
CANADA / JUDGMENT

Low v. Pfizer Canada Inc.

2015 BCCA 506

COURT

British Columbia Court of Appeal

DECIDED

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2015 BCCA 506 Low v. Pfizer Canada Inc.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Low v. Pfizer Canada Inc.,

2015 BCCA 506

Date: 20151208

Docket: CA42139

Between:

Britton Low

Respondent

(Plaintiff)

And

Pfizer Canada Inc., Pfizer Inc., Pfizer Ireland Pharmaceuticals,

Pfizer Research and Development Company N.V./S.A.

Appellants

(Defendants)

Before:

The Honourable Madam Justice Bennett

The Honourable Madam Justice Garson

The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia, dated August 5, 2014 (Low v. Pfizer Canada Ltd., 2014 BCSC 1469, Vancouver Docket S128719).

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Place and Date of Hearing:

Vancouver, British Columbia

September 15, 2015

Place and Date of Judgment:

Vancouver, British Columbia

December 8, 2015

Written Reasons by:

The Honourable Madam Justice Garson

Concurred in by:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Savage

Summary:

The appellants appeal the certification of the respondent's class action lawsuit. The appellants held a patent for Viagra that was determined to be invalid for insufficient disclosure contrary to the Patent Act, R.S.C. 1985, c. P-4. The respondent, a consumer of Viagra, brought an action based on unlawful abuse of the patent system. He alleged consumers were overcharged while the appellants held the invalid patent and prevented generic manufacturers from entering the market. The chambers judge held that the respondent's claim disclosed a cause of action in intentional interference with economic relations and unjust enrichment. He found that it was not plain and obvious the patent regulatory regime was a complete code foreclosing civil actions.

Held: Appeal allowed. The patent regulatory regime is a complete code that forecloses civil actions by consumers centred on breaches of the Patent Act. The respondent's claims in unlawful interference with economic relations and unjust enrichment should not have been certified. In any event, the chambers judge erred in his consideration of intentional interference with economic relations and unjust enrichment. A breach of a statute will only satisfy the "unlawful means" element of intentional interference with economic relations if it is actionable outside the context of the statute, and the appellants' conduct is not actionable outside the patent regulatory regime. Having found that at least one juristic reason existed, the chambers judge should not have certified the claim in unjust enrichment.

Reasons for Judgment of the Honourable Madam Justice Garson:

I. INTRODUCTION

- [1] The Appellants, Pfizer Canada Inc., Pfizer Inc., Pfizer Ireland Pharmaceuticals, and Pfizer Research and Development Company N.V./S.A., (collectively "Pfizer") are a group of companies that produced, marketed, supplied and/or sold Viagra to consumers in Canada. The respondent, Britton Low, is a consumer of Viagra.
- [2] On November 8, 2012, the Supreme Court of Canada determined that Pfizer's Canadian Patent 2,163,446 ("Patent '446") for the active ingredient in Viagra was invalid, based on a failure to meet patent disclosure requirements: *Teva Canada Ltd. v. Pfizer Canada Inc.*, 2012 SCC 60. This judgment enabled generic drug manufacturers to enter the market and sell generic versions of Viagra at a price lower than that previously charged to Low and other consumers.
- [3] On December 7, 2012, Low commenced this proceeding claiming that Pfizer had unlawfully abused the patent system, and as a result of its unlawful conduct, Pfizer had overcharged the purchasers of Viagra. Low brought the proposed class action on behalf of British Columbia purchasers of Viagra who were allegedly overcharged during the period January 1, 2006 to November 30, 2012. I shall explain the significance of this particular time frame below.
- [4] On February 13, 2014, before a Supreme Court Justice, Low applied to certify this action as a class proceeding pursuant to s. 4(1) of the Class Proceedings Act, R.S.B.C. 1996, c. 50. The only issue on the application was whether Low's claim disclosed a cause of action. The chambers judge found that it did disclose a valid cause of action in intentional interference with economic relations and unjust enrichment.

II. ISSUES ON APPEAL

- [5] Pfizer contends the chambers judge erred in finding that Low's claim disclosed a cause of action.
- [6] There are three issues on appeal. They are:

1. Is the patent regulatory regime a complete code that excludes common law remedies for a breach of the legislation?
 2. Does Low's claim disclose a cause of action in unlawful interference with economic relations?
 3. Does Low's claim disclose a cause of action in unjust enrichment?
- [7] On the first issue, Pfizer submits that the patent legislative regime constitutes a complete code that forecloses the possibility of private-law consumer remedies. On the second, Pfizer submits that Low did not satisfy the "unlawful means" requirement for the tort of unlawful interference with economic relations. Finally, Pfizer argues that the claim in unjust enrichment cannot succeed because of the existence of a valid juristic reason for the enrichment.

III. THE PATENT REGULATORY REGIME

- [8] In order to understand the issues on appeal, it is necessary to provide some description of the Canadian patent regime. Throughout this judgment I shall at times refer to the Patent Act, R.S.C. 1985, c. P-4, the Food and Drugs Act, R.S.C. 1985, c. F-27, the Food and Drug Regulations, C.R.C., c. 870, Part C, Division 8, C.08.004, and the Patented Medicines (Notice of Compliance) Regulations, S.O.R./93-133 (the "PM(NOC) Regulations") collectively as the "Patent Regulatory Regime."
- [9] There is no right to a patent at common law; patent rights are a creature of statute: *Apotex Inc. v. Sanofi-Synthelabo Canada Inc.*, 2008 SCC 61 at para. 12.
- [10] In *Teva v. Pfizer Canada Inc.*, LeBel J. described the patent system as "based on a "bargain", or quid pro quo". The essence of that bargain is that the inventor is provided with a monopoly on a new invention for a limited period of time, and in exchange, discloses the invention such that society can benefit from that knowledge (at para. 32). The patent system, LeBel J. explained, requires a certain degree of specificity in the information disclosed, such that a reasonably informed artisan can create the item in question and make it publicly available at the expiry of the monopoly (at para. 33).
- [11] The disclosure requirements relevant to this appeal are described in s. 27 of the Patent Act:
- 27 (1) The Commissioner shall grant a patent for an invention to the inventor or the inventor's legal representative if an application for the patent in Canada is filed in accordance with this Act and all other requirements for the issuance of a patent under this Act are met.
- (3) The specification of an invention must
- (a) correctly and fully describe the invention and its operation or use as contemplated by the inventor;

