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CANADIAN PATENT ACT ANNOTATED SECOND EDITION

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Publisher's Special Release Note 2021

The pages in this work were reissued in December 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the December 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred.

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The *Canadian Patent Act Annotated*, Second Edition, is your one-stop source, bringing together commentary and current case law interpreting patent legislation. This includes all of the relevant statutes, regulations and rules you need to provide your client with the best patent advice available.

What's New in this Update:

This release features updates to the Table of Obviousness Cases (Post-Sanofi-Synthelabo). This release also features updates to the Quantum Table – Remedies for Patent Infringement, as well as the addition of the practice notice: PCT Applicant's Guide (National Chapter – CA).

Highlights:

Table of Obviousness Cases (Post-Sanofi-Synthelabo) — Pharmascience argued that, if the common general knowledge was sufficient to support a sound prediction of utility of the invention of the 802 Patent, then the same common general knowledge would make the invention obvious to try, and therefore invalid for obviousness. Specifically, Pharmascience argued that the Trial Judge erred in her formulation of the test for obviousness by discounting (or ignoring) certain prior art that would not have been located by the PSA in a reasonably diligent search. Pharmascience also argued that the Trial Judge erred in finding that the obviousness argument was based on a mosaic of prior art. Justice Locke was not convinced that the Trial Judge improperly discounted or ignored any of the prior art cited by Pharmascience. The Trial Judge understood the law concerning the relevance of prior art that would not be found in a diligent search, and was apparently concerned that, given the difficulty in locating certain prior art, the PSA would not have been led directly and without difficulty to combine those references. This reasoning was not erroneous. Pharmascience also had not convinced Justice Locke that the Trial Judge erred in characterizing Pharmascience's application of prior art as mosaicking. The Trial Judge saw a gap between the common general knowledge and the invention of the 802 Patent, and was not satisfied that any one of the prior art references cited by Pharmascience that was not part of the common general knowledge bridged the gap. The Trial Judge understood that it was possible in an obviousness analysis to combine prior art references that are not part of the common general knowledge, but the party alleging obviousness must establish that the PSA would have thought to combine those references: *Pharmascience Inc. v. Teva Canada Innovation*, 2022 CarswellNat 7, 2022 FCA 2 (F.C.A.).

Quantum Table — Remedies for Patent Infringement — Reasonable Royalty — DeepRoot sought an accounting of GreenBlue's

profits. Alternatively, if the Court determined that GreenBlue's profits were less than $145,000.00, then DeepRoot sought a reasonable royalty payment. DeepRoot challenged the deductions claimed by GreenBlue. Justice McDonald accepted the financial evidence tendered by GreenBlue in relation to sales the costs associated with manufacturing, purchasing, transporting, and warehousing the RootSpace products. Further, there was no evidence to support the claims of DeepRoot that there were inappropriate intercompany payments. Having accepted the financial evidence of GreenBlue, Justice McDonald was not satisfied that GreenBlue had in fact made a profit on sales of RootSpace. Accordingly, Justice McDonald addressed the alternative relief requested by DeepRoot in the form of reasonable royalty. In the exercise of discretion, Justice McDonald awarded a reasonable royalty on a per-unit basis as GreenBlue had been in the urban landscaping business for a long period of time and it had a vast array of products which were unrelated to the patents at issue. Accordingly, it was not appropriate, on the facts to assess royalties on sales of unrelated products. With respect to the rate of the royalty, the only evidence to assist the Court in setting a reasonable rate was the evidence offered by DeepRoot. Therefore, Justice McDonald granted an award of a 7% royalty rate on a per-unit basis at $0.94 per unit which as calculated by Blacker, amounted to $136,000: *Deeproot Green Infrastructure, LLC v. Greenblue Urban North America Inc.*, 2021 CarswellNat 2880, 2021 FC 501 (F.C.).

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