

2012-01 — Dimock Stratton’s Intellectual Property Law Newsletter

Date: January 2012

Contents

- I. Headlines
 - I.1 Patents — subject matter — purposive construction — “physicality” requirement for inventions — business methods
 - I.2 PM(NOC) — norfloxacin — s. 8 damages — transitional provision — meaning of “pending application”
 - I.3 Patents — infringement — olanzapine — sound prediction — sufficiency of disclosure
 - I.4 Trademarks — copyright — infringement — restaurant appearance and trade dress
 - I.5 PM(NOC) — brimonidine tartrate and timolol maleate — invalidity — obviousness — inventive concept — inducement of infringement
 - I.6 Patents — anticipation — obviousness — “generally” in claims allowing for small variations — disclosure by first use of rental equipment
 - I.7 Patents — infringement — clopidogrel bisulfate — sound prediction — obvious to try
 - I.8 Defamation — website — *ex parte* interlocutory injunction
- II. Other Cases
 - II.1 Court Decisions
 - II.2 Applications for leave to appeal to the Supreme Court of Canada
- III. News
 - III.1 Trademarks — amendment to Wares and Service Manual

I — Headlines

I.1 — Patents — subject matter — purposive construction — “physicality” requirement for inventions — business methods

The Commissioner of Patents appealed from the Federal Court’s earlier decision quashing the Commissioner’s refusal of Amazon.com’s patent application for its “one-click” ordering system, *Amazon.com Inc., Re* (2010), (sub nom. *Amazon.com, Inc. v. Canada (Attorney General)*) 324 D.L.R. (4th) 193, (sub nom. *Amazon.com Inc. v. Canada*) [2010] 4 F.C.R. 541, 2010 FC 1011, 2010 CarswellNat 3730, 2010 CarswellNat 3731, 2010 CF 1011, (sub nom. *Amazon.com Inc. v. Canada (Attorney General)*) 376 F.T.R. 288 (Eng.), (sub nom. *Amazon.com, Inc. v. Canada (Attorney General)*) 86 C.P.R. (4th) 321 (F.C.). In refusing Amazon.com’s application on the basis that its subject matter

did not qualify for patent protection under s. 2 of the *Patent Act*, the Commissioner had applied four different types of analysis which involved: the parsing of the claims to assess only their novel or inventive elements; dissection of the claims to evaluate “form” and “substance”; a ruling that business methods were, *per se*, unpatentable; and the imposition of a “technological” contribution requirement. The Federal Court found that the Commissioner erred; among other findings, it was held that there was no categorical exclusion of business methods from patentability, that the “technological” requirement was unclear, and that a purposive construction should be applied when examining the application’s claims to determine whether the subject matter was patent-eligible. The Court had returned the application to the Commissioner for examination on an expedited basis, subject to the directive that the claimed subject matter was statutory.

The Commissioner’s assessment of a patent application under s. 27(1) of the *Patent Act* to determine whether all of the statutory requirements for a patent are met is, in a sense, a determination of validity. The Commissioner argued that determination of the issue of patentable subject matter requires a determination of what, within the scope of the claims, the inventors had “actually” invented. While the “actual invention” by the inventors may be relevant for certain issues, the Supreme Court of Canada in *Free World Trust* and *Whirlpool* requires that the identification of the actual invention be grounded in a purposive construction of the claims. It cannot be based on a literal reading of the claims, or a determination of the “substance of the invention”. A purposive construction assists in identifying claims to unpatentable subject matter that are “deceptively” worded.

The Federal Court of Appeal noted that the Commissioner’s assessment of a patent application under s. 27(1) to determine whether all of the statutory requirements for a patent are met is, in a sense, a determination of validity. The Commissioner argued that determination of the issue of patentable subject matter requires a determination of what, within the scope of the claims, the inventors had “actually” invented. While the “actual invention” by the inventors may be relevant for certain issues, the Supreme Court of Canada in *Free World Trust* and *Whirlpool* requires that the identification of the actual invention for the purpose of validity be grounded in a purposive construction of the claims. It cannot be based on a literal reading of the claims, or a determination of the “substance of the invention”. The purposive construction assists the Commissioner in identifying claims to unpatentable subject matter that are “deceptively” worded as claims to patentable arts and processes.