- [12] An action to impeach a patent may be brought pursuant to s. 60 of the Act for, among other things, the failure to meet the disclosure requirements of s. 27. Section 53(1) provides that a patent is void if any material allegation in the petition of the applicant in respect of the patent is untrue, or if the specification and drawings contain more or less than is necessary for obtaining the end for which they purport to be made, and the omission or addition is wilfully made for the purpose of misleading.
- [13] The Patented Medicines (Notice of Compliance) Regulations, S.O.R./93-133 regulate patent rights associated with pharmaceuticals as they relate to the regime governing the sale of pharmaceuticals in Canada. Those portions of the regulatory regime that are pertinent to this appeal were described by Moldaver J.A. (as he then was) in *Harris v. GlaxoSmithKline Inc.*, 2010 ONCA 872. I find it convenient to quote and adopt his summary:
- [8] The marketing of drugs in Canada is governed by the Food and Drugs Act, R.S.C. 1985, c. F-27 ("FDA") and the Patent Act. The FDA deals with the safety and efficacy of drugs. Regulations made under that Act (the Food and Drug Regulations, C.R.C., c. 870, Part C, Division 8, C.08.004) provide that a drug cannot be marketed in Canada unless and until the Minister of Health has issued a Notice of Compliance ("NOC") in respect of it.
- [9] The Patent Act deals with intellectual property issues relating to patented drugs and their subsequent generic copies. The Patented Medicines (Notice of Compliance) Regulations, S.O.R./93-133 ("PM (NOC) Regulations") provide that all patents pertaining to a drug for which a NOC has been issued may be listed in the Patent Register. These regulations further provide for a process whereby the interests of innovator patentees are balanced against the competing interests of generic manufacturers.
- [10] A subsequent manufacturer that wishes to market a generic version of a patented drug can simply wait for the relevant patents to expire. Alternatively, s. 5(1) of the PM(NOC) Regulations allows a manufacturer to serve a Notice of Allegation ("NOA") on the patentee asserting that the listed patents are invalid and/or will not be infringed by the proposed generic equivalent.
- [11] Section 6(1) of the PM(NOC) Regulations provides that a patentee who receives a NOA may challenge the allegations made by the generic manufacturer by applying for judicial review in the Federal Court (a "NOC Proceeding"). In the NOC Proceeding, the patentee disputes the NOA and asserts the validity and/or infringement of the patent in issue. The patentee is given an opportunity to demonstrate that the allegations set forth in the NOA are "not justified".
- [12] Upon the commencement of a NOC Proceeding, s. 7(1)(e) of the PM(NOC) Regulations takes effect and automatically enjoins the Minister from issuing a NOC to the generic drug manufacturer for a period of up to 24 months from the date of the filing.

- [13] If the patentee prevails in a NOC Proceeding, the Minister is enjoined from issuing a NOC to the generic manufacturer prior to the expiry of the patent in issue. Alternatively, the court may dismiss a NOC Proceeding if it finds that the patent is invalid or would not be infringed, or that the patent holder has failed to show that the allegations in the NOA are not justified. In that event, the Minister may immediately issue a NOC for the generic product.
- [14] A possible check on the automatic 24-month stay contemplated by the filing of a NOC Proceeding is found in s. 6(5)(b) of the PM(NOC) Regulations. Under that provision, the court may dismiss a s. 6(1) application on the ground that "the application is redundant, scandalous, frivolous or vexatious or is otherwise an abuse of process".
- [15] Another check on patentees who choose to institute NOC Proceedings is found in s. 8 of the PM(NOC) Regulations. Under that provision, where a NOC Proceeding is withdrawn or discontinued or is ultimately dismissed, the unsuccessful patentee is liable to the generic drug manufacturer for any losses the generic manufacturer may have suffered due to its inability to market its product during the stay period. The PM(NOC) Regulations do not, however, provide any form of relief to other persons or entities, including consumers who may have been adversely affected by a patentee's choice to instigate a NOC Proceeding.
- [14] PM(NOC) Regulations, s. 8(1), referred to in para. 15 above, reads as follows:
8. (1) If an application made under subsection 6(1) is withdrawn or discontinued by the first person or is dismissed by the court hearing the application or if an order preventing the Minister from issuing a notice of compliance, made pursuant to that subsection, is reversed on appeal, the first person is liable to the second person for any loss suffered during the period
 - (a) beginning on the date, as certified by the Minister, on which a notice of compliance would have been issued in the absence of these Regulations, unless the court concludes that
 - (i) the certified date was, by the operation of An Act to amend the Patent Act and the Food and Drugs Act (The Jean Chrétien Pledge to Africa), chapter 23 of the Statutes of Canada, 2004, earlier than it would otherwise have been and therefore a date later than the certified date is more appropriate, or
 - (ii) a date other than the certified date is more appropriate; and
 - (b) ending on the date of the withdrawal, the discontinuance, the dismissal or the reversal.
- [15] In summary, a drug cannot be marketed in Canada without its manufacturer first obtaining a Notice of Compliance ("NOC"). If a generic manufacturer wishes to market a generic version of a patented drug, it may challenge the validity of the inventor's patent by issuing a Notice of Allegation ("NOA"). The inventor may then challenge the NOA in court, through an NOC Proceeding. The commencement of an NOC Proceeding results in an automatic stay on the issuance of an NOC in favour of the generic manufacturer for up to 24 months. If the patent is ultimately found to be invalid, then an NOC must be issued immediately. The

generic manufacturer is provided with a right to claim compensation from the unsuccessful manufacturer for loss suffered by reason of delayed market entry. Notably, there is no remedy in the patent regime available to consumers for conduct alleged to have breached the Act or the regulations.

IV. FACTS

Background

- [16] The compliance regime described above was engaged with respect to Patent '446. To the limited extent that it is necessary to do so for the determination of this appeal, I shall describe the background of the Viagra patent registration and the proceedings that ultimately successfully challenged the validity of the patent. None of these facts are in dispute.
- [17] The active ingredient in Viagra is sildenafil citrate ("sildenafil"). In 1998, Pfizer obtained Patent '446 for the use of sildenafil, as well as about "260 quintillion" other compounds, in the treatment of erectile dysfunction.
- [18] Patent '446 provided Pfizer with a monopoly on the sale of sildenafil in Canada and prevented generic manufacturers from introducing a generic version of sildenafil until the patent expired or was invalidated.
- [19] In June 2005, the generic manufacturer Apotex filed a NOA with respect to sildenafil. Pfizer responded by commencing NOC proceedings, and an automatic stay was issued prohibiting Apotex from marketing generic sildenafil for 24 months while the application was adjudicated. In September 2007, it was determined that Apotex's allegations were not justified. This decision was upheld by the Federal Court of Appeal in January, 2009: *Pfizer Canada Inc. v. Apotex Inc.*, 2009 FCA 8.
- [20] In 2006, Novopharm Limited, now Teva Pharmaceuticals Ltd. ("Teva"), sought a NOC on the basis that Patent '446 was invalid for, inter alia, insufficiency of disclosure pursuant to the Patent Act. Again, Pfizer responded by commencing a NOC proceeding, triggering the automatic 24 month stay. Pfizer's prohibition application was successful in the Federal Court in 2009 and the Federal Court of Appeal in 2010. However, Teva successfully appealed the Federal Court of Appeal ruling to the Supreme Court of Canada.
- [21] As noted, on November 8, 2012, and as amended on June 4, 2013, the Supreme Court of Canada held that Patent '446 was not valid. Patent '446 contained a series of cascading claims, ending with two individual claims for compounds purportedly for the treatment of erectile dysfunction. The Court determined that as a whole, the patent specification did not indicate that sildenafil was the effective compound, or that the other compound was not effective. It found that Pfizer had gained a benefit from the Act while withholding disclosure, and that patentees could not be permitted to "game" the patent system in the fashion that it had (at para. 80). It held Patent '446 invalid. As a result of the Supreme Court's ruling, the

