5

Canada

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A. OVERVIEW

Canada is a federal system with jurisdiction shared between the federal government and the provinces. Patent law is a matter of exclusive federal jurisdiction and is based on the federal *Patent Act*. The federal nature of Canada is reflected in a bifurcated judicial system. The Federal Courts of Canada, a statutory court system with defined jurisdiction,[1] and the provincial superior courts, courts of inherent jurisdiction, corresponding to the traditional English common law courts, both have jurisdiction over patent infringement.[2] However, the Federal Court has exclusive jurisdiction to declare a patent invalid,[3] and the very substantial majority of patent cases are decided by the Federal Court. Consequently, it is largely the case law of the Federal Courts which governs the grant of injunctive relief in patent cases, subject to the guidance of the Supreme Court of Canada.[4]

While the Federal Court jurisdiction extends well beyond patent law,[5] there is a core of about half a dozen judges who are normally assigned to most major patent cases, as well as another half dozen who hear some patent issues, so these judges, particularly the core patent judges, have considerable specialized patent expertise.

[1] The Federal Courts of Canada comprises two courts, the Federal Court and the Federal Court of Appeal: *Federal Courts Act*, ss. 3 and 4. As the names imply, the primary jurisdiction of the Federal Court of Appeal is to hear appeals from the Federal Court: *Federal Courts Act*, s. 27(1). Prior to 2 July 2003, the Federal Court of Canada comprised a single court, with two divisions, the Trial Division and the Appeal Division.

[2] See *Patent Act*, s. 54, granting jurisdiction to the provincial superior court in which the infringement is said to have occurred; *Federal Courts Act*, s. 20(2), granting concurrent jurisdiction to the Federal Court in any case relating to patents.

[3] *Federal Courts Act*, s. 20(1).

[4] Similarly, it is the *Federal Courts Rules* that normally govern procedure, including the issuance of orders and findings of contempt.

[5] The jurisdiction also includes matters such as claims against the Crown, judicial review of federal administrative tribunals, and admiralty law: *Federal Courts Act*, ss. 17–26.

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The court also uses specialized case management judges to manage complex patent litigation. Even complex cases may take as little as two years from the time an action is commenced until a trial decision is rendered, but it is not uncommon for litigation to take significantly longer.

In the Canadian system, validity and infringement are never bifurcated. A trial is often bifurcated into liability and monetary remedy, but any injunction is normally granted at the end of the liability phase.

Law firms involved in patent litigation in Canada comprise large national firms with a group specializing in intellectual property or patent litigation, as well as a number of smaller specialized firms. The bar that handles patent litigation in Canada is relatively small.

1. *Permanent Injunctions*

The *Patent Act* provides that a court "may . . . make such order as the court or judge sees fit" enjoining "further use, manufacture or sale of the subject-matter of the patent".[6] While this provision gives the courts authority and discretion to grant injunctive relief, it provides no substantive guidance. As a former colony of the United Kingdom, Canada has based its legal system on the English common law, and the grant of injunctive relief is based on the English legal tradition of equitable remedies.[7] The discretionary nature of equitable remedies is consistent with the permissive mandate of the statute.

Thus it is perfectly clear, both on the basis of the Act and the traditional equitable nature of injunctive relief, that the grant of injunctive relief to a successful patentee is a matter of discretion, and not a matter of right, and the discretionary nature of injunctive relief is regularly acknowledged by the courts. Nonetheless, the Canadian courts are of the view that an injunction will normally follow a finding that a valid patent has been infringed, and a permanent injunction will be refused "only in very rare circumstances"[8] with the caveat that an injunction will not normally be granted

[6] *Patent Act*, s. 57(1).

[7] The statutory provision provides formal authority for the grant of injunctive relief but is never referred to in establishing the relevant principles, which are based on case law and equitable principles.

[8] *Valence* v. *Phostech* (FC 2011, para. 240), stating "The Court should refuse to grant a permanent injunction where there is a finding of infringement, only in very rare circumstances"; and *see, e.g.*, *Merck* v. *Apotex (lisinopril infringement)* (FCA 2006, para. 68), stating "The decision to award an injunction is a discretionary one entitled to considerable deference by this Court", and also stating that an injunction was appropriate because the patent was valid and infringed; *Janssen-Ortho* v. *Novopharm* (FC 2006, para. 133), noting that "As to an injunction that remedy normally follows a finding that a valid patent has been infringed" and recognizing the discretionary nature of the remedy; *Laboratoires Servier* (FC 2008, para. 500), stating: "The grant of a permanent injunction is a discretionary remedy"; *AbbVie* v. *Janssen (injunction)* (FC 2014, para. 34), noting the discretion in s. 57(1)(a) of the Act, and at para. 35, reviewing the case law and stating that "An injunction normally will follow once the Court has found that a patent

if there is no realistic prospect of future infringement.[9] Indeed, there appears to be only one reported Canadian patent case in which a permanent injunction was refused entirely to a successful patentee.[10] However, this historical pattern does not necessarily imply that Canadian courts would be unwilling to refuse a permanent injunction in appropriate circumstances. Cases which present the strongest argument for refusing injunctive relief, such as those involving patent assertion entities (PAEs), as in *eBay* v. *MercExchange* (US 2008), have seldom been litigated to judgment in Canadian courts.

As discussed in the next section, Canadian law implements a patent linkage regime when a generic pharmaceutical company seeks marketing authorization for a pharmaceutical which has patents listed against that pharmaceutical by the innovator company. This patent linkage regime is unique to pharmaceuticals. There are otherwise no apparent differences concerning injunctions across industries.

There is little specifically Canadian scholarship on the issue of injunctive relief in patent cases.

2. *Interlocutory Injunctions*

Like permanent injunctions, interlocutory injunctions (preliminary injunctions pending trial) are similarly authorized by the rules of the relevant court,[11] but again the legislation is merely permissive and the relevant principles are governed by the case law.

The general test for an interlocutory injunction in Canadian law was set out by Lord Diplock in the House of Lords decision in *American Cyanamid* (HL 1975) and subsequently adopted by the Supreme Court of Canada.[12] It is a three-part test, requiring the applicant to establish that: (1) there is a serious question to be tried on the merits; (2) the applicant would suffer irreparable harm if the application were refused; and (3) the balance of convenience favours granting the injunction.[13] Considerable jurisdictional variation has developed in the appellate case law. In Federal Court, the hurdle at the second stage, irreparable harm, is very high. As

is valid and has been infringed" and at para. 36, stating that "an injunction should be refused only in rare circumstances"; *Eurocopter* (FC 2012, at para. 397), noting that the grant of an injunction is discretionary, and that an injunction "will be commonly granted for an infringement or threatened infringement, unless there is some equitable reason not to do so, such as acquiescence, long delay, lack of clean hands, unconscionability, or triviality."

[9] See e.g., *Jay-Lor* (FC 2007, para. 263), declining to grant an injunction as the defendants had not manufactured an infringing unit for two years.

[10] *Unilever* (FCTD 1993) aff'd *Unilever* (FCA 1995). The refusal of injunctive relief was not appealed.

[11] *Federal Courts Rules*, r. 373 (1): "On motion, a judge may grant an interlocutory injunction."

[12] Adopted in *RJR-MacDonald* (SCC 1994) and *Manitoba (AG)* v. *Metropolitan Stores* (SCC 1987).

