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IntellectualPropertyBrief

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In This Issue

In this issue of *IP Brief*, Christos Gazeas reviews the changes to the disclosure requirements for public companies relating to material contracts involving Intellectual Property.

Mark S. Mitchell reviews three cases where the formalities of patent office practice led to loss of patent rights. He then provides a brief review of the effect of the Supreme Court of Canada decision in *Sanofi-Synthelabo* v. *Apotex* on obviousness and anticipation in patent law.

Are You in Compliance with the Current Material Contract Filing Obligations?

Christos Gazeas

Effective March 17, 2008, amendments to Canadian securities law regulation National Instrument 51-102 *Continuous Disclosure Obligations* ("NI 51-102") and its related Companion Policy changed the disclosure and public filing requirements related to material contracts entered into by reporting issuers. These amendments have important implications for companies that deal regularly with intellectual property contracts. The amendments limit the use of the "ordinary course of business" filing exemption and restrict the permitted redactions that can be made to a material contract before it is publicly filed on the System for Electronic Document Analysis and Retrieval ("SEDAR"). The changes apply not only to all new material contracts, but also to material contracts entered into after January 1, 2002, which are still in effect but which were not previously filed.

Key Changes to the Filing Requirements

Prior to March 17, 2008, reporting issuers were not required to file a material contract that was entered into in the "ordinary course of business." Now, under NI 51-102, the following six types of material contracts do not qualify for the "ordinary course of business" filing exemption and must be disclosed:

1. a contract to which directors, officers or promoters are parties, other than a contract of employment;
2. a continuing contract to sell the majority of the reporting issuer's products or services or to purchase the majority of the reporting issuer's requirements of goods, services, or raw materials;
3. **a franchise or licence or other agreement to use a patent, formula, trade secret, process or trade name;**
4. a financing or credit agreement with terms that have a direct correlation with anticipated cash distributions;
5. an external management or external administration agreement (includes contracts with a third party, the reporting issuer's parent, or an affiliate of the reporting issuer, under which management or other administrative services are being provided to the reporting issuer); and

6. a contract on which the reporting issuer's business is "substantially dependent." A reporting issuer is "substantially dependent" on a contract if its business depends on the continuance of that contract. For example, a financing or credit agreement providing a majority of the reporting issuer's capital requirements for which alternative financing is not readily available at comparable terms, qualifies as a substantially dependent contract.

The omission of copyright contracts from item #3 listed above suggests that copyright contracts entered into in the "ordinary course of business" may not have to be publicly filed.

Before the amendments, if disclosure of a provision in a material contract would be seriously prejudicial to the interests of a reporting issuer or would violate confidentiality provisions, the reporting issuer could redact such provision. Now, NI 51-102 provides a list of items in material contracts that cannot be redacted even if their disclosure would be seriously prejudicial to the reporting issuer or would violate confidentiality provisions, such as debt covenants and ratios in financing or credit agreements, or terms relating to the termination of the material contract. In addition, a reporting issuer will have to disclose other terms necessary for understanding the impact of a contract on its business, including the duration and nature of a patent, trademark, licence, franchise, concession or similar agreement.

NI 51-102 now requires that, where a redaction is made, the issuer provide a brief one-line description as to the type of information being redacted and now specifically stipulates that schedules, side letters, exhibits or amendments to a material contract must also be filed.

Practical Considerations

A contract must be filed on SEDAR if it:

- is considered to be material to the reporting issuer;
- has not previously been disclosed, was entered into within the most recently completed financial year or, if still in effect, on or after January 1, 2002; and
- does not fall under the "ordinary course of business" filing exemption.

If the above filing requirements are triggered, the deadline for filing a material contract on SEDAR will be the earlier of: (a) the date a material change report must be filed, if entering into the contract constitutes a material change; or (b) the date of the reporting issuer's Annual Information Form ("AIF") or, in the case of a TSX-V issuer, 120 days after its financial year-end.

