
1966 { *Oct. 21, 24, 25 <hr/> 1967 { May 23 <hr/>	CURL-MASTER MANUFACTURING } COMPANY LIMITED (<i>Plaintiff</i>) ... } AND ATLAS BRUSH LIMITED (<i>Defendant</i>) ..RESPONDENT.	APPELLANT; RESPONDENT.
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ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Infringement—Validity—Curling broom—Reissue patent—Original patent not disclosing essential element of invention—Whether deficiency remediable by reissue patent—Patent Act, R.S.C. 1952, c. 203, s. 50.

In 1955, one F.M. developed a new type of curling broom. In March 1958, a patent was issued to the inventor and was assigned to the plaintiff in January 1959. The latter, in March 1962, petitioned for a reissue of its patent, stating that it was deemed defective because of insufficient description or specification and because, in certain respects, the inventor had claimed more and, in others, less than he had the right to claim as new. On January 1963, a reissue patent was issued to the plaintiff pursuant to s. 50 of the *Patent Act*, R.S.C. 1952, c. 203.

The plaintiff sued the defendant in respect of alleged infringement of these patents and sought a declaration that, as between the parties, the original patent was valid up to the date of the reissuance and that the latter was a valid patent. The defendant counterclaimed for a declaration that both patents were invalid. The action was dismissed by the trial judge and the declaration of invalidity was granted. The trial judge held that the broom in question was the embodiment of an invention of which F.M. was the inventor, but that the inventiveness was neither disclosed nor claimed in the original surrendered patent

*PRESENT: Abbott, Martland, Judson, Ritchie and Hall JJ.

and that s. 50 of the *Patent Act* did not authorize the grant of a reissue patent for an invention that had not been disclosed or claimed by the original patent. The plaintiff appealed to this Court.

Held: The appeal should be allowed.

The patent was defective by reason of insufficient description, and this resulted from mistake, *i.e.*, a failure by the patent attorney fully to comprehend and to describe the invention for which he had been instructed to seek a patent. This was a proper case for the application of s. 50 of the *Patent Act*, and the Commissioner was entitled to grant a reissue patent.

The contention that s. 50 only permits the granting of a reissue patent to the original patentee and not to an assignee, could not be entertained. The rights provided in the reissue section of the Act are not restricted to the original patentee solely.

The further contention that s. 50 was not applicable because the original patent had not been surrendered within 4 years from its date as required by s. 50(1) could not be entertained. The surrender of the patent required under s. 50(1) refers to the step taken by the applicant for the reissue patent when he makes his application. It is that step which must be taken within the stipulated 4-year period, and this was done in this case.

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Brevets—Contrefaçon—Validité—Balai pour le jeu de curling—Redélivrance de brevet—Brevet original ne révélant pas les éléments essentiels de l'invention—Manquement peut-il être remédié par redélivrance d'un nouveau brevet—Loi sur les Brevets, S.R.C. 1952, c. 203, art. 50.

En 1955, un nommé F.M. a développé un nouveau genre de balai pour le jeu de curling. Au mois de mars 1958, un brevet a été accordé à l'inventeur et a été subséquemment cédé à la demanderesse en janvier 1959. Cette dernière, en mars 1962, a présenté une requête pour obtenir la délivrance d'un nouveau brevet, déclarant que son brevet était jugé être défectueux à cause d'une description ou spécification insuffisante et parce que, à certains égards, l'inventeur avait revendiqué plus qu'il n'avait droit de revendiquer à titre d'invention nouvelle et, à d'autres égards, il avait revendiqué moins. En janvier 1963, un nouveau brevet a été délivré à la demanderesse en vertu de l'art. 50 de la *Loi sur les Brevets*, S.R.C. 1952, c. 203.

La demanderesse a poursuivi la défenderesse pour violation de ces deux brevets et a tenté d'obtenir une déclaration à l'effet que, entre les parties, le brevet original était valide jusqu'à la date de redélivrance et que le nouveau brevet était valide. La défenderesse, par contre-demande, a tenté d'obtenir une déclaration à l'effet que les deux brevets étaient invalides. L'action a été rejetée par le juge au procès et la déclaration d'invalidité a été accordée. Le juge au procès a jugé que le balai en question était l'incarnation d'une invention dont F.M. était l'inventeur, mais que le génie inventif n'avait été ni révélé ni revendiqué dans le brevet original et que l'art. 50 de la *Loi sur les Brevets* n'autorise pas la délivrance d'un nouveau brevet pour une invention qui n'a pas été révélée ou revendiquée dans le brevet original. La demanderesse en appela devant cette Cour.

Arrêt: L'appel doit être maintenu.

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Le brevet était défectueux à cause d'une description insuffisante, et ceci était le résultat d'une méprise, *i.e.*, le défaut de l'avocat des brevets de comprendre et de décrire l'invention pour laquelle il avait reçu instruction d'obtenir un brevet. Ceci est un cas approprié pour l'application de l'art. 50 de la *Loi sur les Brevets*, et le commissaire avait le droit d'accorder un nouveau brevet.

La prétention que l'art. 50 permet d'accorder un nouveau brevet seulement au détenteur original et non pas à celui à qui il a été cédé, ne peut pas être maintenue. Les droits accordés dans la partie de la loi traitant de la redélivrance ne sont pas restreints seulement au détenteur original du brevet.

Une autre prétention à l'effet que l'art. 50 ne s'appliquait pas parce que le brevet original n'avait pas été abandonné dans un délai de 4 ans à compter de la date de son émission, tel que requis par l'art. 50 (1), ne peut pas être maintenue. L'abandon du brevet requis en vertu de l'art. 50(1) réfère à la démarche prise par le requérant pour obtenir un nouveau brevet lorsqu'il présente sa requête. C'est cette démarche qui doit être faite dans la période stipulée de 4 ans, et ceci a été fait dans cette cause.

APPEL d'un jugement du Président Jackett de la Cour de l'Échiquier du Canada¹ en matière de contrefaçon de brevet. Appel maintenu.

APPEAL from a judgment of Jackett P. of the Exchequer Court of Canada¹ in a matter of infringement of a patent. Appeal allowed.

Miss Joan Clark and Malcolm E. McLeod, for the plaintiff, appellant.

