Federal Court  Cour fédérale

Date: 20240124

Docket: T-1664-22

Citation: 2024 FC 52

Ottawa, Ontario, January 24, 2024

PRESENT: Madam Justice Pallotta

BETWEEN:

NOVARTIS AG AND NOVARTIS PHARMACEUTICALS CANADA INC.

Applicants

and

BIOGEN, INC., BIOGEN MA INC., BIOGEN CANADA INC. AND SAMSUNG BIOEPIS CO., LTD.

Respondents

PUBLIC JUDGMENT AND REASONS
(Identical to the Confidential Judgment and Reasons issued on January 12, 2024)

I. Introduction

[1] In this application, Novartis AG and Novartis Pharmaceuticals Canada Inc (Novartis Canada) (collectively, Novartis) allege that the respondents' unauthorized use of the trademark BYOOVIZ in association with an ophthalmologic drug violates Novartis' rights in the registered

trademark BEOVU, contrary to sections 7(b), 19, 20, and 22 of the *Trademarks Act*, RSC 1985, c T-13 [*TMA*].

[2] For the reasons that follow, I find Novartis has established that the respondents' use of BYOOVIZ violates Novartis' rights in the BEOVU mark.

II. **Background**

[3] Novartis owns Canadian trademark registration TMA1072372 for BEOVU, registered February 11, 2020 in association with pharmaceutical preparations for use in ophthalmology and pharmaceutical preparations for prevention and treatment of ocular disorders and diseases. Novartis uses the BEOVU trademark in association with an anti-vascular endothelial growth factor (anti-VEGF) biologic drug. The BEOVU drug is approved in Canada for treating neovascular age-related macular degeneration, commonly referred to as wet AMD.

[4] Anti-VEGF drugs are prescription drugs that must be administered by an ophthalmologist. The drugs are liquid formulations that are injected into the vitreous body of the eye using a syringe.

[5] On March 8, 2022, Health Canada issued a notice of compliance authorizing the respondents to market an anti-VEGF drug for treating wet AMD and other ophthalmic indications, under the name BYOOVIZ.

[6] Samsung Bioepis Co, Ltd (Samsung) manufactures the BYOOVIZ drug in Canada.

[7] Biogen, Inc is the parent company of Biogen MA Inc, and Biogen MA Inc is the parent company of Biogen Canada Inc (collectively, Biogen). Biogen MA Inc is responsible for commercializing the BYOOVIZ drug and has a pending Canadian trademark application, filed August 6, 2020 (application no. 2044395), to register BYOOVIZ for use in association with pharmaceutical preparations. Biogen Canada Inc is Biogen MA Inc's primary Canadian operating subsidiary and a licensee of the BYOOVIZ trademark.

[8] The BYOOVIZ drug is a biosimilar drug. It was approved as a biosimilar equivalent to another Novartis drug, marketed under the brand name LUCENTIS. While Novartis' BEOVU and LUCENTIS drugs are both anti-VEGF medications used to treat wet AMD, they contain different active pharmaceutical ingredients (API). The API in BEOVU is brolucizumab. The respondents' biosimilar drug contains ranibizumab, the same API that is in LUCENTIS.

[9] Novartis commenced this application before the respondents had started selling the BYOOVIZ drug in Canada, and the evidence in the record was obtained before the BYOOVIZ drug was on the market. However, the parties confirmed that, by the time of the hearing, the respondents were promoting and selling the BYOOVIZ drug in Canada. The parties also confirmed they were not treating this proceeding as an application for *quia timet* relief, and there are no issues that arise due to the timing of the notice of application relative to the start of the respondents' activities.

[10] While Biogen and Samsung each filed written submissions and made oral submissions, their positions are substantially aligned. For convenience, I will generally refer to the

respondents' evidence and submissions without distinguishing between Biogen and Samsung. Where I refer to Biogen or Samsung submissions separately, it does not mean their positions diverged on the point.

III. **Issues**

[11] The issues on this application are:

A. Does the respondents' use of the BYOOVIZ trademark infringe Novartis' rights in the BEOVU trademark, contrary to sections 19 or 20 of the *TMA*?

B. Do the respondents' actions constitute passing off contrary to subsection 7(b) of the *TMA*?

C. Have the respondents used the BEOVU trademark in a manner that is likely to have the effect of depreciating the value of the goodwill attaching to it, contrary to section 22 of the *TMA*?

D. What is the appropriate remedy, if any?

IV. **Overview of the Evidence**

[12] The parties rely on the affidavit evidence of nine witnesses, and the transcripts of their cross-examinations conducted out of court. Novartis' affiants are two company witnesses (Eve-Lyne Begin and Angela Hamed) and an ophthalmologist (Arif Samad). The respondents' affiants are a Biogen company witness (Blake Leitch), three ophthalmologists (Robert Devenyi, Farzin Forooghian, and Frank Stockl), a linguistics professor (Anne-José Villeneuve), and Joseph Connolly of Sentrex Health Solutions Inc (Sentrex), which is described as a "fully

integrated specialty distributor and patient support provider for pharmaceutical manufacturers, physicians, and their patients, and is more commonly referred to as a specialty pharmacy". Drs. Samad, Devenyi, Forooghian, and Stockl are proposed as experts in ophthalmology with experience prescribing and administering anti-VEGF medications. Dr. Villeneuve is proposed as an expert witness in linguistics and phonology in French and English. I am satisfied that the proposed experts are qualified to give opinion evidence in their respective fields.

[13] The following is a non-comprehensive overview of the witnesses' evidence, beginning with Novartis' affiants.

A. Eve-Lyne Begin: Ms. Begin is the Brand Director of Ophthalmology at Novartis Canada. Her affidavit explains some of Novartis Canada's marketing efforts for the BEOVU drug, which were primarily directed to health care professionals.

B. Angela Hamed: Ms. Hamed is a Regional Director of Portfolio Management at Novartis Canada. Her affidavit provides information about Novartis, the BEOVU trademark, and Novartis' use of the BEOVU trademark in Canada.

C. Arif Samad: Dr. Samad is an ophthalmologist and associate professor in the Ophthalmology and Visual Sciences department at Dalhousie University. Dr. Samad's affidavit explains wet AMD and its treatment, including the drugs that are used and how they are administered. He states: the ophthalmologist, who is familiar with the available products and their respective trademarks, selects the specific anti-VEGF drug to be administered; staff at ophthalmology clinics routinely identify anti-VEGF drugs by their brand names; the BEOVU drug, and other anti-VEGF drugs such as LUCENTIS, EYLEA, and VABYSMO, are

received from the pharmacy in a similar sized box or, in the case of a syringe filled at a hospital pharmacy, a sealable plastic bag; and patients may request medicines based on their own research. The respondents argue Dr. Samad's affidavit (but not his cross-examination testimony) should be given no weight, including because he did not disclose financial ties to Novartis, and his cross-examination revealed a number of substantial changes to his affidavit evidence.

D. Blake Leitch: Mr. Leitch is the head of Marketing and Communications in the Global Biosimilars unit of Biogen MA Inc. His affidavit provides information on Biogen's corporate structure, the BYOOVIZ name selection process, and the regulatory approval process for the BYOOVIZ drug, including Health Canada's approval of the name. It attaches mock-up packaging for the BYOOVIZ drug, explains the marketing efforts that have been undertaken, and states the drug is intended to capitalize on the LUCENTIS market share, not the much smaller BEOVU market share. He states the reputation of the BEOVU drug has suffered due to safety warnings, and his affidavit attaches articles about the BEOVU drug that are accessible in Canada, as evidence of negative publicity. Mr. Leitch states the BYOOVIZ and BEOVU drugs have been sold concurrently in the United States since July 2022 and he is unaware of any confusion.

