

# Pro: Canada Patent Act

*A proposal to revamp Canada's patent system to reflect unique features of the economy*

BY HON. WARREN ALLMAND\*

It has been more than 40 years since the Canadian patent law was revised. The importance of the patent system has been amply demonstrated in the host of different countries and to a surprising degree there is a large amount of similarity between the patent laws in the various countries with which you are most familiar. In part, I am sure that stems from the fact that we are all members of the Paris Union for the Protection of Intellectual Property, a treaty which dates back to the 19th Century, and which, if all goes well, will be revised in 1980.



W. Allmand

226

In approaching the question of patent law revision in Canada one might be tempted to think that in those areas where Canada differs from the rest of the world, changes should be made so as to bring us into closer harmony with other nations.

That, indeed, was my central objective. But upon closer reflection that objective needed to be modified to reflect the unique features of the Canadian economy.

First, more than 95% of all the patents that Canada grants each year are foreign-held or controlled. With 25,000 applications per year, Canada has one of the highest per-capita filing rates in the world. Yet, Canadians themselves file only about 1,500 patents a year around the world. Because of the high degree of foreign ownership in our industrial sector, about 75%, most of the inventions made by Canadians wind up being controlled by the foreign multinational enterprises. By way of contrast, for example, in the United States only about 50% of the patents are granted to nonnationals, but it would appear, at least on the basis of the projections made by the President's Commission on a Review of Innovation in the United States that that percentage of foreign participation will become increasingly higher in the coming years.

With that as background information it may be possible to suggest that Canada is experiencing now a state of affairs which will arise in the larger economically-advanced countries in 10 to 15 years. The question that they will ask themselves then, and which

*\*Former Minister of Consumer and Corporate Affairs of Canada.*

we ask ourselves now, is, "What good does a patent system serve if the vast majority of the patents are held by foreigners?" The quick answer, which I am sure a group such as this would understand, is that these patents help transfer technology through the possibility of licensing. Now this may be true in part, but viewing a license negotiation from the standpoint of the user,

---

## LES U.S.A. Annual Meeting

---

that is the Canadian who may have the capacity to either make or buy the technology at issue, how could it help him if he enters negotiations without the option to "make" what he needs, i.e. to develop the technology in-house. Even in the case of the "user" who lacks the capacity to make the technology by carrying out in-house R&D, patent rights only serve to foreclose "second sourcing". In essence, what I am saying is that a patent may serve as a vehicle for licensing, but we know, on the basis of statistics gathered in Canada, that of all the patents granted in Canada, 50% will be used somewhere in the world, but only 15% will ever be used in Canada. Thus, 85% of the potential for licenses is unexploited!

## Increasing Activity

Another of my central objectives for reform became that of increasing the amount of patents worked in Canada. I wanted to do this for a multitude of reasons, but primarily to increase the amount of technological innovation that occurs in Canada and the amount of industrialization taking place in Canada. Both would thereby build up a cadre of individuals familiar with the latest in technology and thereby capable of expanding our own technological base. This certainly was one of the primary recommendations contained in the report of the Economic Council of Canada in 1971 which dealt with the whole problem of the question of intellectual property.

The second motivating force behind the proposals for reform was to try to take advantage of those kinds of treaties and activities in relation to patents and patent prosecution which have occurred in the international fora. Accordingly, the law that I outlined when speaking to the Patent and Trademark Institute of Canada at its annual meeting last year, divided the Patent Act into two parts, the front and the back. The front end would determine who could get a patent, under what conditions, etc. Here I hope to effect substantial savings in terms of time and work force by paralleling our act as closely as possible with the European Patent Treaty. This action, coincident with the ratification of

the patent cooperation treaty, would permit, in the long run, to institute significant savings in the operation of the office.

It was in the back end, however, where the real innovations occur and which I am sure of the greatest interest to you. I had four principal objectives with the recommendations made regarding the back end of the system. The first was to collect information that would allow government and the public alike to estimate or evaluate the impact of the act in achieving its various objectives. This would be done two ways. First, renewal fees would be charged for each patent on a tri-annual basis over the life of the patent. And second, when each renewal notice was sent up, a simple five-question IBM-type punched card would be sent out which would have to be completed. If the patent were not renewed, it would be a strong indication that that technology was not important, or certainly not as important as some other technologies. And, moreover, when the information was returned the government would get some idea when working first occurred anywhere in the world and when it first occurred in Canada.

### Objective

A second critical objective was to free the information now contained in the patent library and make it available to business across Canada. The idea here was to mandate the commissioner of patents to disseminate the information in a practicable way to small and intermediate businessmen. At present the Department of Consumer and Corporate Affairs has a pilot project based out of Winnipeg. This project, which began during my ministry, is aimed at showing small- and intermediate-sized businesses in Canada what information already exists on the technological problems that they themselves are dealing with. Rather than have these entrepreneurs engaged in reinventing the wheel, I saw this as a cost-effective method for getting technological information where it was needed and useful. This program has had an outstanding amount of success in the four western provinces and it is anticipated that it will be expanded in the future if resources can be made available.