Walter C. Newman, Q.C., and Edwin A. Foster, for the defendant, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This case involves a patent, numbered 554,826, issued on March 25, 1958, to Fernand Marchessault, in respect of the invention of a new style of curling broom, and a reissue of the patent, numbered 656,934, issued on January 29, 1963, to the appellant company, the assignee of Fernand Marchessault, of which he is the president and principal shareholder. The appellant sued the respondent in the Exchequer Court¹ in respect of alleged infringement of these patents, and seeking a declaration that, as between the parties, the former patent was valid

¹[1966] Ex. C.R. 4, 31 Fox Pat. C. 1, 48 C.P.R. 67.

up to the date of the reissuance and that the latter was a valid patent. The respondent counterclaimed for a declaration that both patents were invalid. The action was dismissed and the declaration sought in the counterclaim was granted. The facts, as outlined in the reasons for judgment at trial, are substantially repeated here:

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Prior to 1955, the brooms employed in Canada by participants in the game of curling were normally like ordinary kitchen brooms except that the straws were substantially longer. Such a broom consisted of a cylindrical wooden handle to one end of which was attached a bundle of straws of some suitable kind, the bundle of straws being pressed into a roughly flat broad shape and held in that shape by a number of tight bindings (three or four) near the handle. The opposite sides of these bindings were so stitched together through the straws that they held the bundle of straws in the flat broad shape. These bindings were attached by a machine process and are hereafter referred to as the factory bindings. Such brooms were employed in the game of curling to sweep the ice on which the game is played, in front of the curling stone as it travelled down the ice while in play. Among others, such brooms had the following characteristics:

- (a) As the straws were all of approximately the same length, the outside straws tended, under the influence of vigorous sweeping, to break off at the lowest factory binding.
- (b) As there was a relatively long distance between the lowest factory binding and the part of the broom that came in contact with the ice, the straws tended to spread out on coming in contact with the ice, thus diminishing the force which would otherwise be applied to the ice at the particular place that the player intended to sweep.

About the end of 1953, Fernand Marchessault became interested in breaking into the business of making and selling curling brooms in Canada. In the course of attempting to do so, he developed a new type of curling broom which differs from the type of curling broom above described in that

- (a) it has a "short outer skirt" of straws surrounding the straws that come in contact with the ice (referred to as

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the "sweeping straws")—the outer straws, not being as long as the sweeping straws, are not subject to pressure from the ice and are not as likely to break against the factory binding; they also supply support for the sweeping straws and provide protection to the loose lower binding hereinafter referred to; and

- (b) it has a binding around the sweeping straws about half-way between the lower factory binding and the sweeping end of the broom; such binding is applied by hand and not by machine and is loose enough so that the straws can move in relation to it but it is tight enough and it has its opposite sides so stitched together that the sweeping straws are held together and cannot spread appreciably in any direction. This loose lower binding is attached by cords to the lowest factory binding so that it will not slide off the sweeping end of the broom.

This new style broom is narrower and thicker than the old style broom.

In the fall of 1955, Marchessault introduced brooms of this kind to curlers in various parts of Canada and almost immediately they became very popular. Curlers in substantial numbers preferred them to the old style broom because the short outer skirt solved, to a considerable extent, the very troublesome problem of broken straws and because the loose lower binding kept the sweeping straws together in such a way that much greater force could be applied to the ice that it was desired to sweep. In addition, the concentration of straws enabled some curlers to develop a rhythmic beat.

Commercial success followed the introduction of this broom both for Marchessault and the appellant, and for various competitors who imitated his new style broom.

On March 1, 1956, Marchessault filed an application for a Canadian patent and on March 25, 1958, Patent No. 554,826 was issued to him pursuant to that application. The specification reads as follows:

La présente invention se rapporte à un nouveau balai destiné particulièrement pour le jeu de curling.

Le but principal de l'invention est d'obtenir un balai de grande élasticité et de grande souplesse.

Un autre but de l'invention est d'obtenir un balai dont les fibres le composant sont de grande longueur sans risque de se disloquer ni de se briser.

Encore un but de l'invention est d'obtenir un balai qui est souple et bien monté.

Encore un but de l'invention est d'obtenir un balai homogène dont la qualité des fibres ne varie pas.

Encore un but de l'invention est d'obtenir un balai qui est très fort c'est-à-dire en rapport avec le volume de fibres qui le compose de sorte qu'il peut durer longtemps, les bouts ne se fendant pas et ne produisant pas de fentes.

Enfin, encore un but de l'invention est d'obtenir un balai du but et caractère décrits qui est de construction rationnelle et constitue une innovation très précisée dans le monde du curling.

Dans les buts précités, l'invention consiste en un faisceau plat de longues fibres végétales fixées sur un bout d'un manche. Le faisceau est à deux étages c'est-à-dire que les fibres extérieures ne se rendent pas à l'extrémité. Comme tous les balais, à courte distance de la fixation au manche, le faisceau de fibres comporte plusieurs ligatures transversales qui sont cachées par une gaine de toile. Les fibres se rendant à l'extrémité du balai comportent en outre une ligature transversale cachée par les fibres extérieures. Cette dernière ligature est reliée par des cordelettes aux ligatures supérieures afin qu'elle ne puisse se déplacer.

J'obtiens les buts précités au moyen de l'invention illustrée dans les dessins ci-joints et dans lesquels:

La figure 1 est une vue en élévation d'un balai construit selon l'invention;

La figure 2 est une vue semblable à celle de la figure précédente, sauf qu'elle est partiellement en coupe;

La figure 3 est une vue de côté; et

La figure 4 est une autre vue de côté et illustrant l'emploi de l'invention.

Dans la description qui suit et les dessins qui l'accompagnent les chiffres semblables renvoient à des parties identiques dans les diverses figures.

Comme tous les balais, le balai constituant la présente invention comporte un manche 1 à un bout duquel est fixé un faisceau de fibres végétales 2. Ces fibres sont de préférence des fibres simples et résistant à l'eau. Elles peuvent toutefois être de tampico tiré de feuilles d'un agrave du Mexique, de coco provenant de fibres entourant la noix de coco, de paille de sorgho, ou de piassava provenant de palmiers de l'Amérique du Sud. L'invention ne réside cependant pas dans le choix de fibres mais plutôt dans la construction de balai. Celui-ci est relié au manche 1 par une forte ligature de broche 3 et le joint caché par une bague métallique tronconique 4 elle-même fixée par une autre ligature de fil métallique 5.

