

Full particulars are required when pleading misrepresentation under s. 53 of the Patent Act

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The Federal Court recently ruled on a [motion to amend pleadings](#). The Defendant sought to include additional allegations to its previously pleaded defence that the patent was void pursuant to [s. 53 of the Patent Act](#) (the Act) due to representations made by the Plaintiffs during prosecution of the patent application. The Court's analysis centered on the particularity needed for pleadings in support of such allegations.

The Court reiterated that “section 53 has been described as the Act’s ‘fraud provision’” (para 19) and further held, that as allegations pursuant to s. 53 are allegations of misrepresentation, they must comply with [Rule 181\(1\)](#) of the *Federal Courts Rules*.

The Court cited jurisprudence from the Ontario Courts that requires a pleading of misrepresentation to identify what the misrepresentation is, and how it is false. The Court concluded that when misrepresentation is plead as a defence pursuant to s. 53, it must contain the essential elements of the defence required by the Act, and the particulars of a misrepresentation required in a civil proceeding. The Court set them out as follows:

A) Essential elements required by section 53 of the Act:

- a) the identification of the impugned statements;
- b) the establishment that they were untrue;
- c) the demonstration that they were material;
- d) that they were made in the drafting of the patent with wilful intent to mislead; and,
- e) that the impugned statement would likely mislead the skilled person.

and,

B) Particulars required by Rule 181(1):

- a) the identity of the representor;
- b) the identity of the representee;
- c) when, where and how the representation was made;
- d) the actual words, figures, or information that are alleged to constitute the misrepresentation(s);
- e) how the representation is untrue or false;
- f) that the representor knew that the representation was untrue or false when made to the representee; and,
- g) that the misrepresentation was made with the intention that the representee rely upon it. (para 31)

On the motion, the Court held that leave should be granted for most of the proposed amendments. However, when considering whether the interests of justice would be served in allowing the amendments, the Court refused to allow the addition of a bare list of additional prior publications and uses. The Court held that a list of publications without pinpoints does not provide sufficient particulars of a misrepresentation defence and would complicate the Court's determination of this issue.

Key takeaways

Parties should note that the Court appears to be taking steps toward recognizing that the fraud-like nature of s. 53 of the *Patent Act* means pleadings must be properly particularized to enable the patentee to know the case they have to meet.

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