E. Anne-José Villeneuve: Dr. Villeneuve is an Associate Professor at the University of Alberta's Campus Saint-Jean, and an Adjunct Professor in the Department of Linguistics. She provides an opinion as to how BEOVU and BYOOVIZ would be pronounced by a majority of Canadians, depending on their predominant language. In Dr. Villeneuve's view, the two terms differ phonetically, do not

resemble each other in appearance, and do not have meaning in English or French or share any conceptual similarity. However, if an average French-speaking Canadian "spent some time analyzing and dissecting" BEOVU, they may come to understand the "vu" portion to signify "to see" and therefore allude to eyes. In "analyzing and dissecting" BYOOVIZ, an average Canadian may come to understand "viz" to indicate "vision", however this interpretation is less obvious given that the final consonant "Z" is absent from the French and English spelling of "vision". Novartis submits Dr. Villeneuve's evidence is not necessary to assist the Court, including because she did not put herself in the position of the average consumer as required by the confusion analysis, she has no experience with pharmaceuticals, and she does not know how ophthalmologists would pronounce the trademarks at issue.

F. Robert Devenyi: Dr. Devenyi is a vitreoretinal surgeon with the University Health Network (UHN) in Toronto, and was previously the UHN Ophthalmologist in Chief. The Devenyi affidavit describes the use of anti-VEGF drugs to treat wet AMD, and provides a list of drugs currently on the market in Canada. Dr. Devenyi describes his personal approach to the prescription of anti-VEGF drugs and his clinical practice. He does not prescribe BEOVU because it has been shown to cause inflammation that can lead to vision loss. Dr. Devenyi states the anti-VEGF drugs EYLEA and LUCENTIS, which he uses regularly, come from the manufacturer in the original manufacturer packaging. Sometimes Dr. Devenyi will prescribe AVASTIN "off label". AVASTIN is approved and indicated to treat certain cancers, but it is effective for treating wet AMD and can

be prescribed even though it is not specifically indicated for that treatment. A specialty pharmacy will repackage AVASTIN under sterile conditions, supplying syringes bearing a label with the brand name of the drug. According to Dr. Devenyi, patients almost never ask for a specific anti-VEGF drug. When a patient attends his clinic for treatment of wet AMD or diabetic retinopathy, clinic staff will place a syringe containing the proper drug in the patient treatment room. Before administering the drug, Dr. Devenyi performs a crosscheck to ensure the drug is correct. When he first treats the patient or switches to a different medication, Dr. Devenyi tells his patients what drug he is administering.

G. Joseph Connolly: As noted above, Mr. Connolly founded Sentrex, a specialty pharmacy. His affidavit states the majority of ophthalmology clinics source their drugs from specialty pharmacies like Sentrex. Sentrex supplies more than 35% of ophthalmology clinics across Canada, with a dominant market share in Ontario, Quebec, New Brunswick, Newfoundland, and Nova Scotia. Mr. Connolly explains the checks and balances Sentrex has in place to ensure patients receive the correct drug, and describes the information Sentrex places on medication labels. In Mr. Connolly's experience, the average age of patients who are prescribed anti-VEGF drugs is 81, and while it is possible for patients to pick up their own prescriptions from a pharmacy, anti-VEGF medications are in almost every case sent directly to the clinic where the patient's retinal specialist will administer the drug.

H. Farzin Forooghian: Dr. Forooghian is an ophthalmologist and Clinical Associate Professor of Ophthalmology at the University of British Columbia. His affidavit

provides an overview of available anti-VEGF drugs and the drugs he commonly prescribes, taking cost and British Columbia's funding model into account. Dr. Forooghian states he would not raise BEOVU as a treatment option at an initial consultation and would only offer it as a final option if other anti-VEGF drugs were ineffective, which has not yet happened in his practice. Dr. Forooghian states his patients almost never ask for a specific drug, and if a patient asked for a particular anti-VEGF drug out of the sequence he follows, he would explain his duty to use drugs authorized by the Provincial Retinal Diseases Treatment Program and most cost-effective to treat their specific condition. Dr. Forooghian states all anti-VEGF drugs in the province of British Columbia are provided by compounding pharmacies. The compounding pharmacy he uses orders the drugs from a drug manufacturer or distributor, removes them from the original packaging, repackages them in new syringes under sterile conditions, places the syringes in colour-coded bags, and delivers them to his clinic where the drugs are refrigerated until used. The bags and syringes bear the name of the drug. Dr. Forooghian states he does not see the original manufacturer packaging when he administers anti-VEGF drugs to patients. When Dr. Forooghian enters the room to administer the drug, the drug will already be there in its colour-coded bag. Dr. Forooghian verbally confirms the patient's name and date of birth, cross-references the anti-VEGF drug indicated in the patient's chart with the colour of the bag, and visually verifies it is the correct drug. Dr. Forooghian states he always tells the patient the name of the drug they are about to receive, and always tells the patient if he has switched them to a different drug.

I. Frank Stockl: Dr. Stockl is an ophthalmologist, vitreoretinal surgeon, and Assistant Professor in the Department of Ophthalmology at the University of Manitoba in Winnipeg. He practices in Manitoba and northwestern Ontario. Dr. Stockl's affidavit provides an overview of the anti-VEGF drugs available to ophthalmologists in Canada. In Manitoba, anti-VEGF drugs are available through the Winnipeg Regional Health Authority (WRHA) pharmacy. Manitoba mandates stepwise therapy—ophthalmologists must administer the first-line drug and only move to the next drug if certain criteria are met. AVASTIN is the first-line drug in Manitoba for wet AMD (as noted above, this is an "off-label" use) and the WRHA plan does not currently cover the cost of BEOVU. AVASTIN is less commonly prescribed in Ontario as the costs of approved anti-VEGF drugs are covered under Ontario's health plan. In Manitoba, anti-VEGF drugs are delivered to a compounding pharmacy in vials in their original manufacturer packaging. The compounding pharmacy transfers the drugs from their original packaging into syringes, then the syringes are labelled with the name of the drug, placed in a colour-coded plastic cassette, and sent to the receiving clinic via a refrigerated courier service. In northwestern Ontario, anti-VEGF drugs are procured from private pharmaceutical distributors and may be delivered to the clinic in the manufacturers' packaging, with a label applied by the pharmacy. The drug name is also etched into the syringe. For drugs that are supplied in a vial, they are repackaged into syringes under sterile conditions. A syringe label indicates the drug name. In Dr. Stockl's clinic, a clinical assistant will pull the correct drug from the refrigerator, remove it from its package, and place the

syringe in the treatment room. A technician verifies the patient's name and date of birth, confirms the eye to be treated, and crosschecks the drug. When Dr. Stockl enters the room, he verifies the drug by inspecting the label, and confirms the drug name and the eye to be treated with the patient prior to administration. At a hospital, a nurse will confirm the patient's name, date of birth, the drug to be administered, and which eye or eyes are to be treated in Dr. Stockl's presence. Dr. Stockl crosschecks the drug name on the syringe with the drug named by the nurse before proceeding with the injection. Dr. Stockl states the vast majority of patients will not ask for a specific anti-VEGF drug. If a patient asks about a certain drug, Dr. Stockl states he will usually tell them that the decision is constrained by algorithms provided by the government as to what can be used, and explains the related rules. Dr. Stockl states he informs patients that if the specific drug is still what they want, they would have the option to purchase the drug out-of-pocket or through third party insurance if covered.

V. **Analysis**

A. *Does the respondents' use of the BYOOVIZ trademark infringe Novartis' rights in the BEOVU trademark, contrary to sections 19 or 20 of the* TMA*?*

[14] Novartis submits the respondents have contravened sections 19 and 20 of the *TMA*.

[15] Novartis argues the BEOVU registration gives it the exclusive right to use the BEOVU trademark with the registered goods—pharmaceutical preparations for use in ophthalmology and pharmaceutical preparations for prevention and treatment of ocular disorders and diseases—

throughout Canada. By virtue of section 20 of the *TMA*, the exclusive right granted by section 19 is deemed to be infringed when another person sells, distributes, or advertises goods or services in association with a confusing trademark or trade name.

