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BC Court Signals Change in Patent Landscape with Viagra Decision

The British Columbia Supreme Court's decision in *Low v. Pfizer Canada Inc.*, 2014 BCSC 1469 could radically change the legal landscape for patent law in Canada. Patent law has thus far been entirely statutory rather than a product of the common law; courts had not recognized any common law rights or remedies in relation to patents. The decision of Justice Smith changes that, and in so doing changes the risks innovators must consider.

The Statement of Claim, brought on behalf of BC residents who bought Viagra between 2006 and 2012, alleged that Pfizer misused its patent for sildenafil citrate – the active ingredient in Viagra – which had the effect of preventing competitor Novopharm from marketing its own version of the drug. The class claimed damages for the difference in revenue between what Pfizer charged for Viagra during the class period and what it would have recovered had Novopharm entered the market in 2006.

Pfizer brought a motion to strike the Statement of Claim on the grounds that it disclosed no reasonable cause of action, because the *Patent Act* and *Patented Medicine (Notice of Compliance) Regulations* constituted a complete code of rights and remedies relating to the marketing of patented medicines.

Justice Smith largely dismissed Pfizer's motion. By holding that the Claim disclosed causes of action, the Court created new common law remedies for alleged misuses of the patent system. The *Patented Medicine (Notice of Compliance) Regulations* had granted generic manufacturers the right to sue innovators for damages, but provided no rights to affected consumers.

By granting consumers the ability to bring a class proceeding, the Court's decision in *Low v. Pfizer* radically changes innovators' calculus. Now, instead of only considering the possibility of a claim by the generic, an innovator must also consider the risk of a substantially more expensive class proceeding when deciding whether or not to bring a prohibition application. The Court's decision, if followed and applied more broadly, would alter the careful balance that the federal government had crafted in the governing Regulations.