will therefore be treated in chronological order, the section as it now stands appearing at its proper place as we proceed. It had its origin as s. 13 of the Combines and Fair Prices Act, 1919,<sup>11</sup> which read as follows:

In case the owner or holder of any patent issued under the *Patent Act* has made use of the exclusive rights and privileges which, as such owner or holder he controls, so as unduly to limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article which may be a subject of trade or commerce, or so as to restrain or injure trade or commerce in relation to any such article or unduly to prevent, limit or lessen the manufacture or production of any article or unreasonably to enhance the price thereof, or unduly to

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<sup>10</sup> Ss. 64-71.

<sup>11</sup> 9 and 10 Geo. V., c. 45.

prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation, storage or supply of any article such patent shall be liable to be revoked. And, if the Board reports that a patent has been so made use of, the Minister of Justice may exhibit an information in the Exchequer Court of Canada praying for a judgment revoking such patent, and the court shall thereupon have jurisdiction to hear and decide the matter and to give judgment revoking the patent or otherwise as the evidence before the court may require.

This statute was declared *ultra vires* the Parliament of Canada by the Judicial Committee of the Privy Council in *In re The Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919*,<sup>12</sup> Viscount Haldane observing:<sup>13</sup>

It may well be that the subjects of undue combination and hoarding are matters in which the Dominion has a great practical interest. In special circumstances, such as those of a great war, such an interest might conceivably become of such paramount and overriding importance as to amount to what lies outside the heads in s. 92, and is not covered by them. The decision in *Russell v. The Queen*<sup>14</sup> appears to recognize this as constitutionally possible, even in time of peace; but it is quite another matter to say that under normal circumstances general Canadian policy can justify interference, on such a scale as the statutes in controversy involve, with the property and civil rights of the inhabitants of the Provinces. It is to the Legislatures of the Provinces that the regulation and restriction of their civil rights have in general been exclusively confided, and as to these the Provincial Legislatures possess quasi-sovereign authority. It can, therefore, be only under necessity in highly exceptional circumstances, such as cannot be assumed to exist in the present case, that the liberty of the inhabitants of the Provinces may be restricted by the Parliament of Canada, and that the Dominion can intervene in the interests of Canada as a whole in questions such as the present one. For, normally, the subject-matter to be dealt with in the case would be one falling within s. 92. Nor do the words in s. 91, the "Regulation of trade and commerce", if taken by themselves, assist the present Dominion contention.

Following this finding, the Dominion Parliament enacted the Combines Investigation Act, 1923,<sup>15</sup> in which statute s. 24 appeared in the identical terms of s. 13 of the Act of 1919, although this statute had been declared *ultra vires* by the Privy Council.<sup>16</sup> Curiously, however, the 1923 statute, in the form in which it appeared in the 1927 revision, was held *intra vires* the Parliament of Canada by the Judicial Committee in *Proprietary Articles Trade Association et al. v. Attorney-General for Canada et al.*<sup>17</sup> Lord

<sup>12</sup> [1922] 1 A.C. 191.

<sup>13</sup> At p. 197.

<sup>14</sup> (1892), 7 A.C. 829.

<sup>15</sup> 13-14 Geo. V., c. 9.

<sup>16</sup> S. 24 later appeared as s. 30 in the 1927 revision, R.S.C., 1927, c. 26.

<sup>17</sup> *The Combines Investigation Act* case, [1931] A.C. 310.

Atkin there observed:<sup>18</sup> "It is, however, not enough for Parliament to rely solely on the powers to legislate as to the criminal law for support of the whole Act". He then went on to point out that s. 30, which provided for revoking patents, could be supported as being reasonably ancillary to the power given under s. 91, head 22, of the British North America Act, "patents of invention and discovery". In discussing this section of the statute as well as section 29, which permitted the reduction of customs duty, Lord Atkin said:

It is unfortunately beyond dispute that in a country where a general protective tariff exists persons may be found to take advantage of the protection, and within its walls form combinations that may work to the public disadvantage. It is an elementary point of self-preservation that the legislature which creates the protection should arm the executive with powers of withdrawing or relaxing the protection if abused. The same reasoning applies to grants of monopolies under any system of patents.

It is, with respect, not quite apparent how "the same reasoning applies to grants of monopolies under any system of patents". A general protective tariff is a matter of "protection" accorded by legislative action. A patent of monopoly is not. It is a property right. No person who enjoys tariff protection has any proprietary interest. A patentee, on the other hand, is merely guaranteed, by his grant, the peaceful enjoyment of his own property, which he himself has brought into being. All kinds of property, both real and personal, may be the subject of abuse by their owners, but no court or person has yet suggested that this fact should be a reason requiring the law to withdraw or relax the guarantees of peaceful enjoyment accorded to them by the statute and common law.

But, conceding the point, it might be admitted that there could be some reasonable analogy between the "protection" accorded by tariff structure and the guarantee of exclusivity conferred by patent grant. In such case the statement would seem to be a rational one—provided there is nothing in existence to limit the extent of the withdrawal or relaxation of the protection. And at the date of that judgment there was. Canada had by then adhered to the International Convention for the Protection of Industrial Property as revised at The Hague in 1925.<sup>19</sup>

<sup>18</sup> At p. 325.

<sup>19</sup> Paris, March 20th, 1883; revised at Brussels, December 14th, 1900, at Washington, June 2nd, 1911, at The Hague, November 6th, 1925, and at London, June 2nd, 1934. Canada first ratified the Convention on September 1st, 1923. Later, the Revision of The Hague was accepted, but Canada has not yet ratified the Revision of London.

By this adherence, Canada had undertaken certain solemn obligations by which we are still morally and legally bound; and which totally altered the considerations that ought to govern the situation. We shall return to this point at a later stage in the discussion.

Lord Atkin's observation may be abbreviated by saying that what Parliament has given Parliament can take away or diminish. In pursuance of this principle Parliament examined the whole patent system and, after a series of committee hearings of the evidence and views of interested parties, enacted the Patent Act of 1935.<sup>20</sup> This statute, which, in part, resulted from Canada's adherence to the International Convention above mentioned, contained certain provisions, embodied in ss. 64-71, which were designed to give effect to the social significance of certain aspects of the patent monopoly while at the same time maintaining the solemn obligation Canada assumed on becoming a signatory. The sections are somewhat lengthy, but in general they deal, in a comprehensive manner, with the abuse by patentees of the rights conferred on them. Remedy against abuse is provided in the form of compulsory licences, and of revocation of the patent in extreme cases. Exclusive rights under a patent are imperilled by the following cases of abuse:

- (a) non-working of the patented invention;
- (b) importation to the detriment of home working;
- (c) failure to meet the demand to an adequate extent and on reasonable terms;
- (d) prejudicing, contrary to public interest, the country's trade or industry or that of particular concerns, by refusing a reasonable licence to others;
- (e) attaching unfair conditions to the acquisition, use or working of the patented article or process;
- (f) using a patent for a process to prejudice the manufacture, use or sale of materials used in the process.<sup>21</sup>

The method of approach adopted by the Patent Act to the subject of abuse of exclusive rights is declared to be that "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

<sup>20</sup> 25-26 Geo. V., c. 32.

