

Federal Court



Cour fédérale

Date: 20121120

Docket: T-772-09

Citation: 2012 FC 1339

Ottawa, Ontario, November 20, 2012

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

APOTEX INC.

Plaintiff

and

PFIZER IRELAND PHARMACEUTICALS

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an impeachment action commenced on May 13, 2009, wherein Apotex, the plaintiff, seeks a declaration that each of the claims of Canadian Patent No. 2,163,446 (the “ ‘446 Patent”) is invalid and of no force or effect, as well as a declaration that Apotex’s sildenafil citrate tablets will not infringe any valid claims of the ‘446 Patent. The ‘446 Patent is for Viagra, a drug Pfizer, the defendant, manufactures and markets to treat erectile dysfunction in men.

[2] The trial of this action is scheduled to commence on November 26, 2012, for 20 days. However, the Supreme Court of Canada on November 8, 2012, in *Teva Canada Ltd. v Pfizer Canada Inc.*, 2012 SCC 60 [*Teva*], issued its Reasons and in its Judgment declared the ‘446 Patent void. In the fallout, Apotex moves for summary judgment. Pfizer moves to dismiss the action for want of jurisdiction or mootness.

[3] By way of background, and to appreciate the submissions of the parties, a brief description of the proceedings before the Supreme Court, its decision, and the aftermath is necessary.

Teva Proceeding and Decision

[4] Teva applied for a notice of compliance (“NOC”) in order to produce and market its generic version of Viagra. Pfizer commenced an application under the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-1333 (the “*PMNOC Regulations*”) for an order prohibiting the Minister of Health from issuing a NOC to Teva. This Court granted the requested order of prohibition and that decision was upheld by the Federal Court of Appeal: 2009 FC 638; aff’d 2010 FCA 242. Teva appealed that decision to the Supreme Court of Canada.

[5] Before Teva’s attempt to market its generic version of Viagra, Apotex had also attempted to market its own generic version of Viagra. Pfizer likewise sought an order prohibiting the Minister of Health from issuing a NOC to Apotex. This Court granted the requested order of

prohibition, and that decision was upheld by the Federal Court of Appeal: 2007 FC 971; aff'd 2009 FCA 8. Apotex then commenced this action.

[6] Teva, in its NOC proceeding, took the position that the '446 Patent was invalid for obviousness, lack of utility, and insufficiency of disclosure. On appeal, it dropped its allegation of obviousness. Both the Federal Court and Federal Court of Appeal found that the invention was useful and that the '446 Patent sufficiently disclosed the invention which is "a medicament for the curative or prophylactic oral treatment of erectile dysfunction in man."

[7] The claims of the '446 Patent list an enormous number of compounds (described by the application judge as being in the order of "260 quintillion compounds"). In the disclosure, however, the following was stated:

In man, certain especially preferred compounds have been tested orally in both single dose and multiple dose volunteer studies. Moreover, patient studies conducted thus far have confirmed that one of the especially preferred compounds induces penile erection in impotent males.

[8] The "one" compound referred to in the '446 Patent to have induced penile erection in impotent males, the patients in the "patient studies," was that set out in Claim 7 – sildenafil. The Supreme Court at paragraph 73 of its Reasons found that "although Patent '446 includes the statement that 'one of the especially preferred compounds induces penile erection in impotent males' ... the specification does not indicate that sildenafil is the effective compound, that Claim 7 contains the compound that works, or that the remaining compounds in the patent had not [as at

the filing date] been found to be effective in treating [erectile dysfunction].” The Supreme Court continued at paragraphs 80 and 81, as follows:

[T]he public’s right to proper disclosure was denied in this case, since the claims ended with two individually claimed compounds, thereby obscuring the true invention. The disclosure failed to state in clear terms what the invention was. Pfizer gained a benefit from the Act — exclusive monopoly rights — while withholding disclosure in spite of its disclosure obligations under the Act. As a matter of policy and sound statutory interpretation, patentees cannot be allowed to “game” the system in this way. This, in my view, is the key issue in this appeal. It must be resolved against Pfizer.

I have reached the conclusion that Patent ’446 does not comply with s. 27(3) of the Act. What is the appropriate remedy?

[9] The remedy adjudged by the Supreme Court to be appropriate is reflected in its Judgment which reads that “the appeal ... is allowed with costs and Patent 2,163,446 is declared void.”

