

File Number: 39439
(A-150-17/A-227-17)

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

NOVA CHEMICALS CORPORATION

Appellant

and

**THE DOW CHEMICAL COMPANY,
DOW GLOBAL TECHNOLOGIES INC. and
DOW CHEMICALS CANADA ULC**

Respondents

and

**BELL CANADA, ROGERS COMMUNICATIONS CANADA INC.,
TELUS COMMUNICATIONS INC., VIDEOTRON LTÉE**

and

CANADIAN GENERIC PHARMACEUTICAL ASSOCIATION

Interveners

**DOW'S REPLY FACTUM
IN RESPONSE TO THE INTERVENERS**
(Pursuant to the Order of Justice Malcolm Rowe dated November 25, 2021 and
Rule 42 of the *Rules of the Supreme Court of Canada*)

SMART & BIGGAR LLP

55 Metcalfe St., Suite 900
P.O. Box 2999, Station "D"
Ottawa, Ontario K1P 5Y6

Steven B. Garland

sbgarland@smartbiggar.ca

Jeremy E. Want

jwwant@smartbiggar.ca

Daniel S. Davies

dsdavies@smartbiggar.ca

Telephone: (613) 232-2486

Facsimile: (613) 232-8440

Counsel for the Respondents

ORIGINAL TO: **THE REGISTRAR**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

Torys LLP
79 Wellington Street, Suite 3000
Box 270, TD Centre
Toronto ON M5K 1N2

Shelia R. Block
Tel: (416) 865-7319
sblock@torys.com

Andrew Bernstein
Tel: 416.865.8245
abernstein@torys.com

Nicole Mantini
Tel: (416) 865-7970
nmantini@torys.com

Jonathan Silver
Tel: 416.865.8198
jsilver@torys.com

Counsel for the Appellant

SMART & BIGGAR LLP

55 Metcalfe St., Suite 900
P.O. Box 2999, Station "D"
Ottawa, Ontario K1P 5Y6

Steven B. Garland

sbgarland@smartbiggar.ca

Telephone: (613) 232-2486

Facsimile: (613) 232-8440

Agent for the Respondents

Supreme Advocacy LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3
Fax: 613.695.8580

Marie-France Major
Tel: 613.695.8855
mfmajor@supremeadvocacy.ca

Agent for Counsel of the Appellant

IMK s.e.n.c.r.l./LLP

Place Alexis Nihon, tour 2
3500, boulevard De Maisonneuve Ouest
Bureau 1400
Montréal (Québec) H3Z 3C1

Audrey Boctor
Adam Goldenberg

Tel: (514) 934-7737
Fax: (514) 935-299
E-mail: aboctor@imk.ca

**Counsel for the Interveners, Bell Canada,
Rogers Communications Canada
Inc., and Telus Communications Inc.**

QUEBECOR MEDIA INC.

612, rue Saint-Jacques, 17 etage,
Montreal (Quebec) H3C 4M8

Eric Meunier

Tel: (514) 380-6729
Fax: (514) 985-8834
E-mail: eric.meunier@quebecor.com

**Counsel for the Intervener,
Videotron Itée**

GOODMANS LLP

Barristers & Solicitors
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

H.B. Radomski- hradomski@goodmans.ca
Andrew Brodtkin – abrodtkin@goodmans.ca
Jordan Scopa – jscopa@goodmans.ca

Telephone: (416) 979-2211
Facsimile: (416) 979-1234

**Solicitors for the Intervener,
Canadian Generic Pharmaceutical
Association**

JURISTES POWER LAW

130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

Darius Bosse

Tel: (613) 702-5566
Fax: (613) 702 5566
E-mail: dbosse@juristespower.ca

**Ottawa Agent for Counsel for the
Interveners, Bell Canada
Rogers Communications Canada
Inc. and Telus Communications
Inc.**

