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Fox on the Canadian Law of Patents, Fifth Edition

Fox on the Canadian Law of Patents, Fifth Edition is the pre-eminent text for patent lawyers and agents in Canada. The fourth edition was repeatedly cited by courts including the Supreme Court of Canada. However, since its publication in 1969, there have been significant changes in Canadian patent law, including major statutory revisions in 1989 and 1996. The new edition brings the statement of the law up to date while retaining the jurisprudence as compiled by Dr. Fox to the extent that it remains relevant. Topics covered in this edition include: Invention, Subject Matter of Patents, Obviousness, Novelty, Utility, Application for a Patent, International Patent Protection, Dedication and Re-Examination, and Infringement and Remedies for Infringement.

This release features updates and additions to the commentary and case law in Chapters 1 (Introduction), 2 (Invention), 3 (The Subject Matter of Patents), 4 (Obviousness) and 5 (Novelty).

Case Law Highlights

Introduction

Apotex Inc. continues to assert claims for losses resulting from assertion of a patent ultimately held invalid based on the ancient *Statute of Monopolies*, which is asserted to remain a part of Ontario law. In *Apotex Inc. v. Pfizer Limited*, 2018 QCCS 1765,

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the Quebec Superior Court held that it had jurisdiction to decide such a claim.

Invention

Leave to appeal was refused by the Supreme Court of Canada from *Idenix Pharmaceuticals Inc. v. Gilead Sciences Inc. et al*, 2017 FCA 161, which dealt with several issues including inventorship, obviousness and anticipation.

The Subject Matter of Patents

In *Regents of the University of California's Application*, (2018) C.D. 1442, the Patent Office refused an application for methods for chronic delivery of neurotrophins into mammalian brain and the treatment of neurodegenerative diseases, concluding that the claimed essential elements entailed a level of stereotaxic surgery of the brain and hence a surgical step and the professional skills of a physician.

In *Hospira Healthcare Corporation v. Kennedy Trust for Rheumatology Research*, 2018 FC 259, the patent had “Swiss-form” claims for relating to a composition of infliximab (an anti-tumour necrosis factor- α antibody) for adjunctive use with methotrexate for the treatment of rheumatoid arthritis on a patient whose disease is incompletely controlled by methotrexate. Phelan J. rejected a submission that such claims were invalid as a method of medical treatment.

Computer implemented business methods in the financial and shipping fields were rejected by the Patent Office as non-patentable subject matter.

Obviousness

Obviousness (and novelty) issues were considered in:

- *The Regents of the University of California et al v. I-MED Pharma Inc.*, 2018 FC 164 relating to a system for measuring the osmolarity of a sample of bodily fluid, particularly a tear film using a sample receiving chip and generating a signal from it.
- *Hospira Healthcare Corporation v. Kennedy Trust for Rheumatology Research*, 2018 FC 259 relating to adjunctive use of methotrexate with infliximab methotrexate for the treatment of rheumatoid arthritis.
- *MIPS AB v. Bauer Hockey Ltd. et al*, 2018 FC 485 relating to head-protecting sports helmets, particularly hockey helmets.
- *Corning Cable Systems LLC Patent Application 2,679,996, Re*, (2018) C.D. 1440 relating to optical splitter modules to split a signal from a distribution cable into multiple signals to be carried on multiple cables.
- *Arctic Cat Inc. v. Bombardier Recreational Products Inc.*, 2018 FCA 125 relating to snowmobile engines – the Federal Court of Appeal affirmed the trial decision of obviousness.

Leave to appeal was refused by the Supreme Court of Canada from *Ciba Specialty Water Treatments Limited v. SNF Inc.*, 2017 FCA 225, in which Pelletier J.A. suggested the need for the Supreme Court to develop a workable definition of “inventive concept”.

In *Trading Technologies International, Inc.’s Patent Application 2,541,215, Re*, (2018) C.D. 1438, the Patent Appeal Board rejected a submission that the short time interval between the relevant dates of two patents and the claim date precluded consideration of statements in the background portions of the patents as reflecting salient aspects of the common general knowledge in the art.

Novelty

Novelty issues were considered in *The Regents of the University of California et al v. I-MED Pharma Inc.*, 2018 FC 164; *Hospira Healthcare Corporation v. Kennedy Trust for Rheumatology Research*, 2018 FC 25 and *MIPS AB v. Bauer Hockey Ltd. et al*, 2018 FC 485.

In *Jushi Group Co., Ltd. v. OCV Intellectual Capital, LLC*, [2018] EWCA Civ 1416, the English Court of Appeal considered the issue of anticipation in a case where the claimed ranges overlapped the ranges for a similar product disclosed in a prior reference.