CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

SUPERIOR COURT
(Civil Division)

NO: 500-17-109270-192

MERCK CANADA INC. ET AL

Plaintiffs

v.

ATTORNEY GENERAL OF CANADA

Defendants

-and-

ATTORNEY GENERAL OF QUEBEC

Mise en cause

-and-

CANADIAN CYSTIC FIBROSIS TREATMENT SOCIETY

-and-

INTELLECTUAL PROPERTY OWNERS ASSOCIATION

-and-

CYSTIC FIBROSIS CANADA

Intervenors

FACTUM OF INTELLECTUAL PROPERTY OWNERS ASSOCIATION

I. INTRODUCTION

1. Some of the federal and provincial legislative powers under the *Constitution Act, 1867* are well-trodden. Others are not. This case concerns one such under-defined power: the federal power over "Patents of Invention and Discovery."

2. The scope of that power is at the heart of this case. In particular, the question is whether the federal patent power authorizes Parliament to enact the sections of the *Patent Act* establishing the Patented Medicine Prices Review Board ("PMPRB") and authorizing its regulations.[1] IPO seeks to assist this Court by addressing the scope of federal patent power.

3. The scope of the patent power must be linked to the historical and conceptual understanding of patent rights. The purpose of patent law is to promote innovation across all sectors and industries. It does so through the "patent bargain." A patent grants an inventor the right to exclude others from making, using, importing, offering for sale and selling an invention for a limited time; in exchange, the inventor discloses the invention to the public.

4. But while a patent rewards an inventor by restraining others from making, using or selling her invention, the patent neither creates nor alters the inventor's right to do so. Those rights exist without a patent, before it is granted and continue even after the patent expires. The scope of Parliament's patent power must be defined with a view to this distinction.

5. It must also be circumscribed in a way that is consistent with universal consensus on the nature of patent rights. International patent treaties set out minimum patent protection for patentees. They also contemplate that governments may regulate patent abuse. However, that regulation is tethered to the exclusivity rights granted by the patent – not to the making, using, or selling of patented products.

6. Finally, the scope of the patent power must be defined in a way that preserves the provinces' broad and plenary power over property and civil rights. If the patent power includes the ability to regulate prices of patented medicines, then it could permit Parliament to regulate prices for any patented product. But that would be contrary to the approach courts have taken in construing *broader* federal powers, such as trade and commerce, where courts have been careful to limit federal authority to avoid supplanting provincial authority over property and civil rights.

7. This Court must exercise the same caution here. The patent power must be limited to permit Parliament to regulate the *terms of the patent grant* – i.e., the terms of the patent bargain. It should not extend to permit Parliament to regulate an inventor's *rights to sell* the patented product, which exist separate and apart from patent rights. To do so would not only be inconsistent with the patent grant, but

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[1] *Patent Act*, R.S.C. 1985, c. P-4, ss. 79 to 103 and its regulations.

would also overwhelm the provinces' power over property and civil rights. The principles of federalism must be respected.

II. IPO: INTELLECTUAL PROPERTY OWNERS ASSOCIATION

8. Intellectual Property Owners Association ("IPO") is an international trade association representing individuals and companies who own intellectual property or who are interested in promoting fair and effective intellectual property rights worldwide. Its close to 200 corporate members hold patents in a range of fields, including computer technology, household products, and pharmaceuticals. IPO believes that intellectual property rights promote the innovation, creativity, and investment needed to address major global challenges and improve people's lives.

III. SCOPE OF FEDERAL POWER OVER "PATENTS OF INVENTION"

9. The proper approach to considering the constitutional validity of any legislation is well-established. First, the court characterizes the "pith and substance," or dominant characteristic of the law. Second, the court classifies that essential character under the heads of power in sections 91 and 92 of the *Constitution Act, 1867*. If the law falls within the jurisdiction of the enacting government, it is valid.[2]

10. The Supreme Court of Canada recently explained that the "Constitution of Canada is fundamentally defined by its federal structure."[3] That structure, and the interplay between federal and provincial heads of power, sits at the heart of any division of powers question. Thus, in interpreting the constitution, "courts must continually assess the competing federal and provincial lists of powers against one another."[4]

11. IPO adopts the plaintiffs' submissions on the characterization of the patented medicines regime. IPO's submissions focus on the second step: classification. While classification is self-evident in some circumstances, others require the court to consider the "scope of the relevant head of power."[5] This is such a case. However, here classification is complicated by the dearth of jurisprudence defining the scope of the federal patent power.[6]

12. While several decisions have discussed the patent power, there are no appellate decisions that have thoroughly considered its scope. As a result, there is no framework to ensure that the patent power does not overtake provincial power over

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2 *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, para. 86.