Federal Court also declared Patent '446 invalid and void in *Apotex Inc. v. Pfizer Ireland Pharmaceuticals*, 2012 FC 1339 on November 20, 2012. This judgment was affirmed on appeal: 2014 FCA 13.

- [22] Thus, the defined class period in this litigation (being January 1, 2006 to November 30, 2012) appears to correspond roughly to the period during which Teva sought a notice of compliance for generic sildenafil, but was prevented from doing so by reason of the prohibition proceedings initiated by Pfizer.

History of Proceedings

- [23] This action is brought on behalf of members of the class consisting of British Columbia residents who purchased Viagra from January 1, 2006 to November 30, 2012.
- [24] Low pleads that Pfizer obtained an unlawful monopoly over sildenafil through a patent that breached the disclosure requirements of the Patent Act. Low says that Pfizer was able to charge an inflated price for Viagra as a result of the unlawfully obtained monopoly. Low alleges that the difference between the revenue Pfizer collected by charging the actual price of Viagra, and the revenue it would have collected in the presence of generic competition represents "ill-gotten gains".
- [25] Based on Pfizer's conduct, Low seeks recovery for the tort of unlawful interference with economic relations and for unjust enrichment. The relevant allegations are set out at paras. 16 to 24 of Part 1 of Low's notice of civil claim:
16. The Patent Act system is based on a bargain whereby the inventor is granted monopoly rights in a new and useful invention in exchange for disclosure of the invention so that society, including the Class Members as defined in paragraph 9, can benefit from the knowledge.
17. At the time Pfizer's applied for Patent 446, Pfizer had the information needed to disclose sildenafil and chose not to release it. At the time Pfizer filed the patent application, Pfizer knew that the effective compound was sildenafil. However, Pfizer limited its description to the following statement:

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.

18. Pfizer chose a method of drafting its application for Patent 446 that failed to clearly set out what the invention was. Even during the proceedings in Federal Court and in the Supreme Court of Canada, Pfizer offered no explanation as to why it elected to withhold that information.

19. Pfizer's disclosure of the invention in Patent 446 did not satisfy the disclosure requirements set out in section 27 of the Patent Act and Patent 446 was intentionally misleading, invalid and void.
20. As a consequence of its improper disclosure of the invention of sildenafil, Pfizer gained a benefit from the Patent Act - exclusive monopoly rights - while withholding disclosure contrary to its legal obligations. Pfizer gamed the patent system in order to obtain exclusive monopoly rights.
21. Despite the invalidity of Patent 446, Pfizer used Patent 446 to prevent the introduction of generic sildenafil from 2006 until 2012.
22. As a result of its unlawfully obtained monopoly over sildenafil, Pfizer was able to overcharge the plaintiff and the other Class Members for Viagra as compared to the price Pfizer could have charged for Viagra in the presence of generic competition. The difference between the revenue Pfizer collected by charging the actual price for Viagra and the revenue which Pfizer would have collected at the price prevailing in the presence of generic competition (the "Viagra overcharge") represents Pfizer's ill-gotten gains.
23. The acts particularized in paragraphs 16 to 22 were unlawful acts undertaken by Pfizer with the intent to cause economic harm to the plaintiff and other Class Members as an end in itself or as a necessary means of enriching the Defendants. The unlawful acts undertaken by the Defendants are actionable by third party generic drug manufacturers, or would be actionable by third party generic drug manufacturers, if those generic drug manufacturers had suffered a loss. As such, the Defendants are liable for the tort of intentional interference with economic interests.

[Emphasis in original.]

The Certification Application

- [26] Low successfully sought certification in the Supreme Court. The chambers judge's reasons for judgment are indexed at: 2014 BCSC 1469.
- [27] As noted, the only issue before the judge was whether Low's claim disclosed a cause of action under s. 4(1)(a) of the Class Proceedings Act. He correctly instructed himself that the s. 4(1)(a) test is satisfied unless, assuming all facts pleaded to be true, it is "plain and obvious" the plaintiff's claim will not succeed: (at para. 20, citing *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 595).
- [28] After setting out the applicable test, the chambers judge then considered whether the Patent Regulatory Regime constitutes a complete code. Pfizer argued that the statutes and regulations govern completely the marketing of patented drugs, including all rights and remedies. In the absence of a cause of action for individual purchasers, Pfizer argued that Low's action could not succeed (at para. 22). These same arguments are made on appeal.

- [29] After reviewing this Court's judgments in *Koubi v. Mazda Canada Inc.*, 2012 BCCA 310; *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36; and *Macaraegv. E Care Contact Centres Ltd.*, 2008 BCCA 182, the chambers judge concluded that in those cases, "statutory remedies available to the plaintiffs replaced and excluded remedies the plaintiffs might otherwise have at common law" (at para. 28).
- [30] However, the chambers judge considered these cases (and *Koubi* in particular) to be distinguishable. In reaching this conclusion, he relied on the Supreme Court of Canada's decision in *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205. He noted that *Saskatchewan Wheat Pool* stands for the proposition that a breach of statute can be evidence of a cause of action in negligence, and found that the same principles applied to other causes of action (at para. 31). The chambers judge noted that in *Koubi*, it was found that no cause of action could exist parallel to the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2 ("BPCPA") because it provided the plaintiff with a specific statutory remedy (at paras. 25-26).
- [31] In contrast, because Parliament created no right of action for consumers arising directly out of a breach of the Patent Act, the chambers judge held that it did not bar an action by consumers if the conduct in breach of statute was also relevant to a cause of action (at para. 34). Accordingly, he concluded that it was not "plain and obvious" that the statute in itself barred the plaintiff's action (at para. 35).
- [32] Having concluded that it was not plain and obvious that the Patent Act operated as a complete bar to a consumer remedy, the chambers judge turned to unlawful interference with economic relations. He described the essential elements of the tort as follows (at para. 38):
- The tort of intentional interference with economic relations provides a remedy to victims of intentional commercial wrongdoing. The essential elements of the tort are: (1) the defendant intended to injure the plaintiff's economic interests; (2) the interference was by illegal or unlawful means; and (3) the plaintiff suffered economic loss or harm as a result.
- [33] The chambers judge explained that the tort involves a kind of parasitic liability, in the sense that the defendant's unlawful acts against a third party give rise to liability to the plaintiff (at para. 40).
- [34] His reasons focus largely on the second element of the tort, or "unlawful means". The chambers judge held, relying on the Supreme Court of Canada's decision in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, that a defendant's means are unlawful where they support a civil action for damages or compensation by the third party, or would do so except for the fact that the third party did not suffer a loss as a result of the defendant's acts (at para. 41).