A third and critical concern of myself and my colleagues in Cabinet was that the patent act should not be used as an infinite tariff barrier against Canadian consumers. When I talk about consumers in the patent context, it is worth remembering that more than 94% of all the patents granted apply to component or industrial goods and not to final consumer goods. So, when I talk about Canadian businessmen buying patented products from around the world or from each other, under the existing patent law, the patentee, regardless of whether he manufactures the product in Canada, has the right to exclude any importation into Canada from any source including himself if he himself does not authorize it. We believe that that provides multinational corporations with the possibility of engaging in price discrimination against Canadians. This was perhaps most graphically illustrated by the behavior of the pharmaceutical industry in the last decade, when it was shown that drug prices in Canada were markedly higher than they were elsewhere in the world.

And the proposal that I put forth to my colleagues and to the Patent and Trademark Institute was that, in cases where the patented product or the product resulting from the use of a patented process was bought from the parent or a firm directly related to or controlled by the Canadian or foreign corporation operating in Canada, those goods should be able to enter in Canada subject, of course, to transportation costs, duties and other distribution costs. In other words, there would be an upper limit to the degree of price discrimination that firms could practice against Canadians. Notice, however, that in the case of an arms-length agreement between say a Canadian firm, as a licensee or licensor and its licensee abroad, those goods could not come in because they would not be directly related corporations. I don't think that this limitation on patent rights will hinder the development of licensing activities in Canada, but it will say that there is an upward limit to the potential profit that could occur. It will encourage, I think, patent holders to license their products and processes in Canada.

### Critical Feature

The most critical feature of the proposed patent law revision, and one that I think would do the most toward stimulating the development of a strong licensing activity in Canada was that provision that I made with respect to the term of the patent. I proposed that the initial term of the patent be 14 years from the date of application. And that, when it could be shown that manufacturing was occurring in Canada, the patent term be extended for an additional six year. This combination of 14 plus 6 would be equivalent in length of term to what was available anywhere in the world and would do two things. It would, first, make a reasonable and fair contribution to the development of intellectual property around the world, that is, the basic 14-year term. Second, for those who saw fit to invest in Canada in the form of plant equipment and jobs, for these firms there would be a reward of an additional six more years of patent protection.

In an effort to minimize the bureaucratic involvement in this process in any suit for infringement, which should be the only reason that a patent after 14 years might be contested, the suit on infringement or validity could only proceed after the court had been granted clear evidence of the working of the invention in Canada. Without that evidence it was assumed that the patent was no longer valid. Those, in essence, were the central features of what I proposed to my cabinet colleagues as the basis for the patent law revision — The first revision to occur in Canada in over 45 years.

Criticism arose in regard to my proposals. Many practitioners complained about the fact that the proposed revisions would move Canada to a standard of absolute novelty — that is, the standard that exists in all of the world with the exception of the United States. They felt this would wreak unavoidable hardship upon private Canadian inventors. I have carefully reviewed the evidence, and find that the number of cases involved to be so few as to really bring into question the validity of those arguments that moving to an absolute world novelty standard would be detrimental to the welfare of Canadians. If we were to adopt the proposals

of these critics it would make Canadian industries subject to paying patent royalties on goods that could be patented nowhere in the rest of the world. And that doesn't mean just Canadian inventions but world inventions. As a consequence, this could seriously hinder Canada in developing its international trade and industries.

### Differs Drastically

The second criticism I faced, in large measure, was that this act differed drastically — in what I call the back end — from those systems existant in western Europe, in the United States and in Japan. This, according to some, was equivalent to a sacrilege. The 20-year term was, to these people, inscribed in stone. The idea of trying to stimulate local working through a split-term and to collect information that will permit the evaluation of the impact of the patent act, and finally, the limitation on the use of patents as a means for promoting international price discrimination against Canadians, were roundly condemned as being deviant from the behavior of other patent acts.

I approached these reactions in the following fashion. The kind of house I would build if I were living in Edmonton, Alberta, versus the kind of house that I would build if I were living in Orlando, Florida, are markedly different. I believe that patent systems should, to the greatest degree possible, reflect the necessities and characteristics of the jurisdiction to which they apply. Were I European, were I a United States citizen, were I a Japanese, the kind of patent system that I would have is the kind of patent system

they now have. As I pointed out, more than 70% of our industrial capacity is controlled from abroad; more than 95% of all the patents we grant are owned or controlled by nonnationals. Thus, the major formulators of technology are not Canadian, and the major determinants of whether this technology will be used in Canada, assuming a patent law in Canada like that which exists in Europe, the United States and Japan, would be extraterritorial to Canada. I believe that the system should modestly, and very modestly indeed, lean toward encouraging the working of inventions and the licensing of those inventions in Canada. Moreover, we need to have information on whether this policy is in fact working. There is no other method for us to collect this information. I doubt any of you would run your practices or businesses without at least once in a while having a profit-and-loss statement. While running the patent office is not a necessarily money-making operation, its basic objective is to encourage and stimulate innovation and invention in Canada. And there is no way that I know that we can measure the impact of that act other than the way in which I outlined above.

I believe that the kind of patent act that I proposed and which I hope the new government will also espouse, is aimed at encouraging and fostering the development of modern technological industry in Canada and promoting strong and vibrant licensing activities. I think that your organization should have a keen interest in seeing that the kind of patent proposals I put forth last year are endorsed by the new government.