As for the requirement that patentable subject matter be “technological” in nature, the Federal Court of Appeal agreed that it was vague and should not be used as a stand-alone test. If the term was intended to distinguish subject matter from the fine arts or works of art, then the “technological” requirement would be correct.

The Court also agreed with the lower court’s finding that Canadian jurisprudence did not state conclusively that business methods were unpatentable. However, a business method that is an abstract idea does not become patentable sub-

ject matter simply because it has a practical embodiment or application. Patentable subject matter must have a physical existence, or manifest a discernible effect or change, which was labelled the “physicality requirement”. However, the Court did not agree, to the extent that this was suggested by the lower court, that this physicality requirement could be met merely by the invention having a practical application. This was consistent with an earlier Federal Court of Appeal decision, in a case where a computer was programmed with a novel mathematical formula and produced useful information, the fact that the computer was a practical, physical embodiment was insufficient.

With regard to claim construction, it was inappropriate for the lower court to construe the claims on the basis of the available record. Purposive construction should be carried out on the basis of a foundation of knowledge in the relevant art. In the case of patent application examination, the Commissioner has the benefit of the applicant’s submissions and the staff of the Patent Office. The Court typically relies on expert evidence, which was not available in this case. The Federal Court of Appeal was unable to determine from the record what the Commissioner would have concluded based on the correct principles.

Accordingly, the Federal Court of Appeal set aside the Federal Court’s order and ordered that the application be examined on an expedited basis in accordance with its reasons. Note: The Commissioner subsequently allowed Amazon.com’s patent application.

Amazon.com Inc., Re (2011), 2011 FCA 328, 2011 CarswellNat 4865 (F.C.A.), Sharlow, Trudel, Stratas J.J.A.

1.2 — PM(NOC) — norfloxacin — s. 8 damages — transitional provision — meaning of “pending application”

As a result of a prohibition order granted against Apotex in favour of Merck’s norfloxacin patent, and the subsequent setting aside of that order upon Apotex’s successful appeal to the Supreme Court, Apotex had brought an action for damages under s. 8 of the *PM(NOC) Regulations*. The Federal Court allowed that action, awarding damages pursuant to the amended *Regulations* that had come into force in 1998, four months before the Supreme Court decision. The transitional provision of the 1998 *Regulations* stated that the amended s. 8 provision applied to an application “pending on the coming into force of these *Regulations*.” In view of the compulsory license between Merck and Novopharm for norfloxacin, and the reciprocal agreement between Apotex and Novopharm, Apotex would have been able to get its material from Novopharm and market its product a year after it would have received its NOC in June 10, 1993. Therefore, the Federal Court held that Apotex was entitled to be compensated for its losses from June 10, 1994, to July 9, 1998, the date of the Supreme Court order. On appeal, Merck challenged the application of the 1998 *Regulations* on the basis that only the Supreme Court appeal was pending and not the application for prohibition order, the validity of the amended regulations, and also challenged the finding that Apotex was entitled to losses starting from June 10, 1994.

The appeal was dismissed with costs. The application was properly pending in 1998. The correct test for determining whether an application is “pending” was to ask “whether the application remained alive either at first instance, or an appeal.” Merck’s application at the Supreme Court was definitely pending. The Supreme Court had the power to give a judgement the application court could have given, such as dismissing Merck’s application (which it did) or amending its Notice of Application. As for validity, Merck alleged that the amended *Regulations* were invalid because they had a retroactive effect, or interfered with Merck’s vested rights. The Court held that no one had a vested right in the continuation of substantive standards in the law. Unlike jurisprudence finding a vested right in a limit of damages, there were no such rights removed by the amended *Regulations*. Further, they were not retrospective; they did not create new reasons for liability, but rather clarified the liability of patent holders. Merck was always subject to a “black box” of potential liability, in view of the Court’s discretion in awarding damages, and the inherent obscurity of the previous s. 8 provision. As for the date of Apotex’s entitlement to losses, a holistic assessment of the evidence supported this conclusion.