- [35] The chambers judge held that Teva's right of recovery under PM(NOC) Regulations, s. 8(1), for losses occasioned as a result of Pfizer's unsuccessful NOC proceedings, could satisfy the "unlawful means" element. He concluded that Bram did not necessarily exclude a purely statutory cause of action from the requirement that there be a "civil action" available to the third party (at para. 49).
- [36] On the question of intention (the first element), the chambers judge stated that it would likely be difficult for Low to meet (at para. 52). However, he considered intention a question of fact that could not be resolved on the application, and found Low's pleading of the element to be sufficient (at para. 53).
- [37] Taking into account the low threshold applicable to certification, the chambers judge found that the claim in interference with economic relations was not bound to fail.
- [38] After finding that unlawful interference with economic relations was not bound to fail, the chambers judge considered Low's claim in waiver in tort. He concluded that there was no prospect of success (at para. 72). This finding is not challenged on appeal.
- [39] Last, the chambers judge addressed Low's claim in unjust enrichment. He set out the essential elements of the cause of action, noting that the dispute on certification related to the third element (at paras. 75-76):

The well-established elements of unjust enrichment claim [sic] are: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment

There is no dispute about the fact the plaintiff has properly pleaded the first two elements of enrichment and deprivation. It is the third element--the absence of juristic reason--that renders the enrichment "unjust" (Pacific National at para. 22.).

- [40] A juristic reason may be understood to mean very generally a lawful excuse proffered by the defendant for its apparent enrichment at the expense of the plaintiff. Low pleaded that Pfizer obtained its patent and sought to enforce it through conduct that was an abuse of the patent system. Pfizer argued it was simply exercising authorized statutory rights under the Patent Regulatory Regime. The chambers judge noted that usually, but not necessarily, operating under statutory rights or authority will provide a juristic reason (at para 80).
- [41] The chambers judge concluded that it was not plain and obvious that the fact that Pfizer was operating pursuant to statutory rights was a juristic reason, and therefore not certain that the cause of action was bound to fail (at paras. 84-86). In reaching that conclusion, he pointed out that whether the patent legislation provided a juristic reason may involve a fact specific inquiry into Pfizer's knowledge and intention, and that depending on the evidence, the legislation might be excluded as a sufficient juristic reason (at para. 85).

[42] However, the judge continued his analysis into the question of whether the contracts between Pfizer and direct purchasers could constitute another juristic reason. He concluded that Low failed to show how such contracts could be against public policy, illegal or void for mutual mistake (at para. 88). He noted that there was no statutory or other basis pleaded for illegality. He pointed out the inconsistency of alleging the validity of Patent '446 as a basis for mistake, while simultaneously claiming that Pfizer knew or ought to have known of its invalidity (at paras. 93-94). He conceded that while the existence and presumed validity of Patent '446 may have affected Viagra's price, there were no pleaded facts suggesting the price was a fundamental fact on which the contracts were based, or that the plaintiff or other class members would have refused to pay had they known of the patent's possible invalidity (at para. 96).

[43] Thus, at para. 97, the chambers judge stated:

I find that to the extent the plaintiff relies on alleged abuse of the patent system, the pleadings disclose a cause of action in unjust enrichment. They do not disclose a cause of action to [the] extent they rely on issues relating to the contracts to which Pfizer was a party.

[44] I note that this finding is the subject of the third issue on appeal. In brief, Pfizer argues that having found one juristic reason in the form of the contracts, the chambers judge should not have allowed the claim to proceed. Low says that in fact, the chambers judge never considered the question of whether the contracts provided a juristic reason, only whether they were illegal, void or against public policy.

V. ANALYSIS

Standard of Review

[45] There are elements of a certification order that are discretionary. This Court must review those elements on a highly deferential basis; however, to the extent that the chambers judge's order rests on a question of law, the standard of review is one of correctness: Wakelam at para. 8. As I will explain, it is my view the judge erred in his consideration of the "complete code" argument, in defining the elements of the unlawful interference cause of action, and in his unjust enrichment analysis. These are mistakes of law reviewable on a standard of correctness.

Issue 1: Is the Patent Regulatory Regime a complete code?

[46] On appeal, Pfizer submits that the Patent Regulatory Regime constitutes a complete legislative code as to the rights and remedies of the patent holders and the generic drug makers who invoke the NOC procedure. Pfizer says that Parliament provided a limited statutory cause of action under PM(NOC) Regulations, s. 8, but it must be presumed to have clearly chosen not to create a right of action for consumers arising directly out of a breach of the Patent Act. Because Low's claims are entirely derived from the Patent Act, Pfizer submits that Low must look to the statute for a remedy, which (as noted) does not exist.

- [47] In contrast, Low submits that his claim is based in common law. Regarding his claim in unlawful interference with economic relations, Low says that because the cause of action is grounded in the common law, the "complete code" argument does not apply.
- [48] He concedes, however, that the statutory regime is a complete code as regards the relationship between generic and brand name manufacturers. There is authority supporting this proposition. For example, Richard C.J. speaking for the Court in *DBC Marine Safety Systems Ltd. v. Canada*, 2008 FCA 256, said the following (at para. 2):

The regime for patent applications is firmly established by the Patent Act and the Patent Rules. Together, the various legislative provisions set out a complete code governing the duties of an applicant for a patent, the consequences of a failure to comply with those duties, and the steps that may be taken to avoid those consequences.

See also: *Apotex Inc. v. Abbot Laboratories Ltd. et al.*, 2013 ONSC 356, aff'd 2013 ONCA 555; *Corlac Inc. v. Weatherford Canada Inc.*, 2011 FCA 228 at para. 141.