A courte distance de la fixation au manche, le faisceau 2 comporte plusieurs ligatures transversales et parallèles 6 à l'aide de cordelettes. Dans les dessins, ces ligatures sont au nombre de quatre. Une cinquième ligature 7 est formée un peu plus bas dans un but qui sera expliqué plus loin. Ces ligatures sont cachées par une gaine de toile 8 dont la surface peut recevoir un texte publicitaire ou un écusson d'un club de curling.

Le faisceau 2 est obtenu de fibres végétales très longues qui forment deux groupes d'inégales longueurs. Les fibres intérieures 9 sont les plus longues et les autres 10 formant le tour des premières sont les plus courtes.

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Au point du vue apparence le bout du faisceau est à deux étages. Les fibres le plus longues 9 comportent une ligature transversale 11 sous les fibres 10 de sorte qu'elle est invisible à l'œil. Pour que cette ligature ne puisse se déplacer elle est reliée à la ligature 7 ou à toute autre partie fixe du balai par des cordelettes 12 ou tout autre lien.

Dans l'emploi de l'invention, particulièrement pour le jeu de curling où le palet lancé par le joueur doit glisser sur la glace, le balayage facilitant le parcours doit s'effectuer rapidement et couvrir beaucoup de surface. Le balai constituant la présente invention permet un emploi rapide sans risque de briser les fibres. Ces dernières qui sont longues conservent leur homogénéité tel que la figure 4 des dessins l'illustre. Les fibres 9 se courbent sous la poussée et ne se mélangent pas avec les fibres 10. Les fibres 10 constituent un arc-boutant pour les fibres et ces dernières conservent cette homogénéité grâce à la ligature 11. En même temps les fibres 10 protègent la ligature 11 intérieure contre l'usure et servent de garde aux fibres longues pour les empêcher de briser. Le balai peut donc être ployé dans les deux sens sans qu'il ne puisse se briser.

Quoiqu'une seule forme spécifique de l'invention ait été illustrée et décrite, il est bien entendu que divers changements à la construction de l'invention peuvent être effectués pourvu que l'on ne se déporte pas de son esprit tel que réclamé dans les revendications qui suivent.

Les réalisations de l'invention au sujet desquelles un droit exclusif de propriété ou de privilège est revendiqué, sont définies comme suit:

1. Un balai formé d'un faisceau de fibres fixées à un bout d'un manche, lesdites fibres étant à deux étages c'est-à-dire que les fibres sont en deux groupes d'inégales longueurs, ledit groupe de fibres plus longues que celles de l'autre groupe formant le centre du faisceau tandis que ledit autre groupe l'entoure.

2. Un balai tel que réclamé dans la revendication 1, dans lequel lesdites fibres des deux dits groupes comportent des ligatures transversales, les ligatures dudit centre de faisceau étant sous ledit autre groupe qui l'entoure.

3. Un balai tel que réclamé dans la revendication 1, dans lequel lesdites fibres des deux dits groupes comportent des ligatures transversales, les ligatures dudit centre de faisceau étant sous ledit autre groupe qui l'entoure et suspendues auxdites ligatures dudit autre groupe.

4. Un balai tel que réclamé dans la revendication 1, dans lequel lesdites fibres des deux dits groupes comportent des ligatures transversales, les ligatures dudit centre de faisceau étant sous ledit autre groupe qui l'entoure et suspendues par cordelettes auxdites ligatures dudit autre groupe.

The drawings appear on the following page.

On January 28, 1959, Marchessault assigned this patent to the plaintiff.

In connection with the application for Patent No. 554,-826, Marchessault was represented by a patent attorney whose name was Albert Fournier. Fournier, in February 1957, also made an application on behalf of Marchessault for an invention concerning curling brooms under the United States patent legislation.