Reporting issuers must be alert to the new material contract filing obligations for new contracts and should conduct a review of all material contracts entered into after January 1, 2002, which are still in effect and were not previously filed, to ensure they still qualify for the now limited "ordinary course of business" filing exemption. Contracts that were filed on SEDAR prior to March 17, 2008 do not require review or reassessment by the reporting issuer.

When filing an AIF, a reporting issuer should consider whether any additional or amended disclosure in the AIF concerning the particulars of a material contract is required, even if the contract has been previously filed. Reporting issuers must also adjust their redaction practices to conform to the amended NI 51-102. In addition, reporting issuers should be cognizant of these new rules when negotiating contracts and avoid unnecessarily including sensitive information.

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Ed.: *This article previously appeared in the Fall 2008 issue of* Securities Brief.

Patent Agency Practice: The Formalities are Crucial – A Comment on Recent Cases

Mark S. Mitchell

Over the last few months the Federal Court of Appeal has dismissed three appeals in cases where:

1. an agent inadvertently failed to pay maintenance fees on time and a later letter, sent unaware of the lateness or any notice of abandonment and purporting to pay the maintenance fees, could not be construed as a request for reinstatement;
2. the applicant failed to pay maintenance fees at all and could not later try to revive the application by using the saving provision for top-up payments meant for insufficient payments under the small entity/large entity classification; and
3. an agent inadvertently failed to respond to all requisitions for information made by the Commissioner, no notice of abandonment was sent to the applicant and no response to the requisition was given in the 12-month

reinstatement period. In all three cases the result was the permanent loss of the patent applications.

One of the cases seems relatively straight forward. In *Harry O. Wicks* v. *Commissioner of Patents*, 2008 F.C.A. 96, fees were not paid and a notice of abandonment was given. No attempt was made to pay until long after the expiration of the reinstatement period and the applicant could not fit within the intended scope of s. 78.6(1), enacted to relieve against the effects of the *Dutch Industries* case[1] to assist applicants, who before February 1, 2006 inadvertently paid small entity fees when large entity fees should have been paid by giving a year to make a top-up payment. The Court reasoned that not paying fees at all is not the same thing as not paying enough, and so 78.6(1) did not apply and the patent was lost.

To the lay inventor, the other two cases might appear more problematic. In each case, the agent made an inadvertent mistake. No notice was given by the Patent Office that there was a problem until it was too late and when attempts were made to fix the mistake it was said to be too late and that nothing could be done. What was it about the *Patent Act* that led to those results?

In *Actelion Pharmaceuticals* v. *Commissioner of Patents* 2008 F.C.A. 90, the patent agent made a clerical error regarding the filing date by about a year and therefore also about the date upon which maintenance fee payments were due. A payment was missed and therefore the application was deemed abandoned by s. 73(1)(c) of the *Patent Act*. A Notice of Abandonment was purportedly sent by the Commissioner, but the applicant said it was never received.

Unaware of having missed the payment and with less than a month remaining in the 12-month reinstatement period allowed for abandoned applications, the agents sent in the maintenance fee with a standard letter that included the language:

> The Commissioner is hereby authorized to debit any additional fee or credit any overpayment associated with this communication directly from or to our deposit account…

The Patent Office replied after the reinstatement period had expired that because the payment had been missed and a request for reinstatement plus the maintenance fee and a late payment fee had not been made in the prescribed time, the application was dead.

The *Patent Act* requires that the applicant make the requisition for reinstatement, pay the maintenance fee and the late fee before the expiry of the 12 months from the date of the missed payment.

The Court could not construe the agent's letter as a request for reinstatement because the section requires an express request, whereas the implicit construction sought would mean that the Commissioner would have to infer that corrective actions be taken for whatever problem may threaten the status of the application.

The Court concluded that the onus is on the applicant to comply with the *Patent Act* and even the absence of the usual Notice of Abandonment did not alter that onus. Maintenance fees are to discourage proliferation of deadwood patents by requiring applicants to take steps to keep applications in good standing. The Commissioner has no discretion regarding reinstatement if the procedure is followed, so it was concluded that this is a strict, predictable regime that will result in the application becoming irretrievably abandoned if the applicant fails to take the proper steps.