JURISTES POWER LAW

130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

Darius Bosse

Tel: (613) 702-5566
Fax: (613) 702 5566
E-mail: dbosse@juristespower.ca

**Ottawa Agent for Counsel for the
Intervener, Videotron Itée**

NELLIGAN O'BRIEN PAYNE LLP

Barristers & Solicitors
50 O'Connor Street, Suite 1500
Ottawa, ON K1P 6L2

Christopher Rootham
Christopher.roothman@nelligan.ca

Telephone: (613) 238-8080
Facsimile: (613) 238-2098

**Agent for the Intervener,
Canadian Generic Pharmaceutical
Association**

TABLE OF CONTENTS

I – OVERVIEW	1
II – ARGUMENT	1
A. The Interveners’ Novel Approach	1
B. Problems with the Interveners’ Approach	2
(i) The interveners’ approach is based on a mischaracterization of <i>Schmeiser</i> and is unsupported by any case law.....	2
(ii) The interveners’ approach does not isolate the value of the invention pursuant to <i>Schmeiser</i>	5
(iii) The interveners’ approach is inconsistent with the underlying rationales of the accounting remedy	6
(iv) The interveners rely on irrelevant considerations	7
C. New Issues Improperly Raised by the Interveners	9
(i) The Coalition raises new issues regarding fixed costs	9
(ii) The CGPA raises new procedural issues.....	10
III – SUBMISSIONS REGARDING COSTS	10
IV – ORDER SOUGHT	10
V – SUBMISSIONS ON CONFIDENTIAL INFORMATION	10
VI – TABLE OF AUTHORITIES.....	11

I – OVERVIEW

1. Both interveners, the **CGPA**¹ and the **Coalition**,² represent groups of companies that by their own acknowledgment are frequent defendants in patent litigation. Not surprisingly, they ask this court to adopt an approach to an accounting of the defendant’s profits that would significantly undermine the remedy. Parroting Nova, both incorrectly suggest that their proposed approach is consistent with this Court’s decision in *Schmeiser* and is supported by subsequent jurisprudence from the FCA. However, like Nova, neither intervener can actually point to any authority supporting their position. Rather, they instead rely on a tortured and incorrect interpretation of *Schmeiser*³ that has never been applied or accepted in any decision – including the FCA jurisprudence on which they rely. Their approach undermines the very purpose of the accounting of profits remedy and should not be adopted.

2. Both interveners also argue new issues that are not in dispute in this appeal, contrary to the terms of the order allowing their intervention.⁴ The Coalition makes submissions on fixed cost deductions, which is not an issue on which Nova has appealed. The CGPA asks this court to opine on procedural issues regarding elections between profits and damages, and in favour of a new standard of proof for hypotheticals – again none of which is before this Court.

II – ARGUMENT

A. The Intervenors’ Novel Approach

3. The interveners insist on a much broader consideration of non-infringing alternatives than existing case law supports, such that **any** hypothetical profits earned from **any** hypothetical non-infringing activity that an infringer says it could have engaged in must be taken into account in the determination of an infringer’s profits, irrespective of how disconnected that activity (e.g.,

¹ Canadian Generic Pharmaceutical Association.

² Bell Canada, Rogers Communications Canada Inc., TELUS Communications Inc., and Vidéotron ltée (collectively, the “Coalition”).

³ *Monsanto Canada Inc v Schmeiser*, 2004 SCC 34.

⁴ Order dated October 21, 2021, SCC File No. 39439.

investing in Apple or Amazon) may be from the patented invention and the relevant customers or competitive market.

4. In particular:

(a) the **CGPA's position** is that: "apart from applying an appropriate burden of proof, there should be no restrictions on the hypothetical non-infringing behaviour of an infringer in the but-for world," and that, so long as the infringer was capable of earning the infringing profits by some other non-infringing activity, then there is no need to account for them;⁵ and

(b) the **Coalition's position** is that: the non-infringing option need not be restricted to true market substitutes for the patented invention and the hypothetical world must account for how the defendant would have acted in pursuing its interest in making as much money as possible, by pursuing the "next best method legitimately open to it."⁶

B. Problems with the Interveners' Approach

5. The interveners' position is wrong in law, logically unsupportable, and should be rejected. It: (i) is based on a mischaracterization of *Schmeiser* and is unsupported by any case law, and indeed is directly contrary to the prior FCA jurisprudence on which they specifically rely; (ii) is inconsistent with the purpose of the differential profits approach to isolate the value of the invention; (iii) disregards the underlying policy rationales of the accounting of profits remedy; and (iv) is based on irrelevant and inappropriate considerations.

(i) The interveners' approach is based on a mischaracterization of *Schmeiser* and is unsupported by any case law

6. Both interveners mischaracterize *Schmeiser* in support of an approach that would significantly undermine the accounting of profits remedy. Seeking to insulate their members from the consequences of possible patent infringement, they argue that infringers should be permitted to deduct from their actual infringing profits any hypothetical profits that they could have earned from any non-infringing activity or investment, even if it has no connection to the patented

⁵ Factum of the CGPA ¶7.