[13] *RJR-MacDonald* (SCC 1994, p. 334).

almost all patent actions are brought in Federal Court, this means that interlocutory injunctions are almost never granted in patent cases.[14]

However, the substantial majority of decided patent cases involve pharmaceuticals and Canada has a patent linkage system, based on the US Hatch–Waxman system. Marketing authorization in Canada is referred to as a Notice of Compliance[15] or "NOC", and the patent linkage system is known as the Patented Medicines (Notice of Compliance) (PM(NOC)) regime. Under the PM(NOC) regime, a drug manufacturer seeking marketing authorization for a generic drug product based on a comparison with a pharmaceutical which has already obtained authorization must first challenge the patents listed against the reference product. If the patentee responds to the challenge, an automatic twenty-four-month statutory stay of authorization is triggered, which is functionally equivalent to an interlocutory injunction. Consequently, while interlocutory injunctions as such are almost never granted, generic pharmaceuticals are routinely subject to the statutory stay.[16]

B. DRAFTING AND ENFORCING INJUNCTIONS

1. *Drafting*

In Canadian practice, reasons for judgment are distinct from the formal judgment. The reasons for judgment will state whether the patentee is entitled to injunctive relief, in terms that may be more or less precise, depending on the case. Injunctive relief is granted by way of an order made in the formal judgment and is effective from the time that it is endorsed by the judge.[17] The formal judgment may be issued at the same time as the reasons for judgment, typically appended to the reasons; or, particularly when there is any uncertainty as to the precise terms of the order, it may be issued subsequently. When the formal judgment is issued subsequently, the

[14] A notice of compliance is granted pursuant to the *Food and Drug Regulations* made under the *Food and Drugs Act*. A notice of compliance for new drugs, for example, is governed by the *Food and Drug Regulations* s. C.08.004.01.

[15] See Siebrasse 2009.

[16] Until recently, the proceeding was by way of an application by the patentee seeking an order prohibiting the Minister of Health from granting marketing authorization on the basis that the generic product would infringe a valid patent. If the order of prohibition was granted, the effect would be to prevent the generic product from entering the market. While an injunction against the generic producer would not be granted, the order of prohibition would have the same effect. A generic producer prohibited from entering the market for this reason could seek a stay of the implementation of the order pending appeal, and such a stay would be decided on the same principles as a stay of an injunction. Decisions on a stay of the implementation of the order of prohibition are therefore also relevant to a stay of an injunction pending appeal. The *PM (NOC) Regulations* were amended by SOR/2017-166, s. 7, which came into force on 21 September 2017, to change the proceeding from an application to an action, with the effect of finally deciding the validity of the patent. The nature of the statutory stay was unaffected.

[17] *Federal Courts Rules*, r. 392(2).

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parties may be directed by the court to prepare a draft order in accordance with the reasons for judgment, for endorsement by the court.[18] If the parties cannot agree on the terms of the order, a motion may be brought for judgment so that the particulars of the order will be settled by the court.[19] In some cases, the trial judge may draft a proposed judgment and ask for comment by counsel before issuing the final judgment.[20] Thus, regardless of who drafts the order, counsel for both sides will normally have an opportunity for input as to the precise terms of the injunction. If the order remains unclear, a party may move to have it clarified; however, the courts will not allow motions for clarification to be used to as means of reopening decided issues or litigating infringement by new products.[21]

2. *Wording*

Permanent injunctions are typically granted in broad terms, enjoining the adjudged infringer from infringing the patent or specific claims of the patent.[22] This is sometimes combined with a prohibition on further manufacture or sale of a specific device or process that was adjudged to infringe, or similar variants that infringe, but narrower orders of this type are rarely the sole form of injunctive relief.[23] The claims specified in the order are not generally only the narrowest claims which cover the specific product at issue; the injunction will commonly extend to any claims which

[18] Id., r. 394(1).

[19] Id., r. 394.

[20] *See, e.g., Baxter Travenol* (SCC 1983, pp. 390–91); *Merck* v. *Apotex (enalapril No. 1)* (FCTD 1995); *Merck* v. *Apotex (lisinopril infringement)* (FC 2006, paras. 242–43).

[21] *Merck* v. *Apotex (enalapril No. 3)* (FCTD 1998) aff'd *Merck* v. *Apotex (enalapril No. 4)* (FCA 1999).

[22] *See, e.g., Merck* v. *Apotex (enalapril No. 5)* (FCTD 2000, paras. 11–12) var'd *Merck* v. *Apotex (enalapril No. 6)* (FCA 2003) referring to an injunction of this type, including a broad order against infringing specified claims of the patent at issue, combined with a specific prohibition on making, using or selling a specified product, as "the typical injunctive relief awarded when infringement of patent interests is found". And see also *Trojan* (FCA 2003, para. 4) (enjoining infringement of the patent and the sale of specific products and their equivalents); *Human Care* (FC 2018) at Judgment para. 1(e) (enjoining infringement of the patent); *Bayer* (FC 2016) at Judgment para. 2 (enjoining infringement of specified claims); *Weatherford* (FC 2010) (enjoining infringement of the patent and specified claims); *Valence* v. *Phostech* (FC 2011) at Judgment para. 7 (enjoining infringement of the patent and also enjoining specified process or any similar process that infringes).

[23] If the order includes broad language enjoining infringement generally, an additional reference in the order to specific products "does not in any way cut down" the broad scope of the injunction: *Apotex* v. *Merck (enalapril No. 2)* (FCA 1996, p .168). In the taxonomy developed Golden 2012, 1404, 1420–24, Canadian courts normally grant "Type-2" injunctions, which "generally prohibits infringement of a patent or patent claim without tying the scope of the prohibition to products or processes already adjudged to infringe" (1404), sometimes combined with a Type-0 injunction, which "explicitly forbid[s] only future infringement that involves the exact products or processes already adjudged to infringe" (1403), or Type-1 injunctions, which provide "an explicit prohibition of infringement that involves only relatively insignificant variations of the products or processes specified by accompanying Type-0 language" (1404).

were at issue in the litigation.[24] If the infringement at issue includes inducement, the infringer will also be enjoined from inducing infringement in similarly broad terms.[25]

In addition, when the adjudged infringer is in possession of infringing goods, the court will normally grant an ancillary order to ensure the injunction will be respected.[26] Typically, the ancillary order will be for delivery up or destruction of those goods.[27] The patentee does not get a property right in the infringing material, and if feasible, as when the patented invention is one removable component of a larger product, the court may order that the goods be rendered non-infringing.[28] The courts will avoid granting an order for delivery up when the goods have a substantial non-infringing use.[29] Occasionally a carve-out may be granted exempting certain infringing goods from delivery up or destruction, especially if this can be done without prejudice to the patentee's rights during the term of the patent.[30]

Preliminary injunctions are so rarely granted in patent cases that it is not possible to generalize regarding their language.

3. *Enforcement*

An injunction is enforced by a contempt action. The sanction for contempt is a fine or imprisonment,[31] though imprisonment is almost never imposed for a single act of civil contempt. The fine should be sufficient to serve as a specific deterrent to future contempt by the contemnor, and as a general deterrent to dissuade others from breaching court orders.[32] It is therefore appropriate to take into account the value of the sales of the offending product in determining the magnitude of the fine.[33] The presence or absence of good faith may be taken into account in determining the

[24] See discussion of *Merck* v. *Apotex (enalapril No. 4)* (FCA 1999) aff'g *Merck* v. *Apotex (enalapril No. 3)* (FCTD 1998).

[25] See *Uview* (FC 2009), Order 1(b).

[26] *See, e.g., Diversified Products* (FCTD 1988); *Laboratoires Servier* (FC 2008, para. 496).

[27] *See, e.g., Laboratoires Servier* (FC 2008) Judgment, para. 4; *Human Care Canada Inc.* v. *Evolution Technologies Inc.* (FC 2018); *Janssen-Ortho* v. *Novopharm* (FC 2006, para. 231).

[28] See *Diversified Products* (FCTD 1988).

[29] See *Teva* v. *Novartis* (FC 2013, paras. 399–400), accepting an undertaking that goods would only be used for exempt experimental purposes; *Uponor* (FC 2016, para. 300), refusing to grant an order for delivery up.

[30] See *Bombardier* (FC 2020), enjoining dealers in possession of infringing products from selling those products, but exempting them from the order for delivery up, with the effect that the dealers would be permitted to sell the products after the expiry of the patent; and see *Bombardier (motion)* (FC 2020, paras. 33–35), discussing the effect of the order in *Bombardier* (FC 2020).

[31] *Federal Courts Rules*, r. 472.

[32] See *Merck* v. *Apotex (enalapril No. 6)* (FCA 2003, paras. 80–89), emphasizing the importance of deterrence in imposing a sentence for contempt.