[16] The respondents submit the causes of action for infringement under sections 19 and 20 are distinct. The respondents submit Novartis has no cause of action under section 19 of the *TMA*, which is limited to infringement by use of an identical trademark in association with registered goods or services.

[17] The respondents' position on this point is consistent with the jurisprudence. The Federal Court of Appeal stated in *Sandhu Singh Hamdard Trust v Navsun Holdings Ltd*, 2019 FCA 295 (at paragraph 20) that section 19 is concerned with use of a trademark that is identical to a registered trademark, while section 20 is broader in scope and captures use of a trademark that is confusing in light of, but not necessarily identical to, a registered mark (see also *Ratiopharm Inc v Laboratoire Riva Inc*, 2006 FC 889 at paragraph 7 [*Ratiopharm*] and *A & W Food Services of Canada Inc v McDonald's Restaurants of Canada Ltd*, 2005 FC 406 at paragraphs 9-13 [*A&W*]).

[18] The BEOVU and BYOOVIZ marks are not identical. The infringement analysis will therefore proceed under section 20 of the *TMA*.

[19] Turning to the test for confusion, subsection 6(2) of the *TMA* provides that use of a trademark causes confusion with another trademark if the use of both trademarks in the same area would be likely to lead to the inference that the goods or services associated with the

trademarks are manufactured, sold, leased, hired, or performed by the same person, whether or not the goods or services are of the same general class.

[20] In determining whether trademarks are confusing, the court shall have regard to all the surrounding circumstances, including: (a) the inherent distinctiveness of the trademarks and the extent to which they have become known; (b) the length of time the trademarks have been in use; (c) the nature of the goods, services, or business; (d) the nature of the trade; and (e) the degree of resemblance between the trademarks in appearance, sound, or the ideas suggested by them: *TMA*, s 6(5).

[21] The test to be applied is a matter of first impression in the mind of a casual consumer somewhat in a hurry who, in this case, sees the BYOOVIZ mark at a time when he or she has no more than an imperfect recollection of the BEOVU mark, and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks: *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23 at paras 19-20 [*Veuve Clicquot*]; *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 at paras 40-41 [*Masterpiece*]. The factors to be considered when making a determination as to whether or not a mark is confusing to a somewhat-hurried consumer in all the circumstances include, but are not limited to, those enumerated in subsection 6(5) of the *TMA*: *Veuve Clicquot* at para 21; *Masterpiece* at para 44. The list of circumstances is not exhaustive, and different circumstances will be given different weight in a context-specific assessment: *Veuve Clicquot* at para 21, citing *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22 [*Mattel*].

[22] Reverse confusion is also actionable under the *TMA* and assessed according to the same criteria: *A&W* at para 32.

[23] The parties agree that the outcome of this proceeding hinges on whether there is a likelihood of confusion between the BEOVU and BYOOVIZ trademarks.

[24] The parties disagree on the identity and attitude of the relevant consumer for the likelihood of confusion analysis. The parties also disagree on the relevant point in time for assessing whether a consumer is likely to be confused, which I address in the subsection on consumer attitude.

(1) Relevant consumers

[25] Novartis argues that physicians, pharmacists, and patients—who are the end recipients of the drug and who generally encounter the trademark when their ophthalmologist tells them the name of drug that they will be given—are all relevant consumers. Novartis relies on *Ciba-Geigy Canada Ltd v Apotex Inc*, [1992] 3 SCR 120 [*Ciba-Geigy*] and *Ratiopharm* for the principle that patients using prescription drugs are considered to be relevant consumers for the purposes of a confusion analysis.

[26] Novartis argues that, since patients have no direct access to the BEOVU or BYOOVIZ drugs, it is all the more necessary that they be able to exercise some kind of control over what they are given: *Ciba-Geigy* at 147. The fact that the patient has a choice is sufficient for patients to be considered relevant consumers, regardless of whether the choice is great or small, easily

exercised or not: *Ciba-Geigy* at 150. Novartis states patients receiving anti-VEGF treatments have, at the very least, a choice to refuse treatment, and it would be wrong to exclude them on the basis that they have no choice regarding the brand of drug to be taken: *Ciba-Geigy* at 150.

[27] The respondents argue that patients are not relevant consumers. The respondents submit that trademark use in the context of highly specialized anti-VEGF medications does not transcend to the patient level, and the only relevant consumers are doctors and pharmacists.

[28] Biogen submits it is the persons who are likely to buy the goods that must be considered in a confusion analysis: *Baylor University v Hudson's Bay Co* (2000), 184 FTR 316 at para 27, 8 CPR (4th) 64 (FCA). While patients are the ultimate recipients of the drug, they never encounter the names of anti-VEGF drugs *as consumers* and do not rely on a trademark associated with an anti-VEGF medication to guide their purchasing decisions. In the anti-VEGF medication market context, Biogen states patients do not interact with the brand names of anti-VEGF medications as consumers because they rely entirely on their doctors to select, purchase, and administer the correct medication. Patients do not see the packaging for anti-VEGF medications or have any contact with the medication before it is administered. To the extent a patient is exposed to a trademark associated with anti-VEGF medication, it is when their ophthalmologist tells them the single name of the drug they will be getting—no other drug name is presented to the patient. Biogen argues it does not make sense to consider the perception of a patient solely because they are the beneficiary of the product, when they do not in fact "use the trademark as a consumer".

[29] In terms of patient choice, Biogen submits *Ciba-Geigy* and *Ratiopharm* are distinguishable from the circumstances of this case. In *Ciba-Geigy*, the asserted trademark rights related to the appearance of prescription blood pressure pills purchased from a pharmacist and self-administered by the patient. The drugs at issue were designated interchangeable pharmaceutical products pursuant to the *Prescription Drug Cost Regulation Act, 1986*, SO 1986, c 28, which allows patients a choice to refuse to be sold a drug other than the one indicated by the doctor's prescription. In *Ratiopharm*, patients could purchase the cough drug at issue over the counter, with a pharmacist as the intermediary.

[30] In this case, Biogen submits Novartis' argument of patient choice with respect to their anti-VEGF medication is contrary to the evidence. Anti-VEGF medications must be administered by a highly qualified ophthalmologist and patient preference plays no role in drug selection. Biogen submits ophthalmologists alone select which drug will be administered—often, it is the price of an anti-VEGF medication that will dictate the selection. Furthermore, there are government regulations and policies that dictate which drugs will be covered and may mandate biosimilars, eliminating any choice by the patient. Biogen argues that while a patient may have a choice to refuse treatment, such a choice is highly unlikely to be the result of brand preference.

[31] Biogen argues it is justifiable to exclude patients receiving a drug from the category of relevant consumers in appropriate circumstances. Biogen states the facts of this case are similar to *NeoRx Corp v Cytogen Corp*, [1995] TMOB No 79, 61 CPR (3d) 559 [*NeoRx*], where the Trademarks Opposition Board (TMOB) distinguished *Ciba-Geigy* and found that the end user of

the product at issue, a radiolabelled injectable solution used for tumour imaging, were highly trained, skilled persons such as pharmacists, physicians, radiologists, and technicians working in the specialized field of nuclear medicine. Patients were not relevant consumers, despite being injected with the product at issue in *NeoRx*.

[32] Samsung supports Biogen's position and argues that patients are removed from the decision-making process for anti-VEGF drugs. Patients never handle the drugs themselves, do not request specific drugs, do not see the packaging, and have no agency to select the drug that will be administered. Patients accept the treatment recommended by their ophthalmologist or mandated by provincial funding regimes, and generally rely on their highly trained ophthalmologist to make the right selection of an anti-VEGF drug on their behalf.

