Intellectual Property Weekly Abstracts Bulletin — Week of July 31, 2017

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Patent Decisions

Court of Appeal affirms judgment finding patent invalid due to insufficient disclosure

Idenix Pharmaceuticals, Inc. v. Gilead Pharmasset LLC., 2017 FCA 161

This is an appeal of the Federal Court's decision allowing Gilead's claim to invalidate Idenix's '191 Patent on the grounds of insufficient disclosure and lack of demonstrated utility/sound prediction. The Federal Court also dismissed Idenix's counterclaim that Gilead's subsequent patent, the '657 Patent, was invalid for anticipation (see 2015 FC 1156). Both patents at issue claim compounds having activity against the family of Flaviviridae viruses, including Hepatitis C.

On the issue of sufficiency, the Court of Appeal affirmed the Federal Court's conclusion that the '191 Patent was invalid for insufficiency of disclosure. Idenix had raised a number of issues including that the Trial Judge had not read the '191 Patent's disclosure from the perspective of the person skilled in the art with the benefit of common general knowledge. The Court of Appeal noted that the use of the term "express written disclosure" in the Reasons was not appropriate. However, the Court of Appeal concluded that it was apparent on a fair reading of the Reasons that the Trial Judge was concerned with how the skilled person would have understood the patent, and dismissed Idenix's allegations on this point. The Court of Appeal dismissed Idenix's other points on the issue of sufficiency.

Given the findings on insufficiency of the disclosure, the Court Appeal found it unnecessary to deal with Idenix's submissions on the '191 Patent's utility or on the '657 Patent's validity.

Decision to add Information Commissioner as a party to an ATI decision judicial review upheld by Court of Appeal

Apotex Inc. v. Canada (Health), 2017 FCA 160

The Federal Court of Appeal dismissed Apotex's consolidated appeals of the Federal Court's decision in 2016 FC 776. The Judge had dismissed Apotex's appeal of the

Prothonotary's Order, which granted the Information Commissioner leave to be added as a party to Apotex's application for judicial review. In the underlying application, Apotex applied for judicial review in relation to three separate but identical decisions of the Minister of Health to disclose information in response to an access to information request.

The Court of Appeal found that the Judge had not erred in refusing to interfere with the Prothonotary's order even though the Commissioner had not demonstrated it was a necessary party pursuant to Rule 104 of the *Federal Courts Rules*. Instead, the Court of Appeal concluded that the Judge was not bound to strictly apply Rule 104 to the Commissioner's request. In the Court of Appeal's view, the necessity test provided for in Rule 104 would undermine the intent of paragraph 42(1)(c) of the *Access to Information Act*, which grants the Commissioner the clear possibility of appearing as a party, with leave of the court, in judicial review proceedings before the Federal Court. The Court of Appeal noted that, when exercising discretion to grant leave under paragraph 42(1)(c), the court should be satisfied that the Commissioner would be of assistance to the court in the judicial review proceeding.

Decision refusing to strike inducement to induce infringement allegations affirmed
Elbit Systems Electro-optics Elop Ltd. v. Selex ES Ltd., 2016 FC 1129

In this recently reported decision, the Court dismissed an appeal of the Prothonotary's decision dismissing in part the Defendant's motion to strike portions of the statement of claim. In the underlying action, the Plaintiff claimed that the Defendant has, or will imminently infringe its patent, but also that the Defendant is inducing or procuring the infringement of the patent by a third party and the Canadian Government. Further, the plaintiff alleged that the third party has or will consequently induce infringement by the Government of Canada. The Defendant is a subcontractor of the third party, the prime contractor, which was awarded the upgrade contract from the Government of Canada. Neither the third party nor the Canadian Government were named as defendants, even though allegations were made that they both have or will directly infringe the patent.

The Court concluded that the Prothonotary did not err in law or make any palpable and overriding error in refusing to strike the impugned paragraphs, including those concerning inducement to induce infringement.

Quantum of over $644 million awarded to Dow
The Dow Chemical Company v. Nova Chemical Corporation, 2017 FC 637

Dow requisitioned a reference following a finding that its patent was valid and infringed by Nova. In the decision reported in 2017 FC 350, the Court provided reasons addressing the assumptions and other considerations that were to inform the calculations of damages and profits. In this supplemental decision, the Court addressed three outstanding issues and determined the quantum of damages and profits payable by Nova to Dow. The Court awarded Dow $644,623,550.00, inclusive of pre-judgment interest to April 7, 2017, together with pre-judgment interest.

Industry Updates

CIPO is conducting a public consultation on the proposed amendments to the Patent Rules from August 1 to September 8, 2017. See CIPO's notice for more information.

Health Canada has released a Notice: Validation rules for regulatory transactions provided to Health Canada in the "non-eCTD electronic-only" format.

Health Canada has announced Consultation on Proposed Modification to Bioequivalence Standards for Multiphasic Modified-Release Drug Products. The website indicates that the consultation is open for comment starting July 27, 2017 until September 25, 2017.

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