Federal Court  Cour fédérale

**Date: 20090608**

**Docket: T-56-06**

**Citation: 2009 FC 592**

**Ottawa, Ontario, June 8, 2009**

**PRESENT: The Honourable Mr. Justice O'Reilly**

**BETWEEN:**

**HELI TECH SERVICES (CANADA) LTD.**
**AND CORPORACION LA CAMPANA**
**DE LA VILLA S.A.**
**AND PHILIP JARMAN**

**Plaintiffs**

**and**

**WEYERHAEUSER COMPANY LIMTED/**
**COMPANIE WEYERHAEUSER LIMITEÉ**
**DOING BUSINESS AS CASCADIA**
**FOREST PRODUCTS**
**AND DOING BUSINESS AS**
**ISLAND TIMBERLANDS**
**AND CASCADIA FOREST PRODUCTS LTD.**
**AND ISLAND TIMBERLANDS GP LTD.**
**AND TIMBERWEST FOREST CORP.**
**AND BRASCAN TIMBERLANDS MANAGEMENT GP INC.**
**AND 550777 B.C. LTD. OPERATING AS "R.E.M. CONTRACTING"**
**AND CANADIAN AIR-CRANE LIMITED AND VIH LOGGING LTD.**
**AND INTERNATIONAL FOREST PRODUCTS LIMITED**

**Defendants**

**AND BETWEEN:**

**VIH LOGGING LTD.**

**Plaintiff by Counterclaim**

**and**

**HELI TECH SERVICES (CANADA) LTD.**
**AND CORPORACION LA CAMPANA DE LA VILLA S.A.**

**AND PHILIP JARMAN**

**Defendants by Counterclaim**

**REASONS FOR ORDER AND ORDER**

## I. Introduction

[1] The defendants Brascan Timberlands Management GP Inc. and Island Timberlands GP Ltd. asked Prothonotary Lafrenière to strike various paragraphs of the plaintiffs' statement of claim primarily on the grounds that they did not disclose a reasonable cause of action against them. Prothonotary Lafrenière granted their request in an order dated November 21, 2008. The plaintiffs appeal that order. They argue that Prothonotary Lafrenière wrongly concluded that the plaintiffs had failed to set out in their statement of claim material facts that would support their assertion that Brascan and Island Timberlands were liable for patent infringement.

[2] The patent in issue involves a particular form of helicopter logging referred to as the "standing-stem" method. Standing-stem logging involves preparing a single tree for harvesting by topping and disbranching it, making horizontal cuts in the trunk, stabilizing the trunk with wedges, and then plucking the stem from above after a helicopter has lowered and attached a grapple to it. The patent covers both the grapple and the method itself.

[3] The plaintiffs allege that Brascan and Island Timberlands breached their patent either by employing this method themselves or by inducing others to do so. They submit that the omissions in their previous statement of claim (and amendments thereto) have been corrected in their second further amended statement of claim (FASOC #2) and suggest that Prothonotary Lafrenière erred by failing to recognize that the problems with earlier versions of the statement of claim have now been corrected.

[4] Prothonotary Lafrenière found that the allegations against Brascan amounted to "bald assertions without any material facts". Further, he concluded that the evidence before him on the motion did not disclose any direct infringement or attempted inducement by Brascan. Similarly, he found that the evidence in respect of Island Timberlands showed that a subcontractor was responsible for standing-stem logging, not Island Timberlands. Further, there was no evidence that Island Timberlands had induced any infringement by a subcontractor.

[5] Brascan and Island Timberlands submit that the FASOC #2 suffers from the same defects as the earlier pleadings and argue that Prothonotary Lafrenière was correct to strike the allegations against them.

## II. Standard of Review

[6] Given that the question before Prothonotary Lafrenière was vital to a final issue (*i.e.*, whether the action can be continued against Brascan and Island Timberlands), I must consider the question *de novo*: *AstraZeneca Canada Inc.* v. *Apotex Inc.*, 2005 FC 43, at para. 6.

## III. Valid Pleadings

[7] A statement of claim must set out facts supporting the plaintiff's claim to a particular legal right, as well as facts showing that the defendant has infringed that right: *Dow Chemical Co.* v. *Kayson Plastics & Chemicals Ltd.* (1966), 47 C.P.R. 1 (Ex. Ct). In an action for patent infringement, the plaintiff must set out facts describing the defendant's allegedly infringing

behaviour. It is not sufficient simply to allege that the defendant has infringed the claims of the patent: *Harrison* v. *Sterling Lumber Co.*, 2008 FC 220. Nor can a plaintiff simply make speculative allegations in the hope of learning more at the discovery stage of the action: *Caterpillar Tractor Co.* v. *Babcock Allatt Ltd.* (1982), 67 C.P.R. (2d) 135 (F.C.T.D.), at 138-139.