[33] I agree with Novartis that patients are relevant consumers in a likelihood of confusion analysis. I am not persuaded by the respondents' arguments that patients lack the requisite control over the anti-VEGF medication given to them so as to exclude their perception as a relevant consumer. While *Ciba-Geigy* involved a different factual context, the principles the Supreme Court of Canada set down in that decision support Novartis' position. In my view, patients exercise the requisite control over the anti-VEGF medications they will receive, and the principles in *Ciba-Geigy* support Novartis' position that the patient is a relevant consumer.

[34] The fact that the BYOOVIZ and BEOVU drugs are not interchangeable in the same way as the goods at issue in *Ciba-Geigy* is not a basis for distinguishing the principles set down in *Ciba-Geigy*. The Supreme Court of Canada stated that what is significant is that the patient has a

choice, regardless of whether the choice is great or small, easily exercised or not: *Ciba-Geigy* at 150. The ophthalmologists' evidence in this case is that patients are told the brand name of the drug that will be administered to them. Patients also sign a consent form agreeing to be injected with the anti-VEGF drug. While the patient typically does not see product packaging, the drug name is on the syringe that will be used to inject the drug and the patient may see the name on the syringe before the drug is administered. A patient, upon hearing the trademark, and possibly also upon seeing the trademark on the syringe, can exercise at least the choice to refuse administration. In my opinion, this choice is sufficient to make patients relevant consumers for the purpose of assessing the likelihood that trademarks may be confusing.

[35] Furthermore, the evidence shows that at least in some circumstances in some clinics, patients can choose between anti-VEGF medications. For example, Dr. Stockl's evidence was that if a patient asks about a certain drug, he would tell them that the decision is constrained by algorithms provided by the government and he would explain the related rules; however, if the specific drug is still what patient wants, they would have the option to purchase the drug out-of-pocket or through third party insurance, if covered.

[36] Trademarks serve a public interest in assuring consumers that they are buying from the source from whom they think they are buying and receiving the quality which they associate with that particular trademark: *Mattel* at para 21. Confusion must be avoided in the minds of all customers, and is not limited to the direct customers: *Ciba-Geigy* at 140. The Supreme Court of Canada stated it is "all the more necessary" for patients to be able to exercise some kind of control over what they are being given if they have no direct access to a drug: *Ciba-Geigy* at 147.

In light of these principles, patients are a relevant consumer for anti-VEGF drugs. Even in circumstances where patients do not request a specific anti-VEGF medication, which the evidence suggests occurs the majority of the time, they are informed of the ophthalmologists' choice of drug and they consent to being injected with a drug that is identified by its trademark.

[37] The facts of *NeoRx* are distinguishable, at least because the decision does not mention any evidence that patients were told the name of the imaging medium that would be injected. In any event, I do not find the TMOB's limited discussion of how the circumstances of *NeoRx* were found distinguishable from *Ciba-Geigy* to be helpful in deciding whether patients are a relevant consumer in the case before me. If the TMOB's finding that the reference consumer would not include the patient was based on its statement (at paragraph 11) that the patient would not "purchase or self-administer" the goods that were at issue, I respectfully disagree that the principles in *Ciba-Geigy* are distinguishable on that basis.

[38] Patients are clearly affected by the ophthalmologist's choice of anti-VEGF medication, and while the funding models vary from province to province, the drug is purchased for the patient's benefit and use, injected into the patient's body at regular intervals according to the treatment plan, and the patient can be switched to a different drug. Patients know what medication they are on by its brand name. In my view, a patient who is told the name of the anti-VEGF drug they will receive is a relevant consumer, and entitled to protection from confusion.

[39] In summary, on the facts of this case, the patient as the ultimate end-user of the drug is a relevant consumer for the likelihood of confusion analysis.

(2) Consumer attitude

[40] The casual consumer somewhat in a hurry will differ, depending on the context, and an analysis of the likelihood of confusion accounts for the relevant consumer's "attitude". The care or attention of the consumer may reflect the context and importance of the purchase and the surrounding circumstances: *Masterpiece* at para 67. This care or attention must relate to the attitude of the consumer approaching an important or costly purchase when he or she encounters the trademark, not the research, inquiries, or care that may subsequently be taken: *Masterpiece* at paras 68-69.

[41] Novartis submits that consumer attitude or mindset increases the likelihood of confusion for the relevant universe of consumers.

[42] For ophthalmologists, Novartis argues that the high-throughput, busy, stressful, and demanding nature of their practices should be accounted for in assessing likelihood of confusion. For patients, Novartis' position is that the attributes of the average patient consumer and the circumstances in which they would encounter the trademarks at issue increase the likelihood of confusion. Novartis submits patients are a sensitive population. The average patient receiving the BEOVU or BYOOVIZ drug: is generally over the age of 70 (with the average age over 80); is concerned because they are experiencing vision loss and have received a diagnosis that could lead to blindness; is feeling stressed, anxious, overwhelmed, or frightened; is potentially difficult to communicate with; may have issues understanding and difficulty hearing; and presents with a multitude of challenges including comprehension and dementia. Novartis states it is this elderly,

anxious, and sensitive population of patients suffering from wet AMD who encounter a relevant trademark when they hear it spoken by their ophthalmologist that must be taken into account in assessing whether there is a likelihood of confusion between the trademarks at issue.

[43] The respondents argue that doctors and pharmacists are consumers who will exercise more attention and caution when encountering trademarks. Doctors and pharmacists are highly skilled professionals who exercise the utmost care, and are "less likely to be in the same hurry" as the purchaser of a mid-priced meal or dress: *Ratiopharm* at para 59. The respondents note that in *Pierre Fabre Médicament v Smithkline Beecham Corp*, 2004 FC 811 [*Pierre Fabre*], the Court described the pharmacist as a health professional who is used to prescriptions, and will consult with the doctor if there is a problem, which reduces the risk of confusion: *Pierre Fabre* at para 15. Also, the respondents submit doctors and pharmacists are closer in the chain to manufacturers, and are unlikely to be confused as to the source. In support of this proposition, the respondents contend that Novartis representative Ms. Begin admitted that health care practitioners are not confused as to the source of anti-VEGF drugs because they know who the provider is.

[44] The respondents state that if patients are relevant consumers, then they are informed consumers, decreasing the likelihood of confusion. If a patient were to request a particular anti-VEGF drug, an ophthalmologist would be required to explain the distinction between the anti-VEGF drug proposed to be used and the anti-VEGF drug requested by the patient, prior to the time of transfer. As such, in the rare instances where the patient is involved in the selection of an

anti-VEGF medication, the patient is an informed one since health care professionals intervene before the patient has any contact with either medication.

[45] The respondents further state that Novartis' arguments about patient anxiety or sensitivity are mischaracterized and taken out of context. Patients are not a particularly sensitive population, and ophthalmologists actively mitigate patient anxiety and carefully provide the patient with detailed information and explanations, walking them through each step of the procedure. Where health care practitioners intervene before the patient comes into contact with the medication, the patient is deemed to be informed because they must consult with their doctor before they are given the medication, and there will be less risk of confusion than in the case of impulse buying: *Pierre Fabre* at paras 14, 16. The respondents submit that, given the importance of the decision in selecting anti-VEGF medications, patients will be more attentive, alert, and less susceptible to being confused, and the Court should not undermine patients' attention and alertness simply because of their age.

[46] Related to these points, the parties disagree on the relevant "point in time" for assessing whether a consumer is likely to be confused.

[47] Novartis argues the question has been definitively settled by the Supreme Court of Canada in *Masterpiece*. Likelihood of confusion is a test of first impression, and what matters is the consumer's impression when they *encounter* the marks in question: *Masterpiece* at paras 70–74. Novartis states that for patients, at least one scenario relevant to the confusion analysis is the patient's first impression when they encounter the trademark by hearing it spoken by an

ophthalmologist. The respondents' reliance on factors such as checks and balances for avoiding medication errors are irrelevant to a confusion analysis based on first impression, because they occur after the trademark is encountered.