⁶ Factum of the Coalition ¶26.

invention.⁷ Repeating Nova’s argument, they assert that this is the proper interpretation of *Schmeiser*, but can cite no case law in this or any other jurisdiction in support. *Schmeiser*, and the cases applying *Schmeiser*, only allow the use of differential profits based on proven non-infringing alternatives (“NIAs”) – true market substitutes for the patented invention – not the deduction of any opportunity costs entirely unrelated to the invention.⁸

7. More specifically, as set out in Dow’s responding factum in the main appeal, in *Schmeiser*, this Court confirmed that the value-based differential profits approach is the preferred means of calculating an accounting of profits.⁹ Under this approach, provided there is a suitable NIA that **customers or users would accept as a substitute** for the invention, the profits from the infringement should be compared to the profits from that NIA.¹⁰

8. This approach ensures that an appropriate comparable product is selected to isolate the value contributed to the infringing products by the patented invention.¹¹ It also upholds the goals of the accounting remedy under the *Patent Act* of vindicating the patentee’s right of exclusivity and deterring infringement by stripping from the infringer the profits causally attributable to the infringement.¹²

9. Since *Schmeiser*, the differential profits approach has been consistently applied in both damages and accounting of profits cases, when there is a “true substitute and thus a real alternative” to the patented invention.¹³ Indeed, each of the damages and profits cases cited by the Coalition and the CGPA are unanimous on this point.¹⁴ In *Perindopril 2*, for example, an accounting of

⁷ Factum of the CGPA ¶7, 24.

⁸ See, for example: *Apotex Inc v Merck & Co*, 2015 FCA 171 ¶73, leave to appeal to SCC refused, 36655 (14 April 2016); *Apotex Inc v Eli Lilly and Company*, 2018 FCA 217 ¶54, leave to appeal to SCC refused, 38485 (23 May 2019); *Apotex Inc v ADIR*, 2020 FCA 60 ¶48, leave to appeal to SCC refused, 39172 (24 September 2020); *Monsanto Canada Inc v Rivett*, 2009 FC 317 ¶56, aff’d 2010 FCA 207.

⁹ *Monsanto Canada Inc v Schmeiser*, 2004 SCC 34 ¶102.

¹⁰ *Nova Chemicals Corporation v Dow Chemicals Company*, 2020 FCA 141 ¶73, 97.

¹¹ *Monsanto Canada Inc v Schmeiser*, 2004 SCC 34 ¶102.

¹² *Nova Chemicals Corporation v Dow Chemicals Company*, 2020 FCA 141 ¶106.

¹³ See, for example: *Apotex Inc v Merck & Co*, 2015 FCA 171 ¶73, leave to appeal to SCC refused, 36655 (14 April 2016).

¹⁴ *Apotex v Merck*, 2015 FCA 171 ¶73, leave to appeal to SCC refused, 36655 (14 April 2016); *Apotex v Adir*, 2017 FCA 23 ¶41-42; *Apotex v Eli Lilly*, 2018 FCA 217 ¶51, 54, leave to appeal

profits case cited by both interveners in support of their submissions, the FCA notes that the first issue to be considered when determining the availability of the NIA defence is whether “...the alleged non-infringing alternative [is] **a true substitute** and thus a real alternative.”¹⁵

10. Similarly, in *Cefaclor* (a damages case), cited again by both interveners in support of their submissions, the FCA notes:

[54] ... [T]he very first issue to be considered by any court when determining whether an NIA defence is available: “Is the alleged NIA a **true alternative to the invention at issue?**” ... this is a very important question that usually turns on whether the product at issue would be considered a **true substitute by the consumer.**¹⁶

11. Thus, the FCA in both *Perindopril 2* and *Cefaclor* applied the NIA as the FCA explained below in this case. In the *Cefaclor* case for example, Apotex (a member of CGPA) argued that it would have used a non-infringing process to make the **exact same** product as that covered by the patent and sold to the **exact same** customers. All of the cases cited by the intervenors are to the same effect.