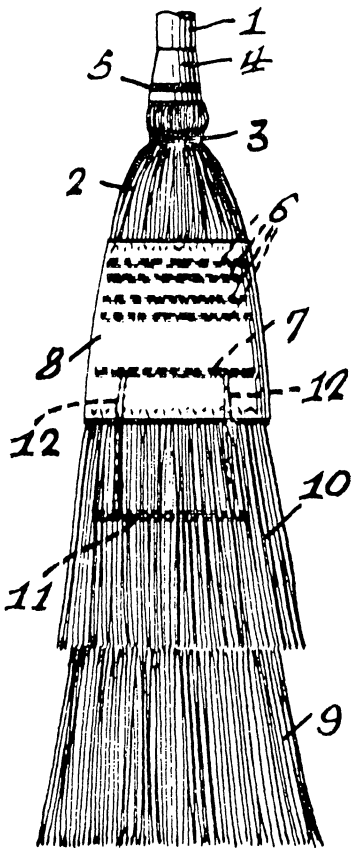


Fig. 1

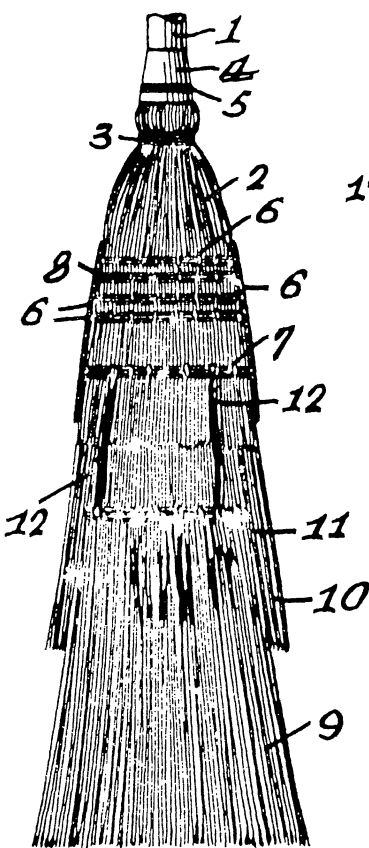


Fig. 2

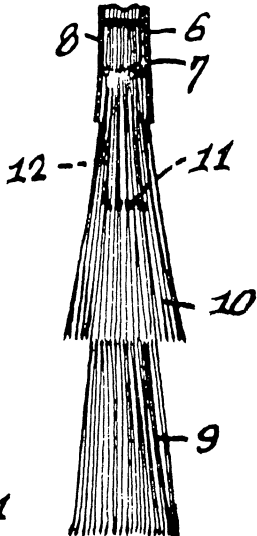


Fig. 3

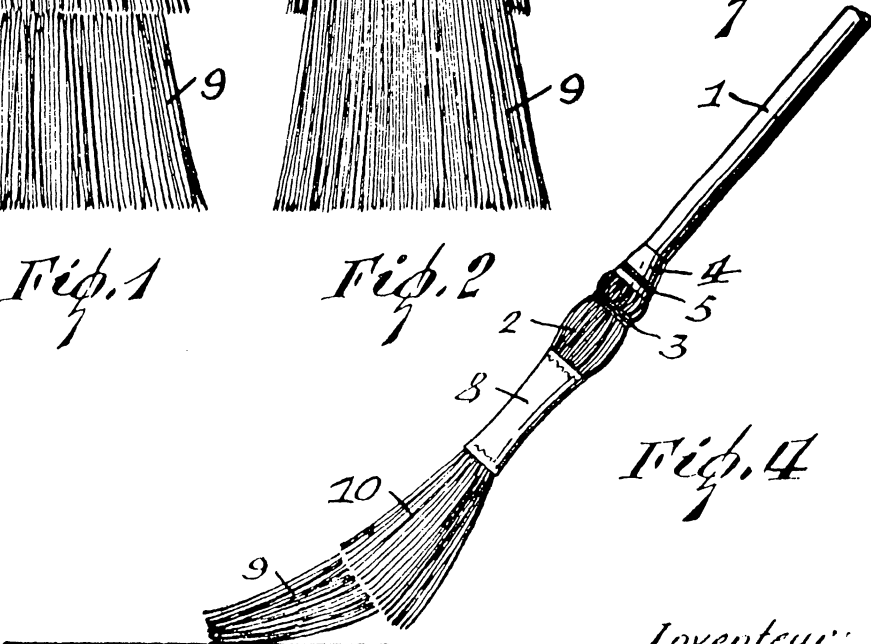


Fig. 4

Inventeur:
Fernand Marchessault
Agent de brevet

(Signature)

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The claims put forward in the original United States application were not in the same terms as the claims subsequently allowed in the Canadian patent, but they followed the same general lines. They were all rejected by the United States Patent Office on the ground that they were anticipated by prior patents. In May 1959, Fournier was replaced by Pierre Lesperance as Marchessault's attorney in connection with this United States application. After some negotiation, a United States patent issued, on May 16, 1961, containing a number of claims, of which the first, second and fifth read as follows:

1. A broom for use in the game of curling comprising a head and a staff to which the head is attached, said head being formed of long fibers, closely spaced bindings extending around said fibers, an additional flexible binding loosely surrounding and loosely stitched through said fibers and slidable relative to said fibers and spaced from said first named bindings a distance about half way between the sweeping end of the broom and said closely spaced bindings, and flexible ties having one end connected to said additional binding and having their other end fixed with respect to said first named bindings in order to prevent slipping of said additional binding off said fibers.

2. A broom for use in the game of curling comprising a head and a staff to which the head is attached, said head being formed of a central bunch, and an outer bunch of fibers, substantially closely spaced bindings extending around the two bunches of fibers, and an additional binding surrounding only the central bunch of fibers and covered by the fibers of the outer bunch, said additional binding being spaced from said first named bindings a distance about half way between said first named bindings and the sweeping ends of said fibers.

* * *

5. A broom for use in the game of curling comprising a head and a staff to which the head is attached, said head being formed of a central bunch of relatively long fibers and an outer bunch of shorter fibers forming a skirt surrounding the upper part of the central bunch, closely spaced cord bindings extending around the two bunches of fibers, and an additional cord binding surrounding only said central bunch of fibers and covered by the free end portions of the fibers of the outer bunch, said additional cord binding being spaced from said first named cord bindings a distance about half way between said first named cord bindings and the sweeping ends of said fibers.

On March 21, 1962, the appellant petitioned for reissue of its patent, stating that it was deemed defective because of insufficient description or specification and because, in certain respects, the appellant had claimed more and, in others, less than he had the right to claim as new.

The petition then went on to state:

That the respects in which the patent is deemed defective are as follows: In the description of the Patent there is insufficient description as to the purpose of the low binding 11 and of the ties 12.

The low binding 11 actually prevents spreading apart of the long fibers during sweeping. In the description of the original Patent this is only mentioned in an inferential way on page 6, line 11, wherein it is stated "et ces dernières conservent cette homogénéité grâce à la ligature 11". (translation, page 3, line 27, "which keep this homogeneity thanks to binding 11".)

Furthermore, the description of the original Patent only mentions in an inferential way that the low binding surrounds and is loosely stitched through the fibers as follows: Page 4, lines 6, 7 and 8: "Cette dernière ligature est reliée par des cordelettes aux ligatures supérieures afin qu'elle ne puisse se déplacer." (translation, page 1, lines 28, 29 and 30: "This last binding is attached by small strings to the top bindings in order that it cannot move.") Page 5, line 25, "pour que cette ligature ne puisse se déplacer elle est reliée à la ligature 7 ou à tout autre partie fixe du balai par des cordelettes 12, ou tout autre lien". (translation, page 3, lines 15, 16, 17: "In order that this binding does not move, it is attached to binding 7 or to any stationary part of the broom by small strings 12 or any other tie.")

In accordance with the invention it is important that said low binding 11 be stitched loosely enough in order to slide on the fibers so as to allow flexibility in the bending of the fibers during sweeping.

Claim 1 of the Patent, which claims the broad idea of having a broom head of stepped formation with a central group of long fibers and an outer group of shorter fibers forming a skirt surrounding the central group, is probably somewhat too broad in view of U.S. Patent: Struve—1,115,255—October 27, 1914.