[48] The respondents' position is that confusion under the *TMA* is tied to use. Section 2 of the *TMA* defines "confusing" with reference to "use" and section 4 of the *TMA* distinguishes between trademark use with services, which generally requires advertising of a service that is available to be performed in Canada, and trademark use with goods, which generally requires a purchase. The respondents argue that the reference to "encounter" in *Masterpiece* stems from a factual matrix that dealt with the likelihood of confusion between trademarks that were used in association with services. The respondents state the trademarks at issue in this case are not "sound marks", but rather word marks that must be visually represented or displayed: *Playboy Enterprises Inc v Germain*, [1988] 1 FC 163, 16 CPR (3d) 517 at 522-523; *Philip Morris Products SA v Marlboro Canada Limited*, 2010 FC 1099 at paras 237-238, rev'd on other grounds in 2012 FCA 201. An ophthalmologist saying the name of the anti-VEGF drug aloud to a patient is not trademark use.

[49] Furthermore, the respondents state that patients would rarely, if ever, "encounter" the BEOVU trademark. Patients are only told the single name of the anti-VEGF drug that will be administered to them—no other drug name is presented. The respondents state the BEOVU drug is a drug of last resort, a failed drug that is only used for a small percentage of patients who do not improve on other drugs. According to the respondents, the real reason Novartis commenced

this action is because the BYOOVIZ biosimilar drug will effectively replace Novartis' LUCENTIS drug, which is a first line treatment with about 30% of the anti-VEGF drug market.

[50] I am not persuaded by the respondents' arguments. I agree with Novartis that in *Masterpiece*, the Supreme Court of Canada did not distinguish between the first impression test as applied to goods versus services, and specifically used the term "encounter" with reference to goods (or wares) as well as services. For example, see the Supreme Court of Canada's statements at paragraphs 67, 70, and 72:

> [67] …[C]onsumers in the market for expensive goods may be less likely to be confused when they encounter a trade-mark, but the test is still one of "first impression"…
>
> […]
>
> [70] … Properly framed, consideration of the nature of wares, services or business should take into account that there may be a lesser likelihood of trade-mark confusion where consumers are in the market for expensive or important wares or services. The reduced likelihood of confusion is still premised on the first impression of consumers *when they encounter* the marks in question…[emphasis in original]
>
> […]
>
> [72]…Careful research and deliberation may dispel any trade-mark confusion that may have arisen. However, that cannot mean that consumers of expensive goods, through their own caution and wariness, should lose the benefit of trade-mark protection. It is confusion when they encounter the trade-marks that is relevant…

[51] I agree with Novartis that while "use" of a confusingly similar trademark is required under section 20 of the *TMA*, the timing of the respondents' "use" and the timing of a consumer's confusion upon encountering a trademark need not be aligned. It is the likelihood of confusion at the time of encounter that matters, even if that confusion is remedied by the time a

consumer pays for the purchase. In *Masterpiece*, the Court noted it is irrelevant that consumers are unlikely to make choices based on first impressions or that they will take time to inform themselves about the source of expensive goods and services, as both of these—subsequent research or consequent purchase—occur *after* the consumer encounters a mark in the marketplace: *Masterpiece* at para 71 [emphasis in original]. Subsequent research and care may unconfuse the consumer, but they do not detract from the confusion relevant for purposes of the *TMA* that occurred when the consumer first encountered the trademark: *Masterpiece* at para 87.

[52] As the Supreme Court of Canada stated in *Masterpiece* (at paragraph 73):

> …[B]efore source confusion is remedied, it may lead a consumer to seek out, consider or purchase the wares or services from a source they previously had no awareness of or interest in. Such diversion diminishes the value of the goodwill associated with the trade-mark and business the consumer initially thought he or she was encountering in seeing the trade-mark. Leading consumers astray in this way is one of the evils that trade-mark law seeks to remedy.

[53] With respect to the consumer's attitude, I agree with the respondents that the evidence does not establish patients would approach a decision about anti-VEGF drugs with reduced care or attention, or that they are more likely to be confused due to their sensitive nature or their age. However, I do not agree with the respondents that patient confusion is less likely because patients must consult with their doctor before they are given anti-VEGF medication, and are therefore deemed to be informed. As stated in *Masterpiece*, a consideration of the nature of the goods, services, or business that may lessen the likelihood of confusion is still premised on the first impression of consumers *when they encounter* the marks in question: *Masterpiece* at para 70 [emphasis in original]; see also *Techno-Pieux Inc v Techno Piles Inc*, 2022 FC 721 at para 86. It

is an error to change the likelihood of confusion test from one of first impression of a trademark to one of whether consumers are likely to make choices based on first impressions: *Masterpiece* at paras 67-69. *Pierre Fabre* pre-dates *Masterpiece*, and the comments in *Pierre Fabre* about a consumer being informed because health care professionals will intervene (at paragraphs 14, 16) must not change the test from one of a consumer's first impression to one of whether or not a consumer is likely to make a choice based on their first impression.

[54] Furthermore, the evidence about the consultation process in *Pierre Fabre* (at paragraph 14) of a patient who has a discussion about the treatments available to him or her before selecting one medication or another differs from the consultation process for anti-VEGF medications. The evidence in this case is that the patient is told the single name of the drug they will be getting, and no other drug name is presented to them. Ophthalmologists do not spend time informing patients about the different anti-VEGF drugs that are available.

[55] In this case, the evidence does not establish that the ordinary patient is equipped with knowledge or awareness that would lessen the likelihood of confusion on first impression.

[56] With respect to ophthalmologists and pharmacists, I disagree with Novartis that the attitude of ophthalmologists (or pharmacists) would effectively be more "hurried" due to the nature of their practice. In my view, due to their training and experience, the average ophthalmologist and pharmacist is more likely to perceive smaller differences in drug name trademarks than the average patient. The jurisprudence has recognized that health care professionals can be "used to prescriptions", or "accustomed to making fine distinctions in

names": *Pierre Fabre* at para 15; *Novopharm Ltd v Nu-Pharm Inc*, [1990] FCJ No 442, 31 CPR (3d) 99 (FCTD), citing *Smith, Kline & French Canada Ltd v Novopharm Ltd* (1983), 72 CPR (2d) 197, 20 ACWS (2d) 473 (Ont HCJ) and *Hoffman-La Roche Ltd v Apotex Inc* (1983), 72 CPR (2d) 183, 19 ACWS (2d) 339 (Ont HCJ). Recognizing this mindset does not change the applicable "first impression" test.

[57] However, other aspects of health care professionals' mindsets discussed in the above-noted cases change the applicable test. For example, in my view the description of a pharmacist in *Pierre Fabre*, as a health professional who will check with the doctor if there is a problem, suggests the kind of subsequent research and care that may unconfuse the consumer but does not detract from trademark confusion that occurs when the consumer first encounters the trademark: *Pierre Fabre* at para 15; *Masterpiece* at para 87. For similar reasons, I disagree with the respondents that Ms. Begin's alleged admission that health care practitioners are not confused as to the source of anti-VEGF drugs because they know who the provider is, or that being closer in the chain to manufacturers means doctors and pharmacists are unlikely to be confused as to the source of anti-VEGF medications. In this regard, I agree with Novartis that Ms. Begin was not admitting there would be no likelihood of *trademark* confusion among healthcare professionals. Even nearly identical trademarks would not likely confuse a health care professional who relies on factors apart from the trademark to identify the source of a product. Novartis' cause of action for infringement under section 20 of the *TMA* is based on its trademark registration for BEOVU, not its corporate name or trade name. The attitude of consumers should not build in factors that rely on a trade name or other non-trademark factors to dispel trademark confusion.

