1938
May 20 & 23.
1939
Jan. 26.

BETWEEN:

CELOTEX CORPORATION (RESPONDENT)
AND
DOMINION SOUND EQUIPMENT (INTERVENANT) } APPELLANTS;

AND

DONNACONA PAPER COMPANY, LIMITED (PETITIONER) ..... } RESPONDENT.

Patent—Appeal from Commissioner of Patents—Abuse of patent rights—Exclusive licence to manufacture and sell in Canada the inventions covered by certain patents—Patent Act, 25-26 Geo. V, c. 32, secs. 65, 66, 67, 68 & 69 (1)—Patents capable of being worked in Canada—Working of the patents on a commercial scale—Qualification of licence granted by the Commissioner of Patents.

The Commissioner of Patents granted an application made by the respondent herein for an exclusive licence to manufacture and sell in Canada the inventions covered by two patents known as the Trader and Mazer patents, on the ground that there had been an abuse of the exclusive rights thereunder, in that they had never been worked in Canada, and fixed the royalty to be paid by the licensee. The Trader patent is owned by Celotex Corporation and that company is also the exclusive licensee, in Canada, under the Mazer patent. The invention disclosed by the Trader patent relates to sound-absorbing board or material, and that of the Mazer patent relates to an improved "sound-absorbing material for halls, auditoriums or other enclosures and adapted to be used, without change of structure, as a surface material for walls, ceilings, and the like, or, between walls, ceilings and floors and the like."

Celotex Corporation and Dominion Sound Equipment appealed from the decision of the Commissioner of Patents.

The Court found that there had been an abuse of the exclusive rights under the two patents mentioned, and that Donnacona had qualified itself as an applicant for a licence to work the said patents in Canada. The licence granted by the Commissioner of Patents was qualified to permit Celotex to import its acoustical board or material into Canada for sale, when manufactured only from begasse fibres, according to the disclosures of Trader and Mazer.

Held: That a patentee who has claimed a wholly new invention must manufacture it in Canada or subject himself to the provisions of s. 65 of the Patent Act.

2. That the importation into Canada of a patented article in sufficient quantities to meet the demand in Canada for that article is not a working of a patent in Canada as contemplated by the Patent Act.

3. That engineering work done in advance of any sale of acoustical board in order to determine the particular character and formation of the material most suitable to meet any particular sound problem, the appointment of selling agents, the licensing of individuals or acoustical engineers, is not a working of the patents on a commercial scale, as contemplated by the Patent Act.

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APPEAL from the decision of the Commissioner of Patents granting to respondent an exclusive licence to manufacture and sell in Canada the inventions covered by two patents.

The appeal was heard before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

W. F. Chipman, K.C. for Dominion Sound Equipment.

F. B. Chauvin for Celotex Corporation.

R. S. Smart, K.C. and *M. B. Gordon* for Donnacona Paper Company Limited.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT, now (January 26, 1939) delivered the following judgment:

This is an appeal from the decision of the Commissioner of Patents, in the matter of an application made by Donnacona Paper Company Ld., under sections 65 and 66 of the *Patent Act*, 25-26 Geo. V, Chap. 32, for an exclusive licence to manufacture and sell in Canada the inventions covered by two patents, known as the Trader and Mazer patents, on the ground that there had been an abuse of the exclusive rights thereunder, in that they have never been worked in Canada. The Trader patent is now owned by Celotex Corporation, and it is the exclusive licensee in Canada under the Mazer patent. Donnacona Paper Company Ld. is a Canadian corporation carrying on business in the City of Quebec. Celotex Corporation has its principal place of business in the City of Chicago, U.S.A. The Commissioner found that there had been an abuse of the exclusive rights under the said patents, and that an exclusive licence should be granted the applicant, and he fixed the royalty to be paid by the applicant to Celotex Corporation. It will be convenient hereafter to refer to the Donnacona Paper Company Ld., as "Donnacona," and to Celotex Corporation as "Celotex." The application of Donnacona for a compulsory exclusive licence is an unusual one, and, I think, it was stated by Mr. Chauvin that it was the first to be made in Canada, under the provisions provided therefor in the *Patent Act*.