Apotex Inc. v. Merck & Co. (2011), 2011 CarswellNat 4918, 2011 FCA 329 (F.C.A.), Sexton, Layden-Stevenson, and Stratas JJ.A.

1.3 — Patents — infringement — olanzapine — sound prediction — sufficiency of disclosure

The plaintiffs sued Novopharm for infringement of Canadian Patent No. 2,041,113 (the 113 Patent), a selection patent for olanzapine. Olanzapine was also within the subject matter of an earlier Lilly patent, No. 1,075,687 (the 687 Patent), a genus patent covering 15 trillion compounds all with a similar chemical structure. The action was dismissed primarily on the basis that Lilly was not entitled to a second patent for olanzapine, but on appeal it was held that the trial judge had erred in his approach. The Federal Court of Appeal concluded that the 113 Patent was not invalid for anticipation, double patenting, or obviousness, and referred the issues of utility and sufficiency back to the trial judge for determination.

Held, the 113 Patent was invalid for lack of utility, and the patent infringement action was dismissed with costs. The issues of utility and sufficiency were determined on the basis of the evidentiary record generated by the first trial. The promise of the patent was that olanzapine was substantially better in the clinical treatment of schizophrenia than other known anti-psychotics, with a better side-effects profile and a high level of activity at low doses. The evidence did not support a *prima facie* reasonable inference that olanzapine would treat schizophrenia in a markedly superior manner with a better side-effects profile than other anti-psychotics. The anti-psychotic effect was, at best, comparable to that of conventional anti-psychotics. Further, the evidence did not create a line of reasoning to support a prediction of substantial advantages of olanzapine over flumezapine and ethyl olanzapine, two compounds of the 687 Patent. Therefore, the 113 Patent was held invalid. With respect to the sufficiency of disclosure,

the patent satisfactorily described the compound of the invention, its advantages, how to make it, and the range within which it can be dosed.

Eli Lilly Canada Inc. v. Novopharm Ltd. (2011), 2011 FC 1288, 2011 CarswellNat 4703 (F.C.), O'Reilly J.

1.4 — Trademarks — copyright — infringement — restaurant appearance and trade dress

In this dispute over a restaurant concept, the plaintiff successfully enforced a registered trademark in restaurant trade dress.

The plaintiff franchised a restaurant concept named “The Symposium Café” featuring the display of School of Athens art, and held a number of trademark registrations relating to various wordmarks and designs, as well as one registration for a three-dimensional restaurant appearance. Two restaurants in the chain were seized by a creditor, and subsequent minutes of settlement transferred the assets of the two restaurants to the creditor, who was entitled to sell them either within or outside the Symposium Café franchise system. The assets were subsequently sold to the defendants on an “as is” basis. The plaintiff proposed that the new owner join the Symposium Café franchise system for \$17,500. The defendants declined, so the plaintiff requested that all signs, menus and other marketing materials associated with the Symposium Café be removed. The defendants continued to operate the restaurants under the name “Café Mirage”, but retained the appearance, trade dress, trademarks and menus of the Symposium Café. Accordingly, the plaintiff sued for trademark and copyright infringement, and sought an injunction.

The defendants were held liable for trademark and copyright infringement. The defendants did not acquire the right to unrestricted use of the plaintiff’s trademarks with the asset purchase. The rights acquired were to use the trademarks within the Symposium Café franchise, which ceased when they declined to join the franchise and the Symposium Café Group served notice to desist from using the marks. The plaintiff held copyright in the Symposium Café menus, which was not disproved by the defendants. Copyright was infringed through the defendant’s use of its menus. Finally, the plaintiff was entitled to retrieve its signs, bearing its trademark, once the defendants declined to join the Symposium Café Group and were served notice.

