

COMMISSIONER'S DECISION

Indefinite claims: Plastic bag for Packaging Fresh Red Meat

Meat is packaged in a container made from two separate and distinct plastic films. Indefinite claim 1 calls for the films to be joined together in a totally undefined or unspecified manner. That claim and other dependent claims were refused for failing to define the invention. An additional claim was suggested for allowance.

Final Action: Affirmed, modification suggested.

This decision deals with a request for review by the Commissioner of Patents of the Examiner's Final Action dated May 3, 1976, on application 049,742 (Class 217-20). The application was filed on April 25, 1969, in the name of Selwyn Simon et al, and is entitled "Plastic Bag For Packaging Fresh Red Meat And Method For Making The Same." The Patent Appeal Board conducted a Hearing on January 25, 1978, at which Mr. A. Koller represented the applicant.

The application is directed to a plastic film package for packaging fresh meats and to the method of producing the package. The package is made by joining together two different plastic films each exhibiting distinct properties and characteristics. The claims under rejection in the Final Action however, are directed to a kit suitable for forming such packages.

In the Final Action the examiner rejected claims 1 through 10 for "indefiniteness and being directed to unpatentable subject matter." We note however, that claims 11 to 26 are considered as allowable claims. In that action the examiner, inter alia, had this to say:

Claims 1 through 5, 8, 9 and 10 are rejected as being directed to subject matter that is not patentable under the Canadian Patent Act. It is again brought out that these claims, as amended, merely define the juxtaposition of two sheets of commercially available plastic films having certain desired specific physical properties. These films do not in any way cooperate to produce a result that is other than the sum of the results of each integer. The various parts or films set forth are merely capable of being put together to carry out a required function. This is brought out in claim 1 by applicant's use of the terms "being joinable" and "to permit the ready formation".

Claims 6 and 7 are rejected as being indefinite. The claims are not directed to a "kit" as set forth in the preamble. The parts have been preformed into a series of bags. However, applicant has not set forth sufficient detail in regard to the structure of the preform, particularly in regard to which sides have been sealed and the orientation of the open end. In addition in claim 7 it is not clear as to whether the bags are inter-connected or completely separate. The only alternative to an individual bag composed of these two particular films is that presented on page 18 at lines 3 to 21 which is directed to a series of bags which are interconnected but separable.

In his response to the Final Action the applicant, inter alia, made the following points:

In the Final Action of May 3, 1976 the Examiner has alleged that claims 1 through 5, 8, 9 and 10 merely define the juxtaposition of two sheets of commercially available plastic films having certain desired specific physical properties and that these films do not in any way cooperate to produce a result that is other than the sum of the results of each integer. Such an allegation is clearly in error as main claim 1 is drawn to "a kit" that comprises a particular combination of film materials that are assembled and disposed therein to permit the ready use thereof for packaging of fresh red meat. Accordingly, the kit as claimed defines a unique composite packaging medium that is assembled and disposed to cooperatively act in a manner that makes possible its use as a packaging medium for the ready formation of a package. That this unique combination in films cooperate in a particular way to form a packaging medium is pointed out in detail and at long length in the specification and that such claims define patentable subject matter, are proper in form and would be clear to those skilled in the art should, it is respectfully, be clear under the law.

In the Final Action the Examiner has further alleged that claims 6 and 7, which depend from claim 1 are indefinite, that the claims are not directed to a "kit" as set forth in the preamble and that even though the parts have been preformed into a series of bags, applicant has not set forth sufficient detail in regard to the structure of the preform. Such an allegation is clearly in error as in these claims are defined preferred embodiments of the disposition of particular combination of films in the kit and the disposition thereof as defined in each of claims 6 and 7 would be clear and definite to anyone having ordinary skill in the art. It is respectfully submitted, that claims 6 and 7 are proper in form and the rejection thereof should be withdrawn.

On July 20, 1977 the applicant also submitted a voluntary amendment in which he cancelled refused claims 1 to 10 and presented new claims 1 to 9. The effect of this amendment was to cancel claim 5 and amend claim 1. The amendment to claim 1 changes the term "kit" to "combination" and to add to the later part of the claim "... and at least partially joined."

At the Hearing Mr. Koller argued that the rejected claims were indeed directed to patentable subject matter. The examiner allowed claims to a method for producing packages of red meat and to a novel practical embodiment in the form of a composite plastic film bag which characterizes the invention made and limits the scope of the monopoly grant. The applicant however, argued for claims of broader scope.