[8] The test on a motion to strike pleadings in a statement of claim is whether it is "plain and obvious" that the plaintiff cannot succeed against the defendant in respect of the particular allegations set out: *Prentice* v. *Canada (Royal Canadian Mounted Police)*, 2005 FCA 395, at para. 23.

## IV. The Plaintiffs' Allegations

[9] The plaintiffs allege that, since 2005, Brascan and Island Timberlands have used the standing-stem method in the Elsie Lake area of Vancouver Island (FASOC #2, para. 53, paragraphs cited are set out in Annex A). The plaintiffs also allege that the defendants have, as a whole, infringed the patent by using a technique that corresponds with the methodology set out in it (FASOC #2, para. 59). The FASOC # 2 sets out a full description of that methodology (paras. 57.1, 57.2).

[10] The plaintiffs also maintain that Island Timberlands induced "an unknown contractor" to carry out standing-stem logging in a manner that infringed the patent by hiring the contractor to do so (FASOC #2, para. 60 (*e*)).

## V. The Prothonotary's Decision

[11] Prothonotary Lafrenière reviewed the pleadings, the written submissions of the parties and the evidence filed on the motion. As mentioned, he concluded that the allegations in the FASOC #2 against Brascan amounted to "bald assertions without any material facts" and without any evidence to support them. In particular, he found no evidence of either direct infringement or inducement.

[12] With respect to Island Timberlands, Prothonotary Lafrenière found that the plaintiffs' allegations were more detailed and ought not to be struck under Rule 221(1)(*a*) (see Annex B) (for failure to disclose a reasonable cause of action). However, he also found no evidence to support the allegation that Island Timberlands induced anyone to infringe the patent or that it was itself responsible for any infringement. The evidence on those issues related to alleged infringement by a contractor named R.E.M. Contracting, not Island Timberlands.

VI. Conclusion and Disposition:

[13] The plaintiffs point out that it is extremely difficult to establish a foundation for their allegations, given that standing-stem logging typically takes place in remote areas. Further, they suggest that the liability of Brascan and Island Timberlands can be inferred from the corporate relationships among various defendants (including Weyerhauser, Cascadia, Island Timberlands and Brascan); the movement of employees from one company to another; their stewardship of large logging operations; and their agency relationships with subcontractors. Further, the plaintiffs note that Brascan and Island Timberlands are sophisticated companies that could easily evade liability by using subcontractors with limited resources as shields.

[14] I have considered the plaintiffs' circumstances and observations, but cannot conclude that they merit a departure from the requirements of sufficiency of pleadings. Further, after reviewing

the materials presented to Prothonotary Lafrenière, as well as those submitted to me, I can find no error in his decision. The pleadings clearly fail to set out material facts supporting the allegations of direct infringement and inducement. In my view, it is plain and obvious that the plaintiffs cannot succeed against Brascan or Island Timberlands in respect of the allegations set out in the pleadings. To conclude otherwise would be to permit the plaintiffs to use the discovery process to explore potential grounds for their infringement action. This the Court cannot permit.

**ORDER**

**THIS COURT ORDERS that**:

1. The appeal is dismissed with costs.

2. Prothonotary Lafrenière's Order of November 21, 2008 is affirmed.

"James W. O'Reilly"

Judge

Annex "A"

Second Further Amended Statement of Claim (FASOC #2), original amended filed March 2, 2006

53. ~~**Based on information provided to it by Weyerhaeuser, T**~~he Defendant, Brascan, **in the Elsie Lake area of Vancouver Island**, has used the helicopter single stem harvesting system in its logging of timber since at least as early as 2005, with the Defendants Cascadia and Island Timberlands, which is the method covered by one or more of the claims of the Harvesting Patent.

**57.1 The Defendants used the helicopter single stem harvesting system covered by the Harvesting Patent by employing a method for preparing and harvesting logs by means of a helicopter equipped with a suspended grapple, removing trees from the forest by lifting them off of their stumps rather than harvesting them after they have been felled. Under the method employed by the Defendants, a standing tree is topped, the branches removed, and the trunk cut near ground level on at least two sides, leaving holding wood connecting the log to the stump to stabilize it. When the helicopter is above the log and the grapple is beside the top of the log, the grapple is engaged to secure the log and a generally horizontally directed force is applied to the top of the log so as to rupture the holding wood and flying the helicopter with the suspended log to a selected collection area.**

**57.2 Further particulars on the use by the Defendants of the standing stem harvesting system covered by the Harvesting Patent include:**

**(a) In relation to the first aspect of the invention, the Defendants employed a method of harvesting a log using an airborne vehicle**