[10] Pfizer takes the view that the Supreme Court of Canada exceeded its jurisdiction in issuing its Judgment invalidating the ‘446 Patent. On November 9, 2012, Pfizer filed a motion pursuant to Rules 76 and 81 of the *Rules of the Supreme Court of Canada*, seeking the following relief:

- (a) an order amending the judgment of this Court in File Number 33951 by replacing the words "and Patent 2,153,446 is declared void" with the words "the application below is dismissed and the Order of the Federal Court dated June 18, 2009, prohibiting the Minister from issuing a notice of compliance to the appellant is hereby set aside"; or
- (b) in the alternative to (a), an order directing that a motion for re-hearing on the issue of remedy be made in accordance with Rule 76;

- (c) if the Court grants the relief set out in (a), an order amending paragraphs 83 and 87 of the Reasons for Judgment to clarify that the Court's discussion of validity of Patent '446 is in the context of the *Patented Medicines (Notice of Compliance) Regulations*, and in particular in the context of Teva's allegation of invalidity under those *Regulations*; and
- (d) such further or other relief as this Court deems appropriate.

[11] Rules 76 and 81 of the *Rules of the Supreme Court of Canada* provide, in limited circumstances, that the Supreme Court can amend a judgment or order a re-hearing. They read as follows:

76. (1) At any time before judgment is rendered or within 30 days after the judgment, a party may make a motion to the Court for a re-hearing of an appeal.

(2) Notwithstanding the time referred to in subrule 54(1), the other parties may respond to the motion for a re-hearing within 15 days after service of the motion.

(3) Within 15 days after service of the response to the motion for a re-hearing, the applicant may reply by serving on all other parties and filing with the Registrar the original and 14 copies of the reply.

(4) Notwithstanding subrule 54(4), there shall be no oral argument on a motion for a re-hearing unless the Court otherwise orders.

76. (1) Toute partie peut, par requête avant jugement ou dans les trente jours suivant le jugement, demander à la Cour de réentendre un appel.

(2) Malgré le délai prévu au paragraphe 54(1), dans les quinze jours suivant la signification de la requête, toute autre partie peut y répondre.

(3) Dans les quinze jours suivant la signification de la réponse à la requête, le requérant peut présenter une réplique en la signifiant aux autres parties et en déposant auprès du registraire l'original et quatorze copies.

(4) Malgré le paragraphe 54(4), aucune plaidoirie orale ne peut être présentée relativement à la requête, sauf ordonnance contraire de la Cour.

(5) If the Court orders a re-hearing, the Court may make any order as to the conduct of the hearing as it considers appropriate.

...

81. (1) Within 30 days after a judgment, a party may make a motion to a judge or, if all the parties affected have consented to amend the judgment, a request to the Registrar, if the judgment

(a) contains an error arising from an accidental slip or omission;

(b) does not accord with the judgment as delivered by the Court in open court; or

(c) overlooked or accidentally omitted a matter that should have been dealt with.

(2) The judge on a motion under subrule (1) may dismiss the motion, amend the judgment or direct that a motion for a re-hearing be made to the Court in accordance with Rule 76.

(5) Si la Cour ordonne une nouvelle audition de l'appel, elle peut prendre toute ordonnance qu'elle estime indiquée pour assurer le bon déroulement de l'audience.

...

81. (1) Toute partie peut, dans les trente jours suivant le jugement, demander à un juge par requête ou, avec le consentement de toutes les parties intéressées, au registraire, la modification du jugement dans les cas suivants :

a) le jugement contient une erreur involontaire ou une omission;

b) il n'est pas conforme au jugement prononcé par la Cour en audience publique;

c) il omet par inadvertance ou fortuitement de trancher une question dont la Cour a été saisie.

(2) Le juge saisi de la requête peut la rejeter, procéder à la modification ou ordonner qu'une requête en nouvelle audition soit présentée à la Cour conformément à la règle 76.

[12] Pfizer's motion before the Supreme Court is outstanding and is unlikely to be disposed of prior to the date scheduled for the commencement of the trial of this action.

