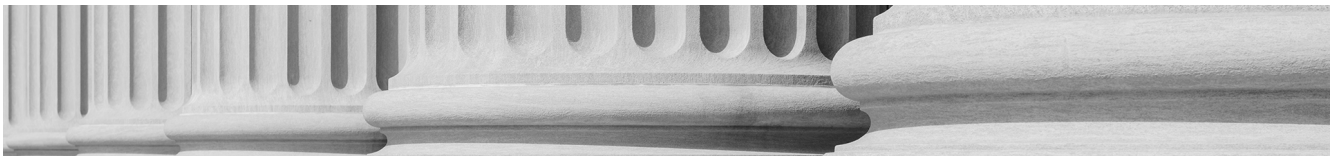

Another Reminder to Plead the Materials Facts of Patent Infringement: Canadian National Railway Co v BNSF Railway Co

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In *Canadian National Railway Co v BNSF Railway Co*[1], Justice Locke reaffirmed the importance of pleading material facts to support allegations of patent infringement. As the case shows, repeating the language of the claims is insufficient if the pleading does not answer the main factual questions of who did what, where, when, and how. To withstand a motion to strike, facts providing a reasonable basis to conclude there has been infringement of all elements of the asserted claims should be pleaded, based on the actual acts of infringement and not solely the words of the patent claims.

The Federal Courts have repeatedly emphasized the need to plead material facts in order to frame the issues relevant to the case and to allow it to move forward in an efficient manner. In *Mancuso v Canada (National Health and Welfare)*[2], the Federal Court of Appeal explained that pleading particular material facts is "fundamental to the trial process"[3] because doing so provides notice and defines the issues. A proper pleading ensures that "the Court and opposing parties cannot be left to speculate as to how the facts might be variously arranged to support various causes of action."

Bald allegations are at the other end of the spectrum and on their own do not establish a cause of action. The dividing line between material facts and bald allegations is not, however, always readily apparent. In *Mancuso*, Justice Rennie made the following observations:

> "There is no bright line between material facts and bald allegations, nor between pleadings of material facts and the prohibition on pleading of evidence. They are points on a continuum, and it is the responsibility of a motions judge, looking at the pleadings as a whole, to ensure that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair.
>
> What constitutes a material fact is determined in light of the cause of action and the damages sought to be recovered. The plaintiff must plead, in summary form but with sufficient detail, the constituent elements of each cause of action or legal ground raised. The pleading must tell the defendant who, when, where, how and what gave rise to its liability."[4]

One distinction that bears reference in the context of patent infringement is that statements based on information received from a party about things that actually happened and statements that describe a process or product tend towards the material fact end of the spectrum. Those conjured by counsel using only patent claim language or statements from case law are more susceptible to classification as a bald allegation.

To sustain a cause of action for patent infringement, a pleading must meet the well-known *Dow Chemical*[5] test. That is, a plaintiff must plead "(a) facts from which it follows that the plaintiff has the exclusive right to do certain things, and (b) facts that constitute an encroachment by the defendant on that right"[6] In *CN* Railway, Justice Locke explained that only the first of these may be established by alleging ownership in a patent and identifying the claims at issue[7] The second requires more: a plaintiff must plead facts that, if true, would establish that the defendant has encroached the exclusive rights.

Three patents were at issue in *CN Railway*. The defendants sought to strike the claim in its entirety, but the Federal Court

upheld the pleading in relation to some claims for two patents because the pleading provided "a reasonable basis for understanding CN's infringement allegations in respect of all of the elements thereof."[8] The Court struck the allegations based on the other claims, including all of those in the third patent. The bar supporting the surviving claims was fairly low. CN had included annotated screen shots in the statement of claim from the defendant's website identifying the online tools in issue. To the extent the annotations mapped onto an asserted claim, the pleading of that claim withstood the motion to strike

> "Despite the fact that CN offers little detail in its Amended Statement of Claim concerning its patent infringement allegations other than boxes and arrows added to a few screenshots, it is my view that there is sufficient detail to establish a reasonable cause of action that is not lacking any reasonable prospect of success, at least for some of the claims in issue. In addition, BNSF has not convinced me that it is unable to respond intelligently to these infringement allegations".[9]

Justice Locke, however, struck the allegations of infringement based upon claims for which there was no pleaded basis for infringement beyond the assertion of the claim language. Claims having elements that could not be construed to cover anything the defendant was alleged to be doing were disallowed.[10]

Also worth mentioning, *CN Railway* follows Prothonotary Aylen's 2017 decision in *Mostar Directional Technologies Inc v Drill-Tek Corp* in which she struck the entirety of the claim before her for want of material facts.[11] The Court emphasized the necessity of pleading facts to establish who, what, where, when, and how the alleged infringement took place. In that case, Mostar alleged that four of its patents relating to oil well directional drilling technology were infringed. In its claim, Mostar identified individual products that allegedly infringed individual claims. It did not, however, plead any facts to support how those products infringed the claims. Prothonotary Aylen stated: "If a statement of claim contains bare assertions without material facts upon which to base those assertions, then it discloses no cause of action and is liable to be struck."[12] This was a fatal flaw in the pleading before her, which led to the conclusion that Mostar was speculating about its claim and waiting for discovery to learn how the allegedly infringing products worked.[13]

Pleadings sufficient to understand how a claim is infringed are crucial for the defendant to know the case it has to meet. "It is not for the Defendant to undertake guesswork in order to respond".[14] Pleading material facts facilitates an efficient route to trial. Where both parties understand the allegations, interlocutory steps such as discovery and expert reports may focus on the central dispute and avoid the make-believe.

Although *CN Railway* and *Mostar* are recent examples of these principles, the importance of pleading material facts in patent infringement actions is not new. As Justice Addy long ago stated in *Caterpillar Tractor*: "A court proceeding is not a speculative exercise and actions are not to be launched or continued, nor are defences to be allowed to stand, where it is clear that the person making the allegation has no evidence to support it and where the onus of proof rests on that person".[15] As recent authority shows, these observations are equally as applicable to proceedings before the court today.

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[1] 2018 FC 614 [*CN Railway*]

[2] 2015 FCA 227 [*Mancuso*].

[3] *Mancuso*, *supra* note 2 at ¶16.

[4] *Ibid,* at ¶18-19.

[5] *Dow Chemical Co v Kayson Plastics & Chemicals Ltd* (1966), 47 CPR 1 (Ex Ct) [*Dow Chemical*].

[6][6] *Ibid,* at 11. See also *CN Railway*, *supra* note 1 at ¶12; *Mostar*, *infra*, note 12 at ¶24.

[7] *CN Railway*, *supra* note 1 at ¶12.

[8] *Ibid,* at ¶45.

[9] *Ibid,* at ¶44.

[10] *Ibid*, at ¶50-53.

[11] 2017 FC 575 [*Mostar*].

[12] *Ibid* at ¶16.

[13] *Ibid* at ¶43-44.

[14] *Ibid* at ¶35-36.

[15] *Caterpillar Tractor Co v Babcock Allatt Ltd* (1982), 67 CPR (2d) 135 at 139 (FCTD), aff'd 72 CPR (2d) 286 (FCA) [*Caterpillar Tractor*].