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Patent Litigation Around the World: Canada, China and Germany

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The recent Supreme Court case of *T.C. Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017) has patent owners reconsidering locations in which they file patent infringement cases. With that geographic reconsideration process in mind, it seems worthwhile to extend the geographic scope outside of the United States. Here, we consider three jurisdictions that have active patent litigation dockets.

CANADA

INTRODUCTION

The Canadian patent system has a long history that shares similarities with both the United States and the United Kingdom's patent systems. Although the first patent was granted in what is now Canada in 1791, there was no official Patent Act until the 1820s. After Canada officially became a country in 1867, it quickly enacted its first Federal Patent Act in 1869. As the country expanded, so did the Patent Act, even allowing foreigners to obtain patents beginning in 1872.

While Canada's patent system shares many similarities with the patent system in the United States, including many of the available defenses and theories of invalidity, there are significant differences. The discovery process in Canada is much more abbreviated, with some cases only having one deposition per party. Juries do not decide patent actions in Canada, and because the Federal Court does not have jurisdictional differences based upon its location, plaintiffs do not benefit from attempting to select one court over another as has become common in the United States.

PATENTS GENERALLY

The requirements to obtain a patent in Canada are very similar to those in the United States. To apply for a patent, the applicant must file a petition and a specification of the invention.[1] The Patent Act describes 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."[2] Just like in the United States, the claimed invention must be novel, non-obvious, and it must have utility.[3] There are limits to what can be patented in Canada. For instance, patents cannot be issued for methods of medical treatment, higher life forms, hypothetical inventions, mere scientific principles or abstract theorem, and nuclear technologies.[4] Software can be patented, but it must be more than an algorithm.[5] Method patents are also available, including methods

[1] R.S.C. 1985, c. P-4, s. 27(2).
[2] R.S.C. 1985, c. P-4, s. 2.
[3] *Patents in Canada*, Belmore Neidrauer LLP - Jason Markwell, Tracey Doyle and Michael Schwartz https://www.lexology.com/library/detail.aspx?g=3714dea0-a5ce-402f-8cf9-9ce059dcfc44.
[4] *Id.*
[5] *Id.*

for certain business methods if they are novel.[6] On average, once a patent application has been filed, it will take about three years for a decision to be made.[7]

INITIATING PATENT INFRINGEMENT LITIGATION

The Canadian court system is made up of provincial courts, which are much like the state courts in the United States, and the Federal Court, Canada's national trial court.[8] Although Canada's Patent Act is a creature of federal law, the Patent Act provides that patent infringement actions may be brought in either the provincial court in the province in which the infringement is said to have occurred, or in the Federal Court.[9] Because almost all patent infringement claims are brought in Federal Court, the discussion that follows centers on Federal Court patent litigation.[10]

Unlike the federal courts in the United States, Canada's Federal Court does not have any specific geographic locations. Rather, the Federal Court may sit anywhere in Canada.[11] Regardless of where the Federal Court is located, there are no jurisdictional differences between the courts.[12] The decisions of the Federal Court are binding in every province and territory in Canada.[13]

A plaintiff institutes a patent infringement action by filing and serving a Statement of Claim setting out the plaintiff's allegations against the defendant.[14] The Statement of Claim must "contain a concise statement of the material facts on which the party relies," but it is not required to include actual evidence of the facts alleged.[15] In response, a defendant must file a Statement of Defence admitting or contesting every allegation of material fact and setting forth his available defenses and counterclaims, if any.[16] The Statement of Defence must be filed within between 30 and 60 days after service of the Statement of Claim, depending upon where service of the Statement of Claim occurred.[17] A plaintiff may file and serve a Reply to the defendant's Statement of Defence within 10 days after service.[18] Pleadings are closed either upon the filing of a reply or on the expiration of the time for filing a reply, and then the discovery phase of the lawsuit begins.[19] Patent infringement proceedings in the Federal Court can last anywhere from two to ten years, but the court

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[6] *Id.*
[7] *Id.*
[8] *How the Courts are Organized*, http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/02.html (July 27, 2017).
[9] R.S.C. 1985, c. P-4, s. 54.
[10] Michael Crichton, Global Patent Litigation: How and Where to Win (2d ed. 2016).
[11] Federal Court (Canada) http://cas-cdc-www02.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Jurisdiction.
[12] *Patents in Canada*, Belmore Neidrauer LLP - Jason Markwell, Tracey Doyle and Michael Schwartz https://www.lexology.com/library/detail.aspx?g=3714dea0-a5ce-402f-8cf9-9ce059dcfc44.
[13] Federal Court (Canada) http://cas-cdc-www02.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Jurisdiction.
[14] Michael Crichton, Global Patent Litigation: How and Where to Win (2d ed. 2016).
[15] Federal Courts Rules, S.O.R./98-106, r. 174.
[16] S.O.R./98-106, r. 183; S.O.R./98-106, r. 189.
[17] S.O.R./98-106, r. 204.
[18] S.O.R./98-106, r. 205.
[19] S.O.R./98-106, r. 202; S.O.R./98-106, r. 223.

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