(3) Likelihood of confusion

[58] In *Masterpiece*, the Supreme Court of Canada suggested that the confusion analysis may start with the last section 6(5) factor, the degree of resemblance under section 6(5)(e), because this factor is likely to have the greatest effect on the confusion analysis: *Masterpiece* at para 49. In this case, the parties' arguments addressed the section 6(5) factors in the order they appear in the *TMA*, and the parties contend that certain 6(5) factors provide context for the degree of resemblance analysis. Therefore, I will address the section 6(5) factors in the order they appear in the *TMA*.

(a) *6(5)(a): inherent distinctiveness and extent known*

[59] Distinctiveness is of the very essence and is the cardinal requirement of a trademark: *Mattel* at para 75, citing *Western Clock Co v Oris Watch Co*, [1931] Ex CR 64 at 67. The first factor, 6(5)(a), involves a determination of the strength of a mark in terms of its inherent and/or acquired distinctiveness: *United Artists Pictures Inc v Pink Panther Beauty Corp*, [1998] 3 FC 534 (FCA) at para 23 [*United Artists*].

[60] Novartis submits that the BEOVU mark is a unique and coined term, and thus should be afforded a greater ambit of protection. Also, Novartis submits the BEOVU mark has acquired distinctiveness through use in Canada. Novartis states it has promoted the BEOVU drug in Canada, spending over $1.5 million in advertising from 2020 to July 31, 2022, and notes that all the healthcare professional witnesses were aware of the BEOVU mark and drug.

[61] The respondents argue that distinctiveness should be a neutral factor that does not favour either party. BEOVU and BYOOVIZ are both coined words, equally unique and equally inherently distinctive. With respect to acquired distinctiveness, the respondents state Novartis' alleged advertising expenditures are unsubstantiated hearsay, and they ask the Court to draw an adverse inference because the Novartis company witnesses failed to produce documents the respondents requested in directions to attend, some of which were for the purpose of substantiating statements in their affidavits about BEOVU advertising expenditures and market share. The respondents contend Novartis presented insufficient evidence to establish that the BEOVU trademark has acquired distinctiveness.

[62] I find that the distinctiveness of the BEOVU mark, which is a coined and inherently distinctive trademark, is a factor that favours Novartis. I do not accept that distinctiveness under 6(5)(a) should be a neutral factor in this case because BYOOVIZ is also a coined word. To do so would undermine the principle that coined words are typically afforded a wider ambit of protection.

[63] With respect to acquired distinctiveness, in my view Novartis' advertising expenditures are not a significant factor in this case. An adverse inference would not affect any pivotal findings, particularly in view of the inherent distinctiveness of the BEOVU trademark. That said, in my view Novartis has established that the BEOVU mark has acquired distinctiveness through use. The BEOVU drug has been on the market for three years, and the trademark is well known to Canadian ophthalmologists. Novartis does not market directly to patients, and while I am not satisfied that the BEOVU trademark has become well known among patients, the

evidence does establish that the mark has become known among patients to some extent. Patients who received the BEOVU drug would have been told the drug administered to them, identified by its brand name. Also, in some circumstances, patients ask for a specific drug or have the ability to choose between anti-VEGF medications. Finally, some patients were likely exposed to negative publicity about the BEOVU drug, including through reports of safety concerns by Health Canada and other regulatory bodies.

[64] I find the 6(5)(a) factor weighs in favour of Novartis' position.

(b) *6(5)(b): length of time in use*

[65] Novartis states it has been using the BEOVU mark in Canada since May 1, 2020, and the BEOVU drug and trademark have become well known to doctors that treat wet AMD.

[66] The respondents submit that even though BEOVU goods were on the market before the BYOOVIZ drug, the BEOVU mark has been in use fewer than three years and in that time the drug has already failed. Its reputation has suffered due to safety concerns, sales have declined significantly, and Novartis dismantled its 20-member marketing field force for BEOVU goods. For these reasons, the respondents submit that the length of time in use is not a strong factor in the confusion analysis.

[67] I have already considered the extent to which the BEOVU mark has become known in the context of section 6(5)(a). In my view, length of time in use under section 6(5)(b) is not a significant factor, and does not add materially to the confusion analysis in this case. While this

factor may marginally favour Novartis' position because the BEOVU mark has been in use longer than the BYOOVIZ mark, I have treated length of time in use as a neutral factor.

(c) *6(5)(c): Nature of the goods, services or business; 6(5)(d): Nature of the trade*

[68] Novartis relies on *Reynolds Presto Products Inc v PRS Mediterranean Ltd*, 2013 FCA 119 at paragraph 30 for the principle that "there is a greater likelihood of confusion if two trade-marks that resemble each other are used in association with the same products (or substantially the same products) in the same markets". Novartis submits there is a greater likelihood of confusion when goods are distributed in the same manner and target the same end consumer: *Precision Door & Gate Services Ltd v Precision Holdings of Brevard, Inc*, 2012 FC 496 at para 35; *United Artists* at para 30.

[69] Novartis submits the BEOVU and BYOOVIZ trademarks are both used with the BEOVU registered goods—pharmaceutical preparations for use in ophthalmology and pharmaceutical preparations for prevention and treatment of ocular disorders and diseases. The nature of the goods and the nature of the trade are substantially identical, as both the BEOVU and BYOOVIZ drugs: are identically classified and indicated for the treatment of the same disease, prescribed to the same patients, and administered in the same manner; would be prescribed and administered by the same doctors; would be sold by the same pharmaceutical wholesalers, distributed by the same pharmacists, stored in the same manner, and handled by the same clinical or hospital staff; and would be identified orally by their respective trademarks.

[70] The respondents state Novartis' position that the BEOVU and BYOOVIZ drugs are identical from a treatment perspective mischaracterizes how the drugs will be positioned in the market. For ophthalmologists, the BYOOVIZ and BEOVU drugs have different APIs and would not be used interchangeably in practice. The respondents submit the BYOOVIZ drug is in a different category, being the first ophthalmological biosimilar in Canada. Biosimilars are subject to government regulations and policies mandating that doctors prescribe the less expensive biosimilar in place of its biological equivalent. The respondents state the BYOOVIZ drug is a biosimilar of LUCENTIS, a drug of first choice that is commonly prescribed, and is expected to replace LUCENTIS as a drug of first choice, while ophthalmologists will avoid the BEOVU drug or only use it as a last resort, due to safety concerns.

[71] As further factors, the respondents submit consumers are likely to pay more care and attention in view of the price of the goods, which are over $1000 per injection, and differences in the BEOVU and BYOOVIZ packaging will negate a likelihood of confusion.

[72] The respondents submit the nature of the pharmaceutical market is highly regulated and reduces the likelihood of confusion. In the context of medication handled and administered by highly trained specialists, the presence of stringent checks and balances and the extreme care taken by specialists in dispensing and administering the drugs negate a finding of confusion. Ophthalmologists implement numerous checks and balances to ensure that the correct drug is ordered, clinics maintain detailed electronic medical records for each patient, and there are protocols and procedures in clinics and hospitals to ensure the correct drug is administered to the correct patient in the correct eye.

[73] The respondents submit doctors do not consider the BEOVU and BYOOVIZ drugs in issue in the same way. The BEOVU drug is rarely selected as a treatment choice, which negates confusion in practice. Furthermore, the drugs in issue are never discussed with a patient at the same time. In the narrow context of highly specialized anti-VEGF medications, where the ophthalmologists are the gatekeepers of drug names, and the same doctors are consistently reluctant to use a particular drug, such facts must be considered in assessing confusion.

[74] In my view, the 6(5)(c) and 6(5)(d) factors favour Novartis.