An express request for reinstatement must be made within 12 months from a missed maintenance fee payment. Silence to a requisition will cause abandonment of the application.

Compare that to *DBC Marine Safety Systems Ltd.* v. *Commissioner of Patents*, 2008 F.C.A. 256. In the first Office Action report, the Examiner requested certain amendments to comply with the Act and Rules and also requested identification of prior art cited in corresponding U.K. and U.S. applications.

The U.S. prior art was already in the application or readily available online at the U.S. Patent and Trademark Office website. The applicant had no connection to the U.K. application; it was referenced in another pending Canadian application for a similar invention. Just saying that the applicant did not have the information on the U.K. application would have been enough to comply.

The *Patent Act*, s. 73(1)(a), deems applications abandoned if the applicant does not make a good faith reply to a requisition within six months. Prior to the Examiner's report in this case, Patent Office practice was changed in response to frequent failures to reply properly to prior art requisitions, and notice was given that complete silence regarding any requisition within the Examiner's report would mean that there was not a good faith response to that requisition and the application would be deemed abandoned.

The agent responded just days before the six-month deadline addressing the requested amendments, but made no response to the prior art request. The failure to respond to the second requisition was purely accidental. Nevertheless, it caused a deemed abandonment and the 12-month reinstatement period was started. The maintenance fee due a few months later was paid, but no notice was given that there was a deemed abandonment in effect. After the expiry of the reinstatement period and unaware of the deemed abandonment and expiry of the reinstatement period, the agent wrote to the Patent Office asking when the application would be examined. The Patent Office responded that a Notice of Abandonment had been filed, but there was no evidence that it was ever sent. It bore a date beyond the reinstatement period. Normal Patent Office practice was to notify the applicant within six months of a failure to respond to a part of an Office Action as a courtesy to allow corrections to take place in time to preserve the application or send a Notice of Abandonment if the six months had passed. This was not done in this case. The applicant, upon receiving the Notice of Abandonment, tried to reinstate the application, but the Commissioner refused, saying that there was no discretion to reinstate after the 12-month reinstatement period expired. The practice of notification is only a courtesy and the Patent Office accepts no responsibility for a failure to do so.

The Court found that the application became dead as a matter of law after expiry of the 12-month reinstatement period and that the Commissioner had made no reviewable decision to refuse reinstatement. The applicant argued that there was a failure of procedural fairness where the courtesy notices were not sent by the Patent Office in this case, although part of their usual practice was to do so.

The Court found that the Commissioner had no duty to provide notice that an application had not been reinstated where the statute clearly places the burden on the applicant to reinstate the application by following a specified procedure and paying certain fees.

This burden is not affected by usual Patent Office practice or its failure to follow it in a particular case.

The *Patent Act* confers a valuable statute-based monopoly on a patentee. In exchange for such exclusivity, the Act requires strict adherence to a set of obligations with the onus squarely on the applicant. The inventor and agent must be ever-vigilant to ensure that the application is maintained in good standing.

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1 For a discussion of the *Dutch Industries* case and this provision of the *Patent Act*, see *IP Brief* Winter 2005 p. 5, Summer 2005 p. 6, Fall 2005 p. 3, 2005, Year in review p. 5, Winter 2006 p. 6 found at www.langmichener.ca/Publications.

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Case Comment: *Apotex Inc.* v. *Sanofi-Synthelabo Canada Inc.*

Mark S. Mitchell

On November 6, 2008, the Supreme Court of Canada released its decision in *Apotex Inc.* v. *Sanofi-Synthelabo Canada Inc. et al.*[1] on an appeal from the Federal Court of Appeal decision upholding the Federal Court order of Shore J. granting an order of prohibition in a *Patented Medicines (Notice of Compliance) Regulations* proceeding in respect of the drug, clopidogrel bisulfate. Clopidogrel is the dextro-rotary isomer selected and claimed in the patent at issue from the racemate disclosed in the earlier genus patent. It is more active, less toxic and better tolerated than the racemate or levo-rotary isomer.