[33] See id., para 84; *Baxter Travenol* (FCA 1987, p. 453).

penalty to be imposed, but is not relevant to whether there was an act of contempt.[34] Exemplary damages may also be awarded as a sanction for breach of an injunction, in particular an interlocutory injunction, but this is unusual.[35]

Because the sanction for contempt is punitive in nature, the alleged contemnor must have had adequate notice as to the acts that would constitute contempt. Accordingly, contempt is inappropriate if the original order was lacking in detail or otherwise insufficiently particularized.[36] Contempt may therefore be inappropriate when the order incorporates overly broad or unclear language.[37]

While there can be no breach of an injunction before the order granting the injunction is formally made, it will nonetheless be a contempt of court to contravene the prohibitions set out in the reasons for judgment, even before the formal order is issued,[38] provided the party had knowledge of the prohibitions in the reasons for judgment[39] and the reasons are clear.[40]

[34] *Baxter Travenol* (FCA 1987, p. 454); *Merck* v. *Apotex (enalapril No. 6)* (FCA 2003, para. 60).

[35] See *Pro Arts* (Ont SC 1980, p. 441ff), awarding exemplary damages for breach of an interlocutory injunction for copyright infringement; *Lubrizol* (FCA 1992, p. 478), holding that exemplary damages are an available remedy for a callous disregard for an interlocutory injunction in a patent case.

[36] See *College of Optometrists* (Ont CA 2008, para. 41), citing cases; Sharpe 2017, § 6.187.

[37] *Fettes* (Sask CA 2010, para. 21), citing cases.

[38] *Baxter Travenol* (SCC 1983) noting that the relevant rules of court provide several distinct branches, including disobeying an order and, separately, interfering with the orderly administration of justice. Prior to the order being issued, contempt for disobeying a prohibition set out in the reasons is based on the second branch. This distinction is further clarified in the current *Federal Courts Rules*, r. 466 which sets out these branches in separate paragraphs ((b) and (c), respectively. In *Baxter Travenol* (SCC 1983) the reasons referred to the defendant being enjoined from selling products "as exemplified by" certain exhibits, while the formal order referred to products "including the type exemplified" by the same exhibits: p. 391. Because the terms of the formal order were broader than the reasons, there was no difficulty regarding notice. The matter was remanded for a decision on the merits, and the defendant was ultimately held in contempt for breach of the prohibition set out in the Reasons: *Baxter Travenol* (FCTD 1986) var'd *Baxter Travenol* (FCA 1987). See also *Merck* v. *Apotex (enalapril No. 6)* (FCA 2003, para. 73) var'g *Merck* v. *Apotex (enalapril No. 5)* (FCTD 2000), finding the appellants in contempt on the second branch for disobeying a prohibition contained in the reasons for judgment.

[39] See *Merck* v. *Apotex (enalapril No 6)* (FCA 2003, para 55).

[40] See id., para. 73, stating, "The test to apply [for finding contempt] asks the following two questions: (1) Did the alleged contemner have the knowledge of the prohibitions in the reasons for judgment?; and, (2) Was there an act that constituted a contravention of a prohibition therein?"; and see para. 50, stating that the character of the intent required for contempt by interfering with the orderly administration of justice is the same as that for breach of an order, "provided the Reasons are clear", and paras. 64–70, holding that the Reasons at issue "were clear and unambiguous, and did not reasonably lend themselves to the interpretation alleged by the Appellants". See also *Baxter Travenol* (FCTD 1986, p. 454), as quoted in *Merck* v. *Apotex (enalapril No. 6)* (FCA 2003, para. 56).

The question therefore arises as to whether a broad "do not infringe" injunction is sufficiently clear to support a finding of contempt.[41] There are few reported decisions relating to contempt of an injunctive relief order in a patent case, and the issue has not often been raised, but it would appear that broad "do not infringe" injunctions will normally be effective according to their terms. The issue arose tangentially in *Weatherford* (FC 2010). After a trial on the merits that focused on one of the defendant's product lines, the defendant was broadly enjoined from infringing the patent at issue.[42] The defendant then brought a motion amending the order to limit the scope of the injunction to the particular product line which had been at issue in the litigation, out of concern that another product line might be subject to the injunction even though those products were not in evidence at trial.[43] The motion was refused, on the basis[44] that it is standard practice to make orders restraining sale and distribution of infringing products generally,[45] and the scope of the order was not unclear: "The Court has provided a claims construction for the relevant claims; the injunction is directed at the Defendants' conduct in infringing the claims as interpreted whether it uses the named products or not", and "The Defendants are in the best position to know their products and whether they infringe".[46] While this was a motion to amend, and not a contempt hearing, this holding strongly suggests that a broad do-not-infringe order would not be held so vague as to preclude enforcement by way of contempt. With that said, there may be some cases in which such an injunction would be too vague on the particular facts.

It is in any event clear that the scope of the injunction will not be limited simply to the products at issue and equivalents. The point arose in *Merck* v. *Apotex (enalapril No. 4)* (FCA 1999).[47] The specific product at issue was generic enalapril maleate. Claim 1 was a claim to a genus of chemical compounds, including enalapril maleate, while Claims 2–5 were directed at enalapril maleate specifically. The injunction granted after trial enjoined Apotex from infringing any of Claims 1–5, as well as specifically enjoining the sale of enalapril maleate tablets.[48] Subsequent to that judgment, Apotex became aware of other compounds that fell

[41] See Golden 2012, 1422, noting that in the US Federal Court "Type-2, obey-the-law injunctions are technically prohibited", and they are typically "narrowly construed to apply only to products or processes 'previously admitted or adjudged to infringe, and to other devices which are no more than colorably different therefrom and which clearly are infringements'".

[42] *Weatherford* (FC 2010, para. 3).

[43] Id., para. 1.

[44] The trial judge remarked that he had "grave doubts" as to whether the court had jurisdiction to vary an order that was consistent with the reasons, but he did not decide on the basis of lack of jurisdiction, but rather on the basis that even if the court had jurisdiction, he would not grant the amendment: Id., paras. 12–15.

[45] Id., para. 17.

[46] Id., paras. 20–21.

[47] *Merck* v. *Apotex (enalapril No. 4)* (FCA 1999) aff'g *Merck* v. *Apotex (enalapril No. 3)* (FCTD 1998).

[48] *Merck* v. *Apotex (enalapril No. 3)* (FCTD 1998, p. 379).

within the scope of Claim 1 alone.[49] Apotex therefore brought an application to vary the injunction, essentially by removing the references to Claim 1, so that it would be able to make and sell these new compounds, presumably thereby triggering new litigation in which it could challenge the validity of Claim 1. The application was refused on the basis that Apotex had had the opportunity to challenge the validity of Claim 1 at trial and had failed to do so.[50] Note that Claim 1 was not unclear by virtue of its breadth; Apotex acknowledged that the new products would infringe Claim 1.

An injunction granted in *AbbVie* v. *Janssen (injunction)* (FC 2014) also received a broad interpretation.[51] As discussed in more detail Section C.6, the products at issue were drugs for the treatment of psoriasis, and AbbVie had been granted an injunction with a carve-out permitting the infringer, Janssen, to continue to supply the infringing product, STELARA, to patients who were not responsive to AbbVie's product. However, the injunction prohibited Janssen from promoting or making any representations or claims respecting the use of STELARA for the treatment of psoriasis. Janssen prepared a "script" to be used to inform dermatologists about STELARA, which contained the following language: "It is important to note that this court order does not impact your ability to prescribe STELARA to your patients. The product itself has not changed and there are no changes from a safety and efficacy standpoint."[52]

Both sentences in this statement were held to constitute prima facie contempt, because they sought to influence the physician's treatment decisions.[53] This is a broad interpretation of the injunction; it is not clear what language might be used to convey basic factual information about STELARA, while avoiding contempt. This suggests that Canadian courts will not be inclined to construe the terms of an injunction narrowly.

C. ALTERNATIVES AND MODIFICATIONS

1. *Overview*

As discussed in Section A.1, it is clear that the grant of a permanent injunction is discretionary in principle and so may be refused entirely. By the same token, it is clear that the court has the authority to tailor or modify the grant of an injunction. Such modifications are occasionally implemented, though they are not common.

[49] Id., pp. 381, 384; *Merck* v. *Apotex (enalapril No. 4)* (FCA 1999, para. 4).

[50] *Merck* v. *Apotex (enalapril No. 4)* (FCA 1999, para. 12); *Merck* v. *Apotex (enalapril No. 3)* (FCTD 1998, pp. 385–86).