Damages of \$30,000 were awarded for trademark infringement and \$7,500 for copyright infringement. Ten thousand dollars were awarded for the non-return of two signs. One individual defendant was held personally liable along with the corporate defendants, given his personal involvement and his acknowledgement that he did not separate the defendant companies’ activities from his own affairs. The defendants were enjoined from infringing the plaintiffs’ rights. The defendants were also enjoined from displaying School of Athens art in its restaurants or on signage or materials otherwise promoting their restaurants.

1429539 Ontario Ltd. v. Café Mirage Inc. (2011), 2011 CarswellNat 4648, 2011 FC 1290 (F.C.), Mandamin J.

1.5 — *PM(NOC)* — brimonidine tartrate and timolol maleate — invalidity — obviousness — inventive concept — inducement of infringement

Allergan applied for a prohibition order under the *PM(NOC) Regulations* in respect of Sandoz’s proposed generic version of a combination brimonidine tartrate and timolol maleate glaucoma drug, until the expiration of Allergan’s CA 2,440,764 (the 764 Patent) and CA 2,225,626 (the 626 Patent). The 764 Patent claimed ophthalmic topical pharmaceutical compositions for the treatment of glaucoma or ocular hypertension comprising brimonidine (0.2%), timolol (0.5%) and the preservative BAK (0.001% to 0.01%) in a pharmaceutically acceptable carrier. The 626 Patent claimed use of certain compounds, including brimonidine, to protect the optic nerve and retina of the mammalian eye from suffering damage from a noxious action or experiencing the risk of noxious action. Sandoz alleged obviousness of the 764 Patent and non-infringement as well as invalidity of the 626 Patent on the basis of inutility and lack of sound prediction.

The prohibition application was granted in part, with costs. A prohibition order was granted with respect to the 764 Patent and denied with respect to the 626 Patent. Sandoz’s allegation of obviousness of the 764 Patent was not justified. Applying the *Sanofi* framework, the applications judge noted that where the inventive concept of the claims was not readily discernible from the claims themselves, it was both necessary and permissible to look to the balance of the patent to determine its inventiveness. It was therefore held that the inventive concept of the 764 patent included certain advantages of the claimed composition over the prior art, and the question was whether these advantages would have been obvious. In the context of “obvious to try”, the question was whether it was more or less self evident that the composition of the 764 would not only work but would also offer those differences, and whether the solutions for achieving the composition were predictable and known to the person skilled in the art. The differences were found not to be obvious to try.

Turning to the 626 Patent, Allergan argued that one sentence and one reference in the product monograph regarding the neuroprotective effect of brimonidine would induce doctors and pharmacists to prescribe or dispense Sandoz’s drug to patients for the neuroprotective use claimed by the 626 Patent. The applications judge preferred Sandoz’s evidence that a physician reading the neuroprotection information sentence and reference would not be so influenced. It was not sufficient for Allergan to simply demonstrate that an off-label prescription would be made by doctors, dispensed by pharmacists and subsequently consumed by patients; there needed to be “something more” to establish infringement by inducement.

The allegations of inutility and lack of sound prediction of the 626 Patent were not justified. The promise of the patent was that the compounds specified, including brimonidine, would have a neuroprotective effect upon retinal or optic nerves in humans, and this effect would be achieved through a mechanism unre-

lated to intraocular pressure. The applications judge preferred Allergan’s evidence of utility, noting that Allergan was not required to unequivocally demonstrate that topically applied brimonidine has a neuroprotective effect; a mere scintilla of utility would suffice. Further, Allergan’s evidence of affirmative findings of neuroprotective activity based on in vivo rat studies would lead the person skilled in the art to understand that it was likely that brimonidine would have the same level of efficacy as a neuroprotective agent in humans. This line of reasoning, which was disclosed in the 626 Patent, was *prima facie* reasonable and entirely sound. Further, in vivo animal studies are sufficient for establishing sound prediction.

Allergan Inc. v. Canada (Minister of Health) (2011), 2011 FC 1316, 2011 CarswellNat 4763 (F.C.), Crampton J.