The Supreme Court dismissed Apotex's appeal and in so doing:

1. affirmed the legitimacy of selection patents that claim one or more compounds from a broader genus claimed in an earlier patent;
2. refined the analysis of the question of anticipation to a two-step process where the necessity for the prior disclosure of the invention and enablement of the invention by the prior disclosure is separately considered;
3. refined the analysis of obviousness to a four-step process suggested in an earlier U.K. decision and contrary to earlier cases, stated that the U.K. "obvious to try" test had some application in Canada; and
4. held that concern over "evergreening" patents by double patenting did not warrant invalidating selection patents as a legitimate class of invention.

Selection Patent Criteria

Briefly, selection patents are valid if:

1. the selected compounds, though encompassed by the genus, had not been actually made before;
2. there is a substantial advantage to be had or disadvantage to be avoided by using the selected group;
3. all of the selected members have the advantage or avoid the disadvantage; and
4. the special character is peculiar to the selected group, i.e. a large number of unselected members could not have the special character.

Test for Anticipation

The accepted test applied by Canadian courts is based on a line of cases summarized in *Beloit* v. *Valmet*[2] and approved by the Supreme Court in *Free World Trust* v. *Electro Santé*[3] as being:

> The prior publication must contain so clear a direction that a skilled person reading and following it would in every case and without possibility of error be led to the claimed invention.[4]

Added to this test are separate considerations of prior disclosure and enablement.

Prior disclosure means that the prior patent must disclose subject matter which, if performed now, would necessarily result in infringement. At this stage there is no trial and error experimentation; it is just being read by the skilled person to understand it. Prior disclosure in the context of a selection patent means that the special advantages must have been previously disclosed.

Anticipation now requires separate consideration of disclosure and enablement by the prior art. Obviousness now includes reference to the effect of whether it was "obvious to try."

Enablement means that the skilled person would have been able to perform the invention. Routine trial and error to get it to work would be permitted at this stage, but it cannot be an undue burden that requires either an inventive step or prolonged or arduous trial and error.

Obviousness

Reviewing recent developments in the U.K. and U.S. on obviousness, the test in Canada was refined to make room for some application of the "obvious to try" test used in the U.K.

The inquiry becomes:

1. a) Identify the notional person skilled in the art.
   b) Identify the relevant common general knowledge.
2. Identify the inventive concept of the claim or construe it.
3. Identify the differences between the state of the art and the inventive concept as construed.
4. Without reference to the invention, do the differences constitute steps that would be obvious to a skilled person or do they require invention?

"Obvious to try" comes in the fourth stage. Whether something is obvious to try has several factors:

1. Is it more or less self-evident that what is being tried ought to work?
2. What is the nature, extent and amount of effort needed (i.e. quick and routine or prolonged and arduous)?
3. Is there a motive in the prior art to find the solution in the patent?

The actual course of conduct, i.e. what people were actually doing in the field at the relevant time, can be considered.

Double Patenting

The concern about "evergreening" and an attack on selection patents as allowing such evergreening was rejected for two reasons:

1. a selection patent may be sought by someone other than the owner of the genus patent so that "evergreening" does not arise; and
2. selection patents encourage improvements by identifying particular members with beneficial properties over a generalized genus.

This case is very important to patent practitioners as it expressly refines or updates crucial patent concepts of obviousness and anticipation used in opinion, prosecution and litigation alike.