- [49] However, Low submits that unlike the claims of generic manufacturers (cited in *DBC Marine* and other cases), his claim is not completely dependent on the rights and remedies contained in the statutory framework. He says that because the Patent Regulatory Regime is silent as to consumer rights and remedies for breach of the Patent Act, it cannot be a complete code. The correct question to ask, Low submits, is whether the legislature intended to oust consumer rights of action, not whether it intended to create them. He submits that his claim is distinguishable from previous cases because it is based in common law.
- [50] I begin my analysis with a recent decision of the Ontario Court of Appeal that was drawn to our attention in supplementary factums, *Apotex Inc. v. Eli Lilly and Company*, 2015 ONCA 305. In *Apotex v. Eli Lilly*, Eli Lilly obtained a patent relating to the use of a drug for the treatment of Attention Deficit Hyperactivity Disorder. Eli Lilly used the NOC Regulations process to keep Apotex's generic version of the drug from entering the market. Its patent was later invalidated. Under NOC Regulations s. 8(1), Apotex was entitled to claim its losses resulting from the exclusion period. However, Apotex instead brought a proceeding claiming unjust enrichment and seeking disgorgement of Eli Lilly's (substantially greater) profits. The chambers judge struck the proceeding, and his order was upheld on appeal.
- [51] The Ontario Court of Appeal considered but did not decide the issue of whether the Patent Regulatory Regime constituted a complete code. The chambers judge's decision in these proceedings is referenced, but as I understand the reasons, neither endorsed nor rejected. At para. 35, the Court erroneously stated that the British Columbia Court of Appeal rejected the complete code argument to the extent that it would preclude a common law right of action by consumers. I assume that the Ontario Court of Appeal intended to say that it was the British Columbia Supreme Court that had rejected the complete code argument, a reference to the decision under appeal. Ultimately, however, the dismissal rested on the absence of a corresponding deprivation, an essential element of unjust enrichment (at

paras. 40-41).

- [52] Both Pfizer and Low rely on this decision in support of their respective positions. Given that the outcome did not depend on a complete code argument, in my view, it does not provide substantial support for either party's position.
- [53] However, other decisions of the Federal Court of Appeal lend support to the notion that Patent Regulatory Regime is a complete code as between brand name drug producers and generics.
- [54] In *Apotex v. Merck & Co. Inc.*, 2009 FCA 187, the Federal Court of Appeal rejected an argument that PM(NOC) Regulations s. 8 could be used to seek disgorgement of profits. The Court held that the language of the section clearly limited recovery to damages for losses suffered during the exclusionary period (at paras. 100-102).
- [55] In *Apotex v. Eli Lilly*, 2011 FCA 358, the Federal Court of Appeal considered whether Apotex's claims for unjust enrichment seeking disgorgement of profits were appropriately struck. The "wrongful acts" alleged in support of the unjust enrichment claims were the initiation of prohibition proceedings, which were ultimately dismissed, that delayed Apotex from marketing generic drugs (at para. 16). The Court noted that the "wrongful acts" were the same wrongful acts underlying liability under PM(NOC) Regulations, s. 8 (at para. 16). It concluded that the claim for disgorgement of profits was tied to the PM(NOC) Regulations, since entitlement was based on the fact that prohibition proceedings were initiated and dismissed, and nothing more (at para. 17). At paras. 22 and 23, the Court said the following:

Parliament, through the auspices of the Governor-in-Council, has considered whether generic companies should be entitled to first persons' profits in the circumstances contemplated by section 8, and has excluded this remedy. It did so in the context of the above-noted balance which is sought to be achieved by the PM(NOC) Regulations. This is a legislative policy issue with respect to which the will of Parliament is paramount.

- [23] It follows that whatever jurisdiction the Federal Court has under subsection 20(s) of the Federal Courts Act to provide equitable relief, it cannot be used to grant a remedy which section 8 was intended to exclude (compare *Radio Corp. of America v. Philco Corp.* (Delaware) (1966), 48 C.P.R. 128 at 136 (SCC); see also *Zaidan Group Ltd. v. London (City)* (1990), 71 O.R. (2d) 65 at 69 (C.A.), *aff'd* [1991] 3 S.C.R. 593), unless a cause of action independent of the operation of section 8 is alleged. Here, no such cause of action has been pled. The result is that Apotex' claim for disgorgement of profits cannot possibly succeed.

[Emphasis added.]

- [56] In *Apotex Inc. v. Abbot Laboratories Ltd. et al.*, Apotex presented an identical claim in the Ontario Supreme Court. After an extensive review of decisions including those of the Federal Court of Appeal in *Apotex v. Merck* and *Apotex v. Eli Lilly*, the Court concluded as follows:

[152] Apotex has argued that the legislation does not oust prior rights and it assumes that there was a pre-existing cause of action, but that cannot be the case in these circumstances. A generic drug manufacturer has no right to patent-related restitution based on unjust enrichment or otherwise that has no statutory background or foundation. Here, the background or foundation and the only source of the entitlement is to be found entirely in the statutory framework that Parliament created, and as is plain from its language, both initially and as amended, and from the Federal Court of Appeal's decision in *Eli Lilly*, that framework constitutes a complete code and does not leave room for any stand-alone equitable remedies.

[57] Outside the specific context of the Patent Regulatory Regime, this Court has held that a comprehensive statutory scheme may preclude common law rights, including unjust enrichment. *Wakelam* ; *Macaraeg* at paras. 73 and 101; *Koubi* at paras. 51-56. See also *Ruth Sullivan*, *Sullivan on the Construction Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008) at 441.

[58] In *Macaraeg Chiasson* J.A. writing for the Court said:

In my view, in ascertaining the intention of the legislators an important indicium is whether the legislation provides effective enforcement of the right conferred by statute. If the statute does so, there is no need for enforcement outside the statute and *prima facie* there is no civil cause of action. If the statutory remedy is inadequate, a logical conclusion is the Legislature intended the right to be enforceable by civil action. If it were not, granting the right would be pyrrhic. It is at this stage of the analysis in the context of employment standards legislation that the issue of implied contractual terms arises.

[Emphasis added.]

[59] Low draws support for his position from this statement. I do not agree that silence in the legislation in the circumstances here may be taken as an indication that a right to a civil action could be inferred based on *Macaraeg*. *Macaraeg* is entirely distinguishable. *Chiasson* J.A.'s statement must be understood within its context. *Macaraeg* sued her employer for overtime pay in accordance with the minimum overtime pay requirement found in the *Employment Standards Act*, R.S.B.C. 1996, c. 113. This Court held that the jurisdiction to determine such a claim lay exclusively with the Director of Employment Standards pursuant to the *Employment Standards Act*. It was in this context that *Chiasson* J.A. said (at para. 74) that the statute conferred a direct benefit or protection on the employee, and that absent a statutory mechanism to enforce that benefit, one could be inferred to exist at common law. However, he found that the enforcement mechanism was available within the legislation.

