

DECISION OF THE COMMISSIONER

FILING DATE: Informal Petition.

The filing date of the application should have been the date on which the letter accompanying the specification and the filing fee were filed.

FINAL ACTION: Reversed.

IN THE MATTER of a request for a review by the Commissioner of Patents of the Examiner's Final Action under Section 46 of the Patent Rules.

AND

IN THE MATTER of a patent application serial number 917,024 filed November 23, 1964 for an invention entitled:

CELLULAR GLASS AND METHOD OF MAKING SAME

Patent Agent for Applicant:
Messrs. Fetherstonhaugh & Co.,
Ottawa, Ontario.

This decision deals with a review by the Commissioner of Patents of the Examiner's Action rejecting the application. The request was made in accordance with Section 46 of the Patent Rules.

The Patent Appeal Board has reviewed the prosecution of this application and the facts are as follows:

Application 917,024 was filed November 23, 1964 in the name of O.A. Vieli and refers to "Cellular Glass and Method of Making Same".

In the prosecution terminated by the Final Action, the examiner refused all the claims (claims 1-23) in view of applicant's prior issued Belgian patent 637,983, January 16, 1964. The examiner maintained that these claims must be removed because they fail to comply with Section 28(2) of the Patent Act since applicant's prior issued patent bears a filing date of September 30, 1963 which is more than 12 months prior to the Canadian filing date of November 23, 1964.

In applicant's letter of November 2, 1970 wherein the review by the Commissioner was requested, he argued:

The application should have been given a filing date of July 20, 1964 and thus have been permitted to claim priority from Austrian application A 5810/63 which was filed on July 19, 1963, July 19, 1964 having fallen on a Sunday. Had the applicant been able to obtain this filing date and claim priority this prior Belgian patent would not constitute a bar under Section 28(2)(b) of the Act.

Upon review of the grounds for rejection set forth by the examiner, as well as all the arguments presented by the applicant, I am not satisfied that the rejection is well founded, although the facts used by the examiner are correct considering the filing date given by the Patent Office.

The applicant of the application in a letter dated July 15, 1964 forwarded a patent specification together with a filing fee of \$30.00 to the Canadian Patent Office.

In a letter dated July 28, 1964 the Office informed the applicant that "the papers may not be entered and given a serial number and filing date as the required formal petition was not included".

On November 23, 1964 Messrs. Fetherstonhaugh and Co. refiled this specification and included the required petition. This application was given a filing date of November 23, 1964 and a serial number 917,024.

This application was given a Final Action on August 7, 1970 on the grounds that the invention being claimed therein was patented in Belgian patent 637,983 filed on September 30, 1963 and which issued on January 16, 1964. This patent constitutes a bar under Section 28(2) of the Patent Act.

The basic point to be resolved is whether the Office should consider the letter dated July 15, 1964, referred to above, acceptable or not acceptable as a petition for the purpose of obtaining a filing date of July 20, 1964 to overcome the statutory bar under Section 28(2).

No definition of the term "petition" appears in the Act or Rules. The definition given in Websters' 3rd New International Dictionary is as follows:

"Petition: 2a: a formal written request addressed to an official person or organized body (2): a formal written request addressed to a sovereign or political superior for a particular grace or right."

I find that Section 31 of the Patent Rules permits an inventor to file an invention with the minimum of formal requirements. Section 33 of the Patent Rules then specifies all the formalities which must be fulfilled in order to complete the filing of the application. I therefore find that the prescribed forms are applicable in Section 33 of the Patent Rules but are not necessarily applicable in Section 31 of the Patent Rules. It is noted that not all petitions submitted to this Office are entirely satisfactory and provisions are made in Section 34 of the Rules for having corrections made, in a specified time, to those which are found to be defective.

I find that the courts have consistently, when possible, avoided an interpretation of the Act and Rules which has the effect of defeating an inventor's rights. In Grunwald v. The Commissioner of Patents (1946) Ex. C.R. 674 a somewhat similar situation existed. An application was filed on June 17, 1937 and the application consisted of a petition, specifications, claims, drawings and fee. The application was made by an attorney for the applicant, but the power of attorney did not accompany the application. The Office refused a filing date. However, this was overruled by the Court and the Judge stated, "In my opinion the application which was received by the Commissioner on June 17, 1937, while incomplete, was nevertheless substantially complete and should therefore have been given a serial number and a filing date".

In the circumstance, therefore, I am satisfied that the letter dated July 15, 1964 accompanying the patent specification together with a filing fee, may be considered an informal petition and the application as filed was substantially complete.

I recommend that this application be given a filing date of July 20, 1964, the date on which it was officially received by the Patent Office.

R.E. Thomas,
Chairman,
Patent Appeal Board.

I concur with the findings of the Patent Appeal Board and I am directing that the application be given a filing date of July 20, 1964.

Decision accordingly,

A.M. Laidlaw,
Commissioner of Patents.

Dated at Ottawa, Ontario
this 11th day of January, 1971