[51] The injunction was granted by *AbbVie* v. *Janssen (injunction)* (FC 2014); see Section C.6 for a discussion. The show case hearing for contempt is *AbbVie* v. *Janssen (contempt)* (FC 2014).

[52] *AbbVie* v. *Janssen* (FC 2014, para. 29).

[53] Id., paras. 66–67 After a complaint by AbbVie, that language was changed (para. 33), but the change did not affect the analysis and the changed language was also held to constitute contempt (para. 73).

Cases departing from the standard practice of granting an injunction against all forms of infringement, effective immediately, can be divided into three broad categories.

The first category is refusal to grant injunctive relief entirely. The second category is decisions involving appeals, either granting a grace period to allow the infringer to bring an appeal or a stay pending the disposition of an appeal. The third category can be divided into two sub-categories, namely cases tailoring the injunction and those granting a stay for reasons unrelated to an appeal.

2. *Refusing Injunctive Relief*

There appears to be only one reported Canadian case refusing injunctive relief as a remedy for infringement of a valid patent, namely *Unilever* (FCTD 1993).[54] The patent at issue related to a method of softening damp clothing in a laundry dryer. The defendant was Procter & Gamble and its product, which was held to infringe, was Bounce dryer sheets. Though Unilever's patent was held to be valid and infringed, the court refused to grant a permanent injunction, instead awarding "a generous, but non-confiscatory, rate of royalty",[55] which was somewhat increased over the reasonable royalty that was payable for the pre-judgment infringement.[56]

The court's discussion of the refusal to award an injunction in favour of the patentee was relatively brief, but two factors were the main basis for the decision:[57]

- the patentees did not practise their patented invention in Canada, nor did they have a competitive product on the Canadian market;[58]
- the patentees "brandish[ed] their patent as a bargaining tool with P & G".[59]

While the patentees did not practise the invention in Canada, they were an operating company, not a patent assertion entity or non-practising entity. The patentee and the defendant were two of the leading global firms in the relevant market, and it appears the Canadian litigation was part of a global litigation strategy. The reference to the patentee "brandishing" their patent as a bargaining tool with

[54] *Unilever* (FCTD 1993) aff'd *Unilever* (FCA 1995) The refusal to grant an injunction was not appealed.

[55] *Unilever* (FCTD 1993, p. 572).

[56] Id., p. 571). The decision was the liability phase of a bifurcated trial, with quantum of damages to be determined on a reference. While the liability phase determined entitlement to various remedies, the actual quantum was not determined. There is no reported decision on the reference as to damages, perhaps because the parties settled after the liability determination, as is common.

[57] Id., pp. 570–71.

[58] Id., pp. 568, 570–72.

[59] Id., pp. 570–71, describing these as being "The two factors which mainly predicate the Court's discretion in this regard."

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P & G appears to have been a reference to offers to settle the Canadian litigation as part of a global settlement;[60] there is certainly no suggestion that the patentee exploited the patented technology solely by licensing in other jurisdictions, or that it was not concerned with its own global market share. In this context, it is difficult to see why the first two factors should be sufficient grounds for refusing an injunction. The basic argument in favour of injunctive relief is that it allows the parties, rather than the courts, to determine the value of the technology. That is what the parties were attempting to do in the settlement.

A third factor was also mentioned, namely "the hardship which an injunction would inflict on the infringer's employees in difficult economic times, and the absence of a competing workforce engaged by the patentee".[61] There are two difficulties with this factor. First, there is no particular reason to believe that it is likely that the injunction would have been enforced. As noted, the parties were seeking a global settlement, and the main effect of the injunction would probably have been simply to give the patentee greater bargaining power. In principle, one would have expected the patentee to want to license in the Canadian market, given that it did not have a competing product, so that enforcing the injunction rather than licensing would not have generated compensating profits. Second, while the patentee did not have a Canadian workforce, it did have a global workforce, and the decision implicitly prefers the infringer's Canadian workforce over the patentee's foreign workforce. While this may be understandable on the part of a Canadian court, it may be doubted whether it is wise for a court to use injunctive relief as a tool of industrial policy in a global economy.

While *Unilever* has never been disapproved, neither has it been followed. It does clearly establish the proposition, which was not really in doubt, that the court does have the discretion to refuse injunctive relief to a successful patentee, but it has not otherwise been influential. The refusal of a permanent injunction in *Unilever* is best seen as an idiosyncratic decision by the trial judge, which was upheld as not being an abuse of discretion, rather than on the basis that refusal of the injunction was correct in the circumstances. It would be unwarranted to draw any general lessons from *Unilever* as to when a Canadian court is likely to deny injunctive relief in future cases.

3. *Damages in Lieu*

In the only patent case to refuse a permanent injunction, *Unilever* (FCTD 1993), the trial court instead awarded a royalty in lieu on a "generous, but non-confiscatory,

[60] Id., pp. 502–05.

[61] Id., p. 572. An additional factor may have been that the patent had less than two years remaining on the term. This was adverted to by the court in the discussion of injunctive relief at p. 570, but was not expressly mentioned as a consideration in refusing injunctive relief.

rate",[62] which was somewhat increased over the reasonable royalty that was payable for the pre-judgment infringement.[63] The enhancement was not based on notions of wilfulness, as is sometimes the rationale for awarding an enhanced royalty in lieu of an injunction in the US context, since wilfulness as such does not play any role in damages in Canadian law.[64] The reasoning behind the enhancement was very brief: "In return for avoidance of an injunction now, it would be equitable for the defendants to enhance the damages payable by means of an increased rate of royalty from and after the date of these reasons."[65] Thus, the enhanced damages were the price the infringer had to pay as compensation for being relieved of the burden of the injunction.

This award was appealed specifically on the basis that the royalty in lieu should have been confined to the same reasonable royalty that would have been payable for pre-judgment infringement. In Canadian practice, an accounting of profits is commonly awarded as a remedy for patent infringement.[66] In this case, the trial judge refused to grant an accounting. The Court of Appeal held that in awarding damages in lieu of an injunction, the trial judge "chose a middle ground" between an accounting and a reasonable royalty and he was entitled to do so.[67] Thus, the enhanced damages were awarded essentially as a middle ground between a reasonable royalty, and the other two remedies, an accounting or an injunction, which a successful patentee might normally expect.

4. *Stay Pending Appeal*

The trial court which grants an injunction has broad discretion to tailor its timing and implementation,[68] including the ability to delay the effect of its grant of injunctive relief until the determination of any appeal.[69] However, this is seldom done. Instead, the trial court will sometimes provide a "grace period" by delaying the

[62] Id., p. 572.
[63] Id., p. 571.
[64] Wilfulness may be relevant to punitive or exemplary damages, but it is very clear that wilfulness alone is not sufficient grounds for awarding punitive damages.
[65] *Unilever* (FCTD 1993, p. 571).
[66] In an accounting, the patentee is awarded that portion of the infringer's profit that is attributable to the infringement, on the basis of "but for" causation, taking into account the availability of non-infringing alternatives: *Monsanto* v. *Schmeiser* (SCC 2004, para. 104); *Apotex* v. *ADIR* (FCA 2017, paras. 24–30); and see Seaman et al. 2019, discussing the "differential profit" method that is used to assess an accounting in Canadian law.
[67] *Unilever* (FCA 1995, p. 524).
[68] See *Janssen* v. *AbbVie (stay)* (FCA 2014, para. 18), noting that a court has discretion over its own order as required in the "interests of justice".
[69] Such a delay is sometimes referred to as a "stay", but strictly it is simply the exercise of the trial court's discretion in drafting its own order, while a stay is an order delaying the order of another body: *Janssen* v. *AbbVie (stay)* (FCA 2014, para. 18). And see *Merck* v. *Canada* (FCTD 1999), granting a stay pending disposition of the appeal on the merits in a PM(NOC) proceeding.

effect of the order for a limited period to allow the adjudged infringer to decide whether to appeal and to seek a stay of the injunction pending appeal.[70] The Court of Appeal may similarly stay the effect of its own orders pending the disposition of an application for leave to appeal to the Supreme Court of Canada.[71]

A motion for a stay pending appeal may also be brought in the Court of Appeal itself. The granting of a stay is a discretionary remedy, with the ultimate basis of doing justice to all the parties.[72] Stays pending the disposition of an appeal are granted on the same basis as interlocutory injunctions. In the Federal Court of Appeal, this means that the party seeking the stay "must establish that there is an arguable issue to be decided on the appeal, adduce clear evidence that it will suffer irreparable harm if the stay is not granted, and demonstrate that the balance of convenience favours the grant of a stay".[73] This test, and particularly the requirement of irreparable harm, puts a significant burden on the party seeking the stay, so that there is effectively a presumption against granting the stay. Apart from the effect of the irreparable harm requirement, it has also been said explicitly that there is a presumption against granting a stay: "[W]here an injunction has been granted by a final judgment, prima facie, it should remain in force until that judgment has been found, on appeal, to be wrong."[74] This presumption is not particularly strong, but it does mean that if all the factors are equally balanced, the stay will be refused.

