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What's Your Evidence? The Danger of Hearsay Evidence in IP Litigation

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In *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161, the Federal Court of Appeal (“FCA”) recently overturned a substantial damages award in a pharmaceutical patented medicines action on the basis that the trial judge admitted improper hearsay evidence. This is an important reminder that the hearsay rule of evidence is alive and well.

At trial, only one witness was called to testify in support of damages and he did not have actual firsthand knowledge of the purported facts to which he was testifying. Instead the witness could only testify to the oral and written statements of others. The FCA ruled that this evidence was hearsay, and therefore inadmissible.

Hearsay evidence is an oral or written statement made by a party who has not come to court to testify. An example of oral hearsay is a witness testifying that “John told me he would give me \$100”. This is hearsay because the author or speaker of these statements is not present in court to testify to the truth of the statement. Whether or not the statement is admissible depends on the use of that statement. If the purpose of calling the hearsay evidence is to prove the truth of the statement, then the statement is

inadmissible. Therefore, in this example, the proper way to prove that John would give the witness \$100 is to call John as a witness to testify to the truth of that statement; otherwise, the statement cannot be used to prove that John would have given the witness any money.

Despite the recent trend of some courts and tribunals to relax the rules of evidence regarding the admissibility of hearsay evidence to allow for more flexibility, here, the Federal Court took a more strict and traditional analysis.

As a result, parties to intellectual property disputes must be aware of the potential inadmissibility of hearsay when collecting evidence. This is particularly germane in trade-mark disputes where evidence of confusion generally comes from second hand sources. The proper collection and documentation of this evidence can make or break a successful infringement or opposition proceeding.

Trade-mark holders should be proactive when presented with evidence of confusion. It may not be enough for a representative of the company to swear an affidavit that the company received phone calls from those who say they confused the company's trade-mark with another. The better evidence is directly from each of those callers who can testify first hand to their confusion. Where feasible, trade-mark holders should have a process in place to document the names and contact information of witnesses and the details of any evidence of confusion. This way, individuals able to give first hand evidence can be contacted if the matter proceeds to litigation or an opposition proceeding. If such evidence is not properly preserved, a trade-mark holder may be left with no admissible evidence to prove its claim.

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