[75] The BYOOVIZ trademark is used with precisely the same goods that are covered by the BEOVU registration. In addition, the nature of the goods and the nature of the trade for the BYOOVIZ drug are essentially identical to the nature of the goods and trade for Novartis' BEOVU drug that is already on the market. I do not accept the respondents' parsing of the relevant market. While BYOOVIZ is a biosimilar with a different API than BEOVU and ophthalmologists may have customary prescribing practices for anti-VEGF drugs, the BEOVU and BYOOVIZ drugs are prescribed and administered by the same specialized doctors in the same way to patients afflicted with the same medical condition. They are sold by the same type of specialty pharmacy, such as Sentrex, stored in the same manner in a hospital or clinic, and handled by the same hospital or clinic staff. Both drugs would likely be encountered in the same manner by each of the relevant consumers groups of ophthalmologists, pharmacists, and patients.

[76] Similarity of the nature of the trade as between products is not the only section 6(5)(d) consideration, and I accept that the nature of the trade itself may be considered in assessing the

likelihood of confusion. In this regard, patients, ophthalmologists, and pharmacists are likely to have an elevated level of attention (somewhat less "hurried"), commensurate with the importance of a medical treatment for preventing vision loss. Furthermore, as noted above, in assessing confusion, the average ophthalmologist and pharmacist is more likely to perceive smaller differences in drug name trademarks due to their training and experience.

[77] However, I do not agree with the respondents that the cost of the injections (or the relative pricing of the respective products), differences in packaging, the fact that BYOOVIZ is expected to replace LUCENTIS in the market, or the safety protocols implemented by pharmacists and ophthalmologists are factors that should be considered to decrease the likelihood of confusion. While anti-VEGF drugs are not inexpensive, the cost is often covered by provincial plans or insurance. Consumers (even ophthalmologists) do not always see the packaging, which in any event is not markedly different as between the two drugs, and can change. The safety protocols to prevent medication errors and ensure drugs are not confused prior to administration are, in my view, the kind of research and deliberation that may dispel trademark confusion (*Masterpiece* at paragraph 72), but does not mean the trademarks are less likely to be confused on first impression.

(d) *6(5)(e): Degree of resemblance between the trademarks, including in appearance or sound or in the ideas suggested by them*

[78] A preliminary issue is whether Dr. Villeneuve's expert evidence is relevant and necessary to assist the Court in determining the degree of resemblance as between the BEOVU and BYOOVIZ trademarks.

[79] Novartis submits Dr. Villeneuve's evidence is not necessary to assist the Court. Novartis argues Dr. Villeneuve was not aware of the average hurried consumer test and did not put herself in the position of the average consumer, as required for the confusion analysis: *Pierre Fabre* at para 48. Also, Novartis states Dr. Villeneuve has no experience with pharmaceuticals, did not speak to ophthalmologists, and does not know how ophthalmologists would pronounce BEOVU or BYOOVIZ, which is particularly relevant to whether patients are likely to be confused.

[80] Biogen agrees that the Court can put itself in the position of the average consumer, but submits it is helpful for the Court to consider the evidence of a linguistic expert in analyzing how Canadians will perceive, pronounce, and understand the trademarks at issue, and whether Canadians will perceive similarities between two unusual, fanciful marks. Dr. Villeneuve considered the perspective of the average Canadian, and the majority of Canadian English, French, and bilingual speakers. Biogen states there is no evidence that ophthalmologists and pharmacists would perceive and pronounce words differently from the average Canadian. Dr. Villeneuve's explanation as to the perception and cognitive process of pronouncing words would apply to Canadians generally, regardless of profession, and would not exclude ophthalmologists or pharmacists.

[81] Samsung submits that in assessing degree of resemblance, the evidence of an expert linguist can assist the Court, particularly where the expert endeavours to put herself in the shoes of those who would see or hear the words: *Ratiopharm* at paras 39, 63. Samsung notes that Dr. Villeneuve specifically mentioned that her opinions were based on that of English-speaking, French-speaking, or bilingual Canadians. Furthermore, she explained that the analysis described

in her affidavit would take a person a “fraction of a second”, and is therefore aligned with the *Masterpiece* requirement to consider the first impression of a trademark.

[82] In my view, Dr. Villeneuve’s evidence is unnecessary. Expert evidence that simply assesses resemblance will not generally be necessary if the casual consumer is not expected to have particular skills or knowledge: *Masterpiece* at para 80. Where the market is specialized, evidence about the special knowledge or sophistication of the targeted consumers may be essential to determining when confusion would be likely to arise: *Masterpiece* at para 88. However, Dr. Villeneuve does not have the relevant expertise to provide the Court with expert evidence about the special knowledge of an ophthalmologist or pharmacist, or how they would perceive the marks at issue.

[83] I have considered Dr. Villeneuve’s analysis, including how, in her opinion, a majority of English-speaking, French-speaking, or bilingual Canadians are likely to pronounce BEOVU and BYOOVIZ. However, in my view Dr. Villeneuve’s opinions are of limited assistance, including because (as discussed below) I find some of her opinions to be somewhat inconsistent. Furthermore, I do not find Dr. Villeneuve’s definitive conclusions—that there is no phonetic resemblance between the trademarks, no resemblance in their appearance, and no conceptual similarity—to be helpful in determining the degree of resemblance of the BEOVU and BYOOVIZ trademarks. Degree of resemblance recognizes that marks with some differences may still result in likely confusion: *Masterpiece* at para 62.

[84] Novartis submits BEOVU and BYOOVIZ are visually similar, both being three-syllable terms that share the sequence B-OV, and they have a degree of conceptual similarity in that neither mark has a meaning and the marks end with VU or VIZ—therefore both have an ending that is reminiscent of vision.

[85] Novartis submits the trademarks are highly similar phonetically, and states the degree of resemblance when sounded may be the most important factor to consider because patients hear the commercial names of anti-VEGF drugs from their doctors. A patient is likely to encounter the trademarks at issue by hearing them, and this may be the only way the patient interacts with the BEOVU and BYOOVIZ trademarks.

[86] Novartis states the BEOVU mark and BYOOVIZ mark are both coined terms, there is no consensus among ophthalmologists on how to pronounce them, and there was variation in how each of the expert ophthalmologists who gave evidence in this case pronounced the trademarks. Furthermore, ophthalmologists may change the way they pronounce the marks if they hear them pronounced or are taught to pronounce them a certain way.

[87] Novartis argues BEOVU and BYOOVIZ have a highly similar sound pattern, rhythm, and emphasis, which is presumably on the first syllable, and they will be pronounced in a highly similar manner, such as BAY - OH - VOO and BEE - OH - VIZ. As such, the marks must be considered overall to be highly phonetically similar.

[88] The respondents submit that BEOVU and BYOOVIZ do not resemble each other in appearance when considering the marks as a whole. BYOOVIZ is a longer word with an unusual YOO combination. The respondents note the evidence of Dr. Villeneuve that the viewer's eyes are drawn to the last syllable of BEOVU given that it has the appearance of a French word and French pronunciation is typically on the last syllable, whereas BYOOVIZ looks more like an English word.

[89] The respondents state the trademarks do not have meaning in the French or English languages. An average Canadian would have to spend time analyzing and dissecting the terms to find any meaning, but even if there are conceptual similarities on first impression, the idea of vision or sight in the context of a drug for ocular disease would be descriptive of the goods in question, and are not distinctive of Novartis.

[90] The respondents submit the trademarks would have distinct pronunciations for the average Canadian consumer, according to Dr. Villeneuve's evidence. Furthermore, the sound of trademarks should be given less weight in assessing confusion where the nature of the business is such that there would be very little ordering of the goods in issue orally. Doctors and pharmacists rely heavily on written records when engaging with drug names on prescriptions and in record keeping in the normal course of trade, and patients never order anti-VEGF drugs themselves.