<sup>21</sup> A Report adopted by the Council of the Chartered Institute of Patent Agents, London, in April 1944, discussing the similar section of the British Patents Act (s. 27), made this observation: "These provisions are so widely drawn that it is difficult to conceive any abuse which is not caught within their net".

without undue delay".<sup>22</sup> When a case of abuse has been made out a compulsory licence may be granted to an applicant, either on an exclusive or non-exclusive basis, or, in the alternative, the Commissioner may order that the patent be revoked.<sup>23</sup> The grant of an exclusive licence strips the patentee of his right to use or work the invention.<sup>24</sup> However, no order for revocation of a patent is to be made which is at variance with any treaty, convention, arrangement, or engagement with any other country to which Canada is a party.<sup>25</sup> No application for a compulsory licence or for the revocation is to be made earlier than three years after the date of a patent.<sup>26</sup>

In April 1937 Parliament repealed s. 30 of the Combines Investigation Act by s. 13 of Chapter 23 of the statutes of that year.<sup>27</sup> In commenting on the repeal of that section Maclean J. in *Thermionics Ltd. et al. v. Philco Products Ltd. et al.* said:<sup>28</sup>

I have no doubt the repeal of this section was attributable to the fact that the Patent Act, 1935, by secs. 65 to 70 inclusive, conferred upon the Attorney-General of Canada, or any other interested party, the right to apply to the Commissioner of Patents, after three years from the date of the grant of any patent, for relief, in any case where it was alleged that there had been an abuse of the exclusive rights granted under any such patent. Those sections of the Patent Act set forth the circumstances under which the exclusive rights under a patent may be deemed to have been abused, and they provide certain remedies for any such abuses. Parliament would appear, in my opinion, to have deliberately legislated so as to exclude from the operation of the Combines Investigation Act and the Criminal Code, anything in the nature of a monopoly derived from the exclusive rights under a patent, and the Patent Act provides the procedure and the remedies for the case where there has been an abuse of such exclusive rights.<sup>29</sup>

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<sup>22</sup> S. 65(3).

<sup>23</sup> S. 66.

<sup>24</sup> S. 67(3).

<sup>25</sup> S. 66.

<sup>26</sup> S. 65(1).

<sup>27</sup> 1 Geo. VI, c. 23, s. 13.

<sup>28</sup> (1941), 1 Fox Pat. C. 166, at p. 207.

<sup>29</sup> When the Combines Investigation Act came up for amendment on February 26th, 1937, the Minister of Labour introduced into the House of Commons a Bill, No. 41, by s. 32 of which it was proposed to repeal s. 30 of the Act and substitute for it a new provision permitting revocation of a patent in any case in which the patentee had become a party to a combine. Representations were made to the Minister of Labour that neither the previous provision nor the proposed new one was necessary. When the Bill was enacted as Chap. 23 of the statutes of 1937, the proposed section was dropped and the existing section 30 was included among the sections of the existing legislation which were repealed. This was done after it became clear that the sections of the Patent Act relating to abuse of exclusive rights enacted in 1935 amply safeguarded the public and that the rights of patentees ought properly to be left to be governed by the provisions of the Patent Act. That it was on this ground that the then proposed section 32 was withdrawn at the instance of the Minister of Labour sufficiently appears from the discussion in the Committee of the Whole on April 5th, 1937: Hansard, pp. 2555-7.



Notwithstanding the enactment of those sections of the Patent Act, which provide, in such a comprehensive manner, the remedies applicable to cases of abuse of exclusive rights and despite the fact that Parliament quite obviously, as Maclean J. pointed out in the *Thermionics* case, repealed s. 30 of the Combines Investigation Act, on the ground that Canada's adherence to the International Convention precluded any legislation which went further than that provided by the Patent Act, Parliament has now been persuaded not only to re-enact s. 30, but in doing so, to add provisions that were unheard of ten years ago and serve to fill with apprehension all those who have a sincere interest in a well-regulated patent system as an incentive to industrial expansion and scientific progress. This section now reads as follows:

30. In any case where use has been made of the exclusive rights and privileges conferred by one or more patents for invention or by one or more trade marks so as:

- (a) unduly to limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or
- (b) unduly to restrain or injure trade or commerce in relation to any such article or commodity; or
- (c) unduly to prevent, limit or lessen the manufacture or production of any such article or commodity or unreasonably to enhance the price thereof; or
- (d) unduly to prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity;

the Exchequer Court of Canada, on an information exhibited by the Attorney General of Canada, may for the purpose of preventing any use in the manner defined above of the exclusive rights and privileges conferred by any patents or trade marks relating to or affecting the manufacture, use or sale of such article or commodity, make one or more of the following orders:

- (e) declaring void, in whole or in part, any agreement, arrangement or licence relating to such use;
- (f) restraining any person from carrying out or exercising any or all of the terms or provisions of such agreement, arrangement or licence;
- (g) directing the grant of licences under any such patent to such persons and on such terms and conditions as the court may deem proper, or, if such grant and other remedies under this section would appear insufficient to prevent such use, revoking such patent;
- (h) directing that the registration of a trade mark in the register of trade marks be expunged or amended; and
- (i) directing that such other acts be done or omitted as the Court may deem necessary to prevent any such use;

Provided that no order shall be made under this section which is at variance with any treaty, convention, arrangement or engagement respecting patents or trade marks with any other country to which Canada is a party.

The first question that naturally arises is as to the constitutionality of such a provision. On this point we have considerable authority already.