1.6 — Patents — anticipation — obviousness — “generally” in claims allowing for small variations — disclosure by first use of rental equipment

The plaintiff alleged infringement of its patent relating to increasing the off-bottom load capacity of a bearing assembly used in the drilling of oil and gas wells. The defendants conceded infringement if the patent claims were valid, but counterclaimed for invalidity on the basis of anticipation, obviousness and inutility.

The Court applied the two-step *Sanofi* test for anticipation. One of the essential elements of the claims was that shoulders on an inner tubular member were “generally” aligned or parallel to shoulders on an outer tubular member so as to define a containment chamber. The only difference between the asserted prior art bearing assembly and the claims was that the prior art bearing assembly had bevelled shoulders, while the claims did not specifically refer to bevelled shoulders. However, based on expert evidence the bevelled shoulders were found to be parallel, and the use of the term “generally” in the claims permitted “small variations to be made to the majority, but perhaps not all, of the shoulder surfaces” of the patent. The prior art bearing assembly was found to fall within the scope of the patent claims.

The defendants demonstrated that the prior art bearing assembly was used on a job site prior to the relevant date. At the job site, assemblies were available for more than a visual inspection, and were available for dismantling, although the assemblies were rented. It was irrelevant whether a dismantling had actually occurred. There was no evidence to suggest that the disclosure of the bearing assemblies was made in confidentiality. Further, although the cited use of the bearing assemblies was their first use, it was not held to be experimental because it was not experimental use in the mind of the customer. Despite attacks on the credibility of the evidence, the Court found that it was more likely than not that the bearing assembly was designed and used prior to the claim date. Accordingly, there was sufficient disclosure and enablement, and the asserted claims were therefore invalid.

The Court applied the *Sanofi* test for obviousness and concluded again that the claims were invalid. The inventive concept was the placement of one or more bi-directional thrust bearings into a single containment chamber with shoulders placed within the chamber such that the same bearings could handle both off-bottom and on-bottom loads during a drilling operation. A prior art core drill demonstrated the use of bi-directional bearings with a containment chamber in the context of core barrels. The differences between the core drill and the inventive concept were minor and related to the different applications of the bearing assemblies. The difference between a prior art core barrel and the patent in suit would not have prevented the person of ordinary skill in the art from applying the bearing assembly of the core barrel to a bearing assembly for a downhole drilling motor. The Court also observed that the fact that the inventor had completed the patented design in only one to two months also favoured a finding of obviousness.

The Court did not rule on utility in light of the finding of anticipation and obviousness. However, it was noted that the defendants' arguments regarding inutility failed to clearly define the promise of the patent and their experts appeared unfamiliar with the term and unable to provide a comprehensible response. Moreover, the defendants' experts attacked the durability of the bearing assembly, which was not a promise of the patent.

Accordingly, the patent was held invalid. With respect to costs, the recovery of fees and disbursements relating to experts was limited to 60%. The defendants had retained three engineering experts, and there was considerable overlap. One or two could have provided the necessary opinions to the Court.

Wenzel Downhole Tools Ltd. v. National-Oilwell Canada Ltd. (2011), 2011 CarswellNat 5065, 2011 FC 1323 (F.C.), Snider J.

1.7 — Patents — infringement — clopidogrel bisulfate — sound prediction — obvious to try

This was a consolidation of an impeachment action and an infringement action related to the drug clopidogrel bisulfate. In a prior PM(NOC) proceeding, *Sanofi-Synthelabo Canada Inc. v. Apotex Inc.* (2008), 2008 SCC 61, 2008 CarswellNat 3844, 2008 CarswellNat 3845, (sub nom. *Apotex Inc. v. Sanofi-Synthelabo Canada Inc.*) [2008] 3 S.C.R. 265, [2009] F.S.R. 7, 69 C.P.R. (4th) 251, [2008] S.C.J. No. 63, 381 N.R. 125, 298 D.L.R. (4th) 385 (S.C.C.), the Supreme Court affirmed a prohibition order in respect of the selection patent CA 1,336,777 and laid down the leading authority for the issues of anticipation and obviousness. Apotex then commenced an impeachment action, and Sanofi an infringement action. Sanofi alleged that Apotex infringed the 777 Patent by manufacturing clopidogrel-containing products in Canada for export to other countries.