Claim 2 of the Patent which mentions the bindings surrounding the center bunch of fibers and surrounded by the outer bunch of fibers depends on claim 1 and is deemed too restricted because the Patentee's broom could very well be made without the skirt or outer bunch of shorter fibers. Such a broom is certainly operative as a curling broom and the low binding 11 would continue to exert its essential function although it will last a shorter time because of the absence of the protection afforded by the skirt of outer fibers.

Claims 3 and 4 of the Patent are also defective for the reasons given in connection with claim 2.

That the error arose from inadvertence, accident or mistake, without any fraudulent or deceptive intention in the following manner:

That the patent application which resulted in the above noted Patent was prepared by Albert Fournier in the month of February 1956 at which time Mr. Fournier was suffering from a heart condition which somewhat impaired his work efficiency; Mr. Fournier died in fact in August 1958. Therefore, he did not fully comprehend the purpose of/and working of the low binding 11 and of the importance of ties 12 of the inventor's broom. On the other hand, the inventor himself was not fully conversant with the requirements of a patent application to wit the fact that he delegated to Mr. Fournier the task of preparing a patent application and obtaining a patent for his invention. Moreover, the Canadian Examiner only cited against the original patent application, U.S. Patent 2,043,758—Lay—June 9, 1936. Therefore the Patent issued without knowledge either by the Patentee, his Patent Agent, or the Canadian Office, of a prior Patent teaching that it was known to have a broom with a stepped construction which might render claim 1 of the Patent invalid.

That knowledge of the new facts stated in the amended disclosure and in the light of which the new claims have been framed was obtained by

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Your Petitioner on or about the last days of December 1958, in the following manner: At that time an official action had been received from the U.S. Examiner citing the Struve U.S. Patent mentioned above against the Patentee's corresponding U.S. patent application Serial No. 640,676 dated February 18, 1957. Copy of this Patent was ordered from the Patent Office and it was then discovered that it showed the stepped construction of Applicant's U.S. claim 1 which at that time somewhat corresponded to claim 1 of the Canadian Patent. In December 1958, the Canadian Patent was already issued. In view of the situation of the U.S. patent application at that time, it was decided to await the issue of the U.S. Patent before initiating re-issue procedure in the Canadian Patent. The eventual U.S. Patent claiming the Patentee's invention finally issued on May 16, 1961, under U.S. Patent 2,983,939.

On January 29, 1963, Patent No. 656,934 was issued as a "reissue" patent pursuant to s. 50 of the *Patent Act*, R.S.C. 1952, c. 203. The specification reads in part as follows:

The present invention relates to a new broom specifically adapted for the game of curling.

In the game of curling, brooms are used for sweeping the ice ahead of the stone sliding on the ice. This has the effect of removing dirt or ice particles and temporarily melting the sandy like frost which covers the ice surface thus making it more slippery so that the stone will travel farther.

Prior to the present invention, brooms identical in construction to household brooms were used for curling, except that they had longer fibers than household brooms. Conventional household brooms comprise a wooden handle or staff to the lower end of which a head is attached, said head consisting of fibers usually secured to the staff and held together as a bunch by means of a wire binding and also by several cord bindings spaced from each other, surrounding the fibers and stitched through the fibers in a tight manner. Because these cord bindings are located in the upper part of the broom head and that the fibers of the broom head are long, the fibers had a tendency to spread excessively when the broom was used for sweeping the ice, and to break, especially at the lowermost cord binding, rendering the old time broom awkward (sic) to use.

It is the general object of the present invention to provide a curling broom which obviates the above disadvantages and which more particularly prevents spreading apart of the fibers of the conventional curling brooms when the broom head is pressed on the ice.

Other objects of the present invention reside in the provision of a curling broom which is of light weight construction and is easy to manipulate and efficient for ice sweeping in the game of curling, and which has a long life because the fibers do not break easily.

The broom in accordance with the present invention is essentially characterised by the provision of low binding stitched loosely enough to slide on the fibers and spaced a substantial distance downward towards the outer ends of the fibers from the conventional cord bindings of the broom, said low cord binding preventing the fibers from spreading apart and maintaining the bunch of fibers in flat condition while at the same time allowing the individual fibers to curve freely when the broom is pressed on the ice, due to the fact that the low binding can slide along the fibers. Thus, the flexibility of the fibers is not impaired.

In accordance with the invention, the low binding is prevented from sliding off the outer end of the fibers by being attached by flexible ties.

In accordance with another characteristic of the invention, the main bunch of fibers is surrounded by an outer bunch of shorter fibers defining a skirt and overlying the low cord binding so as to protect the same against wear as it is known that when the broom is manipulated, the low cord binding due to its very low level position strikes the ice during sweeping motions.

(At this point there is a description of how to make an embodiment of the invention.)

While a preferred embodiment in accordance with the present invention has been illustrated and described, it is understood that various modifications may be resorted to without departing from the spirit and scope of the appended claims.

THE EMBODIMENTS OF THE INVENTION IN WHICH AN EXCLUSIVE PROPERTY OR PRIVILEGE IS CLAIMED ARE DEFINED AS FOLLOWS:

1. A broom for use in the game of curling comprising a head and a staff to which the head is attached, said head being formed of fibers and including fiber binding means in the zone of said head attached to said staff, a low flexible binding surrounding and stitched loosely enough through said fibers to be slidable relative to said fibers, and spaced a substantial distance from said fiber binding means and flexible ties connecting said low binding to said head in order to prevent slipping of said low binding off said fibers.

2. A broom for use in the game of curling comprising a head and a staff to which the head is attached, said head being formed of a central bunch and an outer bunch of fibers and including bindings extending around the two bunches of fibers, a low binding surrounding and loosely stitched through the central bunch of fibers only, slidable with respect to said central bunch of fibers and covered by the fibers of the outer bunch, said low binding being spaced a substantial distance from said first named bindings, and flexible ties connecting said low binding to said head in order to prevent slipping of said low binding off said fibers.

3. A broom as claimed in claim 2, wherein said outer bunch is constituted by fibers shorter than the fibers of the central bunch, whereby said outer bunch forms a skirt surrounding the upper part of the central bunch, said low binding being disposed underneath and covered by the free end portion of the fibers of the outer bunch.