3 *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, para. 20.

4 W.R. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975) 53:3 Can. Bar. Rev. 597, p. 600. See also *Reference re Waters and Water-Powers*, [1929] S.C.R. 200, p. 216.

5 *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, para. 39.

6 There is a brief discussion of the power in *Proprietary Articles Trade Assn. v. Canada (Attorney General)*, [1931] A.C. 310 (J.C.P.C.), but there is no examination of the meaning of the power.

property and civil rights. This stands in sharp contrast to other federal powers (e.g., trade and commerce, criminal law and peace order and good government), where courts have articulated tests with checks-and-balances to guard against constitutional overreach.

13. The need for a framework is particularly acute here. In her expert report, the Attorney General of Canada's expert, Dr. Gallini, explains that patent systems are comprised of "policy levers" that governments can adjust to design and ensure the proper functioning of the patent system. According to Dr. Gallini, these levers include limitations on the nature of patent rights, including patent eligibility requirements such as novelty, utility and inventive step, and the term of exclusivity. Dr. Gallini also includes as a "policy lever" limitations on the price at which a patentee can sell its product.[7] But this view of the patent system fails to distinguish between the patent rights of exclusivity, and the independent rights to make, use and sell a product, which do not originate from the patent grant.

14. This case therefore requires this Court to assess the scope of the patent power, and whether, in addition to regulating the terms of the patent grant, Parliament may also regulate the sale of patented products, including their price. To assist the Court in this exercise, IPO addresses three indicators of constitutional meaning that can be used to delineate the scope of the patent power:

    a) the historical and conceptual context of "patents of invention";

    b) the modern and international framework of patent law; and

    c) the relationship between the patent power and other heads of power.

15. Each of these indicia demonstrate that the scope of the patent power includes the right to regulate the terms of the patent grant – i.e., the exclusivity, but not the rights of patentees to make and sell their products, including the prices at which patented products can be sold.

A. THE CONCEPT AND HISTORICAL CONTEXT OF PATENTS

16. The Supreme Court of Canada has explained that section 91 and 92 powers must be anchored in their "proper linguistic, philosophical and historical contexts".[8] To construe the scope of the patent power, this Court must therefore consider the history and theoretical basis for the federal patent power.

17. The purpose of patent law has been and remains to encourage innovation – not in any particular field, but across industries and sectors.[9] Patent law spurs innovation through the patent bargain, whereby a patent grants to the inventors the right to

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7 Report of Nancy Gallini (Exhibit D-5), paras. 18, 55.

8 *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, para. 32; *R. v. Comeau*, 2018 SCC 15, para. 52.

9 *Actavis Group PTC EHF & Ors v ICOS Corporation & Anor*, [2019] UKSC 15, para. 53.

exclude others from making, using or selling the invention in exchange for public disclosure.[10]

18. Dr. Gallini states that a "patent gives the patent owner exclusive property rights in an invention to use, produce, sell or license it in the market."[11] This is misleading. A patent does not give the patent owner the right to sell a product embodying the invention, for example, if that product infringes the property rights of other patent owners, violates a contract, or otherwise violates commercial laws on the sales of products or services. In defining the scope of the patent power, it is important to distinguish patent rights from pre-existing contract and property rights. While a higher price might be a potential *consequence* of the exclusivity granted by a patent, the patent itself does not convey the right to sell the product at a particular price. Harold G. Fox explains that patents do not create rights to make or sell a patented product – patents only limit *who* can exercise them:

> A patent does not grant to the patentee the right to make and sell the subject of his patent. **That right he had before his patent, quite independent and apart from any government grant. The right to make, use, and sell an invention is a common law right, and has so been held in numerous cases**. All the state grants by a patent is the incident of the right to exclude others—not from something they previously enjoyed and had in possession—but from something that is newly discovered and invented and will, in due time, be presented to them as part of the pool of common enjoyment. The patentee receives nothing from the law which he did not have before [our emphasis].[12]

19. This conception of the patent has many historical antecedents. For example, an important precursor to modern patent law was the early practice of rewarding foreign inventors for introducing innovations to England.[13] The Crown would grant legal privileges (often various forms of monopolies) in exchange for providing the benefit of an innovation to the public.[14] Indeed, the first English patent for invention was granted for this purpose. In 1449, a master glass-maker was induced to remain in England to teach the art of coloured glass by a letters patent, which permitted him to exclude others from practicing this art for twenty years.[15]

20. Patent law statutes emerged in Canada through the 1824 enactment of *An Act to promote the progress of useful Arts in this Province* in Lower Canada. This statute

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[10] *AstraZeneca Canada Inc. v. Apotex Inc*., 2017 SCC 36, para. 51.

[11] Report of Nancy Gallini (Exhibit D-5), para. 17.

[12] Harold G. Fox, *Monopolies & Patents: A Study of the History & Future of the Patent Monopoly* (Toronto: University of Toronto Press, 1947) [Fox, *History of Patent Law*], pp. 202-203; see also *Steers v. Rogers*, [1893] A.C. 232, p. 235 (U.K.H.L.).

[13] Fox, *History of Patent Law*, *supra* note 12, p. 46.

[14] Fox, *History of Patent Law*, *supra* note 12, p. 57.

[15] Ramon A Klitzke, "Historical Background of the English Patent Law" (1959) 41:9 J Pat & Trademark Off Soc'y 615, p. 627.

was consolidated in 1849 with the Upper Canada enactment. These Pre-Confederation patent acts, modelled after U.S. patent statutes, codified the patent bargain: they conferred on the government the power to grant time-limited rights to exclude others in exchange for the disclosure of the invention to the public. They did not include any mechanism by which the government could also regulate the sale of a patented product, including its price.[16]

B. MODERN AND COMPARATIVE CONCEPTION OF PATENTS

21. Of course, the scope of the federal patent power is not defined solely by the historic conception of the patent. The Constitution is interpreted in a manner that is "sensitive to evolving circumstances," and is "capable of growth and expansion within its natural limits."[17] But here, the modern conception of the patent has not materially evolved from its historic roots. Patents continue to be understood in Canada and abroad as a means to secure the disclosure of valuable inventions across fields of technology in exchange for limited rights to exclude.

i. The concepts of patents, in Canada and elsewhere

22. In Canadian law, the patent bargain remains the underlying basis of patent law.[18] Over 30 years ago, the Supreme Court of Canada explained the bargain as a "kind of contract between the Crown and the inventor in which the latter receives an exclusive right to exploit his invention for a certain period in exchange for complete disclosure to the public of the invention and the way in which it operates."[19] By providing a "method by which inventive solutions to practical problems are coaxed into the public domain,"[20] the bargain fulfills the purpose of promoting innovation.

23. The patent bargain, as expressed in Canada and elsewhere, recognizes the essential characteristic of the patent as the right "to exclude others from the exploitation of an invention, rather than to confer rights with respect to that invention on the patent holder(s)."[21]

24. Historically, patent schemes in Canada and Britain have also included ways for governments to prevent patent rights from being abused. But importantly, these

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[16] Donald H. MacOdrum, *Fox on the Canadian Law of Patents*, 5th ed (Toronto: Thomson Reuters, looseleaf ed.), section 1:7(a); *An Act to consolidate and amend the Laws of Patents for Inventions in this Province*, S.U.C. 1849-49 vol. III 162, c 24.

[17] *R. v. Comeau*, 2018 SCC 15, para. 52; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124, p. 136 (J.C.P.C.).

[18] See e.g. *Pope Appliance Corporation v. Spanish River Pulp and Paper Mills, Limited*, [1929] A.C. 269, p. 281 (J.C.P.C.).