Apotex's impeachment action was allowed and Sanofi's infringement action was dismissed. Although the Supreme Court's statements of law were binding,

the Federal Court in this instance was not bound by the findings of fact due to the different record before the Court.

Apotex's importation, manufacture, exportation, and possession for commercial purpose of bulk clopidogrel and clopidogrel tablets were infringing acts. Apotex's process was a "mere tweaking" of the claimed process as the only difference was an additional step. Section 55.2(1) of the *Patent Act* as a defence on basis that use of clopidogrel was required for regulatory purposes. The Court was satisfied that there was use of clopidogrel that should be considered in the circumstance of "fair dealing". The Court held, however, that Apotex had not met its burden of proving that such an exception applied because it failed to provide evidence as to what was ultimately done with the clopidogrel. The Court held that the six-year limitation provided by s. 55.01 of the Patent Act did not apply to an "Old Act" patent. Instead, the Court applied a six-year limitation period pursuant to s. 39(2) of the *Federal Courts Act* rather than a provincial limitation period, since the infringement was not restricted to one province. Apotex advanced defences of a U.S. settlement agreement, estoppel and abuse of process. The U.S. settlement agreement did not mention the 777 Patent or Canada, and those terms could not be implied. The U.S. litigation pertaining to clopidogrel did not preclude Canadian litigation because the cases dealt with different patents and issues.

Arguments of overbreadth, insufficiency, anticipation and double patenting were rejected. However, the 777 Patent failed to demonstrate utility in humans at the relevant date. The human studies were concluded after the filing date of the patent. As for sound prediction, the promise of the patent was construed to be the use of the compound in humans, rather than the *potential* for the use of the compound in humans. The patent only promised some degree of activity, tolerability and toxicity difference in humans over the racemate or the levo-rotatory enantiomer. There was a factual basis for a *prima facie* reasonable inference of utility. Sanofi's extensive research with the class of compounds and both short-term and long-term testing on many species of animals supported a factual basis for its prediction of utility in treating humans. Sanofi also demonstrated a sound line of reasoning that was *prima facie* reasonable. Based on Sanofi's knowledge of clopidogrel stereochemistry, toxicology, haematology and metabolism, and its established track record with the class of compounds, the Court found a sound line of reasoning to predict the promised utility. However, despite Sanofi's work to establish a factual basis and line of reasoning, the disclosure of that work in the 777 Patent was insufficient. Accordingly, the claims were invalid for lack of sound prediction.

With respect to obviousness, the invention included salts and their advantages. The few methods of salt formation were well-known at the relevant time and the person of ordinary skill in the art would have known that they ought to have worked. Salt resolution methods were routine. Further, there were a number of events in the 1980s leading to a paradigm shift in the expectation of the scientific community to separate stereoisomers prior to the invention date. Thus, there was motivation to separate clopidogrel. The actual course of conduct indicated

by the lab notebook revealed no substantial difficulty in separating clopidogrel. Sanofi alleged earlier invention dates that were not supportable, because the properties of the salts had not been ascertained at that time. Without the salts, the invention could not be said to have been reduced to a definite and practical shape.

In evaluating the prior art, conference abstracts for the clopidogrel racemate were held not to form part of the common general knowledge of the person of ordinary skill in the art, because they would not have been available by way of a reasonably diligent search at the relevant time. The racemate compound was part of the common general knowledge at the relevant time but its properties were not.

Apotex Inc. v. Sanofi-Aventis Canada Inc. (2011), 2011 CarswellNat 5423, 2011 FC 1486 (F.C.), Boivin J.