12. Although the courts have often used different terminology to identify the suitable comparable in the differential profits approach, including, for example, “non-infringing option” and “non-infringing alternative”, the meaning is the same. As noted in *Rivett*, the “non-infringing option” referred to in *Schmeiser* is not simply anything that “one would have done had one complied with the law”;¹⁷ rather, it must be a true substitute for the patented invention.¹⁸ Yet, the intervenors proposition would permit an adjudicated infringer to identify any business venture or investment opportunity that would have – in hindsight – generated profits sufficient to offset

to SCC refused, [38485](#) (23 May 2019); *Apotex v Adir*, [2020 FCA 60](#) ¶46-48, leave to appeal to SCC refused, [39172](#) (24 September 2020).

¹⁵ *Apotex v Adir*, [2020 FCA 60](#) ¶48, leave to appeal to SCC refused, [39172](#) (24 September 2020).

¹⁶ *Apotex Inc v Eli Lilly and Company*, [2018 FCA 217](#) ¶54 [emphasis added], leave to appeal to SCC refused, [38485](#) (23 May 2019).

¹⁷ *Monsanto Canada Inc v Rivett*, [2009 FC 317](#) ¶56, aff’d [2010 FCA 207](#).

¹⁸ See also: *Human Care Canada Inc v Evolution Technologies Inc*, [2018 FC 1302](#) ¶451, 453-462, rev’d [2019 FCA 209](#). The Federal Court rejected the proposition that a “non-infringing option” is something different or broader than a “non-infringing alternative.” On appeal to the FCA, the FC’s findings on infringement were overturned so remedies were not addressed.

infringing profits. Such an approach would not only effectively eviscerate that profits remedy, it would erroneously have no bearing on the value of the invention.

13. While the interveners criticize the FCA decision below as a “regression” or a “departure” from *Schmeiser*,¹⁹ the FCA interpreted NIAs in a manner that is entirely consistent with *Schmeiser*, as well as the other prior accounting and damages cases from the FCA. As with the earlier jurisprudence, the FCA below confirmed that in cases where there is a NIA that the infringer’s customers would have considered an acceptable substitute for the invention, the profits attributable to the invention can be isolated by comparing the profits from the infringement with the profits from that NIA.²⁰ In this case, however, Nova admitted **there was no such NIA**.²¹ As a result, Nova **agreed** in both the FC and FCA that a “differential profits” approach pursuant to *Schmeiser* was not available on the facts.²²

(ii) **The interveners’ approach does not isolate the value of the invention pursuant to *Schmeiser***

14. The interveners discount the very purpose of the differential profits approach, which, as stated in *Schmeiser*, is intended to quantify the “value contributed **to the defendant’s wares** by the patent.”²³ This is achieved by first calculating the infringer’s **actual** profits,²⁴ and then considering whether there was a NIA that could have been substituted for the invention such that a differential profits approach would be appropriate so as to isolate the value of the invention.

15. The CGPA criticizes the lower decision of the FCA for focusing on the “value of the patent”²⁵ (even though this is precisely what *Schmeiser* says to do) and not paying close enough attention to the specific circumstances of the infringer. They say that the “general maxim that ‘one takes the infringer as one finds them’” should apply when determining the value of the patented

¹⁹ Factum of the Coalition ¶5; Factum of the CGPA ¶23.

²⁰ *Nova Chemicals Corporation v Dow Chemicals Company*, 2020 FCA 141 ¶72-74.

²¹ *Nova Chemicals Corporation v Dow Chemicals Company*, 2020 FCA 141 ¶97.

²² *Ibid*; *Dow Chemical Company v Nova Chemicals Corporation*, 2017 FC 350 ¶146. Note: the FC and FCA also rejected that Nova would have been able to sell its alleged non-market substitute products, in any event, and noted there was evidence which suggested that Nova could not: *Nova Chemicals Corporation v Dow Chemicals Company*, 2020 FCA 141 ¶92.

²³ *Monsanto Canada Inc v Schmeiser*, 2004 SCC 34 ¶102.

²⁴ *Nova Chemicals Corporation v Dow Chemicals Company*, 2020 FCA 141 ¶36.

²⁵ Factum of the CGPA ¶27.

invention, such that a particularly resourceful and adaptable infringer should pay less given that they are better equipped to earn profits from other means had they not infringed.²⁶ However, the adaptability or resourcefulness of an infringer to engage in activity completely disconnected from the invention says nothing about the value of the invention pursuant to *Schmeiser*.