If the stay is granted by the Court of Appeal, it may be granted subject to conditions intended to protect the patentee from adverse effects of the stay in the event that the infringer's appeal is unsuccessful. Such protections are often aimed at ensuring the adjudged infringer will be able to pay any damages for infringement arising during the period of the stay.[75] The Court of Appeal may order the hearing of

[70] *See, e.g., Merck* v. *Apotex (lisinopril infringement)* (FC 2006, para. 230) (thirty-day delay); *Procter & Gamble* v. *Bristol-Myers* (FCTD 1978, pp. 168–69) (delay of approximately twenty days); *Bombardier* (FC 2020) (delay of twenty days).

[71] See *AstraZeneca* (FCA 2005, para. 35), granting a stay pending the disposition of the leave application by the Supreme Court. Depending on the order, the stay may be extended until disposition of the Supreme Court appeal where leave is granted. In *AstraZeneca* (FCA 2005, para. 35) the FCA held: "If leave is granted, Apotex will have a period of 30 days to apply for a continued stay in which case the stays hereby given will remain effective until the Supreme Court disposes of the stay applications."

[72] *Apotex* v. *Wellcome (stay)* (FCA 1998, para. 5).

[73] *Apotex* v. *Merck (lisinopril stay)* (FCA 2006, para. 4); and see *Trojan* (FCA 2003, para. 5); *Baker Petrolite* (FCA 2001, para. 10).

[74] *Marketing International* (FCA 1977, p. 230).

[75] *See, e.g., Phostech* v. *Valence (stay)* (FCA 2011, para. 6), in which a stay was granted with conditions including an undertaking as to damages, an undertaking that the infringer will make no distributions to shareholders, and requiring deposit of a bond; *Trojan* (FCA 2003, paras. 8–10), which limited payments to creditors and ordered security to be posted, as well as ordering that "Terms of existing contracts shall not be altered by the [adjudged infringer] so as to reduce its expected revenues or profits"; *Baker Petrolite* (FCA 2001), granting a stay subject to various conditions intended to preserve the assets of the adjudged infringer, when the assets of the adjudged infringer appeared to be less than the judgment against it. Similarly, when the trial court grants a grace period to allow the adjudged infringer to seek a stay, the delay may be

the appeal expedited, either instead of granting a stay or in addition to doing so.[76] The Court of Appeal may also tailor the stay to permit only some infringing activity.[77]

Turning to the three-part test, the threshold for a serious question to be tried on appeal is low and is rarely determinative of the decision to refuse a stay.[78]

The need for the adjudged infringer to establish irreparable harm is a significant hurdle to obtaining a stay pending appeal. If a stay is refused and the adjudged infringer is ultimately successful on appeal, the infringer will have suffered harm, such as lost sales, from having been kept off the market while the injunction was "erroneously" in effect.[79] Because the adjudged infringer is kept off the market by the injunction, and not as a result of any wrong done to it by the patentee, it has no legal cause of action to recover those losses. This uncompensated loss, if substantial, will normally constitute irreparable harm satisfying the second branch of the test, and will carry significant weight in the balance of convenience, favouring a stay.[80] Consequently, the patentee seeking to resist a stay may choose to give an undertaking to indemnify the adjudged infringer against such irrecoverable financial loss that it may suffer in the event that its stay is not granted and its appeal is successful.[81]

subject to conditions intended to protect the patentee in the event that the application for a stay is unsuccessful: *See, e.g., Merck* v. *Apotex (lisinopril infringement)* (FC 2006, para. 230), requiring that the adjudged infringer account for all the infringing product during that period and hold the proceeds of any dispositions in a separate trust fund.

[76] *See, e.g., Baker Petrolite* (FCA 2001), granting a stay and expedited appeal; *Apotex* v. *Wellcome (expedite)* (FCA 1998), expediting the appeal because a stay was refused; *Apotex* v. *Merck (lisinopril stay)* (FCA 2006), expediting the appeal and refusing a stay; *Trojan* (FCA 2003, paras. 8–9), granting a stay and expediting the appeal.

[77] See *Trojan* (FCA 2003, paras. 8–9), ordering that the adjudged infringer "shall make no new bids pending the appeal, but will be allowed to fulfill its contracts that have been signed, that are being negotiated at the present time, and any contracts which shall be concluded on the basis of bids that have already been made".

[78] *AstraZenceca* (FCA 2005, para. 5), noting that "it is not usually useful to dwell into the seriousness of the question".

[79] *Apotex* v. *Wellcome (stay)* (FCA 1998, para. 4) rev'g *Apotex* v. *Wellcome (stay)* (FCTD 1998). The injunction would have been issued "erroneously" only with the benefit of hindsight; this is not to say that the trial court was wrong to grant the injunction in light of its own conclusions.

[80] Id.; *Evolution Tech* (FCA 2019, para. 31); but see *Arctic Cat* (FCA 2020), refusing a stay pending appeal even though it appears that no undertaking was provided.

[81] *AstraZenceca* (FCA 2005, para. 19); *Apotex* v. *Merck (lisinopril stay)* (FCA 2006, paras. 7–9); *Merck* v. *Canada* (FCTD 1999, paras. 5 and 7). There is no requirement that the patentee give such an undertaking, but if it does not, the potential irreparable harm to the adjudged infringer will weigh in favour of the stay being granted. Undertakings of this type are almost invariably given by a party seeking an interlocutory (preliminary) injunction pending trial and the relevant law has developed primarily in that context (though outside of the patent context, as interlocutory injunctions are almost never granted). The undertaking is given to the court, not to the other party, and is enforced by an application to the court for an order directing an inquiry as to damages. The court has the discretion to refuse to grant the inquiry, but the inquiry will be ordered absent exceptional circumstances. If there is a question as to the patentee's ability to pay, some form of security, such as a bond, may be provided. Again, there

If the patentee is financially able to pay any loss which might arise, such an undertaking will be a complete answer to this concern.[82] The undertaking may extend to "springboard" damages[83] arising after the disposition of the appeal.[84] While an undertaking to pay any loss incurred by the adjudged infringer is perhaps the most common type of undertaking, undertakings may be used flexibly to address any specific concerns arising on the facts of a particular case.[85]

If such an undertaking is granted, the adjudged infringer must therefore establish some other form of irreparable harm in order to obtain a stay.[86] The administrative burdens of complying with the injunction will not suffice.[87] Nor is the fact that a defendant to a patent infringement action would suffer some other financial harm during the time of appeal in itself a sufficient basis for a stay, as this would make the stay effectively automatic.[88] For example, injury to reputation or permanent loss of market share may constitute irreparable harm, but must be established on the facts.[89] The clearest form of irreparable harm arises when the adjudged infringer can establish that it has insufficient funds to pay the award and would be put out of business if the stay were not granted.[90]

An important consideration is the effect of the injunction on the operations of the adjudged infringer. If the infringing product is one of many, so that the injunction will have little effect on the infringer's overall business, the loss of business will not

is no requirement to do so, but if there is a real likelihood that the patentee will be unable to pay if necessary, the court will take this into account in assessing irreparable harm.

[82] *AstraZenceca* (FCA 2005, paras. 18–19); *Apotex* v. *Merck (lisinopril stay)* (FCA 2006, paras. 7–9); *Novopharm* v. *Janssen-Ortho* (FCA 2006, paras. 12–13).