So far as criminal law is concerned it would appear to be settled by the two cases first referred to above<sup>30</sup> that, whatever may be said of the rest of the Combines Investigation Act, s. 30 is not legislation of a criminal nature. This appears from the observations of Lord Atkin in the *Combines Investigation Act* case<sup>31</sup> where, referring to the judgment of the Board in the *Board of Commerce* case, which had held *ultra vires* the Board of Commerce Act, 1919<sup>32</sup> and the Combines and Fair Prices Act, 1919,<sup>33</sup> he said:

The contrast is with matters which are merely attempts to interfere with Provincial rights, and are sought to be justified under the head of 'criminal law' colourably and merely in aid of what is substantially an encroachment. The Board considered that the Combines and Fair Prices Act of 1919 came within the latter class, and was in substance an encroachment on the exclusive power of the Provinces to legislate on property and civil rights. The judgment of the Board arose in respect of an order under Part II of the Act. Their Lordships pointed out five respects in which the Act was subject to criticism. It empowered the Board to prohibit accumulations in the case of non-traders; to compel surplus articles to be sold at prices fixed by the Board; to regulate profits; to exercise powers over articles produced for his own use by the householder himself; to inquire into individual cases without applying any principles of general application. None of these powers exists in the provisions now under discussion. There is a general definition, and a general condemnation; and if penal consequences follow, they can only follow from the determination by existing courts of an issue of fact defined in express words by the statute.

In the present section 30 there are no penal consequences whatever. It is apparent, therefore, that s. 30 cannot be classed as criminal or quasi-criminal legislation. It stands alone and desolate, dealing only with patents and trade marks, in a statute all other sections of which are directed to defining certain acts which are to have penal consequences, providing for these penal

<sup>30</sup> *In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919*, [1922] A.C. 191; *Proprietary Articles Trade Association et al. v. Attorney-General for Canada et al.*, [1931] A.C. 310, (*The Combines Investigation Act* case).

<sup>31</sup> At p. 325.

<sup>32</sup> 9-10 Geo. V., c. 37.

<sup>33</sup> 9-10 Geo. V., c. 45.

consequences and the procedure to be applied in their enforcement and in the ascertainment of the acts they are to follow. Section 30 is a carbuncle superimposed upon an otherwise clear surface, without continuity or relevance. It must, therefore, if possible, be justified on other grounds. Some of the orders which the Court is empowered to make are substantially similar in their nature to those which the Board was empowered to make by the Board of Commerce Act, 1919, and which the Privy Council held to be not within the competence of the Federal legislature. These provisions must therefore be held *ultra vires*, unless they fall within any of the other enumerated powers of the Dominion Parliament.<sup>33A</sup>

Subsection (g) would appear to be *intra vires* as being legislation concerned with "patents of invention and discovery" under s. 91, head 22, of the British North America Act. As said in effect by Lord Atkin in *Proprietary Articles Trade Association et al. v. Attorney General for Canada et al.*,<sup>34</sup> whatever may be the moral view of thus discriminating against one species of property, it must be conceded as good law that the legislature which sets up a system of grants of monopolies by patent is able to arm the executive with powers of withdrawing or relaxing those rights if abused. On the same basis sub-s. (h) relating to expungement or amendment of trade marks may be considered *intra vires*. Although trade marks are not mentioned in the British North America Act, it is now settled law that they fall within the legislative competence of the Dominion Parliament under s. 91, head 2, dealing with the "regulation of trade and commerce".<sup>35</sup>

But sub-s. (e) gives the Exchequer Court power to declare void, in whole or in part, any agreement, arrangement or licence relating to the use of patents or trade marks in the manner set forth in the earlier subsections and sub-s. (f) permits that court to restrain any person from carrying out or exercising any of the terms or provisions of such agreement, arrangement or licence.

<sup>33A</sup> See e.g. *Attorney-General for British Columbia v. Attorney-General for Canada*, [1937] A.C. 368, at p. 375, where, discussing the validity of s. 498A of the Criminal Code, introduced by 25 & 26 Geo. V., c. 56, s. 9, Lord Atkin observed: "The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition that Parliament shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in s. 92. It is no objection that it does in fact affect them. If a genuine attempt to amend the criminal law, it may obviously affect previously existing civil rights."

<sup>34</sup> [1931] A.C. 310, at p. 325.

<sup>35</sup> *Attorney-General for Ontario v. Attorney-General for Canada et al.*, [1937] A.C. 405, at p. 417 per Lord Atkin; *Good Humor Corporation of America v. Good Humor Food Products Ltd. et al.*, [1937] Ex. C.R. 61.

This can hardly be considered as being legislation reasonably ancillary to the power given under s. 91, head 22, "patents of invention and discovery". It would rather appear to be legislation with respect to "property and civil rights in the Provinces" under s. 92, head 13. It is quite true that, as Lord Atkin pointed out in the *Proprietary Articles* case:<sup>36</sup> "If then the legislation in question is authorized under one or other of the heads specifically enumerated in S. 91 it is not to the purpose to say that it affects property and civil rights in the Provinces. Most of the specific subjects in S. 91 do affect property and civil rights but so far as the legislation in pith and substance is operating within the enumerated powers there is constitutional authority to interfere with property and civil rights."

But the crucial point of distinction is that the competence of the Federal Parliament to pass legislation affecting property and civil rights can only be invoked if the subject matter of the legislation falls within one or more of the enumerated powers of section 91. If it does not, then it cannot be justified and the Federal Parliament has no authority to override the jurisdiction of the provincial legislature. In order, therefore, that the section shall be *intra vires* it must be brought under one of the enumerated powers contained in s. 91 of the B.N.A. Act.

The first line of investigation is obviously to inquire whether this is legislation affecting "patents of invention and discovery" under head 22 of s. 91, and trade marks which are now conceded to be within the competence of the Dominion legislature. It is not to be assumed that because a patent is concerned incidentally any legislation on the subject must necessarily fall within the competence of the Dominion Parliament. Such a construction would be an obvious absurdity. A patent, when granted, is a chose in action and, as such, is subject to provincial legislation. Thus, provincial legislatures have exclusive power to legislate on such matters as the seizure under execution of patent rights.<sup>37</sup> Section 30 concerns patents and trade marks not primarily but only incidentally. This distinction was pointed out by Maclean J. in *McCracken & Concrete Pipe Ltd. v. Watson*.<sup>38</sup> In 1928 an amendment<sup>39</sup> to the Exchequer Court Act was passed, which provided that the court should have jurisdiction

<sup>36</sup> *Supra*.

<sup>37</sup> See e.g. The Execution Act, R.S.O. 1937, c. 125, s. 17(1): "All rights under letters patent of invention and any equitable or other right, property, interest or equity of redemption therein shall be deemed to be personal property and may be seized and sold under execution in like manner as other personal property".

<sup>38</sup> [1932] Ex. C.R. 83.

<sup>39</sup> 18 Geo. V., c. 23, s. 3.