- [60] By contrast, the Patent Regulatory Regime does not confer a direct benefit or protection on a consumer. The legislation confers no express right on a consumer. Macaraeg therefore cannot be applied for the proposition that the absence of an enforcement mechanism in the legislation at issue may be taken as implying a common law private cause of action by a consumer.
- [61] In *Koubi*, the plaintiff sought certification of a class action asserting waiver of tort based on breaches of the BPCPA relating to faulty locking mechanisms on Mazda vehicles. Neilson J.A., writing for the Court, described the circumstances in which legislation is considered comprehensive and thus excludes common law causes of action, relying on this Court's decision in *Macaraeg* (at paras. 51-55). In summary, Nielson J.A. held that the general rule is that there is no cause of action at common law to enforce statutorily-conferred rights, and that the critical question is whether it is clear that legislators intended to allow common law rights to exist in parallel to statutory enforcement mechanisms.
- [62] Ultimately, the Court in *Koubi* concluded that the language of the BPCPA revealed a clear intent to provide a complete code, and that there was nothing in the Act to support the view that legislature intended to augment existing statutory remedies by allowing a consumer action in waiver of tort.
- [63] In *Wakelam*, the plaintiff sought certification of a class action against a drug manufacturer for misrepresenting the effectiveness of a children's cough medication. She sought restitutionary remedies for (among other things) alleged deceptive acts and practices under the BCPA. Following the decision in *Koubi*, this Court held that the statute was an exhaustive piece of legislation regulating consumer transactions.
- [64] As noted, Low argues that these authorities are distinguishable. Principally, he says that the Patent Regulatory Regime is not a complete code as between consumers and brand name manufacturers because it does not consider consumer rights at all. In support of this proposition, he relies, as I have noted, on Chiasson J.A.'s statement in *Macaraeg* that "if the statutory remedy is inadequate, a logical conclusion is the Legislature intended the right to be enforceable by civil action" (at para. 74). Because consumers lack a means of recouping losses resulting from breaches of the Patent Act, he argues that Parliament could not have intended it and the regulations to be exhaustive vis-à-vis consumers. As I have said, it is my opinion that Chiasson J.A.'s comments in *Macaraeg* are inapplicable to Low's circumstances, because they presuppose the existence of a statutorily conferred right. The Patent Regulatory Regime confers no rights on consumers.
- [65] In my view, Saskatchewan Wheat Pool presents the clearest challenge to Low's claim. Saskatchewan Wheat Pool is authority for the proposition that there is no common law tort of breach of statute, and that such breaches should be generally subsumed in the law of negligence. It follows that there can be no tort of breach of the legislation forming the Patent Regulatory Regime.

- [66] This renders Low's claim problematic. A crucial aspect of the claim is the assertion that it rests on a footing outside of the Patent Regulatory Regime--that is to say, in the common law of unlawful interference with economic relations and in unjust enrichment. I do not agree with this submission. Low's pleading indicates that the wrongful conduct at issue is, at its root, Pfizer's failure to make disclosure in accordance with s. 27 of the Patent Act. His claim is, in my opinion, fundamentally a claim for breach of statute. His right to recovery is said to arise out of "abuse of the Patent system."
- [67] Assuming that the Patent Regulatory Regime is not a complete code, Low's claim necessarily runs afoul of the rule in Saskatchewan Wheat Pool unless it can be shown that Pfizer's statutory breach itself is a component of a civil action. In response to this problem, Low says that his claims are in unlawful interference with economic relations and in unjust enrichment. The circularity of this line of reasoning becomes readily apparent.
- [68] However, I am of the view that the completeness of the Patent Regulatory Regime forecloses parallel civil actions by consumers that are rooted in a breach of the Patent Act. In my opinion, there is nothing in the legislation comprising the Patent Regulatory Regime (and in the Patent Act particularly) that evinces an intention to allow consumers to make such claims. Saskatchewan Wheat Pool cautions that courts "must refrain from conjecture as to Parliament's unexpressed intent" (at 226). As I have stated, patent rights are a construct of statute. The legislative regime creates rights which would not otherwise exist at common law. In effect, Low seeks to use the common law to expand the scope of those statutory rights and redefine the consequences of their breach by relying on Parliament's silence. It is perhaps not strictly accurate to say that the statutes displace the common law in this case, since there would be no basis for any of the common law claims asserted if the statute did not exist. However, in circumstances such as these--where Parliament has comprehensively legislated a particular area of the law--the reasonable inference is that it did not intend to extend rights of recovery beyond those embodied in the regime.
- [69] Courts have determined that the Patent Act constitutes a complete code as between brand name and generic manufacturers. Courts have also concluded that the completeness of the Patent Regulatory Regime prevents generic drug manufacturers from claiming disgorgement of profits based on unjust enrichment. It would make no sense logically or from a policy perspective to allow consumers to claim disgorgement of profits from brand names when generics are precluded from claiming the same based on identical wrongful acts.
- [70] As Pfizer has noted in its factum, there is evidence that Parliament considered the interests of consumers when legislating the Patent Regulatory Regime. Under the Patent Act, drug innovators must submit proposed drug prices to the Patented Medicines Review Board (continued under s. 91), which has the power to reduce the price of medicine deemed to be excessive (see ss. 79-103). Courts have variously described the powers granted to the Board as directed at protecting consumers' interests (see *Sanofi Pasteur Limited v. Canada* (Attorney General), 2011 FC 859 at para. 52); enacted out of concern that patent holders

could "take undue advantage of their monopolies to the detriment of Canadian consumers" (*Ratiopharm Inc. v. Canada (Attorney General)*, 2014 FC 502 at para. 15); and ensuring that patent monopolies are "not abused to the financial detriment of Canadian patients" (*Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1 at para. 57).

[71] The Patent Regulatory Regime involves a balancing of interests through the implementation of legislative policy choices. As the Court stated in *Teva v. Pfizer Canada Inc.*, the patent system is based on a quid pro quo. It provides an incentive for disclosing a new invention in the form of a limited monopoly, such that society can benefit from that knowledge. In the context of patented medicines, the notice of compliance system acts as an accountability mechanism. In *Apotex Inc. v. Eli Lilly Canada Inc.*, the Federal Court of Appeal described the PM(NOC) Regulations (and s. 8 in particular) as "an attempt to strike a balance between the need for patent protection on the one hand and the timely entry of lower priced drugs on the market, on the other" (at para. 18). In my view, it is not for this Court to upset the balance that Parliament has struck by expanding the scope of available remedies.