1.8 — Defamation — website — ex parte interlocutory injunction

The applicant sought an *ex parte* interlocutory injunction against the operation of an allegedly defamatory website by the defendants at “www.deepcapture.com”. The plaintiff sought to enjoin the author of the allegedly defamatory work, the operator of the website and the owner of the operator from further publishing defamatory materials against the applicant on the Internet or in any other form of publication; the domain name registrar from allowing operation of or transfer of the domain name registration for deepcapture.com; the host from allowing Internet access to any website files at that domain name or any future website referring to the plaintiff; and Google Inc. and Google Canada from returning search results from the impugned website.

An interim injunction was granted, subject to extension by the Court on notice to the defendants. The plaintiff showed that the material was manifestly defamatory such that any jury verdict to the contrary would be considered perverse, and that he was also likely to suffer irreparable harm, since a damaged reputation was irreversible.

With respect to the *ex parte* nature of the injunction, the Court found that requiring the plaintiff to give notice to the defendants would render the relief sought ineffective, since the defendants (author and operator of the website) could simply locate their domain name and website somewhere else or set up a differently named website, which would make it impossible to track down and remove the offending materials. Similarly, had notice been given to the host and domain registrar, they would likely notify the author, which would again result in the transfer of the website to evade interception. While the Court expressed reluctance in issuing the injunction against Google, on the balance of convenience, it was proper to grant the injunction in view of the pervasive nature of the material throughout the website, the plaintiff’s undertaking for damages and the temporary nature of the injunction.

Nazerli v. Mitchell (2011), 2011 BCSC 1581, 2011 CarswellBC 3064 (B.C. S.C. [In Chambers]), Grauer J.

II. — Other Cases

II.1 — Court Decisions

Practice — PM(NOC) — pending appeal — motions to stay and to expedite dismissed

Astrazeneca Canada Inc. v. Mylan Pharmaceuticals ULC (2011), 2011 FCA 312, 2011 CarswellNat 4717 (F.C.A.), Stratas J.A.

Trademarks — expungement — no palpable or overriding error

Empresa Cubana del Tabaco Trading v. Shapiro Cohen (2011), 2011 FCA 340, 2011 CarswellNat 5501, 2011 CAF 340, 2011 CarswellNat 5405 (F.C.A.), Dawson, Gauthier, Trudel JJ.A.

Trademarks — opposition — low inherent distinctiveness — bilingual market

Nautilus Plus Inc. c. Centres Stop Inc. (2011), 2011 CAF 342, 2011 CarswellNat 5591 (F.C.A.), Noël, Pelletier, Trudel JJ.A.

Innovative drugs — judicial review — standing to challenge listings on Register of Innovative Drugs

Canadian Generic Pharmaceutical Assn. v. Canada (Minister of Health) (2011), 2011 CarswellNat 5400, 2011 FCA 357 (F.C.A.), Noël, Dawson, Trudel JJ.A.

Practice — judicial review — no extension of time granted in respect of refusal to grant NOC

Apotex Inc. v. Canada (Minister of Health) (2011), 2011 FC 1308, 2011 CarswellNat 4727, 2011 CarswellNat 5495, 2011 CF 1308 (F.C.), Barnes J.

Practice — taking of commission evidence in a re-opened trial

Varco Canada Ltd. v. Pason Systems Corp. (2011), 2011 FC 1318, 2011 CarswellNat 4767 (F.C.), Phelan J.

Trademarks — expungement — design mark — essential feature

Convenience Food Industries (Private) Ltd. v. Clic International Inc. (2011), 2011 FC 1338, 2011 CarswellNat 4862 (F.C.), Martineau J.

Costs — innovative drugs — genuine interest in bringing proceeding

Canadian Generic Pharmaceutical Assn. v. Canada (Minister of Health) (2011), 2011 CarswellNat 4876, 2011 FC 1345, 2011 CF 1345 (F.C.), de Montigny J.

Practice — PM(NOC) — reversal of order of evidence — case management

Astrazeneca Canada Inc. v. Teva Canada Ltd. (2011), 2011 FC 1377, 2011 CarswellNat 5046 (F.C.), Hughes J.

Trademarks — expungement — reinstatement on new evidence

Locke v. Osler, Hoskin & Harcourt LLP (2011), 2011 FC 1390, 2011 CarswellNat 5067 (F.C.), O’Keefe J.