16. Indeed, rather than supporting its approach, the CGPA's submissions highlight that its approach would advantage large, recourse-rich defendants (such as the interveners) over smaller companies engaged in the exact same infringing activity but with fewer hypothetical options in terms of potential investments or non-infringing activity. The approach adopted by the FCA (including in this case) and the FC avoids this potential inequity. For example, in *Rivett*, a defendant farmer was permitted to rely on traditional canola as a NIA to genetically modified canola even though he did not have access to traditional canola at the relevant time.²⁷ As held by the FC, the unavailability of traditional canola to an individual farmer was not a relevant factor in assessing the patentee's remedy. Under the approach advanced by Nova and the interveners, however, this single fact would be determinative.

17. In the decisions below, the FC and FCA did exactly as *Schmeiser* instructs: they determined the actual profits Nova generated from the infringement, and then considered whether there was a suitable NIA available to Nova to isolate the portion of those profits attributable to the patented invention. Because Nova admitted that there was no such NIA for Dow's patented compositions, the FC and FCA below correctly concluded that all Nova's real-world profits were entirely attributable to its exploitation of the patented invention.

(iii) The interveners' approach is inconsistent with the underlying rationales of the accounting remedy

18. By allowing infringers to deduct hypothetical profits from foregone hypothetical activity or investments having nothing to do with the patent, the interveners' approach would also undermine the two rationales underlying the accounting of profits remedy that serve to vindicate the patentee's exclusive right: to **restore** to the patentee profits rightfully belonging to it but

²⁶ Factum of the CGPA ¶26.

²⁷ *Monsanto Canada Inc v Rivett*, 2009 FC 317 ¶63, aff'd 2010 FCA 207.

wrongly appropriated by the infringer, and to ensure that the infringer does not retain any benefits from that activity thus **detering** (and not incentivizing) other instances of infringement.²⁸

19. The Coalition takes the position that there is no deterrent rationale for the accounting remedy as it applies in the patent context.²⁹ They attempt to distinguish the equitable remedy of disgorgement (which they acknowledge serves to deter certain activities) from the statutory accounting of profits remedy under section 57(1) of the *Patent Act*. However, the Coalition does not provide any support for this proposition, which is also contrary to how the courts have interpreted the accounting provision in the *Patent Act* since its enactment. For example, the courts retain discretion not to award an accounting of profits in cases where it would be **inequitable** to do so.³⁰ It must also be presumed that Parliament did not intend to create a new, non-equitable version of the accounting remedy when it decided to make this remedy available under the *Patent Act*.³¹

20. Not only does the Coalition dispute the relevance of deterrence to an accounting of profits, it also disputes the other accepted rationale of the remedy: restitution for the wrongful taking of the patentee's statutory monopoly. According to the Coalition, the extent to which the infringement enabled the infringer to compete with the patentee is irrelevant. However, the FCA held in *Perindopril 2* (a decision on which the Coalition relies) that an NIA must be taken into account in an accounting of profits precisely because **“a patent does not confer a complete monopoly if a defendant could make or sell a non-infringing version of the patented invention.”**³² The right of exclusivity is the foundation of Canadian patent law, including its remedies.

(iv) The interveners rely on irrelevant considerations

21. The Coalition's industry- and fact-specific concerns regarding purported non-practicing entities (“NPEs”), patent “trolls”, and telecom-related “patent thickets” should not guide the law

²⁸ *Strother v 3464920 Canada Inc*, 2007 SCC 24 ¶¶75-77; *Nova Chemicals Corporation v Dow Chemicals Company*, 2020 FCA 141 ¶33; *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 ¶107; *Monsanto Canada Inc v Rivett*, 2009 FC 317 ¶18-26, aff'd 2010 FCA 207.

²⁹ Factum of the Coalition ¶16.

³⁰ *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2021 FCA 154 ¶76-81; *Merck & Co v Apotex Inc*, 2006 FCA 323 ¶127.

³¹ *Patent Act*, RSC 1985, c P-4, s 57.

³² *Apotex Inc v ADIR*, 2020 FCA 60 ¶40 [emphasis added], leave to appeal to SCC refused, 39172 (24 September 2020).

on the accounting of profits remedy.³³ The Coalition’s concerns can be addressed, if necessary, in other more appropriate cases (supported by appropriate records) and by other more appropriate mechanisms. For example, it is not clear that NPEs would even be entitled to an accounting of the infringer’s profits in patent cases.³⁴ The remedy is equitable in nature and the court always has discretion on whether to award an accounting of profits and if so, under what conditions.³⁵ The Coalition has not identified a single instance where a recognized NPE has succeeded in a patent case in Canada **and** been granted the right to pursue an infringer’s profits. Its concerns at this point are purely theoretical.