4. A broom for use in the game of curling comprising a head and a staff to which the head is attached, said head being formed of a central bunch of long fibers and an outer bunch of shorter fibers forming a skirt surrounding the upper part of the central bunch, said head including bindings extending around the two bunches of fibers, and a low flexible binding surrounding and loosely stitched through said central bunch of fibers only and slidable relative to the fibers of said central bunch and covered by the free end portions of the fibers of the outer bunch, said low binding being spaced about half way between said first named bindings and the sweeping ends of said long fibers, and flexible ties attached to the low binding at one end and having their other end connected to said head in order to prevent slipping of said low binding off the fibers of said central bunch.

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The learned trial judge made findings of fact, which are supported by the evidence, as follows:

I find as a fact that the broom that Marchessault put on the market in the fall of 1955 was the embodiment of an invention of which Marchessault was the inventor. Leaving aside the element of the short outer skirt as a protection against the breaking of the sweeping straws at the bottom factory binding and as a support for the sweeping straws, in my opinion, the loose lower cord around the sweeping straws a substantial distance down the broom from the factory bindings (which I have already described), by virtue of its effect of keeping the sweeping straws in a compact bundle without interfering with their flexibility, created a curling broom that was substantially different from the brooms previously used by curlers and definitely more satisfactory to them. It was not anticipated in my view by any of the earlier patents or by Ken Watson's personal practice of putting a loose string an inch or so below the factory binding (Ken Watson himself admitted that Marchessault deserved the credit for getting the loose string "down there" although he thought that his loose string involved the same principle). The new element was relatively simple, it is true. It resulted, however, in a radically different broom that was so much more useful (judged by the assessment of those who used curling brooms) that it immediately came into great demand. There is no doubt in my mind that it was an "invention" within the meaning of the *Patent Act* in the sense that it was "new" and "useful". It was an inventive step forward. I also find that the combination of the element of the loose lower binding and the element of the short outer skirt as a means of protecting the loose lower binding from wear also constituted an invention for the same reasons.

Section 50 of the *Patent Act*, which governs the reissue of patents, provides as follows:

50. (1) Whenever any patent is deemed defective or inoperative by reason of insufficient description or specification, or by reason of the patentee claiming more or less than he had a right to claim as new, but at the same time it appears that the error arose from inadvertence, accident or mistake, without any fraudulent or deceptive intention, the Commissioner may, upon the surrender of such patent within four years from its date and the payment of the further fee hereinafter provided, cause a new patent, in accordance with an amended description and specification made by such patentee, to be issued to him for the same invention for the then unexpired term for which the original patent was granted.

(2) Such surrender takes effect only upon the issue of the new patent, and such new patent and the amended description and specification have the same effect in law, on the trial of any action thereafter commenced for any cause subsequently accruing, as if such amended description and specification had been originally filed in their corrected form before the issue of the original patent, but in so far as the claims of the original and reissued patents are identical such surrender does not affect any action pending at the time of reissue nor abate any cause of action then existing, and the reissued patent to the extent that its claims are identical with the original patent constitutes a continuation thereof and has effect continuously from the date of the original patent.

(3) The Commissioner may entertain separate applications and cause patents to be issued for distinct and separate parts of the invention patented, upon payment of the fee for a reissue for each of such reissued patents.

The learned trial judge relied upon the statement of Maclean J., as to the purpose of s. 50, in *Northern Electric Company Ltd. v. Photo Sound Corporation*¹:

. . . the purpose of a re-issue is to amend an imperfect patent, defects of statement or drawings, and not subject-matter, so that it may disclose and protect the patentable subject-matter which it was the purpose of that patent to secure to its inventor. Therefore the re-issue patent must be confined to the invention which the patentee attempted to describe and claim in his original specification, but which owing to "inadvertence, error or mistake," he failed to do perfectly; he is not to be granted a new patent but an amended patent. An intolerable situation would be created if anything else were permissible. It logically follows of course, that no patent is "defective or inoperative" within the meaning of the Act, by reason of its failure to describe and claim subject-matter outside the limits of that invention, as conceived or perceived by the inventor, at the time of his invention.

He also referred to the reasons of Duff C.J., in the same case²:

First of all, the invention described in the amended description or specification and protected by the new patent must be the same invention as that to which the original patent related.

and at page 652:

The statute does not contemplate a case in which an inventor has failed to claim protection in respect of something he has invented but failed to describe or specify adequately because he did not know or believe that what he had done constituted invention in the sense of the patent law and, consequently, had no intention of describing or specifying or claiming it in his original patent. The tenor of the section decisively negatives any intention to make provision for relief in such a case.

Section 50 of the *Patent Act* was recently considered in this Court in *Farbwerke Hoechst Aktiengesellschaft v. The Commissioner of Patents*³. In that case reference was made to the judgment of the Supreme Court of the United States in *Mahn v. Harwood*⁴ which defined the purpose of the American provision as to reissue as being "to provide that kind of relief which courts of equity have always given in cases of clear accident and mistake in the drawing up of written instruments".

Commenting on this statement, this Court went on to say, at p. 614:

Used in this sense, the word "mistake" means that a written instrument does not accord with the true intention of the party who prepared it. A person relying upon a mistake under s. 50 would have to establish that the patent which was issued did not accurately express the inventor's

¹ [1936] Ex. C.R. 75 at 89, 2 D.L.R. 711.

² [1936] S.C.R. 649 at 651, 4 D.L.R. 657.

³ [1966] S.C.R. 604, 33 Fox Pat. C. 99.

⁴ (1884), 112 U.S. 354 at 363.

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intention with respect to the description or specification of the invention or with respect to the scope of the claims which he made. This view appears to me to coincide with that expressed by Chief Justice Duff in relation to the word "inadvertence" in *Northern Electric Company Ltd. v. Photo Sound Corporation*, (1936) S.C.R. 649 at 661, 4 D.L.R. 657, cited by the respondent in his reasons for the refusal of the appellant's petition.

In that case, unlike the present, the Commissioner of Patents had refused to reissue the patent. The patent in respect of which reissue was sought was subsequently held to be invalid by another decision of this Court, in respect of the product tolbutamide, because of the absence of a valid process claim as required by s. 41 of the Act. In the light of that situation it was said, at p. 615:

Section 50 deals only with a patent which is defective or inoperative. In my opinion it contemplates the existence of a valid patent which requires reissue in order to become fully effective and operative. In the present case, in so far as the substance tolbutamide is concerned, the patent for which reissue is sought has been held by this Court to be invalid.