Before referring to the provisions of the *Patent Act* relevant to the issues here, which are sections 65 to 70

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inclusive, I might observe that prior to the enactment of such sections, the *Patent Act* provided that any person might apply to the Commissioner, at any time after three years from the date of a patent, for the revocation of such patent on the ground that the patented articles or process was manufactured or carried on exclusively or mainly outside Canada, to supply the Canadian market with the invention covered by the patent. The Commissioner, in the absence of satisfactory reasons as to why the article or process was not manufactured or carried on in Canada, was empowered to make an order revoking the patent forthwith, or after a reasonable interval. This provision was enacted with a view to establishing new industries in this country, but it was evidently found at times impractical, or oppressive, and it was superseded by the provisions of the *Patent Act* to which I am about to turn, which are almost identical with section 27 of the English *Patent Act*.

Sec. 65 (1) provides that any person interested may at any time after the expiration of three years from the date of the grant of a patent apply to the Commissioner alleging, in the case of that patent, that there has been an abuse of the exclusive rights thereunder, and asking for relief under the Act. There are six classes of cases in which monopoly rights are to be deemed to be abused. These classes are not mutually exclusive; but unless the circumstances relied upon fall within one or other of the classes, no relief can be granted under the section. The six classes of cases in which the exclusive rights under a patent may be deemed to be abused, are to be found in subsec. 2 of s. 65, and the first four may be recited. They are as follows:

(2) The exclusive rights under a patent shall be deemed to have been abused in any of the following circumstances:

(*a*) If the patented invention (being one capable of being worked within Canada) is not being worked within Canada on a commercial scale, and no satisfactory reason can be given for such non-working;

Provided that, if an application is presented to the Commissioner on this ground, and the Commissioner is of opinion that the time which has elapsed since the grant of the patent has by reason of the nature of the invention or for any other cause been insufficient to enable the invention to be worked within Canada on a commercial scale, the Commissioner may make an order adjourning the application for such period as will in his opinion be sufficient for that purpose;

(*b*) If the working of the invention within Canada on a commercial scale is being prevented or hindered by the importation from abroad

of the patented article by the patentee or persons claiming under him, or by persons directly or indirectly purchasing from him, or by other persons against whom the patentee is not taking or has not taken any proceedings for infringement;

(*c*) If the demand for the patented article in Canada is not being met to an adequate extent and on reasonable terms;

(*d*) If, by reason of the refusal of the patentee to grant a licence or licences upon reasonable terms, the trade or industry of Canada or the trade of any person or class of persons trading in Canada, or the establishment of any new trade or industry in Canada, is prejudiced, and it is in the public interest that a licence or licences should be granted;

Subsec. 3 of s. 65 is of importance and it reads as follows:

(3) It is declared with relation to every paragraph of the next foregoing subsection that, for the purpose of determining whether there has been any abuse of the exclusive rights under a patent, it shall be taken that patents for new inventions are granted not only to encourage invention but to secure that new inventions shall so far as possible be worked on a commercial scale in Canada without undue delay.

Then s. 66 provides that if the Commissioner is satisfied that a case of abuse of the exclusive rights under a patent has been established, he may order the grant to the applicant of a licence upon terms, or he may grant an exclusive licence upon terms, or he may order the patent to be revoked. S. 66 (iii) (b) is as follows:

(*b*) If the Commissioner is satisfied that the invention is not being worked on a commercial scale within Canada, and is such that it cannot be so worked without the expenditure of capital for the raising of which it will be necessary to rely on the exclusive rights under the patent, he may, unless the patentee or those claiming under him will undertake to find such capital, order the grant to the applicant, or any other person, or to the applicant and any other person or persons jointly, if able and willing to provide such capital, of an exclusive licence on such terms as the Commissioner may think just, but subject as hereafter in this Act provided;

Sec. 67 deals further with the subject of exclusive licence and may be recited. It is as follows:

67. (1) In settling the terms of any such exclusive licence as is provided in paragraph (*b*) of the last preceding section, due regard shall be had to the risks undertaken by the licensee in providing the capital and working the invention, but, subject thereto, the licence shall be so framed as

(*a*) to secure to the patentee the maximum royalty compatible with the licensee working the invention within Canada on a commercial scale and at a reasonable profit;

(*b*) to guarantee to the patentee a minimum yearly sum by way of royalty, if and as far as it is reasonable so to do, having regard to the capital requisite for the proper working of the invention and all the circumstances of the case;

and, in addition to any other powers expressed in the licence or order, the licence and the order granting the licence shall be made revocable

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at the discretion of the Commissioner if the licensee fails to expend the amount specified in the licence as being the amount which he is able and willing to provide for the purpose of working the invention on a commercial scale within Canada, or if he fails so to work the invention within the time specified in the order.

