DECISION OF THE COMMISSIONER

STATUTORY: Feeding Animals; Discovery.

Feeding animals many times in succession for a period of each day, each time offering more feed than can be eaten but withdrawing it before an animal is satisfied, is a statutory process which improves a vendible product within the rules of Morton, S. in G.E.C.'s Appln (1943) 60 R.P.C. @ 4 and within the meaning of #manufacture# in Lawson v. Commissioner (1970) 62 C.P.R. 101. The subject matter appears to denote "discovery" and invention per Continental Soya v. J.R. Short (1942) 2 C.P.R. 1.

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 954,851 filed March 16, 1966 for an invention entitled:

METHOD FOR FEEDING DOMESTIC ANIMALS

Patent Agent for Applicant: Messrs. R.K. McFadden & Co., Ottawa, Ontario.

This decision deals with a request for review by the Commissioner of Patents of the Examiner's Final Action dated May 13, 1970 refusing to allow application 954,851.

The refusal of the examiner to allow the application was based on the grounds that the method claimed and described is not within the ambit of Section 2(d) of the Patent Act.

The Patent Appeal Board conducted a hearing on February 9, 1971. Mr. R.K. McFadden and Mr. I. Fincham represented the applicant. The facts are as follows:

Application 954,851 was filed on March 16, 1966 in the name of H. Biehl and refers to Method For Feeding Domestic Animals.

In the prosecution terminated by the Final Action dated May 13, 1970 the examiner refused the application on the grounds that the method claimed and described is not within the abmit of Section 2(d) of the Patent Act.

The examined Stated:

Farmers and scientists have been experimenting with a varying number of feeds per day, the length of time of feeding and the amount of feed supplied being varied, also. The choice of the optimum amount and length of time during and time for feeding depends largely on the exercise of normal skills of observation of those concerned with animal husbandry and depends, also,on the physiology and nature of the animal. It is well known to control the quantity of food and type of food in the case of humans who are dieting. In most cases their appetites are not completely satisfied.

As stated in the previous Office Action, the results of the method are not constantly reproducible. Increase in weight, meat to fat ratio and speed of increase in weight appear to be dependent upon the physiology of the animal and the metabolism rate of the individual animal. It would appear to be a matter of human judgement as to when the appetite of the animal is or is not satisfied completely. Certainly all animals' appetites are not the same and an essential limitation of the method claimed is the removal of the feed before the animals' appetites are completely satisfied.

Not every process or art falls within Section 2(d) of the Patent Act. The word art cannot be taken in its broadest meaning for there are arts which are excluded from patentability, some by statutes, such as Section 28(3), others by well known and accepted court rulings, such as business systems, methods of accounting, etc., still others by other statutes such as the Design Act. There may be processes which are not manners of manufacture although they produce a useful result, for instance methods or processes of treating diseases in human beings. The Patent Act is designed to protect inventions in the field of industry and commerce. Method of feeding is not within the scope of trade or commerce envisaged for protection under the Patent Act. The existing laws of nature govern the results of feeding and the discovery of an existing law of nature is not grounds for a valid patent. Optimizing conditions governing the method of feeding is ordinary agricultural knowledge and practice and not subject matter under Section 2(d). The patenting of these methods would constitute an unfair restraint on the normal exercise of the skilled person in the art.

In applicant's response of November 13, 1970 he stated:

Section 2(d) of the Act defines invention as "any new and useful art, process, machine, manufacture or composition of matter or any new and useful improvement in any art, process, machine, manufacture of composition of matter", and it is submitted that the method claimed does represent a <u>new</u> and <u>useful</u> art