Motion for Summary Judgment

[13] Apotex offers three bases in support of its submission that there is no genuine issue for trial as a result of the decision in *Teva*. First, it submits that the declaration by the Supreme Court in its Judgment that the '446 Patent is void is dispositive of the relief it seeks in this action. Second, the determination by the Supreme Court in its Reasons that the '446 Patent fails to meet the requirement of sufficient disclosure pursuant to subsection 27(3) of the *Patent Act*, RSC 1985, c P-4, is a legal determination binding on this Court and is dispositive of its claim in this action that the '446 Patent is invalid due to insufficiency of disclosure. Third, and in the alternative, it submits that Pfizer is not able to put forward a case in this action that differs from that before the Supreme Court concerning the sufficiency of disclosure of the '446 Patent.

[14] There being no genuine issue for trial, it asks that summary judgment be granted declaring the '446 Patent invalid.

Motion Seeking Dismissal of the Action

[15] Pfizer submits that as a consequence of the Judgment of the Supreme Court declaring the '446 Patent void, there is no patent of invention at issue in this litigation between these parties and thus the Court has no jurisdiction to hear this action under either section 60 of the *Patent Act* or paragraph 20(1)(b) and subsection 20(2) of the *Federal Courts Act*, RSC 1985 c F-7, the sources of the Court's jurisdiction to hear actions and applications involving patents of invention. They read as follows:

Patent Act

60. (1) A patent or any claim

Loi sur les brevets

60. (1) Un brevet ou une

in a patent may be declared invalid or void by the Federal Court at the instance of the Attorney General of Canada or at the instance of any interested person.

(2) Where any person has reasonable cause to believe that any process used or proposed to be used or any article made, used or sold or proposed to be made, used or sold by him might be alleged by any patentee to constitute an infringement of an exclusive property or privilege granted thereby, he may bring an action in the Federal Court against the patentee for a declaration that the process or article does not or would not constitute an infringement of the exclusive property or privilege.

(3) With the exception of the Attorney General of Canada or the attorney general of a province, the plaintiff in any action under this section shall, before proceeding therein, give security for the costs of the patentee in such sum as the Federal Court may direct, but a defendant in any action for the infringement of a patent is entitled to obtain a declaration under this section without being required to furnish any security.

revendication se rapportant à un brevet peut être déclaré invalide ou nul par la Cour fédérale, à la diligence du procureur général du Canada ou à la diligence d'un intéressé.

(2) Si une personne a un motif raisonnable de croire qu'un procédé employé ou dont l'emploi est projeté, ou qu'un article fabriqué, employé ou vendu ou dont sont projetés la fabrication, l'emploi ou la vente par elle, pourrait, d'après l'allégation d'un breveté, constituer une violation d'un droit de propriété ou privilège exclusif accordé de ce chef, elle peut intenter une action devant la Cour fédérale contre le breveté afin d'obtenir une déclaration que ce procédé ou cet article ne constitue pas ou ne constituerait pas une violation de ce droit de propriété ou de ce privilège exclusif.

(3) À l'exception du procureur général du Canada ou du procureur général d'une province, le plaignant dans une action exercée sous l'autorité du présent article fournit, avant de s'y engager, un cautionnement pour les frais du breveté au montant que le tribunal peut déterminer. Toutefois, le défendeur dans toute action en contrefaçon de brevet a le droit d'obtenir une déclaration en vertu du présent article sans être tenu de fournir un cautionnement.

Federal Courts Act

20. (1) The Federal Court has exclusive original jurisdiction, between subject and subject as well as otherwise,

...

(b) in all cases in which it is sought to impeach or annul any patent of invention or to have any entry in any register of copyrights, trade-marks, industrial designs or topographies referred to in paragraph (a) made, expunged, varied or rectified.

20. (2) The Federal Court has concurrent jurisdiction in all cases, other than those mentioned in subsection (1), in which a remedy is sought under the authority of an Act of Parliament or at law or in equity respecting any patent of invention, copyright, trade-mark, industrial design or topography referred to in paragraph (1)(a).

Loi sur les Cours fédérales

20. (1) La Cour fédérale a compétence exclusive, en première instance, dans les cas suivants opposant notamment des administrés :

...

b) tentative d'invalidation ou d'annulation d'un brevet d'invention, ou d'inscription, de radiation ou de modification dans un registre de droits d'auteur, de marques de commerce, de dessins industriels ou de topographies visées à l'alinéa a).

20. (2) Elle a compétence concurrente dans tous les autres cas de recours sous le régime d'une loi fédérale ou de toute autre règle de droit non visés par le paragraphe (1) relativement à un brevet d'invention, un droit d'auteur, une marque de commerce, un dessin industriel ou une topographie au sens de la *Loi sur les topographies de circuits intégrés*.