[83] Springboard damages are damages awarded for losses caused by infringement during the term, but arising after the term, typically associated with the fact that it may take some time for the competitor to ramp up production after the patent has expired while the patentee still has substantial market power. See also Chapter 13 (United Kingdom), Section H.2, discussing springboard damages.

[84] *Novopharm* v. *Janssen-Ortho* (FCA 2006, paras. 14–15).

[85] See *Bristol-Myers* v. *Canada* (FCTD 2002) in which the defendant's business would have been put at risk had it been prevented from selling its only product, and the applicant, Bristol-Myers Squibb, had offered to pay up to $50,000.00 per month for six months to cover operating costs, in mitigation. The stay was nonetheless granted, on the basis that the balance of convenience favoured the adjudged infringer; while the court did not say so expressly, it apparently considered the amount of the undertaking inadequate compensation for potentially being forced out of business.

[86] *See, e.g.*, *Novopharm* v. *Janssen-Ortho* (FCA 2006), refusing a stay on the basis that irreparable harm had not been established in light of the undertaking.

[87] *Janssen* v. *AbbVie (stay)* (FCA 2014, para. 25).

[88] *Apotex* v. *Wellcome (stay)* (FCA 1998, para. 5).

[89] *Janssen* v. *AbbVie (stay)* (FCA 2014, paras. 26–27); *Apotex* v. *Merck (lisinopril stay)* (FCA 2006, paras. 11–17); *Bristol-Myers* v. *Canada* (FCTD 2002), finding injury to reputation likely as a result of substantial business disruption; *Apotex* v. *Wellcome (stay)* (FCTD 1998) rev'd on other grounds *Apotex* v. *Wellcome (stay)* (FCA 1998) holding no likelihood of injury to reputation on the facts.

[90] *Evolution Tech* (FCA 2019, para. 29).

normally constitute irreparable harm.[91] Conversely, if the effect would be to shut down all or a substantial part of the adjudged infringer's business, as contrasted with causing lost sales in one product line of many, this will normally constitute irreparable harm, and will also weigh heavily in the balance of convenience.[92] This scenario is perhaps the most common reason for a stay being granted.

The impact on the patentee's business will also be considered in the balance of convenience. If sales lost to the infringer will cause substantial harm to the patentee's business, or if the infringer is unlikely to be able to satisfy a damages judgment, this will be given significant weight in the balance of convenience.[93] However, an adjudged infringer's inability to pay must be established on the facts.[94] Conversely, the balance of convenience is more likely to favour a stay if the parties do not compete in the same market, so that the only harm to the patentee is a longer period during which it will be entitled to damages in the form of a reasonable royalty.[95]

It is sometimes suggested that a stay is less likely to be granted when the adjudged infringer knew of the patent and that its product would likely infringe and took a calculated risk that a validity challenge would be successful. This suggestion has had a mixed reception in the Court of Appeal.[96] As a matter of policy, many granted

[91] *Apotex* v. *Wellcome (stay)* (FCTD 1998, para. 11) rev'd on other grounds *Apotex* v. *Wellcome (stay)* (FCA 1998).

[92] See *Phostech* v. *Valence (stay)* (FCA 2011, para. 3), granting a stay; *Trojan* (FCA 2003, paras. 8–9), granting a stay on evidence that the adjudged infringer would be unable to continue to operate if the injunction were not stayed; *Bristol-Myers* v. *Canada* (FCTD 2002), granting a stay where there was a serious risk the defendant would have gone out of business if prevented from selling its product; *Baker Petrolite* (FCA 2001, paras. 12 and 14), granting a stay when substantially all of the adjudged infringer's business consisted of dealing in the infringing product, so that it could not cease the infringement without ceasing to carry on its business. Moreover, if the injunction were immediately enforced, the infringer probably would not have been financially able to bring an appeal; *Merck* v. *Canada* (FCTD 1999), granting a stay, noting that infringing product was a very substantial part of the infringer's assets, and refusal of the stay would jeopardize the infringer's continued viability; *Marketing International* (FCA 1977, p. 231), granting stay when the appellant's business would otherwise be terminated, eliminating the appellant as a competitor even if the appeal were successful.

[93] *Bristol-Myers* v. *Canada* (FCTD 2002); *Baker Petrolite* (FCA 2001), noting that the net value of the adjudged infringer's assets was less than the amount of the judgment against it, but nonetheless granting a stay subject to conditions intended to preserve the infringer's assets, as a stay would have required the infringer to cease operations entirely.

[94] *Apotex* v. *Merck* (*lisinopril stay*) (FCA 2006, para. 30).

[95] *Phostech* v. *Valence (stay)* (FCA 2011, para. 4); *Marketing International* (FCA 1977, p. 231); *Corning Glass* (FCTD 1984, p. 376)

[96] See *Apotex* v. *Wellcome (stay)* (FCTD 1998, para. 10), refusing a stay in part because the adjudged infringers "knew the business risks they were taking when they decided to produce and market [the infringing product] in the midst of the ongoing litigation in Canada and the United States. For whatever reason, they both calculated that the risks of being found to infringe a valid patent were acceptable". However, on appeal, the stay was granted, with the Court of Appeal remarking that "the idea that the loss was merely a foreseeable normal business risk" was "unwarranted". But see *Apotex* v. *Merck (lisinopril stay)* (FCA 2006, para. 31), refusing a stay in part because the adjudged infringer "took a calculated risk that its challenge to the validity of the "350 patent would prove a good defence to an infringement action". See also

patents are ultimately determined to be invalid, and a knowing infringer who successfully attacks the validity of a patent is doing a public service, which should not be discouraged by unduly harsh sanctions.[97] This suggests that known assumption of risk should be irrelevant. On the other hand, it might be said that even so, the infringer should only be excused if it had a good-faith belief in the invalidity of the patent. However, establishing a good-faith belief in invalidity as a condition for various remedies raises significant difficulties in establishing subjective motivation, as illustrated by the US experience with enhanced damages for wilful infringement,[98] and it would seem unwise to import such considerations into a motion for a stay.

If the adjudged infringer has been selling the product at issue for a lengthy period of time, this will weigh in favour of granting a stay. Whatever impact the infringing competition will have on the patentee's market share has already occurred, so the main effect of the stay is only to extend the period for which the patentee will be owed damages.[99] Also the infringer will often have invested substantially in the product lines, so that the implementation of the injunction is likely to cause loss of reputation and other sunk costs, as well as permanent loss of market share due to unreliability of supply to purchasers.[100]

When the public interest lies only in the reduced prices that will result if the adjudged infringer is permitted to continue selling its product, this will not play any role in the balance of convenience, because the premise of the patent system is that this is more than offset by increased innovation; the public interest lies only in allowing competition after the patent has expired.[101] Some more specific impact on the public must be alleged for the public interest to be relevant. In one case, a stay pending disposition of the appeal was granted and upheld, in part because of the potential effect of the injunction on a third-party supplier to the adjudged infringer. The third party was "a charitable organization employing some physically handicapped persons as well as others, many of whose ability to earn a livelihood would be jeopardized by the injunction".[102] However, in upholding the stay, the Court of Appeal remarked that "great care must be exercised in widening the ambit of factors to be taken into account in the determination of the question of irreparable

Corning Glass (FCTD 1984, p. 378), refusing a stay in part because the adjudged infringer "went into this undertaking with its eyes open and fully aware of the risks".

97 See *Lear* v. *Adkins* (US 1969, 670, 673–74), emphasizing the strong public interest in enabling challenges to bad patents.

98 See *Read* v. *Portec* (Fed. Cir. 1992, pp. 656–57), discussing role of good faith in the context of enhanced damages for willful infringement in US law; and see Chien et al. 2019, 91–94, discussing the US approach to wilfulness.

99 *Baker Petrolite* (FCA 2001, para. 14); *Apotex* v. *Wellcome (stay)* (FCA 1998).

100 *Apotex* v. *Wellcome (stay)* (FCA 1998, paras. 3, 5–6).

101 *AstraZenceca* (FCA 2005, paras. 20–34).