> or process within the meaning of Section 2(d) and actually does result in a reproducible result which can be predicated and one which improves a vendible product, namely livestock and the resulting meat.
>
> The applicant, now, has unexpectedly found that the exploitation of the feed may be influenced quite substantially if the feed is allowed to the animals in quite a special and inventive manner. What is essential to the invention is that the animals are offered feed many times in succession during the day for a certain period of time. This period of time is measured to be such that the animals cannot fully satisfy their hunger. In this manner, the animals are offered more feed at each feeding time than it is possible for them to eat; the feed being then withdrawn before they are satisfied. It is believed that sticking to these measures by which saturation is not fully reached, will cause a continuous stimulation of the digestive system which thus keeps the gastric juices in readiness so that the feed actually taken will be completely converted. In addition as the feed is offered at time intervals distributed over the entire day a uniform working of the peptic system is guaranteed.
>
> Adhering to the method of the application brings about an improved process, namely a shortening of the fattening time with low feed consumption as compared with previously used feeding methods. Another improvement consists in that in the last portion of the fattening period the protein is not converted into fat as is the case withconventional feeding methods but into animal albumen which is of greatest importance from an economical standpoint (please refer to the last paragraph of the disclosure of the application).
>
> Accordingly, the proposed method is new and brings about a useful and essential improvement. It gives an exact teaching for technical operation and does result in a physical phenomenon, namely an improved and foreseeable conversion of feed into animal albumen.

After reviewing the grounds for rejection set forth by the examiner, as well as the arguments both written and oral set forth by the applicant I am not satisfied that the rejection is well founded.

At the hearing a brief was submitted and many points raised during prosecution were expanded and re-emphasized.

Claim 1 of this application reads as follows:

> A method for the timed controlled feeding of domestic animals to provide improved efficiency of conversion of a feed ration into useable animal weight wherein said feed is presented to the animals for consumption during a series of daily timed feeding intervals and removed from the animals for timed non-feeding intervals separating the said timed feeding intervals of the series, comprising daily presenting all of the said feed ration that is to be fed to the animals each day during at least six spaced feeding intervals, said feeding intervals of each daily series each being of appriximately equal duration of time and separated by non-feeding intervals which are each of approximately equal duration of time, the number and duration of said feeding intervals being sufficient to present to the animals a quantity of said feed ration sufficient to increase the weight of the animals and said feeding intervals being regulated such that said non-feeding intervals occur prior to the animals having consumed all of the feed and having their appetites completely satisfied.

The consideration which must be decided in this application is whether the subject matter of the claims fall within the ambit of Section 2(d) of the Patent Act.

I note the rules for defining when a method may constitute patentable subject matter are recited in G.E.C.'s application (1943) 60 R.P.C., 1 at 4, per Morton, J. These rules, quoted below, are recited from Canadian Patent Law and Practice, Harold G. Fox, Fourth Edition, 1969, pages 33 and 34:

> It appears that a method or process is a manner of new manufacture if it (a) results in the production of some vendible product, or (b) improves or restroes to its former condition a vendible product, or (c) has the effect of preserving from deterioration some vendible product to which it is applied.

Applying Rule (b) it is held that a method of improving the yield of a vendible product does in fact "improve .....a vendible product", and hence is a manner of manufacture and within the ambit of invention as defined by Section 2(d).

In a recent Exchequer Court decision, Lawon v. The Commissioner of Patents (1970) 62 C.P.R. 101, the Judge discussed the term "manner of manufacture", which is used in the English, Australian and New Zealand statutes, in relation to the words "act, process, machine, manufacture or composition of matter" which appear in Section 2(d) of the Patent Act and concluded that both groups of words are simply different ways of expressing the same idea. He went on to express the view that:

> "Manufacture", connotes the making of something. Thus it is seldom that there can be a process of manufacture unless there is a vendible product of the process. It must accomplish some change in the character of conditions of material objects.

In the circumstance I am satisfied beyond reasonable doubt that the subject matter of the claims is within the ambit of Section 2(d).

While it is not necessary for me, in this consideration, to further comment on the application I find claim 1 is not clear and distinct. I also find that the subject matter of the application appears to denote a discovery. The court has held, Continental Soya v. J.R. Short (1942) 2 C.P.R. 1, "the difference between discovery and invention has been frequently emphasized, and it has been laid down that a patent cannot be obtained for a discovery in the strict sense. If, however, the patented article or process has not actually been anticipated, so that the effect of the claims is not to prevent anything being done which has been done or proposed previously, the discovery which led to the patentee devising a process or apparatus may well supply the necessary elements of invention required to support a patent".

I recommend that the rejection of the examiner, refusing the claims, be withdrawn based on the grounds set forth.

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

I concur with the finding of the Patent Appeal Board and I am therefore setting aside the Final Action and returning the application to the examiner for resumption of prosecution.

Decision accordingly,

A. M. Laidlaw,
Commissioner of Patents.

Dated at Ottawa, Ontario,
this 13th day of April 1971.