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ARTICLE

## Intellectual Property Weekly Abstracts Bulletin — Week Of January 30, 2017

### Patent Decisions

Unparticularized Allegations Made Pursuant to S. 53 Struck Without Leave to Amend  
[Apotex Inc. v. Shire LLC, 2016 FC 1267](#)  
Drug: lisdexamfetamine dimesylate

In this case, Apotex started an action to impeach Shire's patent relating to lisdexamfetamine dimesylate. Shire brought a motion to strike portions of Apotex's Reply.

The Court held that Section 53 allegations are essentially allegations of fraud and of a state of mind, and pursuant to Rule 181, require full particulars. Here, the pleadings failed to identify exactly who made what statements to the Patent Office. Furthermore, they were bereft of particulars as to the factual basis upon which the Court might be able to conclude that this person or persons knew, at the time, that the statements were false, or that these persons intended to mislead the Patent Office with these statements. There were only vague allegations that Shire made assertions as to the utility of the invention and now denies that these assertions amount to utility.

The Court held that implicit allegations of fraud such as these are not proper pleadings. Such pleadings may be saved if the material facts can be inferred from the pleadings or representations of a party on a motion to strike. However, that is not the case here.

Shire sought to strike a further paragraph. However, the Court held that it was a statement of legal conclusion, that does not open the door for Apotex to rely on or have discovery with respect to any fact that is already not specifically pleaded as a basis for arguing ambiguity. Parties are free to argue any legal consequence supported by the facts pleaded, thus, it is a waste of the Court's time to move to strike a legal conclusion. Thus, this portion of the motion was dismissed.

Despite the divided success, the Court awarded elevated costs to Shire because Apotex's allegations of s.53 fraud were made casually and thoughtlessly.

Court Dismisses Alexion's Appeals from Three Separate Orders  
[Alexion Pharmaceuticals Inc. v. Canada \(Attorney General\), 2017 FC 22](#) and  
[Alexion Pharmaceuticals Inc. v. Canada \(Attorney General\), 2017 FC 21](#)  
Drug: eculizumab

The Court dismissed Alexion's appeals concerning three separate Orders. The first appeal concerned Prothonotary Aalto's Order allowing the Respondent's motion to strike Alexion's constitutional challenge to the price regulation scheme found in sections 83-86 of the *Patent Act*. The Court agreed with Prothonotary Aalto that the Court in *Canada (Attorney General) v. Sandoz Canada Inc.* (2015 FCA 249) is the binding authority. Therefore, Prothonotary Aalto's decision was correct, and accordingly, the appeal was dismissed.

The second and third appeals concerned two Orders from Prothonotary Aylen. The first Order struck, as premature, Alexion's Application for Judicial Review of a decision of the PMPRB allowing certain amendments to the Board's Notice of Allegation. In the second Order, the Prothonotary dismissed as moot Alexion's motion for an order on consent protecting certain information as confidential. The Court found no palpable or overriding error in either decision, and accordingly, the appeals were dismissed.

Costs Awarded at the Higher End of Column IV, with Elevated Costs for Various Factors  
[Pollard Banknote Limited v. Babn Technologies Corp., 2016 FC 1193](#)

In this decision on costs, the Court award costs calculated at the top of column IV of Tariff B to the Plaintiff for its successful impeachment action.

The Court considered the factors listed under Rule 400(3). The Court had serious concerns on three issues, including the manner in which the Defendant dealt with one of its expert's testimony. According to the Court, it appeared likely that the Defendant and/or its counsel was aware before trial that it had no reliable expert evidence to defend against the Plaintiff's central issue in the case. Furthermore, the Court noted that the Defendant failed to address the situation in any way during trial, either in re-direct or in argument. The Court was also concerned about the Defendant's position on the Patent's construction, which was contrary to the position it took during prosecution of the patent application. While these grounds justified elevated costs, the Court was not convinced that the Defendant's conduct had been so reprehensible as to justify a lump sum award of costs.

### Trademark Related Decision

Decision on Passing Off and the Use of Internet Keywords is Reversed on Appeal  
[Vancouver Community College v. Vancouver Career College \(Burnaby\) Inc., 2017 BCCA 41](#)

The B.C. Court of Appeal has overturned a lower court decision that had dismissed a trademark passing off claim against the Defendant Vancouver Career College brought by the Plaintiff Vancouver Community College. (2015 BCSC 1470)

The Plaintiff alleged passing off its VCC mark.

The two schools offer programs that overlap to a degree. It was alleged that in 2009 the Defendant used keywords to direct traffic to its website VCCollege[.ca], including VCC, Vancouver Community College, and other educational institutions.

The Court of Appeal found that the trial judge had erred in appreciating the evidence of goodwill, finding that the Plaintiff had goodwill in the VCC mark, which was recognized in the relevant market-place as a public provider of post-secondary education. It was further held that confusion is to be assessed while the user is still on the internet, so it does not matter whether the user's misconceptions would be set straight later. Damage was inferred from the unauthorized use of goodwill, and thus the passing off claim was found to succeed.

The Plaintiff also has two official marks, VCC and VANCOUVER COMMUNITY COLLEGE. The Court of Appeal held it could not perform an appellate review of the order dismissing the claim of breach of official marks. This was remitted to the trial court for determination.

The issue of damages for the passing off claim was also remitted.

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