[19] *Pioneer Hi-Bred Ltd. v. Canada (Commissioner of Patents)*, [1989] 1 S.C.R. 1623, p. 1636.

[20] *Apotex Inc. v. Wellcome Foundation Ltd.*, 2002 SCC 77, para. 37.

[21] *Forget v. Specialty Tools of Canada Inc*. (1995), 62 C.P.R. (3d) 537, para. 16 (B.C.C.A); *Merck & Co., Inc. v. Apotex Inc.*, 2013 FC 751, para. 239; *Motion Picture Patents Co v Universal Film Mfg Co* (1917), 243 US 502, 37 S Ct 416; *Steers v. Rogers*, [1893] A.C. 232, p. 235 (U.K.H.L.).

mechanisms have been expressly tethered to the exclusivity rights conferred by the patent. They have not interfered with the non-patent rights to make, use, and sell a product. For example, a compulsory licensing regime was upheld under Parliament's patent power because it involved "limiting the scope of the property right, the monopoly, which Parliament is authorized but not obliged to grant."[22]

ii. International instruments and approaches

25. In constitutional cases, this Court can also look to international instruments and approaches for guidance.[23] Here, Canada's international obligations under intellectual property treaties, and what they do and do not contemplate, provide a useful indication of the scope of the patent power. Consistent with how patent rights have been understood in Canada and elsewhere, these treaties conceive of patent rights as a right to exclude.

26. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) set outs universal requirements for a patent and the minimum rights conferred by a patent. This agreement, which came into effect on 1 January 1995 and binds all members of the World Trade Organization, is to date the most comprehensive multilateral agreement on intellectual property:[24]

a) Article 27 of TRIPS provides that, subject to certain exceptions, "patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application."

b) Article 29 of TRIPS sets out the disclosure requirement that is fundamental to the patent bargain: the patent must disclose the invention such that it can be carried out by a person skilled in the art.

c) Articles 28 of TRIPS provides that a patent confers an exclusive right on a patentee to prevent third parties from "making, using, offering for sale, selling or importing" the product. These are designed to ensure that patent owners can take "effective advantage" of the period of exclusivity.[25]

d) Article 33 of TRIPS provides that the term of protection cannot be less than twenty years from the filing date.

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[22] *Smith, Kline & French v. Attorney General of Canada*, [1986] 1 F.C. 274, para. 50, aff'd *Smith, Kline & French Laboratories v. Canada (Attorney-General)*, [1987] 2 F.C. 359 (F.C.A.).

[23] See *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

[24] World Trade Organization, "Overview: the TRIPS Agreement" (2020), online: https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm.

[25] World Trade Organization, *Canada—Patent Protection of Pharmaceutical Products: Report of the Panel*, WT/DS114/R, 17 March 2000, at 7.55, online: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/114R.pdf&Open=True.

27. TRIPS also permits its signatories to interfere with the enjoyment and exploitation of patent rights, for example, to prevent "abuse of intellectual property rights by right holders." However, that interference must be consistent with the terms of the agreement.[26] In particular, it must comply with the following provisions:

    a) Under Article 30 of TRIPS, while members may provide "limited exceptions to the exclusive rights conferred by a patent," those exceptions must not "unreasonably conflict with a normal exploitation of the patent" or "unreasonably prejudice the legitimate interests of the patent owner."

    b) Article 27 of TRIPS requires patent rights to be enjoyed without discrimination as to the place of invention, the field of technology, and whether products are imported or locally produced.[27]

    c) Article 31 of TRIPS sets out a detailed regime for compulsory licensing to governments or third parties, with strict conditions for its use. However, nothing in this regime contemplates price control as an alternative to compulsory licensing.

28. Like Article 31 of TRIPS, the World Intellectual Property Organization's Paris Convention for the Protection of Industrial Property, to which Canada became a party to in 1923, speaks specifically to permissible remedies for patent abuse. It states that each country "shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work."[28] Nowhere does it provide for any sort of regulation over the prices of patented products.