(c) In all other cases in which a remedy is sought under the authority of any Act of the Parliament of Canada or at Common Law or in Equity, respecting any patent of invention, copyright, trade mark or industrial design.

The action above noted was brought to determine the rights of the parties under a licence agreement entered into with respect to a patent. In dismissing the action on the ground of lack of jurisdiction, Maclean J. pointed out that this amendment was not to be construed so broadly as to give the Exchequer Court jurisdiction in cases of contract between subject and subject, just because the contract incidentally related to something that was a patent of invention. On proper construction the section meant that where the subject-matter of the action primarily, but not incidentally, concerned a patent of invention, trade mark or copyright, the court might grant any appropriate remedy known to the common law or equity. Maclean J. held in terms that the issue between the parties was one relating to breach of contract affecting property and civil rights and was not strictly an action for infringement.

On this principle, it is plain that legislation conferring jurisdiction to declare void agreements, arrangements or licences and to restrain the carrying out or exercising the terms or provisions contained in them is not legislation relating to patents merely because the agreements in question relate to patents. Nor is it legislation that serves to withdraw or relax the rights arising from "grants of monopolies under any system of patents", as suggested by Lord Atkin in the *Combines Investigation Act* case. The presence of patents and trade marks is merely incidental. The legislation affects property rights which are brought into being not by the fact that a patent or a trade mark is in existence, but by the fact that two or more parties enter into contractual relationship. It is to be noted that, under sub-ss. (e) and (f), the rights in the patent or trade mark concerned are in no way affected or diminished. These rights are left completely untouched. It is only the contractual relationship between the parties that is interfered with and limited or destroyed.

So far as concerns any claim that this is legislation affecting trade and commerce, that claim is effectively dissipated by Lord Haldane in the *Board of Commerce* case<sup>40</sup> when he observed: "Nor do the words in S. 91, the 'Regulation of trade and commerce', if taken by themselves, assist the present Dominion contention. It may well be, if the Parliament of Canada had, by reason of an

<sup>40</sup> [1922] A.C. 191, at p. 198.

altogether exceptional situation, capacity to interfere, that these words would apply so as to enable that Parliament to oust the exclusive character of the Provincial powers under S.92." As pointed out by Lord Haldane<sup>41</sup> the law was not one enacted to meet special conditions in wartime. It was passed in 1919, after peace had been declared, and was not confined to any temporary purpose, but was to continue without limit in time, and to apply throughout Canada. Exactly the same circumstances apply to the legislation now under discussion and, although peace has not yet been declared, the legislation in this case, as in the former, was enacted a year after the termination of hostilities.<sup>42</sup>

It would, therefore, seem that on all grounds sub-ss. (e) and (f) of s. 30 as enacted by s. 9 of the 1946 Act are *ultra vires*. Subsections (g) and (h) are *intra vires* and sub-s. (i) if it goes any farther than conferring jurisdiction reasonably ancillary to that conferred by sub-ss. (g) and (h) is also *ultra vires*.

But the constitutional aspect of this section is only one of the objections that may properly be taken against it. The section ends with a proviso which prohibits the making of any order which is at variance with any treaty, convention or engagement respecting patents or trade marks with any other country to which Canada is a party. Canada, as mentioned above, adhered to the International Convention for the Protection of Industrial Property at the time of its revision at The Hague in 1925. Among the provisions of this Convention appears the following article:

5A. (1) The introduction by the patentee into the country where the patent has been granted of objects manufactured in any of the countries of the Union shall not entail forfeiture.

(2) Nevertheless, each of the countries of the Union shall have the right to take the necessary legislative measures to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent: for example, failure to use.

(3) These measures will only provide for the revocation of the patent if the granting of compulsory licenses shall not suffice to prevent these abuses.

(4) In any case the issuance of a compulsory license cannot be demanded before the expiration of three years beginning with the date of the granting of the patent and this license can be issued only if the patentee does not produce acceptable excuses. No action for the cancellation or revocation of a patent can be introduced before the expiration of two years beginning with the issuance of the first compulsory license.

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<sup>41</sup> At p. 197.

<sup>42</sup> It is to be noted that, in the *Proprietary Articles* case, Lord Atkin refrained from expressing an opinion on this aspect of the subject, pointing out that it was unnecessary in view of the finding that the legislation could be supported on other grounds: cf. [1931] A.C. 310, at p. 326.

(5) The preceding provisions, subject to necessary modifications, shall be applicable to utility models.

In the first place, s. 30(g) is clearly at variance with article 5A(4) of the Convention. Canada has bound herself by solemn obligation not to allow applications for compulsory licence until three years have elapsed from the date of any given patent. A licence is not then to be issued unless the patentee fails to produce "acceptable excuses". In any event, no patent can be revoked on the ground of abuse of exclusive rights until after the lapse of two years from the date of issue of the first compulsory licence. The legislative measures to correct abuses which are permitted to the contracting members of the Union are severely curtailed by article 5A(3). They are limited to the passage of measures that "will only provide for the revocation of the patent if the granting of compulsory licences shall not suffice to prevent these abuses". And yet the Combines Investigation Act now, by s. 30(g), blandly provides that in case the exclusive rights and privileges conferred by a patent have been used to limit production unduly, or unduly to restrain or injure trade, the issue of licences may be ordered without limitation as to time, or the patent may be revoked by order of the Exchequer Court, if the grant of a compulsory licence or any of the other remedies contained in the section "would appear insufficient to prevent such use". Then follows the proviso which completely destroys any effect which s. 30(g) may have beyond the provisions contained in ss. 64-71 of the Patent Act. Thus, except under certain defined conditions and at clearly defined times, the subsection so far as it relates to the grant of licences and the revocation of patents is inoperative. These conditions and times have been defined in the Patent Act and appropriate remedies provided. Section 30(g) of the Combines Investigation Act is, to this extent, surplus and meaningless verbiage.

A curious situation thus arises with respect to sub-ss. (e) (f) and (i) of s. 30. If they do not constitute legislation concerning patents and trade marks they must constitute legislation affecting property and civil rights and hence are *ultra vires*. If, on the other hand, they constitute legislation concerning patents and trade marks and are hence *intra vires*, they are at variance with article 5A(3) of the Convention. Under this article the contracting nations are precluded from enacting other than certain specified legislation by way of remedy. These subsections clearly go beyond this limitation and thus constitute a breach of an international obligation solemnly entered into. In these days, when

every politician is vaunting Canada's moral rectitude and high principles, the time is singularly inappropriate for either cynical or ignorant disregard of international covenants. If only we could arrive at the sane and sensible time when the legislature

“ . . . withholds its legislative hand,  
And noble statesmen do not itch  
To interfere in matters which  
They do not understand.”