[16] Alternatively, Pfizer submits that if the Court has jurisdiction, this action ought to be dismissed for mootness because, at this time, there is no live controversy between the parties in light of the Judgment of the Supreme Court in *Teva* declaring the '446 Patent void.

Analysis

Jurisdiction to Hear This Action

[17] I agree with Pfizer that the first issue to be addressed is whether this Court has jurisdiction over this action. It is not in dispute that prior to the decision in *Teva*, the Court had jurisdiction. Pfizer submits that jurisdiction was lost when the Supreme Court issued its Judgment declaring the '446 Patent void because with the Judgment there ceased to be a patent of invention as described in section 60 of the *Patent Act* or paragraph 20(1)(b) and subsection 20(2) of the *Federal Courts Act*.

[18] I understand the position of Pfizer to be as follows. Prior to *Teva*, this Court had jurisdiction to hear this action because there was a patent of invention – the '446 Patent – which may or may not have been a valid patent. As a consequence of the Judgment in *Teva*, there is currently no patent of invention because the '446 Patent was declared to be void. If the Supreme Court grants Pfizer's motion and amends its Judgment by deleting the declaration that the '446 Patent is void, then this Court would again have jurisdiction to hear an action challenging the validity of the '446 Patent. However, with reference specifically to this action, it is Pfizer's position that once the Court lost jurisdiction on November 8, 2012, it cannot be revived or reinstated if the Supreme Court subsequently deletes from its Judgment its declaration that the '446 Patent is void.

[19] I do not accept this last submission. If the Supreme Court grants Pfizer's motion and deletes the declaration of invalidity from its Judgment, and if this action has not been disposed of in the interim, then the jurisdiction that Pfizer claims has been lost will be restored by that amendment. I reach this conclusion because the amendment, if made by the Supreme Court

would be made on the basis submitted by Pfizer in its motion, namely that the Supreme Court had no jurisdiction to make the declaration of invalidity. If the declaration of invalidity was made without jurisdiction, then it is a nullity, it never happened. If it never happened then there was never a loss of this Court's jurisdiction to hear this action.

[20] This alone, in my view, is sufficient to deny the motion to dismiss for want of jurisdiction because it is not plain and obvious that the declaration of invalidity will be maintained in light of Pfizer's motion. I am also not persuaded of Pfizer's second submission above that as things currently stand this Court has no jurisdiction over this action.

[21] Pfizer pointed the Court to the decision of Justice Rothstein, as he then was, in *Merck Frosst Canada Inc v Canada (Minister of National Health and Welfare)*, 128 FCT 210, 72 CPR (3d) 453 [*Merck Frosst*] as support for its submission that this Court lost jurisdiction when the Supreme Court issued its declaration of invalidity. In that case, *Merck Frosst*, under the *PMNOC Regulations*, as they then provided, brought an application to extend the statutory stay prohibiting the Minister from issuing a NOC at the commencement of its application for a prohibition order. The period of the statutory stay had expired and Justice Rothstein held that "upon expiry of the statutory stay the Court no longer has jurisdiction to issue a prohibition order ... and an extension order" Pfizer submits, by way of analogy, that when the '446 Patent was declared void there was no longer anything underlying this action, or as counsel put it, there was no longer any *res*.

[22] *Merck Frosst* is not applicable or helpful, even by way of analogy, to the unique circumstance before this Court. In any event, as was noted by counsel for Apotex, the reasoning of Justice Rothstein on this point was specifically rejected by Justices Desjardin and Nadon in *Abbott Laboratories v Canada (Minister of Health)*, 2007 FCA 187. One of the reasons they gave at para 62 was that “there is nothing in the Regulations which expressly or implicitly provides that the Court is without jurisdiction to make an order of prohibition once the statutory stay has expired.”

[23] In my view, this Court retains jurisdiction to hear this action notwithstanding the declaration of invalidity of the ‘446 Patent by the Supreme Court. Parliament has specifically provided in section 62 of the *Patent Act* the mechanism by which a patent becomes void and of no effect following a court’s judgment invalidating it:

62. A certificate of a judgment voiding in whole or in part any patent shall, at the request of any person filing it to make it a record in the Patent Office, be registered in the Patent Office, and the patent, or such part as is voided, shall thereupon be and be held to have been void and of no effect, unless the judgment is reversed on appeal as provided in section 63.