1 2008 SCC 61 Judgment by Rothstein J., Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ. concurring

2 *Beloit* v. *Valmet* (1986) 8 CPR (3d) 289 (FCA)

3 *Free World Trust* v. *Electro Santé* [2000] 2 SCR 1024

4 Apotex (supra) at para 20

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Patenting Business Methods in the United States and Canada after *In re Bilski*

Ted Urbanek

Although business methods have, at least arguably, never properly been excluded from the ambit of patentable subject matter in the United States, the U.S. Patent and Trademark Office ("USPTO") generally took the position prior to the 1998 decision of the U.S. Court of Appeals for the Federal Circuit ("CAFC") in *State Street Bank & Trust Co.* v. *Signature Financial Group Inc.*, 149 F.3d 1368, Fed. Cir. 1998 ("*State Street*") that business methods were not patentable as a matter of principle. The *State Street* decision extinguished the so-called "business method exception," and established that a business method could be patented if it involved a practical application, in that it could be applied to produce a "useful, concrete and tangible" result.

A wave of business method patent applications followed in the wake of the *State Street* decision, many relating to methods of doing business on-line (such as, for example, Amazon.com's well-publicized "one click" e-commerce ordering system). Criticism of the USPTO's treatment of business method patent applications soon followed, largely as a consequence of the difficulty that the USPTO encountered in identifying relevant prior art in business method cases. This led to the issuance of numerous patents directed to business methods that (allegedly) were widely practiced or obvious at the time that the patent application claiming them was filed. Ironically, one reason that the USPTO encountered such difficulties in identifying relevant prior art in these cases is that, until *State Street*, business methods were commonly kept secret.

> *The* State Street *test of "useful, concrete and tangible result" has been replaced by the "machine-or-transformation" test in* Bilski. *It applies to all process claims including business methods.*

Against this backdrop, the CAFC held last October, in the much-anticipated *en banc* decision in *In re Bilski*, 545 F.3d 843, 88 U.S.P.Q.2d 1385, Fed. Cir. 2008 ("*Bilski*") that the "useful, concrete and tangible result" test enunciated in *State Street* was insufficient to determine whether claimed subject matter is patent-eligible, and that the single, definitive test to be applied in determining the patent eligibility of any claimed process (including business methods) is whether: (1) the process is tied to a particular machine or apparatus, or (2) the process transforms a particular article into a different state or thing. This test has become known as the "machine-or-transformation" test.

Although the machine-or-transformation test purports to clarify the analysis of patent eligibility for process claims, several key questions are left unanswered. Significantly, since the invention claimed by *Bilski* (a hedging method for "managing the consumption risk costs of a commodity provider at a fixed price") was not limited to any specific apparatus such a computer, the court declined comment on the question of whether a general-purpose computer may properly be considered to be a "particular machine." Also debatable is what constitutes a "particular article" being transformed by the claimed process. Would the transformation of financial data, such as was claimed in *State Street*, qualify under the new test?

The machine-or-transformation test also requires the claimed transformation or the tie to a particular machine to be central to the purpose of the claimed process such as to "impose meaningful limits on the claim's scope," and not to "pre-empt substantially all uses" of a fundamental principle. When is the claimed transformation "central" to the purpose of the claimed process? And when does the claimed process pre-empt substantially all uses of a fundamental principle?

However these and other questions may ultimately be resolved, it appears that the status of many business-method patents that were granted in the U.S. in the last decade is unclear, at least for the time being, since they may well be considered to be directed to patent-ineligible subject matter under the more stringent criteria enunciated in the *Bilski* decision for evaluating the patent eligibility of all processes. Furthermore, the standards for subject-matter eligibility that will be applied by the USPTO in currently pending patent applications claiming processes will also remain unsettled until redrafted guidelines for the examination of process claims in light of *Bilski* are prepared and issued.

In any event, these uncertainties are probably likely to be resolved (or perhaps be supplanted with new ones) when the Supreme Court of the United States hears *Bilski's* petition for a *writ of certiorari* filed on January 28, 2009. The writ presents the following two questions for consideration by the Supreme Court:

> Whether the Federal Circuit erred by holding that a "process" must be tied to a particular machine or apparatus, or transform a particular article into a different state or thing ("machine-or-transformation" test), to be eligible for patenting under 35 U.S.C. §101, despite this Court's precedent declining to limit the broad statutory grant of patent eligibility for "any" new and useful process beyond excluding patents for "laws of nature, physical phenomena, and abstract ideas."
>
> and
>
> Whether the Federal Circuit's "machine-or-transformation" test for patent eligibility, which effectively forecloses meaningful patent protection to many business methods, contradicts the clear Congressional intent that patents protect "method[s] of doing or conducting business." 35 U.S.C. § 273.