(2) In deciding to whom such an exclusive licence is to be granted the Commissioner shall, unless good reason is shown to the contrary, prefer an existing licensee to a person having no registered interest in the patent.

(3) The order granting an exclusive licence under the last foregoing section shall operate to take away from the patentee any right which he may have as patentee to work or use the invention and to revoke all existing licences, unless otherwise provided in the order, but on granting an exclusive licence the Commissioner may, if he thinks it fair and equitable, make it a condition that the licensee shall give proper compensation to be fixed by the Commissioner for any money or labour expended by the patentee or any existing licensee in developing or exploiting the invention.

It will be convenient next to refer to the two patents here involved. The first to be mentioned is that known as the Trader patent. This patent was granted in March, 1925, and will thus expire within five years. This invention, the patent states, relates to sound-absorbing board or material and has for its object to provide "an article of manufacture" that will be simple in construction and for the same absorbing capacity will be less costly to make than those heretofore proposed. As a preferred sound-absorbing board or material Trader suggests that made from begasse fibres which are derived from the stalks of sugar corn, and so compacted as to be capable of use as an artificial lumber, and board made from begasse fibres is mentioned in some of the claims. The invention here lies in the formation of perforations or openings in various forms, in a sound-absorbing board or material. Claims 7 and 8 will make clear what is the invention claimed and they are as follows:

7. In a sound-absorbing construction, the combination of a fibrous porous layer of sound-absorbing material provided with openings communicating with its interior; a wall; and means to space said layer from said wall.

8. In a sound-absorbing construction, the combination of a fibrous, porous layer of sound absorbing material provided with perforations extending entirely through said layer; a wall; and means to support said layer away from said wall and provide a space into which said perforations open.

I think the invention here clearly relates to "an article of manufacture," as the patentee himself stated.

The second patent in question is one granted to Mazer, in October, 1925, and which therefore has been in force

thirteen years. The invention is said to relate to an improved "sound-absorbing material for halls, auditoriums or other enclosures and adapted to be used, without change of structure, as a surface material for walls, ceilings and the like, or, between walls, ceilings and floors and the like." One paragraph of the specification reads:

> My invention aims particularly to provide sound-absorbing material having predetermined and controllable sound modifying effect which may be selected and controlled, and which is produced by surface apertures which are in free communication with the room or other space where the acoustics are to be controlled. The surface apertures may be formed in the material in advance of its installation, or may be formed in the material after the material has been placed in position. This general aspect of my invention is capable of being put to use with a great variety of substances and with many different arrangements of apertures some of which are described below.

The character, the form, the size and number of sound-absorbing surface apertures formed in the board or material selected for treatment according to the teaching of this patent, need not be explained. The important feature of the invention is the formation of apertures or openings in one form or another, on the surface of a selected sound-absorbing material, which apertures or openings are formed usually before the material is put in place in any enclosure, but it is also claimed that this may be done on the surface of a wall or ceiling already erected, although that has never been done in Canada. Whether or not this is a practical suggestion I cannot say. There is a claim for the method of establishing predetermined acoustic conditions for an enclosure in which the invention is to be applied, which I confess I cannot well understand, and there does not seem to be any description of any such method in the specification. The patentee states that his invention relates to an improved sound-absorbing material, having predetermined and controllable sound-modifying effect produced by surface apertures, and I think it is that and nothing else.

Sec. 68 of the Act requires that every application made to the Commissioner under sections 65 or 66 of the Act shall set out fully the nature of the applicant's interest and the facts upon which he bases his case, and the relief which he seeks. This requirement was complied with and the same was accompanied by certain statutory declarations verifying the facts set out in the application. Similarly, Celotex delivered to the Commissioner a counter