62. Le certificat d’un jugement annulant totalement ou partiellement un brevet est, à la requête de quiconque en fait la production pour que ce certificat soit déposé au Bureau des brevets, enregistré à ce bureau. Le brevet ou telle partie du brevet qui a été ainsi annulé devient alors nul et de nul effet et est tenu pour tel, à moins que le jugement ne soit infirmé en appel en vertu de l’article 63.

[24] The phrase “shall thereupon be and be held to have been void and of no effect [emphasis added]” makes it clear that it is the filing of the judgment that has the effect of voiding a patent (albeit retrospectively to the date of judgment). A court issuing its judgment and declaring a

patent invalid, such as was done by the Supreme Court in *Teva*, is therefore insufficient to strip a court properly seized of a patent proceeding of its jurisdiction.

[25] I reject Pfizer's submission that section 62 of the *Patent Act* is merely administrative and intended to constitute notice to the public of a declaration of invalidity. It is rejected because a court judgment itself is public notice. It is also rejected because if the section was intended merely as a notice provision, then it would have been worded differently. There would be no need to specify that on filing the patent "shall thereupon be and be held to have been void and of no effect." Those words, if the submission of Apotex is accepted, are redundant. "It is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage:" *R v Proulx*, 2000 SCC 5, at para 28.

[26] There is no evidence before the Court that the Judgment of the Supreme Court has been filed in the Patent Office. Indeed, it would be surprising if Pfizer had done so given its pending motion before the Supreme Court. Absent proof of filing, pursuant to section 62 of the *Patent Act*, I find that the '446 Patent is not void and of no effect for the purposes of the *Patent Act* and accordingly, this Court retains jurisdiction to entertain this action.

[27] Moreover, the *Patent Act* contemplates that the Federal Court has jurisdiction even in circumstances where there is no valid patent. Indeed, under section 60 of the *Patent Act*, which is the provision enabling this very action, the Federal Court has the power to declare a patent invalid. A declaration of invalidity is a declaration that a patent is, and has been void all along (i.e. *ab initio*). If Pfizer's submission that this Court has no jurisdiction to entertain this action is

right, it would follow that there can only be valid judgments issued under section 60 of the *Patent Act* if the judgment is to refuse to grant a declaration of invalidity. It is an absurdity to suggest that the Court has jurisdiction to declare a patent valid but not to declare a patent to be invalid.

Mootness

[28] I accept that as things currently stand, this action is moot. Apotex has been granted its NOC and the Supreme Court has declared the '446 Patent void. Apotex has all that it seeks in this action, save its costs. However, Pfizer's motion to the Supreme Court, like the sword of Damocles, hangs over the head of Apotex. Pfizer does not concede that Apotex is and will remain at liberty to produce and market its generic version of Viagra with no fear of suit from Pfizer. It is fair to say, given Pfizer's submissions on these motions, that the possibility of an action for infringement if the Supreme Court amends its Judgment and removes the declaration of invalidity is not unlikely. That alone, in my view, is sufficient reason not to dismiss the action now for mootness. Furthermore, I accept the submission of Apotex that marketing its sildenafil product to customers in competition with Pfizer and Teva may prove problematic. Purchasers may have reservations about buying its product in the absence of a specific declaration of invalidity because of the uncertainty that arises from Pfizer's challenge to the Judgment of the Supreme Court. Indeed, Apotex may be reluctant to produce and market its product given the threat of future litigation.

[29] The disposition of this action, either by summary judgment or trial will have a practical effect on the rights of the parties and thus ought to be dealt with: see *Sanofi-Aventis Canada Inc v Apotex Inc*, 2006 FCA 328 at para 21.

Motion for Summary Judgment

[30] For the reasons that follow, the determination by the Supreme Court in its Reasons that the '446 Patent fails to meet the requirement of sufficient disclosure pursuant to subsection 27(3) of the *Patent Act* is a legal determination binding on this Court and is dispositive of Apotex's claim in this action that the '446 Patent is invalid due to insufficiency of disclosure, even if the Supreme Court grants Pfizer's motion and deletes its declaration of invalidity from its Judgment.

