# Intellectual Property Weekly Abstracts Bulletin — Week Of November 7

November 09, 2016

## Patent Decisions

An unsuccessful defendant is not entitled to elect an accounting of profits to shield itself from an award of damages
Bayer Inc. v Cobalt Pharmaceuticals Company, 2016 FC 1192

On September 7, 2016, the Court held that Bayer's patent was valid and infringed (2016 FC 1013; our summary here). The parties were given an opportunity to make written submissions regarding Bayer's entitlement to elect between damages and an accounting of profits.

Apotex submitted that it should be entitled to make the election, and that Bayer should be restricted to an accounting of profits. The Court disagreed finding that the award of an equitable remedy, such as an accounting of profits, is at the Court's discretion, subject to the principles governing its availability. The Court noted that an unsuccessful defendant cannot invoke the Court's equitable jurisdiction to shield itself from an award of damages. Rather, at most, an unsuccessful defendant may oppose the grant of an equitable remedy based on considerations that have been recognized in the jurisprudence.

Bayer was entitled to damages and the parties agreed that an accounting of profits may also be an appropriate remedy. Therefore, the Court held that Bayer may elect between damages and an accounting of profits following discovery.

**Appeal relating to double patenting and sufficiency of tadalafil patent dismissed**
*Apotex Inc. v. Eli Lilly Canada Inc.*, 2016 FCA 267

The Federal Court of Appeal considered an appeal from Apotex relating to double patenting and insufficiency of a patent claiming the use of tadalafil to treat erectile dysfunction. The Court of Appeal had previously considered the issue of double patenting of this patent with a different generic company, Mylan (2016 FCA 119; our

summary here). The Court of Appeal dismissed Apotex's argument that the Mylan case was wrongly decided, and did not accept Apotex's arguments relating to insufficiency. The appeal was dismissed with costs.

# Supreme Court Updates

*Wael Maged Badawy v. Law Society of Alberta, et al.* (SCC Docket No. 37165)

The Supreme Court of Canada announced that judgment in the following application for leave to appeal will be delivered on Thursday, November 10, 2016. The following is the summary provided by the Supreme Court:

Civil procedure — Case management — Applicant seeking leave to add third parties, to file affidavit of documents and to have procedure set for summary trial – Whether Law Society of Alberta and Alberta Lawyers Insurance Association failed in their mandate and role in protecting the public from abuse and in advertising, marketing and selling legal services using applicant's registered trademark without permission or authorization.

Mr. Badawy is a plaintiff and a defendant by counterclaim in an action he launched in the Federal Court. Mr. Badawy sought leave to file a third party claim against the Alberta Law Society and the Alberta Law Insurance Association. He also requested leave to file an affidavit of documents and to have a summary trial procedure set.

# Industry Updates

On October 31, 2016, Bill C-30 titled "Canada-European Union Comprehensive Economic and Trade Agreement Implementation Act" was introduced in the House of Commons. This Bill seeks to implement the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States, done at Brussels on October 30, 2016.

The latest publication of the Bill can be found here.

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