22. The Coalition’s concern that some infringers may be unknowing “innocent” infringers is also misplaced in the context of the *Patent Act*’s public notice system. Patents are published and the law requires that they be respected.³⁶ It is antithetical to such a system to shape its remedies around accommodating “unknowing” infringers. In any event, as noted above, the remedy is an equitable one and its availability and application is always left with the trial judge based on the circumstances of a given case.

23. Even if there are legitimate concerns about inadequacies or uncertainties in the public notice system as the Coalition suggests, undermining the accounting of profits remedy is not the answer. Such concerns should be addressed directly by Parliament. The Coalition also refers to uncertainties resulting from “ambiguous” claim language. However, ambiguous patent claims are invalid. An accounting of profits only applies to patent claims that have been adjudicated to be valid and infringed.

24. The CGPA argues that the accounting of profits remedy need not stand on its own as a remedy capable of protecting the patent bargain because patentees would have the option to claim damages instead. This submission, while illogical, does serve to highlight that the CGPA’s

³³ Factum of the Coalition ¶13.

³⁴ Factum of the Coalition ¶13-15.

³⁵ *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2021 FCA 154 ¶76.

³⁶ See for example: *Apotex Inc v Wellcome Foundation Ltd*, 2002 SCC 77 ¶45 [emphasis added]: “Once the subject matter of the patent is fenced in by the claims, others trespass (**advertently or inadvertently**) on the forbidden territory at their peril. The boundary is defended by a considerable arsenal of remedies conferred by the *Patent Act*, including an accounting of the infringer’s profits in an appropriate case.”

approach would fundamentally undermine the accounting remedy. The *Patent Act* permits the accounting remedy as an alternative to damages because damages are often insufficient to achieve the remedial aims of the *Patent Act*.³⁷ Indeed, by its own submissions, the CGPA’s proposed approach to the remedy could result in many cases in which an accounting of profits remedy would be illusory for reasons “completely unrelated to competing with a patentee.”³⁸ It cannot be assumed that damages would be an adequate remedy in all such cases. Thus, the CGPA’s approach could result in many cases where damages are inadequate, **and** an accounting of profits would be rendered worthless for reasons unrelated to the patent rights in issue.

25. Additionally, the CGPA’s suggestion that the “burden of proof” on the defendant addresses any concern about some hypotheticals being too speculative is disingenuous.³⁹ The determination of the speculative nature of the hypothetical (and therefore its non-applicability) is made by the trial judge, which is often long after the plaintiff has been required to make its election as between damages and an accounting.

26. Overall, the interveners’ proposed approach to the accounting of profits should be rejected as it is not only unsupported by any authority but completely contrary to prior jurisprudence, and is inconsistent with the purpose of the remedy, which is to protect the exclusive rights granted to patentees by the *Patent Act*.

C. New Issues Improperly Raised by the Intervenors

27. The October 21, 2021 Order granting the Coalition and the CGPA leave to intervene is clear that the intervenors are not entitled to raise new issues or new evidence.⁴⁰

(i) The Coalition raises new issues regarding fixed costs

28. Although the appropriateness of certain fixed cost deductions was argued in the lower courts, Nova has not raised this issue on appeal. The Coalition’s one-sided argument on the

³⁷ *Nova Chemicals Corporation v Dow Chemicals Company*, 2020 FCA 141 ¶¶17-19; *Varco Canada Ltd v Pason Systems Corp*, 2013 FC 750 ¶400.

³⁸ Factum of the CGPA ¶24.

³⁹ Factum of the CGPA ¶25.

⁴⁰ Order dated October 21, 2021, SCC File No. 39439.

application of fixed costs in general is not appropriate and is contrary to the order granting leave to intervene.