Section 30 of the Combines Act now, for the first time, makes provision for the expungement of one or more trade marks or the amendment of the register concerning it or them, if used in such a way as to limit production unduly or to restrain or injure trade. The Exchequer Court may declare void in whole or in part any agreement, arrangement or licence relating to such use or restrain the carrying out of its terms. Apparently neither the legislature nor the draftsmen of this section had looked into the law on the question very thoroughly. So far as trade marks are concerned, the section is quite unnecessary. The Unfair Competition Act, 1932,<sup>43</sup> which is the relevant statute affecting trade marks and their registration, permits licensing only in connection with association marks under s. 12. It has been held over and over again that, except in special circumstances, the licensing of a trade mark destroys its validity.<sup>44</sup> In such case there is no need to order its expungement for it is ineffective and no longer has within its content any of the “exclusive rights and privileges” that s. 30 is designed to attack.

But, apart altogether from the question of validity, it is not seen how trade marks can possibly operate in the formation of combines and cartels or can be used to limit production unduly or restrain or injure trade. If a trade mark, other than an association mark<sup>45</sup> or a trade union label,<sup>46</sup> is licensed or is used to designate the goods of more than one person, it becomes invalid under the common law. In the debate in the House of Commons<sup>47</sup> the discussion on this feature of the section centred around the trade mark “Aspirin”. The Minister of Justice observed:

My information is that it is not a patent which is involved there, but rather the registration of the word ‘aspirin’ as a trade mark, and that

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<sup>43</sup> 22-23 Geo. V., c. 38.

<sup>44</sup> *Bowden Wire Ltd v. Bowden Brake Co., Ltd.* (1913), 30 R.P.C. 45, 580; (1914), 31 R.P.C. 385; *Siegel Kahn of Canada Ltd. v. Peggy Sage, Inc.*, [1935] Ex. C.R. 1; Fox, *Trade Mark Assignments and Licences in Canada* (1945), 35 T.M. Rep. 79.

<sup>45</sup> Unfair Competition Act, 1932, s. 12.

<sup>46</sup> Trade Mark and Design Act, R.S.C., 1927, c. 201, s. 22.

<sup>47</sup> July 3rd, 1946, Hansard, p. 3142.



this registration prevents anyone else from selling the same thing under the name of aspirin. It is acetyl-salicylic acid; and aspirin now appears in fact to have become more than a trade mark. A trade mark is used to designate a certain thing made by a certain producer; but aspirin has in fact become a household word, and much better known than acetyl-salicylic acid. There is a matter there which is under consideration. Even in the United States the word 'aspirin' can be used by others than Bayer. In England the same situation exists. And that is the matter which is under consideration, and which, because of the form of our Trade Marks Act, which gives a perpetual right in a registered trade mark as long as it remains registered, creates a difficulty.

This statement of the Minister of Justice calls for some examination, explanation and correction. In the first place, the trade mark "Aspirin" was held to be properly on the register of trade marks by the Supreme Court of Canada in *The Bayer Co. Ltd. v. The American Druggists' Syndicate Ltd.*<sup>48</sup> In the second place, the Trade Marks Act, mentioned by the Minister, was repealed, except as to the sections relating to industrial designs and trade union labels, fourteen years ago, and the effective statute is now The Unfair Competition Act, 1932. In the third place, the statute does not, as stated by the Minister, give "a perpetual right in a registered trade mark as long as it remains registered". Section 52 provides, in terms, that an application may be made by any person interested for an order that any entry in the register be "struck out or amended on the ground that at the date of such application the entry as it appears on the register does not accurately express or define the existing rights of the person appearing to be the registered owner of the mark". If then, as the Minister suggested, the word "aspirin" has in fact become a household word procedure is expressly provided for its expungement from the register on the ground that it has become *publici juris*.<sup>49</sup> There is no such thing as a perpetual right in a registered trade mark as long as it remains registered. It seems almost unnecessary to point out that trade mark rights do not arise by registration but only by adoption for use.<sup>50</sup> Registration under the statute merely serves to confirm the title, which has already been established by use, and at the same time provides for the technical action of infringement, which is of a more simple and speedy nature than the action for passing off. As observed by Ritchie C.J. in *Partlo v. Todd*:<sup>51</sup> "It is not the registration that makes the party proprietor of the trade mark; he must be the

<sup>48</sup> [1924] S.C.R. 558.

<sup>49</sup> Cf. *Gallaher Ltd.'s Application* (1925), 42 R.P.C. 215.

<sup>50</sup> *Partlo v. Todd* (1888), 17 S.C.R. 196; *In re Vulcan Trade Mark* (1915), 51 S.C.R. 411; *Bayer Co. Ltd. v. American Druggists' Syndicate Ltd.*, [1924] S.C.R. 558, at p. 569 per Duff J.

<sup>51</sup> (1888), 17 S.C.R. 196, at p. 200.

proprietor before he can register". A trade mark may be perfectly good and enforceable even though it is never registered. How the statute is supposed to give a perpetual right as long as a trade mark remains registered is a new concept of trade mark law for which there is no authority to be found either in the statute or in the decided cases.

The important point is that the remedy provided by this new legislation is completely unnecessary. In the case discussed in the House of Commons the appropriate remedy is already on the statute books, and the new remedies proposed are quite inappropriate when applied to trade marks. The code of trade mark law, embodied in the principles of the common law and in *The Unfair Competition Act, 1932*, provides a good system for the protection of the public. It is drawn with the public interest as the controlling factor. It should not be interfered with except for specific cause to meet defined circumstances. If a trade mark is capable of being abused except by a seller who fraudulently applies it to his goods, abuses of trade mark rights which it is desired that the court should suppress are presumably capable of as ready definition as abuses of patent rights. This is not the case with the legislation under discussion. The section gives no indication whatever of the kind of abuse which it is contemplated that the court might intervene to suppress. The making of vague and undefined threats against trade mark owners as such serves only to discourage commendable industrial and mercantile activity.

The Minister also misdirected himself on another point. He stated during the debate<sup>52</sup> that "the registration of a trade mark is used to limit the zones in which certain traders can operate. The same trade mark being registered in the name of different owners in different countries and being applied to something in which there enters a patented part or patented material, makes it impossible for the licensees to invade the territory of another because they would be infringing the trademark of the other owner. . . . These things have to be studied in that light, and I think the dispositions manifested by several of the western allies do give some promise that this kind of conference will bring about results that should remove some of the fetters that now embarrass trade and frequently enable inordinate profits to be realized."