102 *Procter & Gamble (stay)* (FCA 1978, p. 177).

harm" when determining whether a stay should be granted.[103] In effect, the trial court is permitted to take such considerations into account, but is not encouraged to do so.[104]

In summary, the Canadian courts are of the view that the patentee is entitled to the enforcement of an injunction granted at trial, and there is in effect a presumption against a stay, which is reflected in the doctrinal test requiring the party seeking the stay to establish irreparable harm. However, a stay will be granted in unusual circumstances, especially when the injunction threatens the adjudged infringer's entire business operations.

5. *Stays Other than Pending Appeal*

A stay pending appeal is the most common reason for a stay of a permanent injunction to be granted. Aside from that scenario, there are a few cases in which the grant of a permanent injunction has been made subject to a short runoff period, during which the infringer can dispose of existing stock. The infringer will still be monetarily liable for those sales, either in damages or for an accounting of profits.[105] The practice does not appear to be common.[106] Presumably it does not appeal to the patentee, which would rather make its own sales, and it does not appeal to the infringer, which will be denied part or all of the profit on the sales made in the runoff period.

An adjudged infringer will be ordered to destroy infringing material in its possession at the time the injunction becomes effective, or to deliver such material to the patentee for destruction. These ancillary orders, like the injunction itself, are discretionary, and they may occasionally be modified to allow the adjudged infringer

[103] Id., p. 176.

[104] And see *Arctic Cat* (FCA 2020, para. 32), holding that the public interest is not to be taken into consideration unless the party seeking the stay can establish irreparable harm to itself, apart from any effect on the public. This decision appears to be an outlier in entirely excluding consideration of the public interest, but it does illustrate the general reluctance of the courts to take the public interest into account.

[105] See *Janssen-Ortho* v. *Novopharm* (FC 2006, para. 133), granting a permanent injunction, but delaying the effect for thirty days, during which time "the Defendant's [*sic*] may continue to sell or otherwise dispose of its [infringing] products already in its possession, custody or control, but only in the normal course of business and provided that all monies received in respect thereof are accounted for and held in a separate trust fund to be paid to the Plaintiffs or as they may direct by December 31, 2006"; see also *Weatherford* (FC 2010, para. 3), setting out the order granting a broad injunction against infringement, "except for delivery of any Infringing Items presently contracted to be delivered within thirty (30) days of this Order but without prejudice to the Plaintiffs' right to damages".

[106] See *AbbVie* v. *Janssen (injunction)* (FC 2014, para. 89–90), noting that neither party had requested an order with a runoff period of this type.

to retain the infringing material until the expiry of the patent, particularly when the remaining term of the patent is short.[107]

The use of a stay to allow the infringer to design around the patent or otherwise mitigate the effect of injunctive relief is notable by its absence in Canadian law. An illustration, in a negative sense, is provided by *Valence* v. *Phostech* (FC 2011). The invention in question related to a process for making lithium mixed metal ($LiFePO_4$) cathodes for lithium ion batteries. It was known that lithium mixed metal was a good cathode material, but it had not been commercially adopted, apparently because of the cost of production.[108] Both the plaintiff, Valence, and the defendant, Phostech, had independently developed new processes for making lithium mixed metal cathodes at about the same time. The validity of Valence's patents at issue was conceded,[109] but infringement was strongly contested and presented a very difficult issue on the facts.[110] The court ultimately held that Valence had established on the balance of probabilities that the Phostech process infringed.[111] While the court did not say so expressly, the factual issue was closely decided, and it would have been reasonable for Phostech to have believed that its process did not infringe. There was no copying or any other form of bad faith on the part of Phostech.[112] The infringing process was being used by defendant Phostech in its existing facility. After it had become aware of the patent, it began constructing a new facility designed to produce the cathodes using a non-infringing process.[113] The court delivered its judgment in early 2011 and at that time construction of the new plant was underway and it was scheduled to be ready in 2012. Phostech asked the court to give it a two-year grace period before giving effect to the injunction, to allow the new plant to be completed.[114] As well as the business disruption to Phostech, employees at the existing plant would presumably have been affected as well. Given independent invention, good faith, high sunk costs and the substantial business disruption to the adjudged infringer, this would appear to be a situation in which a short stay to allow design around might have been appropriate as a matter of policy. Nonetheless, the court refused to grant a stay, saying simply that a permanent

[107] See e.g. *Merck* v. *Apotex (lisinopril infringement)* (FC 2006, para. 231), permitting the adjudged infringer to choose between delivering up the infringing material to the patentee for destruction, or retaining until after expiry of the patent, subject to a requirement to keep an account of all such material and money received in respect thereof.

[108] *Valence* v. *Phostech* (FC 2011, para. 24).

[109] Id., para. 180.

[110] The key to the patented process was the use of carbothermal reduction. It was established that the compounds used in Phostech's allegedly infringing process could support carbothermal reduction under the right conditions, but it was difficult to determine whether the conditions inside the closed industrial kiln used by Phostech would actually result in carbothermal reduction: Id., para. 158.

[111] Id., para. 166.

[112] Id., paras. 44 and 237.

[113] Id., para. 3.

[114] Id., para. 239.

injunction should be refused "only in very rare circumstances", and it was not satisfied that the facts warranted an exception.[115]

6. *Tailored Injunction*

There is one recent example of a tailored injunction, granted in *AbbVie* v. *Janssen (injunction)* (FC 2014).[116] The litigation concerned treatments for psoriasis, which, in its severe form, can be disabling.[117] At the time, there were four biologics[118] available on the market for the treatment of psoriasis, including AbbVie's HUMIRA and Janssen's STELARA. AbbVie's patent at issue was ultimately held to be infringed by Janssen's STELARA, but none of the other products on the market, including AbbVie's own HUMIRA, were covered by the patent.[119] While AbbVie did not practise the patent, by keeping STELARA off the market AbbVie sought to preserve the largest possible "footprint" for HUMIRA in the market for psoriasis treatments.[120] However, the products are not perfect substitutes. STELARA had a different mechanism from the other products on the market, and while many patients would respond to either HUMIRA or STELARA, there were some patients for whom only STELARA was effective.[121]

Thus, a permanent injunction would in principle have allowed AbbVie to prevent the sale of a drug that AbbVie itself did not supply and that, for some patients, was the only effective treatment for a disabling condition. In the circumstances, AbbVie did not even ask for a broad permanent injunction prohibiting sale of STELARA. One might speculate that this is because AbbVie did not want to be responsible for depriving some patients of the only effective treatment for a serious disorder, either for moral reasons, or because of fear of bad publicity. It is also possible that AbbVie anticipated that it would not have been granted a broad injunction. In any event, AbbVie instead sought an injunction with an exception for existing patients and restrictions on new patients, with all the sales permitted

[115] Id, para. 240. A stay pending disposition of the appeal was granted, but allowing Phostech to finish the new plant was not a consideration in the decision to grant a stay: *Phostech* v. *Valence (stay)* (FCA 2011)). The appeal decision (*Phostech* v. *Valence* (FCA 2011)), affirming the trial decision, was rendered in August 2011, and so would not have had the practical effect of giving Phostech time to finish the new plant.

[116] The trial had been divided into several parts, and the decision in *AbbVie* v. *Janssen (injunction)* (FC 2014) concerned only injunctive relief. The underlying liability decision, holding the patent to be valid and infringed, was subsequently set aside: *Janssen* v. *AbbVie (liability)* (FCA 2014) rev'g *AbbVie* v. *Janssen* (FC 2013) and setting aside *AbbVie* v. *Janssen (liability)* (FC 2014). The decision on injunctive relief was set aside in consequence.

[117] *AbbVie* v. *Janssen (injunction)* (FC 2014, para. 17).

[118] A "biologic" is a pharmaceutical derived from living organisms or their cells. They are often contrasted with "small molecule" drugs which are normally chemically synthesized. While small molecule drugs made by different manufacturers are normally pharmacologically identical, biologics from different sources often have different properties.

[119] *AbbVie* v. *Janssen (injunction)* (FC 2014, para. 15).

[120] Id., para. 45.

[121] Id., paras. 21–23.