[72] In my opinion, the foregoing is a complete answer to Low's claims.

[73] However, even if I had found that the completeness of the Patent Regulatory Regime did not prohibit common law actions, I would not allow certification of the claim in unlawful interference with economic relations. As explained in greater detail below, Low's unlawful interference claim is parasitic on an actionable claim by Teva. Teva is only able to claim its losses under PM(NOC) Regulations, s. 8. Patent rights are statutory. If the wrong to which Low seeks to attach liability is not itself "actionable" as required by the tort of unlawful interference with economic relations, then Low's parasitic claim cannot succeed.

[74] This brings me to the second issue on this appeal.

Issue 2: Does Low's claim disclose a cause of action in unlawful interference with economic relations?

What are the elements of the cause of action?

[75] The leading authority on the tort of unlawful interference with economic relations is the Supreme Court of Canada's decision in *Bram*. In *Bram*, five members of a family owned an apartment building in Moncton through corporate entities. Four of five family members wished to sell the apartment building. The fifth did not support a sale, and undertook a variety of activities allegedly intended to frustrate the sale. These included advancing legally groundless defences for a notice of right of first refusal which he filed against the property, filing a groundless certificate of pending litigation, and denying the entry of prospective buyers into the property. The Court ultimately determined that this conduct could not support recovery through unlawful interference with economic relations. In making that determination, the Court clarified the law surrounding what is often called the "unlawful means" tort.

[76] Cromwell J. writing for the Court described the circumstances where the tort is available as follows (at para. 5):

It will be available in three-party situations in which the defendant commits an unlawful act against a third party and that act intentionally causes economic harm to the plaintiff.

[77] The elements of the tort may therefore be described as follows:

- a) an unlawful act committed against a third party;
- b) intended to cause economic harm to the plaintiff; and
- c) resulting in economic harm to the plaintiff.

[78] Applied to the pleading in this case, Low alleges that Pfizer (through its breach of the Patent Act) committed an unlawful act against generic manufacturers, intended to and in fact caused economic harm to Viagra purchasers.

What constitutes an unlawful act or unlawful means within the meaning of the tort?

[79] Acts (or means) are "unlawful" if they would support a civil action for damages or compensation by the third party, or would have supported an action had the third party suffered a loss. Bram describes "unlawful" conduct at para. 5 in the following manner:

Conduct is unlawful if it would be actionable by the third party or would have been actionable if the third party had suffered loss as a result of it.

[80] The unlawful means tort (as it is sometimes known) therefore creates a kind of "parasitic" liability, whereby "[l]iability to the plaintiff is based on (or parasitic upon) the defendant's unlawful act against the third party" (the third party here is the generic) (at para. 23).

[81] Bram describes the theory of liability underlying the tort as based on a "liability stretching rationale". Under the liability stretching rationale, both intention and the presence of an actionable civil wrong act to restrict the ambit of liability (at para. 37), consistent with tort law's reluctance to intrude too far into the realm of cooperative economic activity (at para. 44). Thus, "the tort does not seek to create new actionable wrongs but simply to expand the range of persons who may sue for harm intentionally caused by existing actionable wrongs to a third party" (at para. 45).

[82] The "unlawful means" must therefore take the form of an actionable civil wrong of some kind. Most often, the civil wrong in question is another tort or a breach of contract. A simple though historic example given in Bram was the decision in *Tarleton v. M'Gawley* (1793), Peake 270, 170 E.R. 153. There the defendant, master of a trading ship, fired the ship's cannons at a canoe attempting to trade with the plaintiffs' trading ship in order to prevent it from doing so. The plaintiffs were able to recover for intentional economic injury occasioned as a result of wrongful conduct towards the occupants of the canoe. That conduct would clearly have been actionable as assault, if not battery.

[83] Bram does not, however, foreclose the possibility of a breach of statute as (indirectly) satisfying the "unlawful means" requirement of the tort. Cromwell J. stated at para. 62:

A breach of statute will constitute unlawful means if it would be otherwise actionable under the principles developed in these later cases.

[Emphasis added.]

[84] The "later cases" referred to in the foregoing passage include Saskatchewan Wheat Pool, *Edwards v. Law Society of Upper Canada*, 2001 SCC 80; *Odhavji Estate v. Woodhouse*, 2003 SCC 69; and *Hill v. Hamilton-Wentworth Police Services Board*, 2007 SCC 41. As noted, Saskatchewan Wheat Pool is the well-known authority for the proposition that there is no nominate tort of breach of statute or breach of statutory duty. It likewise stands for the principle that civil liability arising from statutory breaches should generally be subsumed in the law of negligence. The remaining authorities concern the interplay between statutory breaches and negligence, or (in the case of *Odhavji Estate*) misfeasance in public office.

[85] In my opinion, Cromwell J.'s comments in *Bram* support the position that a breach of statute must be otherwise actionable in order to satisfy the "unlawful means" requirement of unlawful interference with economic relations. In other words, they must be actionable outside the context of the statute itself. For example, conduct underlying breaches of certain provisions of the Criminal Code, R.S.C. 1985, c. C-46 will give rise to civil liability in assault or battery.

[86] Cromwell J. discusses the need to avoid "tortifying" regulatory law at para. 74 of *Bram*:

The limitation of unlawful means to actionable civil wrongs provides certainty and predictability in this area of the law, since it does not expand the types of conduct for which a defendant may be held liable but merely adds another plaintiff who may recover if intentionally harmed as a result of that conduct. While details relating to the scope of what is "actionable" may need to be worked out in the future, the basic contours of liability would be clear: see *Alleslev-Krofchak*, at para. 63. This approach does not risk "tortifying" conduct rendered illegal by statute for reasons remote from civil liability: see *OBG*, at paras. 57 and 152. The narrow definition of "unlawful means", in short, keeps tort law within its proper bounds.

[Emphasis added.]

[87] In my view, requiring actionable conduct outside the context of the statute itself is consistent with the Court's comments in *Bram*.

Does Pfizer's conduct satisfy the "Unlawful Means" Element of the Tort?

[88] To repeat, the amended notice of civil claim describes the cause of action as follows:

The acts particularized in paragraphs 16 to 22 were unlawful acts undertaken by Pfizer with the intent to [injure] cause economic harm to the plaintiff and other Class Members as an end in itself or as a necessary means of enriching the Defendants. The unlawful acts undertaken by the Defendants are actionable by third party generic drug manufacturers, or would be actionable by third party generic drug manufacturers, if those generic drug manufacturers had suffered a loss. As such, the Defendants are liable for the tort of intentional interference with economic interests.

[Emphasis added.]