I venture to think that the ownership by different parties in different countries of similar trade marks applied to similar

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<sup>52</sup> Hansard, p. 3144.

goods can hardly be considered objectionable. It would appear reasonable and proper that the protection accorded by trade mark should ensure to each trader the right to apply that mark exclusively to his goods throughout the area of protection in order that the public shall not be deceived as to the origin of and the responsibility for the quality of the goods. If such a trader permits importation of goods from another country marked with a trade mark similar to his own, then not only will the public be confused and deceived as to the source of the goods but the trader's mark will be invalidated. Nor will it help him in any way to urge that, in doing so, he was complying with an order made under the Combines Investigation Act. The section does not save any rights but only permits their destruction. Nor can it be suggested that an order expunging the mark will in any way help the situation. This will probably result only in creating further confusion in the minds of the purchasing public.

The expungement of a trade mark from the register will accomplish only the very limited purpose of precluding the owner from bringing an action for infringement. It will not prevent his bringing an action for passing off. It will not interfere in any way with his exclusive right to the use of the mark. It will not serve to throw the mark into the public domain as in the case of revocation of a patent. It will not put an end to the "perpetual right" assumed to exist by the Minister of Justice. In short, it will serve no really useful purpose. It will certainly not do anything to contribute to the control of combines.

Section 30 shows a lack of acquaintance with the forms of industrial property. Of the three forms only two are provided for, and it requires only a slight amount of experience with them to realize that industrial designs are far more susceptible of improper use than are trade marks. Designs bear much closer similarity to patents than they do to trade marks. In the United States, they are proper subject matter for patents and in Europe for the issue of utility model patents, as *e.g.* the *Gebrauchsmuster* of Germany. Yet they are left quite untouched by this statute. The legislature has shown little real endeavour to understand the essential nature of the forms of industrial property or to dovetail the provisions of the section with the rights and obligations flowing from the International Convention.

If the forms of industrial property constitute the means of forming monopolies and exercising monopolistic practices, so equally does intellectual property. If patents can be used to restrain trade and lessen competition, so equally can copyright.

It is obvious that restraints on educational and cultural publications can be exercised by copyright owners, and combines formed by publishers, at least to the same extent as by patent holders. The Copyright Act contains far less stringent provision against abuse than does the Patent Act.<sup>53</sup> Yet in the whole of the Combines Investigation Act the word "copyright" is not mentioned. Copyright is practically never stated to be an improper monopoly such as a patent. But it is a much more powerful and much more lengthy form of exclusive property than a patent, capable of enduring, in an appropriate case, for over a century. There is an undue preoccupation with patents these days, engendered by antagonism to the patent system, which causes one to wonder whether those who concern themselves so fanatically with monopolies and combines have any real grasp of the subject or are labouring under the anachronistic spirit of thinking that agitated the Long Parliament in 1640.

If the maxim *Interest reipublicae ut sit finis litem* may be somewhat more than liberally translated, it might well be said that it is in the interests of the state that there be no multiplicity of lawsuits. In this case, however, a person who feels that there has been an abuse of the exclusive rights granted by patent may apply to the Commissioner of Patents for a compulsory licence or for revocation of the patent under ss. 65-71 of the Patent Act. He may, if unsuccessful, go on appeal to the Exchequer Court. If that avenue of remedy is finally closed to him, the matter should be at an end. But now the patentee may be further harried by another proceeding brought *de novo* alleging abuse of exclusive rights under s. 30 of the Combines Investigation Act. All the disgruntled applicant has to do is to persuade the Attorney-General to exhibit an information. In these days of antagonism to patents that should not be a difficult task.

It seems not unreasonable to propose that all rights existing by virtue of the grant of patents of invention should be defined and delimited by a single statute relating to patents. The Patent Act<sup>54</sup> grants to the patentee, for a term certain, "the exclusive

<sup>53</sup> These provide for reproduction in published form or performance in public only *after the death of the author*, (s. 13) or for printing and publishing a published book only where the copyright owner fails to supply by means of copies of the book printed in Canada the reasonable demands of the Canadian public for such book. Nothing is said as to the terms, price or conditions on which the book is supplied. And there is this restriction that, if one edition of the work has been published in Canada, no licence to republish can be granted without the consent of the author (s. 14). There is further provision for compulsory licence to publish in serial form a work which has been so published in a foreign country (s. 15).

<sup>54</sup> S. 45.

right, privilege and liberty of making, constructing, using and vending to others to be used the said invention, subject to adjudication in respect thereof before any court of competent jurisdiction". This exclusive right is relaxed and diminished by other sections of the statute, notably ss. 65-71. If the right is to be still further diminished and controlled it should be done by the same statute, not by another which has a completely different end in view and is based upon a completely different and opposing philosophy. Section 30 is not combines legislation but patent and trade mark legislation. It should, therefore, find its place in the relevant statutes.

It would, of course, be both idle and presumptuous to say that any system of law is perfect and that there is no room for improvement. No lawyer would admit for a moment that our patent system cannot be made a better system than it is. But it must be emphasized and reiterated that patents are socially useful and that, therefore, any revision of the patent system must not be too drastic. We must be careful that, in revising and amending the system, we do not destroy it. There is little real credit and honour to be given to the surgeon who performs a delicate and skilful operation which results in the death of his patient. The situation should be approached in an analytical and definitive manner and not by the piecemeal process of adding sections here and there to various statutes at random. Improvement does not, however, lie in the drastic measure of making patent rights and contracts related thereto subject to attack under a statute which has nothing to do with patents and which is based upon a philosophy inimical to the maintenance of patent rights. Efforts have been made for years to induce the Government to improve Patent Office administration.<sup>55</sup> So far, all appeals have fallen on unresponsive ears. But s. 30 of this statute dealing with combines was enacted without any study or consideration of the patent system as a whole. In Great Britain, a Committee of the Board of Trade, which is the department administering the patent system in that country, recently made a thorough study of the patent system and received briefs from numerous organizations making suggestions and recommendations. Its deliberations occupied over two years and its Report, published in April 1946, is replete with sound judgment on the subject under discussion. On the question of abuse of exclusive rights it recommended that s. 27 of the Patents and Designs Act<sup>56</sup> be amended to provide for

<sup>55</sup> See e.g. (1945), 6 University of Toronto Law Journal at p. 143; *The Financial Post*, Toronto, September 21st, 1946, at p. 13.