The reason for dismissing the appellant's claim and for allowing the counterclaim is stated by the learned trial judge as follows:

In my view, a reissue patent under section 50 of the *Patent Act* can replace a defective or inoperative patent with a valid patent by substituting a sufficient description or specification for an insufficient description or specification or by adding or omitting claims but it cannot be for any invention other than an invention disclosed by the original patent. The invention that is embodied in the brooms that Marchessault put on the market in 1955, prior to applying for either patent, and that is disclosed in Patent No. 656,934, the reissue patent, is not disclosed in Patent No. 554,826, and Patent No. 656,934 is therefore invalid.

The main question in issue on this appeal is, therefore, whether there was, in relation to Patent No. 554,826, a complete failure to disclose Marchessault's invention, so as to render that patent invalid, as failing to disclose any invention, or whether there was an imperfect description of the appellant's invention which would render the patent defective, but still capable of correction by reissue, if such imperfection resulted from error or mistake.

The facts in the *Northern Electric Company* case are not comparable to those in the present one. In that case, the inventor, Arnold, an accomplished physicist, a competent radio engineer and inventor, accustomed to framing specifications, had obtained a patent for an invention relating to receiving systems for radio communication, par-

ticularly to devices for limiting the electrical power which might be transmitted to a receiving instrument in such a system. He sought a reissue patent which would have extended its scope so as to include additional claims for certain new and useful improvements in radio communication.

At p. 659, Duff C.J. said:

Now, I have no hesitation in drawing the inference that Arnold fully understood the scope and effect of the application of May 22nd, 1916, and of the specification in the original Canadian patent. He understood, that is to say, that he was excluding from the invention specified and claimed by him those devices and arrangements which are described and specified and claimed in the amendments in so far as we are presently concerned with such amendments. It is also very clear on the material before us that in the proceedings before the Commissioner leading up to the grant of the reissue patent no evidence was adduced to show that the specifications, the description or the claims of the original patent were insufficient to give effect to the intention of Arnold.

It was held that there was no defect in the original patent, in that there was no reasonable ground for apprehending that it was defective in failing sufficiently to describe the invention in respect of which the applicant intended to claim invention.

In the present case, Marchessault did intend to protect the invention which he had actually made. The patent which he obtained was defective in that it failed sufficiently to describe it. He was not an engineer, and had had no prior experience in relation to patents. He was a broom manufacturer, who had made a useful invention, which he sought to protect through the services of a patent attorney.

The invention which the learned trial judge found that Marchessault had made contained two features. The primary feature was that

the loose lower cord around the sweeping straws a substantial distance down the broom from the factory bindings, by virtue of its effect of keeping the sweeping straws in a compact bundle without interfering with their flexibility, created a curling broom that was substantially different from the brooms previously used by curlers and definitely more satisfactory to them.

The secondary feature was the protection of the loose lower binding by the short outer skirt.

Does the first patent contain a description, albeit imperfect, of that which he had invented? The secondary feature, i.e., the protective short outer skirt, is adequately described. The question is as to the description of the loose lower

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binding, surrounding the sweeping straws. It is referred to in the description of the invention in the following terms:

Les fibres se rendant à l'extrémité du balai comportent en outre une ligature transversale cachée par les fibres extérieures. Cette dernière ligature est reliée par des cordelettes aux ligatures supérieures afin qu'elle ne puisse se déplacer.

The attachment of this binding to the upper binding is thus made so that it will not get out of place, i.e., shift its position in the course of manipulating the broom.

It is referred to again, in the following manner:

Pour que cette ligature ne puisse se déplacer elle est reliée à la ligature 7 ou à toute autre partie fixe du balai par des cordelettes 12 ou tout autre lien.

* * *

Les fibres 9 se courbent sous la poussée et ne se mélangent pas avec les fibres 10. Les fibres 10 constituent un arc-boutant pour les fibres et ces dernières conservent cette homogénéité grâce à la ligature 11. En même temps les fibres 10 protègent la ligature 11 intérieure contre l'usure et servent de garde aux fibres longues pour les empêcher de briser.

Claim 4 reads:

4. Un balai tel que réclaté dans la revendication 1, dans lequel lesdites fibres des deux dits groupes comportent des ligatures transversales, les ligatures dudit centre de faisceau étant sous ledit autre groupe qui l'entoure et suspendues par cordelettes auxdites ligatures dudit autre groupe.

The use of the term "suspendues" is, I think, significant. It is descriptive of a binding which hangs from the upper bindings and, as indicated in the other quoted portions of the description, is attached thereto in order that it will not be displaced. The drawings which formed a part of the specification show the position of the lower binding and illustrate the fact that it is in suspension from the upper binding.

It is, I think, proper to consider the drawings with a view to comprehending the invention which the appellant was seeking to describe. In the case of *In re Leonard*¹ Cassels J., when considering the application of the section governing reissue patents, adopted the reasons of Blatchford J. in *Wilson v. Coon*², which he cites. He quoted from those reasons at p. 363:

The new patent must be for the same invention. This does not mean that the claim in the reissue must be the same as the claim in the original. A patentee may, in the description and claim in his original patent, erroneously set forth as his idea of his invention something far short of his

¹ (1913), 14 Ex. C.R. 351, 14 D.L.R. 364.

² Vol. 19 U.S. Off. Patent Gaz. 482.

real invention, yet his real invention may be fully described and shown in the drawings and model. Such a case is a proper one for a reissue. A patent may be inoperative from a defective or insufficient description, because it fails to claim as much as was really invented, and yet the claim may be a valid claim, sustainable in law, and there may be a description valid and sufficient to support such claim. In one sense such patent is operative and is not inoperative, yet it is inoperative to extend or to claim the real invention, and the description may be defective or insufficient to support a claim to the real invention, although the drawings and model show the things in respect to which the defect or insufficiency of description exists, and show enough to warrant a new claim to the real invention.