The facts particularized in paras. 16-22 are those facts relating to the filing of the Patent '446, the subsequent successful challenge and the claim for damages by consumers.

- [89] Pfizer submits that Bram requires an "actionable civil wrong". It argues that an "actionable civil wrong" demands "means which in themselves are in the nature of civil wrongs": Hazel Carty, *An Analysis of the Economic Torts*, 2d ed. (Oxford: Oxford University Press, 2010) at 180.
- [90] It argues that a "civil wrong" necessarily involves the breach of a legal duty owed to the plaintiff, and must give rise to a personal right of action: Peter Birks, "The Concept of a Civil Wrong" in David Owen, ed., *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995) 31 at 33, 51. It argues that Bram endorses the concept of a civil wrong as a breach of an established duty.
- [91] In my opinion, the key to this aspect of the appeal lies in the statement in Bram that a breach of statute must be otherwise actionable under the principles developed in the line of authorities beginning with Saskatchewan Wheat Pool. A generic has no actionable claim against a brand name manufacturer for unjust enrichment or disgorgement of profits, because the Patent Regulatory Regime is a complete code: *Apotex v. Merck*; *Apotex v. Eli Lilly*. It is only able to make a claim for its own losses under PM(NOC) Regulations, s. 8. If a generic manufacturer has no cause of action against a brand name, then the tort of unlawful interference with economic relations--which is entirely parasitic--cannot succeed. If Pfizer has no liability to Teva (outside of PM(NOC) Regulations, s. 8), it follows that it cannot be liable to Low for the same conduct.
- [92] Accordingly, I would allow the appeal as it relates to Low's claim for unlawful interference with economic relations.

Issue 3: Does Low's claim disclose a cause of action in unjust enrichment?

- [93] Because I am of the view that the Patent Regulatory Regime forecloses any parallel common law action centred on a breach of its provisions, it follows that I would allow the appeal on this issue.

- [94] While I have addressed the complete code argument in some detail above, I turn to Wakelam to explain my conclusion more fully. As noted, in Wakelam, the plaintiff sought certification of a class action seeking restitutionary remedies for breaches of the BPCPA. These restitutionary remedies included unjust enrichment, waiver of tort, and constructive trust. The plaintiff relied on a breach of the statute as an "element" of the purported causes of action, in much the same way that Low does.
- [95] Writing for the Court, Newbury J.A. reviewed the reasons in Koubi extensively. She recognized that the starting point for claims based on a breach of statute is Saskatchewan Wheat Pool (at para. 61). She noted this Court's suggestion in Macaraeg that effective enforcement rights may be an important deciding factor in determining whether an exception to Saskatchewan Wheat Pool may be made (at para. 62). In Koubi, the Court found that the BPCPA was an exhaustive statute that could not underpin a claim in waiver of tort. Newbury J.A. was satisfied that the same reasoning applied to the plaintiff's claim in unjust enrichment (at para. 66).
- [96] I am cognizant of the fact that the BPCPA creates specific statutory remedies for consumers in ss. 171 and 172, and that the courts in Koubi and Wakelam considered this significant.
- [97] Nevertheless, Wakelam stands as authority for the proposition that complete statutory codes exclude equitable claims in unjust enrichment. As explained above, I consider the Patent Regulatory Regime to be a complete code. I therefore consider Wakelam applicable to Low's claim in unjust enrichment.
- [98] However, even if I did not consider the Patent Regulatory Regime a complete code, I would not allow Low's claim in unjust enrichment to proceed because of the existence of a juristic reason.
- [99] To succeed in unjust enrichment, Low must prove that none of the established categories of juristic reason would deny recovery: *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 44; *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75 at para. 23.
- [100] As noted, the chambers judge found that it was not plain and obvious that the Patent Regulatory Regime would provide a juristic reason for enrichment. In considering whether contracts between Pfizer and direct purchasers provided a juristic reason, he said the following:
- [87] I have come to a different conclusion on the plaintiff's second ground for alleging absence of juristic reason, which refers to the contracts by which Pfizer received the alleged overcharge.
- [88] The contracts in question would be the contracts between Pfizer and direct purchasers, such as distributors or pharmacies, from whom the alleged overcharge was presumably passed on to the plaintiff and other class members. The plaintiff has failed to show, as a matter of law, how such contracts could be against public policy, illegal or void for mutual mistake.

- [90] The plaintiff in this case has not alleged any statutory or other basis for the illegality of the contracts. He provides no authority for the proposition that a contract for sale of a legal product, the price of which is not subject to any direct regulation or restriction, is illegal merely because the price charged could or should have been lower
- [94] The allegation here is a common mistake by buyer and seller as to the validity of the patent. It is difficult to understand how the plaintiff can allege common mistake when the essence of its claim is that Pfizer, the seller under the contracts, knew or ought to have known the patent was invalid.
- [95] More important, the doctrine of common mistake requires that the mistaken fact be fundamental to the agreement between the parties, in that it constitutes the underlying assumption on which the entire contract was based: *Munro v. Munro Estate* (1995), 4 B.C.L.R. (3d) 250 at para. 14 (C.A.).
- [96] The contracts at issue were contracts for sale of a drug that had a specific intended and approved purpose and an anticipated physical benefit to its ultimate users. The existence and presumed validity of the patent may have affected the price, but the plaintiff has pleaded no facts to suggest the price was the fundamental fact on which the contracts were based. As Pfizer argues, there is no allegation that the plaintiff, other class members or the intermediate purchasers who were parties to the contracts would have refused to pay the price demanded if they had known the patent was possibly invalid.
- [Emphasis added.]
- [101] I do not agree with Low's submission that the chambers judge did not decide whether the contracts provided a juristic reason. In my view, it is clear from the wording of his reasons (particularly, para. 87) that he did in fact consider the contracts to be a juristic reason. I see no error in his analysis.
- [102] However, *Garland and Pacific National Investments* indicate that one juristic reason is sufficient to defeat an unjust enrichment claim. In *Garland*, the Court said that a plaintiff must show that "no juristic reason from an established category exists to deny recovery" (at para. 44 (emphasis added)). In *Pacific National Investments*, the Court said that a plaintiff must prove "none of the limited categorical reasons exist to deny recovery" (at para. 23 (emphasis added)).
- [103] Having found that the contracts provided a juristic reason, the chambers judge should have found that the claim had no prospect of success, notwithstanding any uncertainty concerning whether the Patent Regulatory Regime provides a juristic reason.
- [104] I would therefore allow the appeal on this issue even if the Patent Regulatory Regime did not constitute a complete code.

VI. DISPOSITION

[105] I would allow the appeal.

[106] I would dismiss the action.

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Madam Justice Bennett"

I agree:

"The Honourable Mr. Justice Savage"

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