Pursuant to the Supreme Court Rules, *amici* briefs and those in support of the USPTO are due at the end of February, although the USPTO may (and probably will) seek an extension.

In the meantime, the Canadian approach to the patentability of business methods has not changed significantly over the past several years. Although there have been no judicial pronouncements in the area, the Canadian Intellectual Property Office ("CIPO") currently takes the administrative position that business methods "are not automatically excluded from patentability, since there is no authority in the *Patent Act* or Rules or in the jurisprudence to sanction or preclude patentability based on their inclusion in this category. Patentability is established from criteria provided by the *Patent Act* and Rules and from jurisprudence as for other inventions."

Section 2 of the Canadian *Patent Act* defines an invention as "any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter." To be considered as any one of an "art," "process," or manner of "manufacture" under section 2 (and therefore statutory subject matter for a patent in Canada), a method must produce an "essentially economic result in relation to trade, commerce, or industry," in that it is either: (a) a method for producing, making, constructing or building a vendible product; (b) a method of using or operating an inventive "thing," or a known "thing" for an inventive new use; or (c) a method of diagnosing a physical disease or physical medical condition in a human being.

In Canada, business methods involving computer programs can be patented if they involve "an act or series of acts performed by some physical agent upon some physical object and producing in such object some change either of character or condition" and "produce an essentially economic result in relation to trade, industry or commerce."

Accordingly, claims directed to subject matter that relates solely to the skills of a professional are not considered patentable in Canada, but business methods implemented as computer programs may be patentable, provided that they involve "an act or series of acts performed by some physical agent upon some physical object and producing in such object some change either of character or condition" and "produce an essentially economic result in relation to trade, industry or commerce."

The requirements for a "change" in a "physical agent" in the Canadian approach are conceptually similar to the transformation element of the current "machine-or-transformation" test applied in the United States. Whether the U.S. approach retains such requirements following the *Bilski* appeal to the Supreme Court remains to be seen.

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News

New Client Identification and Verification Requirements Enacted by the Law Society of Upper Canada

The Law Society of Upper Canada, the body that governs lawyers and paralegals in Ontario, has enacted new client identification and verification requirements. Effective December 31, 2008, any new matter that Lang Michener LLP accepts for existing and new clients requires the firm to obtain certain information for individuals and organizations. This information includes, but is not limited to, name, home address, home telephone number for individuals and full name of the business, address, telephone number, incorporation or business identification number, and the place of incorporation for organizations. While these questions may seem somewhat intrusive, particularly for the firms' long-time clients, the Law Society has enacted the regulations with the goal to enhance public protection to assist in the prevention/identification of potential money laundering and other fraudulent or criminal activities.

Lang Michener Toronto Welcomes Two New Patent Agents


Yasin Bismilla


Marco Clementoni

We are pleased to announce that **Yasin Bismilla** and **Marco Clementoni** have joined the Intellectual Property Group as Patent Agents in the Toronto office.

Don MacOdrum Listed in The *2009 Lexpert/ALM Guide to the Leading 500 Lawyers in Canada*


Donald MacOdrum

Lang Michener is pleased to announce that three lawyers from the firm have been recognized as leading practitioners in the *2009 Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada*, an annual publication reporting on Canadian legal matters. Donald MacOdrum, Partner, Intellectual Property Group, is listed once again as a Leading Lawyer in Intellectual Property and Intellectual Property Litigation.

Sandra Knowler Admitted to the Partnership


Sandra M. Knowler

Sandra M. Knowler, from the Technology, Intellectual Property and Business Law Groups in our Vancouver office, was admitted to the partnership effective January 1, 2009. Sandra has demonstrated a strong commitment to excellence, leadership and client service. Congratulations!

IntellectualPropertyBrief

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