(ii) The CGPA raises new procedural issues

29. The CGPA asks this court to adopt a particular procedural framework regarding the steps leading up to, during, and after the patentee's election as between damages and an accounting of profits.⁴¹ This is clearly outside the scope of this appeal. It is noteworthy that the procedure outlined by the CGPA is not universal nor is it well-accepted as they claim, especially in the context of non-bifurcated proceedings where a patentee does not know in advance of trial if it will even be allowed to elect an accounting of profits.⁴²

30. The CGPA also argues in favour of a different burden of proof for hypothetical events than the one that is currently accepted in intellectual-property remedies cases.⁴³ Again, this is not an issue between the parties, and ought not to be addressed by this Court based on the CGPA's one-sided briefing.

III – SUBMISSIONS REGARDING COSTS

31. Dow submits it should be awarded its costs.

IV – ORDER SOUGHT

32. Dow repeats its request that Nova's appeal be dismissed with costs.

V – SUBMISSIONS ON CONFIDENTIAL INFORMATION

33. Dow's reply factum does not include any confidential information.

Date: December 9, 2021

ALL OF WHICH IS RESPECTFULLY SUBMITTED

D. S. Davies

SMART & BIGGAR LLP
Solicitors for the Respondents

⁴¹ Factum of the CGPA ¶6.

⁴² See for example: *Varco Canada Ltd v Pason Systems Corp*, 2013 FC 750 ¶383, 395; *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2021 FCA 154 ¶75-81.

⁴³ Factum of the CGPA ¶25, 28.

VI – TABLE OF AUTHORITIES

CASES	Cited in paras.
<i>Apotex Inc v ADIR</i> , 2017 FCA 23	9
<i>Apotex Inc v ADIR</i> , 2020 FCA 60	6, 9, 20
<i>Apotex Inc v Eli Lilly and Company</i> , 2018 FCA 217	6, 9-10
<i>Apotex Inc v Merck & Co</i> , 2015 FCA 171	6, 9
<i>Apotex Inc v Wellcome Foundation Ltd</i> , 2002 SCC 77	22
<i>Atlantic Lottery Corp Inc v Babstock</i> , 2020 SCC 19	18
<i>Dow Chemical Company v Nova Chemicals Corporation</i> , 2017 FC 350	13
<i>Evolution Technologies Inc v Human Care Canada Inc</i> , 2019 FCA 209	12
<i>Human Care Canada Inc v Evolution Technologies Inc</i> , 2018 FC 1302	12
<i>Merck & Co v Apotex Inc</i> , 2006 FCA 323	19
<i>Monsanto Canada Inc v Rivett</i> , 2009 FC 317	6, 12, 16, 18
<i>Monsanto Canada Inc v Schmeiser</i> , 2004 SCC 34	1, 7-8, 14
<i>Nova Chemicals Corporation v Dow Chemicals Company</i> , 2020 FCA 141	7-8, 13-14, 18, 24
<i>Rivett v Monsanto Canada Inc</i> , 2010 FCA 207	6, 10, 15, 17
<i>Seedlings Life Science Ventures, LLC v Pfizer Canada ULC</i> , 2021 FCA 154	19, 21, 29
<i>Strother v 3464920 Canada Inc</i> , 2007 SCC 24	18
<i>Varco Canada Limited v Pason Systems Corp</i> , 2013 FC 750	24, 29

STATUTORY PROVISIONS	Cited in paras.
<i>Patent Act</i> , RSC 1985, c P-4, s 57	19

Court File No. 37274
(A-379-14)

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM
THE FEDERAL COURT OF APPEAL)

BETWEEN:

NOVA CHEMICALS CORPORATION
Appellant

AND:

THE DOW CHEMICAL COMPANY,
DOW GLOBAL TECHNOLOGIES INC. and
DOW CHEMICAL CANADA ULC
Respondents

BELL CANADA, ROGERS COMMUNICATIONS
CANADA INC.,
TELUS COMMUNICATIONS INC., VIDEOTRON
LTÉE

CANADIAN GENERIC PHARMACEUTICAL
ASSOCIATION
Intervenors

DOW'S REPLY FACTUM
IN RESPONSE TO THE INTERVENERS
(Pursuant to the Order of Justice Malcolm Rowe dated
November 25, 2021 and Rule 42 of the *Rules of the*
Supreme Court of Canada)

SMART & BIGGAR LLP
55 Metcalfe St., Suite 900
P.O. Box 2999, Station "D"
Ottawa, Ontario K1P 6L5

Steven B. Garland
Jeremy E. Want
Daniel S. Davies

Tel: (613) 232-2486
Fax: (613) 232-8440

Counsel for the Respondents