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statement setting forth the grounds on which the application was to be opposed, as required by s. 69 (1). Donnacona, in its application, states that the inventions covered by the Trader and Mazer patents have never been worked in Canada on a commercial scale; that it presently operates a factory in Canada for the manufacture of fibre board in connection with which it spent the sum of $1,250,000, and that it is prepared to carry on the manufacture of acoustical board in the manner described by the Trader and Mazer patents, which would require a further capital expenditure of the order of $20,000, for special equipment; that at various times since 1930 it sought to enter into negotiations with Celotex for a licence to manufacture acoustical board in Canada under the said patents, but without success; that since 1930 Celotex has continued to import into Canada the inventions, an improved sound-absorbing material, covered by the Trader and Mazer patents; that the demand in Canada for acoustical board of the type covered by the patents in question could be increased if such a board were made in Canada; that the selling of acoustical board or material must be done by sale engineers who are able to advise a potential purchaser as to the character of the material required to meet a particular sound problem in a given installation, which must be done in advance of the sale and the expense of installation, and which adds to the cost of any installation; that the present market for acoustical board in Canada is limited and if the applicant installed the necessary equipment to manufacture acoustical board its capacity would be many times greater than the existing market in Canada and that it would not be profitable to install such equipment unless it could be assured of a reasonable expectation of an increase in the demand for acoustical board, and the exclusive right to the Canadian market during the period of development; that with an expenditure of $20,000 the applicant could equip itself to manufacture 500,000 square feet of acoustical board per year though not over 100,000 square feet of such material has been sold in Canada during the past five years; that the applicant would, providing an exclusive licence were granted it under the patents in question, make the necessary capital expenditure to enable it to manufacture acoustical board and aggressively market the same in order

to develop the market therefor in Canada with resultant increased employment of Canadian labour not only in the manufacture of the said board but also in the sale, engineering and installation thereof; and the applicant states that a royalty of 3 per cent on the factory sales price of such acoustical board would be a reasonable royalty to allow Celotex for the working and use of the old patents of invention.

Celotex, in its counter statement, denies that there has been any abuse of the exclusive rights granted under the patents in question, and it sets forth that the invention covered by the Trader and Mazer patents involve methods of determining, by proper computations from an examination by experts of any given enclosure, the acoustical treatment that may be required, and the processes of making apertures in the surface material of an enclosure, whether such apertures are formed in the material before or after it has been placed in position; that since 1925 approximately 1,000,000 square feet of installations have been made in Canada in conformity with the teachings of the patents in question, and that all the labour and engineering work incident thereto has been Canadian, and two large and well known Canadian buildings are mentioned as having been acoustically treated,—and there were others —which, it is claimed, was a working of the patents in Canada; that in 1928 it appointed Alexander Murray & Company Ld., of Montreal, as its exclusive representative in Canada to further there the working of the said patents, by contact with architects, owners, distributors, dealers and contractors, and that in 1937 it appointed Dominion Sound Equipments Ld., the Intervenant here, its exclusive representative for Canada in an endeavour to increase the demand and develop the market in Canada for the inventions covered by Trader and Mazer; that in the exercise or working of the inventions of the patents in question it had determined that where there is required the installation of a fibre board, prepared in accordance with the disclosures of Trader and Mazer, a fibre board composed of strong begasse fibres derived from the stalks of sugar-cane was most in demand, and in the majority of cases was the most suitable, and that as sugar-cane was not a Canadian product and must be imported the cost to the Canadian consumer would be greater if the raw

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material were imported into Canada and there converted into board and processed in accordance with the disclosures of Trader and Mazer; that it has never refused a licence to carry on in Canada the methods and processes described in the said patents; that no part of the Canadian public is deprived of the use and benefit of the inventions disclosed in the said patents on the ground that they cannot be had in Canada upon reasonable terms, and that any importations of board have been purely incidental to the working of the invention in Canada; that an expenditure of the sum of $20,000, as suggested by Donnacona, would not procure an efficient and economical equipment for the production of the apertures in any fibre board that might be used in the working of the said patents; and that a royalty of 3 per cent of the net factory selling price would be inadequate and it submitted that a royalty of 10 per cent of such selling price would be a reasonable royalty, or, in the alternative, a royalty of 4 cents per square foot of surface treated, and in any event a minimum annual royalty of $10,000.

In addition to the statements of fact admitted by Donnacona and Celotex, and also one submitted by the Intervenant, each of which was accompanied by one or more statutory declarations, counsel on behalf of Donnacona and Celotex, and the Intervenant, were heard by the Commissioner.