**equipped with a suspended grapple comprising topping and disbranching the tree, cutting the tree near ground level on at least two sides of the trunk leaving holding wood connecting the log to the stump, stabilizing the trunk with select described methods, moving the airborne vehicle to a position above the log with the grapple beside the top of the log, applying a generally horizontally directed force to the top of the log to rupture the holding wood, flying the airborne vehicle with the suspended log to a collection area, and releasing the log at the collection area.**

**(b)** **In relation to the second aspect of the invention, the Defendants used a tree harvesting grapple for helicopters comprising: a support member having a top and two sides, a wing connected to each side of the support member and extending outwardly therefrom forming a tree receiving recess between the wings and the support member, and a grapple pivotally connected to each wing with the arms being movable from an open position to a closed position extending across the recess to retain trees in the grapple.**

**(c)** **In relation to the fourth aspect of the invention, the Defendants employed a method of preparing a tree for standing-stem harvesting directly from the stump comprising: topping the tree, cutting through the trunk to make a pair of horizontal saw cuts**

**parallel to one another and separated by holding wood, and**

**driving in support wedges to stabilize the trunk.**

59. By reason of the use by the Defendants of the helicopter single stem harvesting system the Defendants have infringed the exclusive right, privilege and liberty of the Plaintiffs in one or more of Claims #1 through 35 of the Harvesting Patent.

60. The Defendants and each of them, with the exception of the Defendant, VIH Logging Ltd., have induced infringement of method Claims #1-16 and #26-35 of the Harvesting Patent doing the following:

[…]

(e) **The Defendant, Island Timberland, induced an unknown contractor to employ the methods of the inventor as set out in paragraphs 31, 32, 34 and 57.1, by hiring them to harvest timber in a manner, or acting recklessly knowing that they would employ the methods of the inventor, that they would infringe on the Plaintiffs' patent rights.**

Annex “B”

*Federal Courts Rules*, SOR98/106

Motion to strike

**221.** (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it

(*a*) discloses no reasonable cause of action or defence, as the case may be,

(*b*) is immaterial or redundant,

(*c*) is scandalous, frivolous or vexatious,

(*d*) may prejudice or delay the fair trial of the action,

[…]

(*f*) is otherwise an abuse of the process of the Court,

and may order the action be dismissed or judgment entered accordingly.

.

*Règles des Cours fédérales*, DORS/98-106

Requête en radiation

**221.** (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d’un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :

*a*) qu’il ne révèle aucune cause d’action ou de défense valable;

*b*) qu’il n’est pas pertinent ou qu’il est redondant;

*c*) qu’il est scandaleux, frivole ou vexatoire;

*d*) qu’il risque de nuire à l’instruction équitable de l’action ou de la retarder;

…

*f*) qu’il constitue autrement un abus de procédure.

Elle peut aussi ordonner que l’action soit rejetée ou qu’un jugement soit enregistré en conséquence.

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | T- 56-06 |
| **STYLE OF CAUSE:** | HELI TECH SERVICES (CANADA) LTD., ET AL v. WEYERHAEUSER COMPANY LIMITED, ET AL |
| **PLACE OF HEARING:** | Vancouver, British Columbia |
| **DATE OF HEARING:** | April 23, 2009 |
| **REASONS FOR ORDER AND ORDER:** | O'REILLY J. |
| **DATED:** | June 8, 2009 |

**APPEARANCES:**

| | |
|---|---|
| Derek C. Creighton | FOR THE PLAINTIFFS |
| J. Kevin Wright | FOR THE DEFENDANTS ISLAND TIMBERLANDS GP LTD. And BRASCAN TIMBERLANDS MANAGEMENT GP INC |
| Mark S. Oulton<br>Jacqueline D. Hughes | FOR THE DEFENDANTS CASCADIA FOREST PRODUCTS LTD., TIMBERWEST FOREST CORP.; INTERNATIONAL FOREST PRODUCTS LIMITED |
| Mark Fancourt-Smith | FOR THE DEFENDANT CANADIAN AIR-CRANE LIMITED |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| ACCESS LAW GROUP<br>Vancouver, BC | FOR THE PLAINTIFFS |
| DAVIS & COMPANY LLP<br>Vancouver, BC | FOR THE DEFENDANTS ISLAND TIMBERLANDS GP LTD. And BRASCAN |

| | |
|---|---|
| | TIMBERLANDS MANAGEMENT GP INC |
| HUNTER LITIGATION CHAMBERS<br>Vancouver, BC | FOR THE DEFENDANTS CASCADIA FOREST PRODUCTS LTD., TIMBERWEST FOREST CORP.; INTERNATIONAL FOREST PRODUCTS LIMITED |
| FASKEN MARTINEAU DUMOULIN LLP<br>Vancouver, BC | FOR THE DEFENDANT CANADIAN AIR-CRANE LIMITED |