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under the exception subject to a continuing royalty.[122] The issue in the decision on injunctive relief was therefore not whether there should be a carve-out, but rather the precise terms of the carve-out.[123]

On its face, this seems like a compelling case in which a carve-out should be granted and, given the court's concern over the details of the carve-out, it seems likely that a request for a broad injunction without a carve-out would have been refused. However, there is an argument to be made to the contrary. In principle, granting AbbVie a complete injunction, prohibiting any sales of STELARA without AbbVie's permission would not necessarily mean that patients who need STELARA would be forced to go without. If a patient is not responding to AbbVie's HUMIRA, and does respond to STELARA, it would be in AbbVie's own interest to allow Janssen to sell the STELARA, subject to a royalty negotiated with AbbVie. The only difference is that AbbVie would decide the royalty instead of the court. On the facts, it seems possible, or even likely, that something like this would have happened.

On this view, the real problem with granting a broad injunction is that AbbVie would determine the terms of access. AbbVie sought to require physicians to formally certify that new patients had a medical need for STELARA that could not be met by HUMIRA before prescribing STELARA. The court refused to impose this requirement.[124] The case against a broad injunction, therefore, is not necessarily that it would result in STELARA being taken off the market, but rather that the court is in a better position than AbbVie to determine the terms of access.

One disadvantage of the carve-out is the need for detailed judicial supervision of the terms of access. The carve-out order did give rise to a subsequent contempt hearing over the precise words that Janssen was permitted to use in its communications with physicians.[125]

D. PROCEDURAL ISSUES

1. *Types of Parties*

To date, the types of plaintiffs and defendants do not appear to have any influence on the grant and tailoring of injunctions. The bulk of decided patent cases in

[122] Id., para. 43.

[123] AbbVie did not seek to restrain dissemination of technical information regarding STELARA (Id., para. 68), but it sought to restrain active marketing by sales representatives. The trial judge agreed to this (para. 71). AbbVie also proposed that Janssen be required to approach the formularies with new criteria for listing (para. 73), be ordered to comply only with lawful requests from Health Canada (para. 77), and be ordered to write a letter to physicians stating that STELARA infringes AbbVie's patent (para. 78). The trial judge refused all these requests. He did order a prohibition on Phase IV clinical trials of STELARA in Canada, although this apparently turned, at least in part, on the fact that none were planned (para. 87).

[124] Id., paras. 63 and 66.

[125] *AbbVie* v. *Janssen (contempt)* (FC 2014), discussed in Section B.3 Enforcement.

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Canada involve pharmaceutical companies and, in particular, litigation between branded pharmaceutical companies and generics, but successful patentees in all fields are routinely granted a permanent injunction, and similarly, patentees in all fields are routinely denied interlocutory injunctions.

However, very few decided cases have involved PAEs and there are even fewer, if any, in which a PAE has been successful in establishing infringement.[126] It is therefore premature to conclude that the Canadian courts would routinely grant injunctions to PAEs. Canadian courts would probably apply traditional principles to cases involving a successful PAE, without drawing a formal distinction based on the nature of the patentee.[127] However, it is entirely possible that the courts would find that the circumstances typically attending the assertion of patent rights by a PAE would justify refusing injunctive relief on the basis of traditional principles.[128]

The Canadian *Patent Act* had long granted the government the unrestricted right to use any patented invention, subject only to an obligation to pay reasonable compensation, as determined by the Commissioner of Patents, a civil servant.[129] This provision was invoked by Crown corporations using patented inventions in the ordinary course of their operations.[130] This was changed in 1993 with the advent of the North American Free Trade Agreement Implementation Act.[131] Under current law, Canadian patents are binding on the government, and there is no immunity from injunctive relief.[132] The modified provisions on "Use of Patents by Government" permit the government to apply for what amounts to a compulsory licence; that is, on application by the Crown, the Commissioner of Patents may authorize the use of a patented invention by the government,[133] though only for specific purposes and a limited time,[134] and subject to a requirement to pay "adequate remuneration" as determined by the Commissioner.[135] Further, use by

[126] There had been no comprehensive analysis of the decisions according to the nature of the parties. PAEs are reputed to be active litigants, but to date few cases have come to trial. But see *Safe Gaming* (FC 2018) in which the plaintiff PAE was unsuccessful on the merits.

[127] But see *T-Rex Property* (FC 2019), raising the issue of whether a PAE should be entitled to elect between damages and an accounting of profits.

[128] Note that in *Safe Gaming* (FCA 2018) the Federal Court of Appeal granted a motion for security for costs, both at trial and on appeal, against a PAE that sought to appeal a trial decision holding its patents to be invalid and not infringed. The motion was granted on standard principles set out in the relevant *Federal Courts Rules*, but the fact that the PAE did not carry on any business and had no assets of material value did come into play; see Siebrasse 2018.

[129] See *Formea Chemicals* (SCC 1968, p. 763), holding that the Crown, under the relevant provision, "has an unrestricted right to use a patent".

[130] See id., holding that a Crown corporation dealing in synthetic rubber was entitled to the benefit of s. 19 to use a patented invention relating to polymers.

[131] *NAFTA Implementation Act*, s. 190, providing that the *Patent Act* is binding on the Crown, and s. 191 implementing the new provisions.

[132] *Patent Act*, s. 2.1.

[133] Id., s. 19–19.1.

[134] Id., s. 19(4).

[135] Id., s. 19(2).

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the Crown may only be authorized if the Crown establishes that it has made efforts to obtain a licence from the patentee on reasonable commercial terms and those efforts to obtain a licence were unsuccessful within a reasonable period,[136] although those conditions do not apply in the case of a national emergency.[137] To my knowledge this modern provision has not been used, presumably because the conditions are such that it is normally simpler to obtain a commercial licence.

2. *Effect of Validity*

Ex ante uncertainty as to patent validity has no influence on the tailoring of injunctions. If the patent is found to be valid and infringed, injunctive relief is routinely granted. That the infringer might reasonably have believed the patent to be invalid or not infringed has not, to date, factored into a decision to refuse or tailor injunctive relief.[138]

3. *Public Interest*

The public interest may in principle be taken into account, but it is rarely considered in practice.[139]

4. *Follow-on Innovation*

The courts do not explicitly take into account follow-on innovation. As discussed earlier, permanent injunctions are routinely granted. Whether this implicitly takes account of follow-on innovation depends on one's view of the implications of blocking patents for follow-on innovation. On one view, refusing injunctions is good for follow-on innovation because follow-on innovators will then be able to use the invention without paying any licence fee. On the other hand, an injunction that encompasses follow-on innovation is arguably good for that innovation because it encourages pioneer invention and follow-on innovation cannot occur without the original pioneer invention. To optimally encourage invention, the scope of protection should be commensurate with the value of the invention. In many cases, a substantial part of the value of the pioneer invention is embodied in the follow-on innovation which the pioneer invention enables. Presumably there is some balance to be struck between these effects, but it is not clear that the courts are in a good position to make such an assessment.

[136] Id, s. 19.1(1).
[137] Id, s .19.1(2).
[138] See *Valence* v. *Phostech* (FC 2011), discussed in Section C.5 Stays Other Than Pending Appeal.
[139] See the discussion of *Unilever* (FCTD 1993) aff'd *Unilever* (FCA 1995) in Section C.2 Refusing Injunctive Relief; *Valence* v. *Phostech* (FC 2011), discussed above Section C.5 Stays Other Than Pending Appeal; and generally Section C.4 Stay Pending Appeal.

E. CONCLUSION

In summary, preliminary injunctions as such are never granted in patent cases in Canadian law, but the statutory stay under the patent linkage system has the same effect in cases involving patented pharmaceuticals. Permanent injunctions are routinely granted to a prevailing patentee as a remedy for patent infringement, but it is clear that grant of an injunction is discretionary. In some circumstances a permanent injunction may be modified, stayed or, rarely, even refused entirely, but on the whole Canadian courts are disinclined to make such adjustments. *Valence* v. *Phostech* in a noteworthy example where a stay to allow design around was summarily refused, even though the facts appeared to provide a good prima facie case for such a stay. The sole case to deny a permanent injunction to a successful patentee has not been influential. With that said, the Canadian courts have seen very little litigation involving patent assertion entities, and it remains an open question as to what course the Canadian courts will take when faced with the prospect of granting injunctive relief to a patent assertion entity in circumstances where the injunction would allow the patent assertion entity to hold up a practicing entity and extract an excessive royalty.

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