Trademarks — opposition — common use of MARCHÉ in food trade leading consumers to focus on other mark features — no likelihood of confusion

Mövenpick Holding AG v. Exxon Mobil Corp. (2011), 2011 FC 1397, 2011 CarswellNat 5141 (F.C.), Harrington J.

Copyright — pre-judgment interest — statutory damages precluding claim for unpaid provincial license fees and pre-judgment interest

Society of Composers, Authors & Music Publishers of Canada v. IIC Enterprises Ltd. (2011), 2011 FC 1399, 2011 CarswellNat 5087 (F.C.), Lemieux J.

Pleadings — amendment — contributory infringement not reasonable cause of action

Apotex Inc. v. Nycomed Canada Inc. (2011), 2011 FC 1441, 2011 CarswellNat 5280 (F.C.), Simpson J.

Costs — PM(NOC) s. 8 — date from which party entitled to costs

Teva Canada Ltd. v. Wyeth LLC (2011), 2011 FC 1442, 2011 CarswellNat 5266 (F.C.), Hughes J.

Innovative drugs — enantiomer as variant — no breach of duty of fairness in refusing to consider clinical data

Takeda Canada Inc. v. Canada (Minister of Health) (2011), 2011 FC 1444, 2011 CarswellNat 5267 (F.C.), Barnes J.

Practice — motion to compel

Sanofi-Aventis Canada Inc. v. Laboratoire Riva Inc. (2011), 2011 FC 1469, 2011 CarswellNat 5265 (F.C.), Mandamin J.

Trade secrets — non-solicitation — summary trial judgment set aside due to error in contract construction

Jones v. Mirminachi (2011), 2011 BCCA 493, 2011 CarswellBC 3488 (B.C. C.A.), Prowse, Frankel and Hinkson JJ.A.

Trade secrets — no communication of information in confidence

Sabre Inc. v. International Air Transport Assn. (2011), 2011 CarswellOnt 13233, 2011 ONCA 747 (Ont. C.A.), Barnes J.

Ontario Drug Benefit Act — regulations banning private label generic drugs intra vires

Shoppers Drug Mart Inc. v. Ontario (Minister of Health & Long-Term Care) (2011), 2011 CarswellOnt 14816, 2011 ONCA 830 (Ont. C.A.), MacPherson, Epstein, Karakatsanis J.J.A.

Practice — extension of time to serve pleading — two actions based on same facts not abuse of process

Applied Process Technology International, LLC v. Terra Grain Fuels Inc. (2011), 2011 SKQB 452 (Sask. Q.B.), McMurtry J.

Copyright — infringement — bankruptcy — rights assigned by trustee

Latour c. 6921086 Canada inc. (Édikom), 2011 QCCQ 14817, Dupuis J.

II.2 — Applications for leave to appeal to the Supreme Court of Canada

Practice — PM(NOC) — motion to set aside order — fraud or irregularity

Pfizer Canada Inc. v. Canada (Minister of Health) (2011), 2011 CarswellNat 5301, 2011 CarswellNat 5302 (S.C.C.), McLachlin C.J., Rothstein, Moldaver J.J., application for leave to appeal from *Pfizer Canada Inc. v. Canada (Minister of Health)* (2011), 336 D.L.R. (4th) 49, 2011 CarswellNat 4620, 2011 CAF 215, 2011 CarswellNat 2517, 2011 FCA 215, 420 N.R. 337, 95 C.P.R. (4th) 1 (F.C.A.) dismissed with costs.

III — News

III.1 — Trademarks — amendment to Wares and Service Manual

The Trade-marks Office amended the Wares and Services Manual to include terms compliant with para. 30(a) of the *Trade-marks Act*, effective 24 November 2011. The Wares and Services User Guide was also updated to include sections on postage stamps, medicated preparations and postal services, as well as to update the section on indefinite terms.

Dimock Stratton's Intellectual Property Newsletter is edited by Jenna Wilson