[31] This Court has often stated that the construction of the claims of a patent is a question of law: See for example *Procter & Gamble Co v Kimberly-Clark of Canada Ltd* (1991), 49 FTR 31, 40 CPR (3d) 1 (TD); *Mobil Oil Corp v Hercules Canada Inc* (1994), 82 FTR 211, 57 CPR (3d) 488 (TD); *Pharmacia Inc v Canada (Minister of National Health and Welfare)* (1996), 111 FTR 140, 66 CPR (3d) 129 (TD); *Eli Lilly and Co v Novopharm Ltd* (1997), 137 FTR 32, 76 CPR (3d) 312 (TD); *VISX Inc v Nidek Co* (1999), 181 FTR 22, 3 CPR (4th) 417 (TD); *GlaxoSmithKline Inc v Canada (Attorney General)*, 2004 FC 1725; *Janssen-Ortho Inc v Canada (Minister of Health)*, 2005 FC 765; *Halford v Seed Hawk Inc*, 2006 FCA 275; *Shire Biochem Inc v Canada (Minister of Health)*, 2008 FC 538; *UView Ultraviolet Systems Inc v Brasscorp Ltd (cob Cliplight Manufacturing Co)*, 2009 FC 58. The determination of the invention or inventive concept of a patent is an exercise of patent construction and thus a question of law: *Apotex Inc v Pfizer Canada Inc*, 2011 FCA 236, at para 17. The construction of the specification of a patent

is a question of law: *Western Electric Co v Baldwin International Radio of Canada*, [1934] SCR 570, at p 572-573.

[32] I reject the submission of Pfizer that the question of the sufficiency of disclosure in *Teva* was a mixed question of fact and law. I agree with Apotex that in *Teva* the sufficiency of the disclosure of the '446 Patent turned on three questions of law: (1) the determination of the invention or inventive concept of the patent, (2) the construction of the '446 Patent, and (3) whether the '446 Patent, properly construed, permitted the person of skill in the art "to make the same successful use of the invention as the inventor could at the time of his application."

[33] The determinations made by the Supreme Court on those three questions of law are binding on this Court. Its finding that Pfizer, in failing to disclose which of the many compounds named in the '446 Patent was effective in treating erectile dysfunction, had not properly or sufficiently disclosed its invention, is a finding that this Court must respect and follow. As a consequence, when, as here, the action seeks a declaration of the invalidity of the '446 Patent for insufficient disclosure, there can be no genuine issue for trial because no result is possible other than a finding that the '446 Patent is invalid. Accordingly, Apotex is entitled to summary judgment.

Is a Declaration of Invalidity Appropriate?

[34] It seems peculiar, in the face of a Judgment of the Supreme Court declaring the '446 Patent to be void, for a lower court to issue its own declaration of invalidity. However, to do so in these circumstances would be redundant at worst. If the Supreme Court does not remove the

declaration of invalidity, then arguably a declaration in this action is duplicative and unnecessary. On the other hand, if the Supreme Court removes the declaration of invalidity from its Judgment, even though Apotex is entitled to a similar declaration in this action because of the determinations made by the Supreme Court in its Reasons for Judgment, it will have the benefit of no such declaration. There is therefore not only considerable upside in granting the declaration sought in this action – the requested declaration will provide the parties and the public with greater certainty that Apotex’s sildenafil product will not infringe any valid claim of the ‘446 Patent, which it will not – doing so also prevents a procedural injustice from being worked upon Apotex in these unusual procedural circumstances. In my view, these reasons far outweigh the interest in delaying the disposition of this action until the disposition of the motion before the Supreme Court, which, to reiterate, can only ensure that this Court avoids rendering a redundant declaration.

Costs

[35] Apotex is entitled to its costs of the action and these motions. The parties are represented by very experienced counsel and one would expect that they can agree on quantum. If there is no agreement, then the Court retains jurisdiction to deal with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The defendant's motion for dismissal is denied;
2. The plaintiff's motion for summary judgment is allowed;
3. The action is allowed;
4. Canadian Patent No. 2,163,446 is declared invalid and void, and the plaintiff's sildenafil citrate tablets do not therefore infringe that patent;
5. Apotex is awarded its costs of these motions and of this action;
6. The Court retains jurisdiction to deal with costs;
7. If the parties are unable to agree on the quantum of costs they are to advise the Court within twenty (20) days of this Judgment.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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PHARMACEUTICALS

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AND JUDGMENT:** ZINN J.

DATED: November 20, 2012

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