<sup>56</sup> Corresponding to ss. 65-71 of the Canadian Act.

the grant of compulsory licences where a more extended use of a patent could be made, even if no actual abuse of patent rights has taken place. Specific grounds were added for the grant of licences as follows:

- (a) if there is scope for export trade under the patent which the applicant desires to undertake;
- (b) if the use of the patented invention is required for or will assist the efficient operation of any other process or invention;
- (c) if the development of any commercial or industrial activity is being hampered;
- (d) if the patent has been used improperly with regard to the use of materials not covered by the patent.

None of these factors, it will be observed, are present either in the Patent Act or in s. 30 of the Combines Investigation Act.

Specific provisions already appear in the British Act<sup>57</sup> making it unlawful to insert in any patent agreement conditions

- (a) prohibiting or restricting the purchaser or licensee from using any articles or class of articles, or any patented process, supplied or owned by any other person;
- (b) requiring the purchaser or licensee to acquire from the patentee any article or class of articles not protected by the patent.

This is the type of specific restriction that may properly be included in the law regulating any system of patents and not the loose, widely-drawn provisions of s. 30, which are directed to circumstances depending for their solution on judicial discretion or "value" judgments. Lord Camden rightly observed that "judicial discretion is the law of tyrants" and the less scope the legislature gives for its exercise the better.

Patents must, by their very nature, restrain trade and commerce in relation to their subject matter. The statutory provision for their grant is predicated upon such restraint. And both by statute and at common law a trade mark consists in the right to restrain trade or commerce in articles bearing the mark. Section 30 cuts across the whole theory of the law of industrial property and derogates from the rights granted under the Patent Act by making patents subject to revocation for the doing of those very things which are included within the ambit of the patent grant. To suggest that the inclusion of the word "unduly" in the first four subsections overcomes this objection is to miss the

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<sup>57</sup> S. 38.

point entirely, for the interpretation of what is undue restraint or interference with trade is nowhere defined. The vague threats and the obscure, undefined limitations on the rights of owners of patents and trade marks contained in this section can hardly assist in the proper solution of economic problems. They will, on the contrary, call for the determination of questions by the exercise of discretion on the part of bureaucratic civil servants assisted by the courts of law who have been supplied by Parliament with no yardstick and no definition. For the solution of those problems and the determination of these questions we shall be at the mercy of discretionary powers, acknowledged by all but bureaucrats to be the arch-enemies of freedom.

These are days in which the patent system is being attacked on every hand. There are those who value the baby as much as they value the bath water. Over and over again we hear the dismal refrain, designed for the ears of the majority of the voters, that the patent laws were designed to encourage invention but the unjust use made of patent rights by big companies make their net benefit doubtful. There, if ever, is the perfect *non sequitur*. If the result of the patent laws has been the production of invention, then their object has obviously been fulfilled. The object of the patent laws is the stimulation of invention—the progress of science and the useful arts. If someone other than the inventor profits from an invention, that is a completely irrelevant circumstance to which abolition of the patent system is not the answer. So far as the so-called big companies are concerned, does it really matter whether inventions are made and exploited by the “lone wolf” inventor, or by the corporate employee working in the well-fitted and established laboratory, so long as inventions are made and put into wide commercial use? The general public gets the benefit no matter who makes them and regardless of who commercializes them and profits from them. And the really important, worthwhile inventions are now almost all made in the well-equipped laboratories of big companies. The development of nylon may be cited as a typical example. Far from any “unjust use” being made of patents by big companies, the truth is that these big companies are constantly developing new processes and techniques at enormous expense. The patents granted to them are no more than a proper reward for their expenditures and the encouragement they give to the individual inventor, to say nothing of the great public service they render in enabling the individual inventor to work and produce effectively. The individual inventor receives his share and the public obtains the benefit of the scientific advance. Few, if any, individuals have

at their disposal the means to make important inventions in these days unless they are in the service of large and well-equipped corporations.

There should be a little more realism and a little less political obscurantism in approaching the question of patents and so-called patent abuse. There should be a cessation of the habit of mind that assesses how much the individual receives compared with how much the "big company" receives. The questions for examination should be: Who is entitled to the credit? Who has earned the reward? Does the public benefit from the invention? It is time we stopped damning the big corporations for their massive contributions to progress. If the so-called "big companies" give scope and opportunity to the accomplishments, the energies and the endeavours of inventors, they should be entitled to a little more respect than they are currently receiving.

There is not only too much superficial thinking about patents and other forms of industrial property these days; there is far too much irresponsible talk—and much of this irresponsible talk (as well as the superficial thinking) is accompanied by words such as monopolies, cartels, combines, vested interests, big business, and abuse of exclusive rights. Cartels and combines are not necessarily bad nor are monopolies necessarily harmful. Not only may they work for the benefit of the public<sup>58</sup> but they may be the only means by which some commodities can be made available to the public. The emphasis of thinking on these subjects—if there is any thinking—is generally misdirected. The question should not be whether a combine, cartel or monopoly exists but whether and to what extent it is prejudicial to the public interest. The impropriety of vested interests is a socialist cry that has now lost most of its force, since the trade unions are themselves advancing the theory that the union member has acquired a vested interest in his job which cannot be set aside by unilateral action on the part of the employer.<sup>59</sup> Big business has been the target for so much opprobrium of recent years that any rational person must begin to realize that it must possess much of greatness to attract so many envious hands to assail its splendour.

So far as abuse of exclusive rights is concerned the entire situation is nothing short of *opéra bouffe*. Charges of abuse of patents and suppression of patents are hurled right and left. Big business

<sup>58</sup> See e.g. per Maclean J., *Philco Products Ltd. et al. v. Thermionics Ltd. et al.* (1941), 1 Fox Pat. C. at p. 202.

<sup>59</sup> It is not without significance that the trade unionist violently and vehemently denies the existence of such vested interest adhering to the non-union worker particularly when he refuses to join a strike.



is accused of buying up patents for the sole purpose of "putting them in mothballs"—of deliberately depriving the public of the benefits that would accrue from their manufacture and exploitation. The great majority of people believe these charges—either because they do not know any better or because they do not want to know any better. Ignorance always persists in delivering "brawling judgments, unashamed, on all things all day long". What are the facts?

Sections providing remedies for abuse of exclusive rights have found their place in the Patent Act since 1923. In the decade 1935-1945 the Commissioner of Patents has granted two orders for compulsory licences. In Great Britain similar provisions were enacted in 1919. The Board of Trade Report of April 1946<sup>60</sup> pointed out that in the intervening 27 years only 42 applications based on abuse were made. A majority of the applications were withdrawn, only eight cases being heard by the Comptroller. Of these, patents were held to be abused in four cases. In other words, the record showed an average of only one case of abuse in every seven years.<sup>61</sup> It cannot be too often reiterated or too strongly emphasized that abuse of exclusive rights under patents usually takes place only in the imagination.