29. TRIPS and the Paris Convention provide an important indication of universally accepted criteria for patentability, rights conferred by patents, and government's ability to regulate patent rights. Importantly, they each reserve a role for the regulation of patent abuse. However, none of these international treaties, either expressly or by implication, provide any rights for states to regulate the *prices* of patented goods (or any other aspect of the making, using, or selling of patented goods) as a matter of patent law.

30. This approach makes sense. Patents only confer a right to exclude others from making, using, or selling an invention. Preventing patent abuse should therefore be understood as limiting the right that is conferred in the first place, i.e., the right

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[26] TRIPS, Article 8, online: https://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm.

[27] World Trade Organization, *Canada—Patent Protection of Pharmaceutical Products: Report of the Panel*, WT/DS114/R, 17 March 2000, at 7.92, online: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/114R.pdf&Open=True.

[28] Paris Convention, Article 5A (2) (Official Translation), online: https://wipolex.wipo.int/en/text/287556.

to exclude. This is precisely why these treaties contemplate compulsory licensing, which is a limit on the right of exclusivity, but not price control.

31. It should therefore come as no surprise that Canada stands alone internationally for having implemented a pharmaceutical pricing control board as a part of its patent policy. As the plaintiffs' experts opined, to their knowledge, Canada is the only country that ties its price control regime of medicines to its patent scheme.[29]

C. FEDERAL ECONOMIC POWERS NARROWLY CONSTRUED

32. This Court must also situate the power over "Patents of Invention and Discovery" in Canada's constitutional scheme.[30] In doing so, the Court must be sensitive to the interaction between federal and provincial powers. Indeed, since the early days of the Privy Council, courts have held that section 91 and 92 powers must be interpreted in relation to each other and the "general scheme" of the constitution.[31]

33. The provincial power over "property and civil rights" under s. 92(13) of the *Constitution Act, 1867* is well established as a broad and plenary head of power.[32] Arising from the *Quebec Act of 1774*, the term "property and civil rights" referred to "the entire body of private law which governs the relationships between subject and subject."[33] At the time of confederation, many classes of subjects, including "patents of invention," "trade and commerce," and "copyrights" were "withdrawn from the historic scope of the provincial property and civil rights clause."[34]

34. Because these powers were carved out of provincial power over property and civil rights, courts have sought to limit their scope by articulating various frameworks or tests to ensure that they do not overtake and "supplant the provinces' jurisdiction over property and civil rights."[35] As the Privy Council famously wrote in *Parsons*, the *Constitution Act, 1867* "could not have intended that the powers assigned

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29 Reply report of W. Neil Palmer (Exhibit P-159), para. 57; Supplementary report of Jorge Padilla (Exhibit P-158), para. 1.10.

30 *Russell v. The Queen* (1882), 7 App. Cas. 829, p. 836; *Reference re Waters and Water-Powers*, [1929] S.C.R. 200, p. 216.

31 *Ibid.*

32 *Reference re Genetic Non-Discrimination Act,* 2020 SCC 17, para. 66; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, p. 180; Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, looseleaf ed.) [Hogg, *Constitutional Law*], section 17.1.

33 Hogg, *Constitutional Law*, *supra* note 32, section 21.2. See also *Québec (Procureure générale) c. Canada (Procureure générale)*, 2011 QCCA 591, para. 123, 131.

34 Hogg, *Constitutional Law*, *supra* note 32, section 21.2. See also W.R. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975) 53:3 Can. Bar. Rev. 597 at 601-602.

35 *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, para. 100.

exclusively to the provincial legislatures should be absorbed in those given to the Dominion Parliament."[36]

35. Courts have been especially cautious in interpreting the scope of powers that relate to economic matters.[37] For example, the Supreme Court of Canada has explained that an "overly broad interpretation of the general branch under s. 91(2) [the trade and commerce power] could entirely supplant the provinces' jurisdiction over property and civil rights."[38] As a result, governmental interventions in the marketplace "have for the most part been allocated by the courts to property and civil rights in the province."[39] The Supreme Court's interpretation of, and limitations on, three broader heads of power, discussed below, is illustrative.