I come now to the main facts of the appeal. There can be no doubt but that the patents in question are capable of being worked in Canada. The inventions therein claimed are to be construed as relating to the manufacture of a sound-absorbing board or material, because of the particular form in which it is manufactured and given acoustical qualities, that is, by the formation mechanically of perforations, apertures or openings, upon the surface of any selected board or material. It is essential to the working of the patents in Canada, in my opinion, that the formation of perforations, apertures, or surface openings, in the acoustical board should be carried out in Canada, because such is the essence of the inventions; it is an acoustical board so formed, having such physical characteristics, and that is the invention in the case of each patent. Engineering work done in advance of any sale of acoustical board in order to determine the particular

character and formation of the material most suitable to meet any particular sound problem, the appointment of selling agents, the licensing of individuals or acoustical engineers, is not, in my opinion, a working of the patents on a commercial scale, as contemplated by the *Patent Act,* and I think such contentions are altogether untenable. As practised by Celotex, the sound-absorbing apertures or perforations are made by a special drilling machine of which there are only three in existence, all located and operated in the State of Louisiana, U.S.A., so there could have been no working of the patents in Canada. It is clear therefore that neither Celotex, or the Intervenant, ever manufactured in Canada an acoustical board or material according to Trader or Mazer, during all the years both patents have been in existence, and any sales of such board made in Canada have been by way of importations. It is quite clear also, I think, that Celotex does not propose to work the patents in question in Canada, because, as was argued by its counsel, it is not practical to import begasse fibres into Canada for the purpose of manufacturing an acoustical board according to Trader or Mazer, and Celotex seems to have committed itself to the policy of making an acoustical board from begasse fibres only, although, of course, it might use many other materials. It is unlikely that Celotex would at this stage in the life of the patents in question contemplate the working of the patents in Canada. It may also be said with confidence that Celotex did not sympathetically or seriously consider Donnacona's approaches for some licensing arrangement by which it might manufacture in Canada an acoustical board made from wood fibres, according to Trader and Mazer, and I am rather of the opinion that it never intended doing so. Donnacona proposes to undertake the manufacture of an acoustical board from wood pulp tailings, under the patents in question, if its application for an exclusive licence is granted. It is presently the manufacturer of a wood fibre board, apparently in a large way, and the raw material is readily available to it, in large quantities, in Canada. I assume that Donnacona possesses the financial resources to warrant it embarking in this new industrial venture, so therefore it may fairly be said that Donnacona is an interested party, acting in good faith, and it seems to me, not unreasonable

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that Donnacona should seek the licence it does, if the patents are held to have been abused. Whether or not the Intervenant is a licensee of Celotex is not of importance here, because in any event it does not manufacture an acoustical board or material under the patents in question, or at all, and there is no suggestion that it proposes to do so during the lifetime of such patents.

In the same connection there is one further point to which I must refer, and that briefly. Claim 10 of the Mazer patent refers to a method of providing the surface of an enclosure, a room, with a material capable of being treated according to Trader and Mazer after the surface material is in position in the enclosure, and then forming the apertures, perforations or openings, by some special tool or apparatus. The suggestion in respect of this point is that this would constitute a working of the invention in Canada. Whether this is a practical proposal I cannot say, but in any event, any invention covered by this claim has never been practised or worked in Canada, by Celotex or the Intervenant, and therefore that contention falls.

It has, I think, been clearly established that there has been an abuse of the exclusive rights under the patents in question here, and that Donnacona has qualified itself as an applicant for a licence to work the said patents in Canada. I think therefore the Commissioner, upon the facts and circumstances disclosed, was justified in finding that there had been an abuse of the exclusive rights under such patents. Sec. 65, ss. (3) of the Act declares that in an application of this nature it shall be taken that patents for new inventions are granted not only to encourage inventions but to secure that new inventions shall, as far as possible, be worked on a commercial scale in Canada, without undue delay; that is, and always has been, the spirit of the several Patent Acts in force in this country, at least for a long time. The present *Patent Act* is more liberal to patentees than former Acts. If a patentee has claimed a wholly new invention, a machine, an acoustical board, he must manufacture it in this country or run the risk of coming within the provisions of s. 65 of the Act. Each case must, of course, be determined on its merits, and in each case it will have to be determined on a proper construction of the patentee's specification, what the invention really is, and what are its essential features. In

this case the essential feature of the inventions of Trader and Mazer, as I have already stated, is the manufacture of a suitable acoustical board or material according to the manner described in such patents. That is a new manufacture. The patentee must, in such cases make an effort to create a demand for the monopoly, and the establishment of an industry will in itself frequently help to create a demand for the article or process in question. And regard must be had to the possible export trade with countries in which the importer would not be liable to actions for infringement, as well as the demand for domestic consumption. It may be that the demand in Canada for the acoustical board produced by Celotex is limited, and that Celotex has adequately met Canadian demands for that board by importations of such board, but that is not a working of the patents as contemplated by the *Patent Act*. It seems to me that Donnacona has made out a case for an exclusive licence to work Trader and Mazer, and upon the terms proposed in the draft order of the Commissioner, subject, however, to one qualification to which I will refer at the end of this judgment.

