

COMMISSIONER'S DECISION

Section 2 of the Patent Act - Insecticidal Composition

The *Bacillus thuringiensis*, which is living matter, was used in a new and inventive composition. The living matter per se is not the inventive factor of the claimed invention and has not offended Section 2 of the Patent Act.

Final Action: Reversed

Patent application 226,382 (Cl. 167-2), was filed on May 6, 1975 for an invention entitled "Insecticidal Composition of *Bacillus Thuringiensis* Admixed With Pyrethrum." The inventor is Edward B. Westall, assignor to Nutrilite Products, Inc. The Examiner in charge of the application took a Final Action on November 29, 1977 refusing to allow it to proceed to patent.

This application is directed to an improved insecticidal composition where *Bacillus thuringiensis*, Berliner is admixed with the natural botanical insecticide Pyrethrum in a ratio (by weight) from about 12 to 1 to about 1 to 20. The "improved insecticide is particularly useful in the control of insects and larvae."

In the Final Action the Examiner refused the claims because these claims are directed to "living matter" which, in his view, is not included in the definition of the invention in Section 2 of the Patent Act. Claim 1 reads:

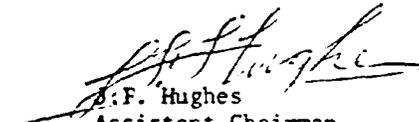
An improved insecticidal composition comprising *Bacillus thuringiensis*, Berliner admixed with the natural botanical insecticide Pyrethrum in a weight ratio of *Bacillus thuringiensis*, Berliner to Pyrethrum of from about 12 to 1 to about 1 to 20.

In response to the Final Action the applicant argued that his "invention lies in the discovery that certain mixtures of *Bacillus thuringiensis*, Berliner and Pyrethrum within a particular range of defined proportions, as stated in claim 1, have a synergistic effect" and thus patentable.

It is clear from the disclosure that Bacillus thuringiensis, Berliner "is well known" It is also clear that the applicant is not attempting to claim the Bacillus thuringiensis per se as a living micro-organism for a particular new use. He argues that his invention is in a new and unobvious mixture, which mixture has a synergistic effect and is particularly useful in the control of certain insects. We have no reason to disagree with these statements.

We are satisfied then that, at least, where the living matter per se is not the inventive factor of the subject matter defined in the claim it is not objectionable under Section 2 of the Patent Act. In our view we need not pursue this point further at this time.

We recommend that the decision in the Final Action refusing the claims be withdrawn.


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

I have reviewed the prosecution of this application and concur with recommendation of the Patent Appeal Board. Accordingly, I return the application to the examiner for resumption of prosecution.


J.H.A. Gariépy
Commissioner of Patents

Dated at Hull, Quebec

this 16th. day of May, 1979