36. ***Trade and commerce.*** The trade and commerce power, the most broadly worded of the federal economic powers, has been interpreted restrictively. That approach is designed to protect the exclusive provincial power over property and civil rights. As a result, courts have held that the trade and commerce power "does not extend to regulating the contracts of a particular business or trade."[40] It only permits regulation of matters that "transcend local concerns and must therefore, by their very nature, 'be regulated federally, or not at all.'"[41] For a law to be authorized under the trade and commerce power, the law must conform with five indicia of federal authority. Among other things, the law must be "concerned with trade as a whole rather than with a particular industry."[42]

37. The patented medicines pricing regime would be unlikely to pass muster under the federal trade and commerce power. Unlike the civil remedy in the *Trade-marks Act*, which was upheld because it applied trade-marks "across and between industries,"[43] the PMPRB singles out the pharmaceutical industry. Further, the PMPRB regulates pharmaceutical products in a manner that is not "qualitatively different from anything that could practically or constitutionally be enacted by the individual provinces."[44] As the plaintiffs explain, the provinces already regulate the price of medicines.[45]

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[36] *Citizens Insurance Co. v. Parsons (1881),* 7 App. Cas. 96, p. 108 (J.C.P.C.); See also *Reference re Waters and Water-Powers*, [1929] S.C.R. 200, p. 216.

[37] *Reference Re Securities Act (Canada)*, 2011 ABCA 77, paras. 28-29. See e.g. *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357, p. 366.

[38] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, para. 100.

[39] Hogg, *Constitutional Law*, *supra* note 32, section 21.2**.**

[40] *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, p. 656.

[41] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, para. 101.

[42] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, para. 103.

[43] *Kirkbi AG v. Ritvik Holdings Inc*., 2005 SCC 65, para. 29.

[44] *Reference re Securities Act*, 2011 SCC 66, para. 79.

[45] Factum of the plaintiffs, paras. 6, 30-32 148-163, 168.

38. ***Criminal law.*** The "broad and plenary" federal criminal law power has also been limited so that it cannot permit Parliament to usurp the provincial power over property and civil rights. To be valid criminal law, there must be a valid criminal law purpose. As Chief Justice McLachlin warned, "a limitless definition [of this power] has the potential to upset the constitutional balance of federal-provincial powers" and thus "extensions that have the potential to undermine the constitutional division of powers should be rejected."[46]

39. ***POGG.*** The residual federal POGG power has also been limited so that the federal government cannot regulate the economy absent specific circumstances. To invoke that power, the federal law must concern a gap in the division of powers, a distinct matter of national concern, or the response to an emergency.[47] It could not be invoked to enact a permanent pricing regime for specific patented products.

40. In articulating the scope of the patent power, this Court must show the same concern for preserving provincial power over property and civil rights that it has shown for these broader federal powers. In this case, the federal government is seeking to uphold a detailed regulatory regime over the prices of patented medicines under the relatively narrow federal head of power over "patents of invention." It would be illogical if this narrower patent power could grant the federal government with broader authority to regulate commercial activity than the more broadly defined federal trade and commerce power.

V. CONCLUSION

41. IPO submits that the patent power must be interpreted in a way that appropriately ties the scope of the patent power to the nature of the patent grant and balances federal and provincial authority over economic issues.

42. Accordingly, the federal patent power must include the power to regulate the scope of the rights conferred by a patent, such as who may apply for a patent, what the eligibility requirements are, what a patent may cover, and how long the term of exclusivity lasts. But it cannot extend to regulating the patentee's pre-existing and independent rights to make, use, and sell products at a price the market will bear.

43. As Parliament creeps further towards patented medicines price control schemes, choosing one industry as its target and ignoring the scope of the patent grant, it strays from the patent power into provincial jurisdiction over property and civil rights. With the PMPRB pricing scheme, Parliament has strayed too far.

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[46] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, para. 43; *Reference re Validity of Section 5 (a) Dairy Industry Act*, [1949] S.C.R. 1, p. 50, aff'd [1951] A.C. 179.

[47] See Hogg, *Constitutional Law*, *supra* note 32, section 17.

THE WHOLE RESPECTFULLY SUBMITTED.

MONTRÉAL, July 15, 2020

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FACTUM OF INTELLECTUAL PROPERTY OWNERS ASSOCIATION

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