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I do not think we are precluded from considering the drawings for assistance in determining the real purpose of the invention because of the statement contained in the patent:

Quoiqu'une seule forme spécifique de l'invention ait été illustrée et décrite, il est bien entendu que divers changements à la construction de l'invention peuvent être effectués pourvu que l'on ne se dépare pas de son esprit tel que réclamé dans les revendications qui suivent.

In my view this is a case of a patent which is defective by reason of insufficient description, and this resulted from mistake; i.e., a failure by the first patent attorney fully to comprehend and to describe the invention for which he had been instructed to seek a patent. In my opinion it was a proper case for the application of s. 50, and the Commissioner was entitled to grant a reissue patent.

The respondent raised two matters, in addition to those which are dealt with in the reasons of the Court below. It was contended that s. 50 only permits the granting of a reissue patent to the original patentee and not to an assignee. It was also submitted that the original patent had not been surrendered within four years from its date, as required by s. 50(1), and that, in consequence, the section was inapplicable.

The first argument is based upon the wording of s. 50 providing that the Commissioner may "cause a new patent, in accordance with an amended description and specification made by *such patentee*, to be issued to *him* . . ." It was pointed out that, whereas the predecessor of s. 50, s. 24 of the *Patent Act*, R.S.C. 1906, c. 69, had contained subs. 2 reading: "In the event of the death of the original patentee or of his having assigned the patent, a like right shall vest in his assignee or his legal representatives", this subsection disappeared when the *Patent Act*, 1935 (S.C. 1935, c. 32) was enacted. It does not appear in the present Act.

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In the *Patent Act*, as it appeared in the Revised Statutes of Canada, 1906, s. 2, the definition section contained no definition of the word "patentee". In chapter 23 of the Statutes of Canada, 1923, a definition of that word appears as follows: "'patentee' means the person for the time being entitled to the benefit of a patent". The subsection dealing with the rights of an assignee or legal representatives was retained.

In 1935, chapter 32 retained the definition of a patentee in substantially the same form: "'patentee' means the person for the time being entitled to the benefit of a patent for an invention", the same definition which appears in the present Act. However, the subsection dealing with the rights of an assignee or legal representatives was eliminated.

The section of the Act dealing with disclaimers contained, in the Revised Statutes of 1906, a subsection providing that: "In case of the death of the original patentee, or of his having assigned the patent, a like right shall vest in his legal representatives, any of whom may make disclaimer."

A similar provision has been carried forward down to and including the present Act.

The issue is as to whether the elimination from the section dealing with reissue of patents of the subsection dealing with the rights of assignees and legal representatives indicated an intention to restrict the rights provided in the reissue section to the original patentee solely.

In the absence of the enactment of the definition of the word "patentee" I would have thought that this would be so. That definition, however, appears to me to enable "the person for the time being entitled to the benefit of a patent for an invention" to exercise any of the rights conferred upon a "patentee" by the Act. Applying the definition in s. 50(1), it would read that:

...the Commissioner may, upon the surrender of such patent within four years from its date and the payment of the further fee hereinafter provided, cause a new patent, in accordance with an amended description and specification made by *such person for the time being entitled to the benefit of (the patent), to be issued to him...*

I cannot see any reason, in principle, why the right of an assignee under the section, which had clearly existed until 1935, should be considered as having been taken away in the light of the existence of the broad terms of the definition of the word "patentee". I do not think the use of the

word "such" in s. 50(1) manifests that intention. It was not introduced for the first time in 1935, but had existed for many years before that.

Section 53 of the Act, which permits the assignment of the *whole interest* of a patentee by an instrument in writing, contemplates the assignment of all the rights of a patentee vested in him under the provisions of the Act.

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The second contention is based upon subs. (2) of s. 50, which provides that the surrender of the original patent, which is a necessary requirement of an application for reissue under subs. (1), does not take effect until the issue of the new patent. Under subs. (1) the surrender is to be made within four years from the date of the original patent. In the present case the petition for reissue was dated March 21, 1962, the original patent having been issued on March 25, 1958, and the petition included a surrender of that patent. However, the reissue patent was not granted until January 29, 1963, at which date the surrender took effect. The respondent claims that, because of this, the surrender was not effected within the required four-year period.

I am not in agreement with this argument. The surrender of the patent required under subs. (1) refers to the step taken by the applicant for the reissue patent when he makes his application. It is that step which must be taken within the stipulated four-year period. Subsection (2) refers to "such surrender", i.e., that made by the applicant, and it then provides that that surrender becomes effective when the new patent issues. Subsection (1) is clearly referring to a step to be taken by the applicant within a limited time. He cannot be charged with non-compliance with the provision because of any subsequent delays which are beyond his control.

My conclusion is, therefore, that patent numbered 656,-934 is a valid and subsisting patent. The learned trial judge has found as a fact that the respondent did manufacture some brooms, in the period since the issue of that patent, which fall within claim 3 of that patent.

I am not prepared to accede to the appellant's submission that claim 4 of the original patent is identical with claim 3 of the reissue patent so as to enable the appellant to take advantage of the provision in subs. (2) of s. 50 that "the reissued patent to the extent that its claims are iden-

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tical with the original patent constitutes a continuation thereof and has effect continuously from the date of the original patent" and so that the surrender of the patent does not "abate any cause of action then existing".

In the result, the appellant is entitled to claim in respect of infringements of the reissue patent occurring after it was issued. It was agreed at the trial that, if the appellant had made out a case for one act of infringement of either patent, there would be a reference as to what acts of infringement had been committed and a reference as to the damages flowing from such acts of infringement, or a reference for an accounting of profits depending upon what relief the Court determines that the plaintiff is entitled to.

I would, therefore, allow the appeal, with costs in this Court and in the Exchequer Court. The appellant is entitled to a declaration that reissue Patent No. 656,934 is a valid and subsisting patent. The appellant is also entitled to a reference to determine what acts of infringement of that patent have been committed by the respondent and also to determine, at the election of the appellant, either what damages have flowed from such acts of infringement, or for an accounting of the profits derived therefrom, and judgment for such amount.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: Howard, Cate, Ogilvy, Bishop, Cope, Porteous & Hansard, Montreal.

Solicitors for the defendant, respondent: Newman, McLean & Associates, Winnipeg.