We are satisfied that the patentable advance in the art is in the discovery that some unexpected meritorious result has been achieved from the properties and characteristics of the respective films when used in packaging fresh red meat. A claim then may be directed to a novel practical embodiment of that discovery, but the exclusive right granted must be limited to embodiments of the idea, or invention that has been made (vide, Farbwerke Hoechst A.G. v Commissioner of Patents (1962) 22 Fox C 141 at 169). In other words the claim must characterize the invention made and define the limits of the scope of the monopoly grant.

We will now consider the claims. Amended claim 1 reads:

A packaging combination for forming packages for fresh red meats, said combination comprising a pair of flexible plastic films having dissimilar properties, a first length of one of said pair of films being selected from the group of flexible thermoplastic films consisting of ethylene vinyl acetate and polyvinyl chloride, said film being formulated so as to have a tendency to block to itself and so as to be clear, transparent, non-fogging and to provide an oxygen transmission rate in a package formed from said pair of films of at least about 140 cc/100 sq.in./24 hrs./atm. at 32°F., and a second length of the other of said pair of films being selected from the group consisting of ethylene vinyl acetate, polyethylene and polyvinyl chloride, said film being formulated so as to be non-blocking with respect to said first length of film, and said pair of films being joinable by heat sealing said first and second lengths of films being assembled and at least partially joined in combination to permit the ready formation of a composite film package having red meat completely enveloped therebetween.

Claim 1, inter alia, calls for the two specified films to be at least partly joined together, but in a totally undefined or unspecified manner.

The claim, in part, merely covers a securing means somewhere between the two layers and the product would, at least in some instances, have no practical utility. The claim is not specifically directed to a novel practical embodiment of the discovery made. How, for example, would one know when he was infringing that claim? Also the fact that the claim refers to a "combination" does not change anything. This claim, in our view, should be refused for failing to clearly define the invention, or more correctly for failing to define any invention.

Claims 2 to 4 and 7 to 9, which depend directly or indirectly on claim 1, are directed to inherent characteristics of the plastic film which does not make these claims inventive over refused claim 1. The applicant, by his own admission, is not the inventor of the individual films.

Claim 6 is again refused for being indefinite and should be refused as presented. This claim however, will be discussed below in conjunction with claim 5.

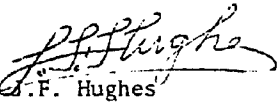
Claim 5, which depends on claim 1, is indefinite due mainly to the lack of inventive subject matter in claim 1. Claims 5 and 6 however, appear to relate to some structure, which if properly defined, could form the basis of an additional claim. At the Hearing Mr. Koller argued along these lines and stated that the longitudinal edges of the top and bottom film could be joined together and be presented on a composite roll. In support of that argument he referred to page 18, lines 3 f.f., which read:

As an alternate embodiment of the kit for forming the packages, the longitudinal edges of the top and bottom film plies can be similarly joined together followed by joining the film plies together transversely at predetermined intervals to form a plurality of consecutive, connected pouches. These pouches or bags in tandem can be fed from reel stock to the packaging station. After fresh meat items have been inserted into the thusly formed pouches, the open edges of the film plies can be joined together. The pouches containing the fresh meat items can then be severed to provide individual, fresh meat packages. In this embodiment, as well as in the previous embodiment, the transverse joints should either be of sufficient width to provide a joint for two, adjacent pouches or the transverse joints of each adjacent pouch should be spaced apart so that severing can be accomplished therebetween without destroying the integrity of the transverse joints.

In our view then a claim supported by the disclosure, supra, could be made if drafted along the format of claim 11 and would read:

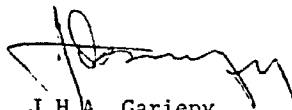
Composite plastic bags or pouches for forming packages for fresh red meats, ... and the other of said pair of films formulated so as to be non-blocking with said oxygen transmitting film, said bags or pouches formed from a composite roll of said films having their longitudinal edges continuously joined and providing spaced transverse joins to provide a plurality of interconnected bags or pouches.

To summarize, we are not satisfied that claims 1 to 9 are allowable in their present form and we recommend that the decision in the Final Action to refuse these claims be affirmed. We also recommend the allowance of an additional claim if drawn in the format suggested.



J.F. Hughes
Assistant Chairman
Patent Appeal Board, Canada

I have studied the prosecution of this application and have reviewed the recommendation of the Patent Appeal Board. I concur with the recommendation and I refuse to accept claims 1 to 9. I will however, accept an additional claim for allowance if presented as suggested by the Board. The applicant has six months within which to cancel the refused claims and submit an appropriate amendment, or to appeal my decision under the provision of Section 44 of the Patent Act.



J.H.A. Gariépy
Commissioner of Patents

Dated at Hull, Quebec

this 8th. day of February, 1978

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