I should have earlier referred to the following point. It was contended upon behalf of Celotex that the Commissioner should first have found whether or not there had been an abuse of the patents in question, and, if he decided in the affirmative, that there should have been an adjournment of the hearing, to be followed by a second hearing, in respect of the nature of the licence to be granted, and the terms of the order to be made. I have no doubt that the Commissioner had power to direct an adjournment and a further hearing, and to hear further evidence if he so desired, or to call witnesses of his own accord to assist him if he so felt, after having decided that there had been an abuse of the patents. And possibly this might be a desirable practice to adopt in some cases. But the relevant provisions of the Act do not seem to contemplate this, or require it. However, in this case, the facts found in the application of Donnacona, and in the counter statement of Celotex and that of the Intervenant, seem complete, and there were filed several statutory declarations verifying the facts therein stated. I cannot see that more could usefully be said or done. The Commisioner has yet to fix definitely the terms of the licence. In this case

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the Commissioner was evidently of the opinion that another hearing was unnecessary upon the point as to whether or not Donnacona was entitled to an exclusive licence, and I cannot say that he was in error in reaching that conclusion. All of the facts really relevant to the issues were presented to the Commissioner apparently with great care, and in the main they are really not seriously in dispute, except possibly as to the question of royalty. I do not think that the facts pertaining to the issues here could have been amplified or clarified by any further hearing.

The Commissioner filed with his decision a draft of the form of licence proposed to be made in this case, if his decision is sustained. Subject to one qualification, I approve of the terms of the proposed form of licence. Therein the Commissioner proposes to grant an exclusive licence to Donnacona to manufacture, sell and use in Canada the inventions covered by the Trader and Mazer patents. This would seem to involve a prohibition of the importation of the type of acoustical board made by Celotex, and would virtually mean the termination of its patent rights in Canada. In point of law that might well be justified, yet, in all the circumstances of the case that would appear to me to be an unnecessarily severe term to impose against Celotex, and one which I think might be modified. I have some measure of sympathy for the contention made on behalf of Celotex, namely, that it is not practical to import begasse fibres into Canada wherefrom to make acoustical board according to the disclosures of Trader and Mazer, and as I have elsewhere stated it is to the begasse fibre acoustical board that Celotex directs its activities, in Canada. Donnacona proposes to work the Trader and Mazer patents in the manufacture of an acoustical board made from a wood fibre material, and it is not suggested that it proposes to employ begasse fibres. It therefore appears to me that the interests of all here concerned might justly be served if the exclusive licence were so qualified as to permit Celotex to import into Canada for sale its acoustical board or material, but only when manufactured from begasse fibres, according to the disclosures of Trader and Mazer. It is conceivable that some persons in Canada might in the future regard an acoustical board made from begasse fibres as the one which would best meet their particular problems. Further, the

acoustical board of Celotex has become known in the Canadian market, and, I think, has been widely advertised, and probably considerable money has been expended in promoting sales in one way or another, so therefore to exclude Celotex from the Canadian market entirely so close to the expiration of its patent rights, would seem unduly severe. In the facts of this particular case, and I am not laying down any rule of general application, I think ample justice will be done all parties here concerned by qualifying the proposed licence in the manner I have suggested. Subject to that qualification, Donnacona will be the sole licensee in Canada during the balance of the life of Trader and Mazer, which should adequately meet all its requirements. Such a qualification would not, I think, offend against the intent and spirit of the *Patent Act*, and I therefore direct that the form of licence include such a term as I have just indicated. The inclusion of this term in the licence may in turn, in the judgment of the Commissioner, require some variations in or additions to his proposed form of licence, but that may be determined by him when the precise form of the licence is finally settled.

In the result the appeal herein is dismissed, and as Celotex resisted throughout the granting of any form of licence to Donnacona, the latter is entitled to its costs of the appeal.

Appeal dismissed.