As to the charge of suppression of patents, two statements from authoritative sources should be sufficient to dispose of this canard. The Second Interim Report of the Board of Trade Committee<sup>62</sup> had this to say on the subject:

Rumours of this practice are frequent but, in spite of our endeavours to obtain it, no satisfactory evidence of particular examples has been forthcoming. Several persons who had made public statements about the suppression of inventions were invited to give evidence before us but did not accept the invitation. We have formed the opinion that this type of restriction has been much exaggerated.

In the United States an extensive survey conducted by the American Chemical Society some years ago failed to reveal a single instance of this kind. Frank Jewett recently wrote: "Despite the fact that I have made diligent enquiry over the years, I have never been able to locate a suppressed patent nor have I found anyone who could cite an authentic case of suppression."<sup>63</sup>

So far as Canada is concerned, I can repeat Mr. Jewett's words, and I venture to think that all the sound and fury heard

<sup>60</sup> At p. 9.

<sup>61</sup> The average annual number of patents granted in Great Britain is roughly 18,500; in Canada, 9,000.

<sup>62</sup> April 1946, at p. 6.

<sup>63</sup> Cf. Journal of the United States Patent Office, Vol. xxviii, no. 2, Feb. 1946, p. 86.

from time to time in this country about the iniquities of big business buying up patents in order to suppress them in the interests of the continuation of obsolete methods and products would disappear into thin air the moment those who make the statements were called to the witness stand and required to give factual evidence under oath.

One of the great paradoxes of our time is to be seen in the attitude adopted by Government toward monopolies, combines and cartels operated by industry and commerce on the one hand and toward those operated by the Government itself on the other hand. Thus, for example, the Milk Control Board of Ontario determines the price at which distributors must buy milk from the farmer and the price at which they must resell to the consumer. New Brunswick, Nova Scotia and British Columbia provide arbitrarily fixed prices for the resale of gasoline to the consumer. And yet, when the gasoline dealers of Toronto recently discussed concerted action on the retail price of gasoline, the Combines Investigation Commission warned them over the radio that such action would constitute a breach of the statute and the Criminal Code and would be followed by prosecution. The policy appears to be that if any government, federal, provincial, or municipal, accords its blessing to any combine agreement, that agreement is assumed to be in the public interest and neither the provisions of the Combines Investigation Act nor the Criminal Code will be invoked. The assumption that government always acts in the public interest is sheer nonsense. After all, we spent the years from September 1939 to May 1945 actively endeavouring to prove to the German people that its government was not acting in their interests, and we now attempt to clinch that proof by the judgment of Nuremberg. The same thought is applicable to the Japanese and a considerable number of other governments. What particular brand of egotism prompts us to think that our government is made up of Galahads *sans peur et sans reproche*? There can hardly be an example of more gigantic, octopean, restrictive monopoly than that enjoyed by the Government's creature, the Canadian Broadcasting Corporation. Private radio stations and the public generally may clamour all they like about the necessity of competition and the right of the small operator not to be submerged. The only answer is that the Government represents the public and what it gathers unto itself is gathered in the public interest.

When manufacturers, wholesalers, jobbers or retailers get together to control a trade or industry against vicious and unbridled competition, to restrain unfair trade practices such as the sale of "loss leaders", to maintain resale prices, and generally

to regulate the trade or industry against the type of internecine strife which always reacts to public disadvantage, the cry of monopoly and combine is raised at once. Price control agreements are condemned and action swiftly follows. On the other hand the labour unions combine freely to raise prices and shelter comfortably behind the provisions of the Criminal Code.<sup>64</sup> Wages constitute a controlling factor which enters into the determination of the price of every commodity and service. They aggregate, from the primary producer, through the manufacturer and distributor, by far the greatest percentage of the final consumer price. And yet the public interest is set aside and the labour unions are permitted to combine as they please to dictate the price at which they will sell their commodity to the public. Nay, more, the public, represented by industry, is compelled, under penal sanction, to "bargain collectively" with them. Labour unions are obviously cartels but "it is doubtful if industrial cartels have ever resorted to the same type of belligerent methods in order to stabilize the price for their products as have the labour unions".<sup>65</sup> An ordinary citizen, and perhaps even a lawyer, may be excused for some sense of bewilderment when he attempts to reconcile the Government's inconsistency in pressing through to enactment a statute which thus proposes to regulate and regiment industry and commerce, while, at the very same time, permitting the labour unions to indulge in the most flagrant violations of the elementary principles upon which the order and peace of any community are established. It is a paradox that industry, represented by management, should be subjected to further shackles and restraints while labour is left free to trample underfoot the ordinary sanctions of the law and to thrust ruthlessly aside the common rights and freedoms of those who are not members of their trade monopoly. It is not too harsh to say that, in this display of inconsistency, s. 30 enjoys pride of place—the jewel of inconsistency—the paradox *par excellence*.

It may be, of course, that the present legislation is but another symptom of the times. Much legislation is enacted as a result of the crusading zeal of civil servants who feel that they have a mission to perform, without a full knowledge and understanding of all the implications of the legislation on the part of the

<sup>64</sup> S. 497: "The purposes of a trade union are not, by reason merely that they are in restraint of trade, unlawful within the meaning of the last preceding section."

S. 498 (2): "Nothing in this section shall be construed to apply to combinations of workmen or employees for their own reasonable protection as such workmen or employees."

<sup>65</sup> J. W. HANSEN: CARTELS: A STUDY OF THE PROS AND CONS as THEY IMPINGE ON CANADA, 1946, p. 13.

legislators. In the case of legislation of this type, little harm is usually done, because, as soon as the implications are perceived, its fate is either repeal or a sane and restricted enforcement. Then, too, it seems not unfair to say that, within recent years, we have witnessed much legislation and administrative regulation that has not really been intended to be put into execution. It is in some cases palliative of a highly vocal section of ill-informed public opinion. In other cases it is minatory and intended only to operate *in terrorem*. It is to be hoped that s. 30 as enacted is legislation of this class. It is to be hoped, also, that the practical impossibility of its interpretation and operation will be quickly perceived, as it must be eventually. In that case we may happily leave it to the fate of so many of its fellows gathering dust on the forgotten pages of the statute books and enjoying the oblivion of its epitaph:

*Ossa quieta, precor, tuta requiescite in urna;  
Et sit humus cineri non onerosa tuo.*

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## PURPOSES OF THE UNITED NATIONS

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

(Article 1 of the Charter of the United Nations)