[91] Biogen notes the pronunciation of the terms by certain witnesses: for BEOVU, Dr. Forooghian's pronunciation was "BEE-OH-VIEW" speaking in English, Dr. Devenyi's

pronunciation was “BEE-OH-VIEW” speaking in English, and Mr. Connolly’s pronunciation was “BEE-OH-VIEW” speaking in English, or “BAY-OH-VIEW” from what he has heard spoken in French; for BYOOVIZ, Dr. Forooghian’s pronunciation was “BYE-YOO-VIZ” speaking in English, Dr. Devenyi’s pronunciation was “BY-U-VIZ” or “BE-U-VIZ” speaking in English; Dr. Stockl’s pronunciation was “BYE-O-VIZ” speaking in English, Mr. Connolly’s pronunciation was “BIO-OH-VIZ” speaking in English, and Mr. Leitch’s pronunciation was “BY-YOU-VIZ” speaking in English. The respondents submit Dr. Villeneuve’s evidence of how the marks would likely be pronounced is consistent with the witnesses’ pronunciations, and not indicative of a likelihood of confusion.

[92] The preferable approach to the degree of resemblance is to consider whether there is an aspect of the trademark that is particularly striking or unique: *Masterpiece* at para 64. Considering a trademark as a whole does not mean that a dominant component in a mark that would affect the overall impression of an average consumer should be ignored: *Masterpiece* at para 84.

[93] Considering the trademarks as a whole, I do not find any aspect of them stands out as being striking, unique, or dominant. I am not persuaded that YOO would be perceived to stand out, visually or aurally, or seen to be a particularly unusual aspect of the BYOOVIZ trademark. Dr. Villeneuve states the combination YOO is a particularly unusual letter combination that is absent in BEOVU, and this factors into her conclusion that there is no resemblance in the appearance of the two marks. I find Dr. Villeneuve’s point about YOO to be somewhat inconsistent with her statements that the first four letters of BYOOVIZ are the “main

component" in the overall pronunciation, that the viewer's eyes are drawn to "by" and "oo", and that the stressed syllables in BYOOVIZ would be "bye" and "viz". Also, most of Dr. Villeneuve's proposed pronunciations place the Y with the first syllable and the OO with the second, with the exception of the French pronunciation "bee-you-viz".

[94] I find that BEOVU and BYOOVIZ resemble each other to at least a moderate degree in appearance and ideas suggested. Both are coined, three syllable words, with a similar sequence of letters. The common B-OV sequence provides a degree of resemblance—each syllable begins with the same letter, in the same sequence. Furthermore, both terms have a suffix that conveys a similar idea.

[95] With respect to the degree of resemblance in sound, I find there is a high degree of resemblance between BEOVU and BYOOVIZ. As noted above, both are three syllable words, and each syllable begins with the same or a very similar sound, in the same sequence. I agree with Novartis that the terms share a similar sound pattern, rhythm, and emphasis. As coined words, there is uncertainty regarding how the terms are pronounced, and the evidence in this case demonstrates there is variability and/or subjectivity regarding how the terms would be sounded. There is no consensus on how patients, ophthalmologists, or pharmacists would pronounce the words and the evidence is that the pronunciation can change, depending on what is heard or taught. Some pronunciations by witnesses in this case bring the terms closer—for example Dr. Devenyi, an expert witness in ophthalmology, pronounced BEOVU as "BEE-OH-VIEW" and BYOOVIZ as "BY-U-VIZ" or "BE-U-VIZ"—and in my view, the variability increases the likelihood of confusion.

[96] I agree with Novartis that sound is a particularly important factor in this case, in view of the ophthalmologist experts' evidence regarding the role of oral communication of the names of anti-VEGF medications as between health care professionals and staff, and the role of oral communication in informing patients. The evidence is that doctors and staff use the brand name, not the API, to identify anti-VEGF drugs, they tell patients the brand name of the drug that will be administered, and patients consent to administration of the drug identified by its brand name. The spoken trademark is an important way consumers encounter the trademarks in question, and the predominant way patient consumers encounter the trademarks in question.

(e) *Other Surrounding Circumstances*

[97] Novartis submits there are a number of surrounding circumstances that should be considered in the confusion analysis: Dr. Samad, the only ophthalmologist who has administered the BEOVU drug, stated that the likelihood of confusion between the BEOVU mark and BYOOVIZ mark is a concern for patients and medical professionals; Health Canada expressed concern about the similarity between the BEOVU mark and BYOOVIZ mark; even highly trained doctors and their staff make mistakes; Mr. Leitch, the corporate representative for Biogen, and the court reporter for Dr. Samad's cross-examination both confused the BEOVU mark and BYOOVIZ mark; and the trademarks used in association with other anti-VEGF drugs on the market in Canada are markedly different—LUCENTIS, EYLEA, and VABYSMO.

[98] Novartis also argues Biogen's BYOOVIZ trademark application was filed in bad faith: *TMA*, s 18(1)(e). Biogen received a report that ranked various proposed names for its biosimilar drug and was aware of potential issues with confusion before choosing the name BYOOVIZ.

Mr. Leitch refused to answer whether any proposed names were closer in resemblance to BEOVU, and Novartis argues the Court should infer that BYOOVIZ was the closest. Also, Samsung was aware of concerns about confusion raised by the European Medicines Agency and Health Canada.

[99] The respondents submit Dr. Samad's affidavit evidence should be given no weight. The respondents submit Dr. Samad's affidavit reads like a legal argument and provides an opinion on trademark law when he is not an expert in this regard. Dr. Samad failed to disclose financial ties to Novartis, did not produce documents requested in a direction to attend, and his cross-examination demonstrated a lack of care and attention to the preparation of his affidavit. He had given no information in advance to the lawyers who drafted his affidavit, and he made substantial changes to his affidavit evidence at the outset of his cross-examination and during questioning.

[100] The respondents also submit: Novartis' arguments about concerns by Health Canada or the European Medicines Agency are taken out of context, and both organizations ultimately approved the name; the spoken or typographic slips by Mr. Leitch and the court reporter, understood in context, are irrelevant and not indicative of trademark confusion in the marketplace; Novartis' arguments about bad faith are irrelevant, and this Court lacks the jurisdiction to strike out a trademark application (as opposed to a trademark registration) pursuant to section 18 of the *TMA*.

[101] The respondents state all the surrounding circumstances point to the conclusion that confusion is unlikely, including because: ophthalmologists are very aware of the BEOVU drug and its safety concerns, and unlikely to confuse it with the BYOOVIZ drug; BEOVU is a drug of last resort; ophthalmologists only use a small number of anti-VEGF drugs, and would have a high degree of familiarity with the names of all anti-VEGF drugs; the BYOOVIZ drug is a biosimilar of LUCENTIS that will replace LUCENTIS in the market; there are rigorous checks and balances in place to prevent the administration of the wrong anti-VEGF drug; highly trained ophthalmologists are the decision makers with respect to the choice of anti-VEGF drugs and patients do not play a role in the decision; Health Canada and other regulatory agencies have concluded the name BYOOVIZ is acceptable, including in some cases after having considered the BYOOVIZ name relative to BEOVU; and since at least as early as July 2022, BYOOVIZ has been sold concurrently with BEOVU in the United States, with no evidence of actual confusion or administration of the wrong drug to patients.

[102] I will briefly address some of the surrounding circumstances raised by the parties that I have not already addressed above.

[103] I have considered the names of the other anti-VEGF drugs as being relevant in the sense that there is no state of the register/state of the marketplace evidence to suggest that the presence of other “close” third party trademarks should reduce the ambit of protection afforded to the BEOVU trademark. I do not find any of the other additional surrounding circumstances significantly changes the confusion analysis.

[104] I disagree that Dr. Samad's opinion "reads like legal argument", but it does include paragraphs that provide legal opinion, which I have disregarded. The respondents do not assert that Dr. Samad lacked credibility in the sense of being untruthful, and I am not persuaded that I should disregard Dr. Samad's affidavit in its entirety because he failed to adhere to the expert's code of conduct in disclosing potential conflicts of interest, or because he failed to exercise adequate care and attention preparing his affidavit evidence. Nonetheless, the issues the respondents raise are serious issues, and in my view they affect the reliability of Dr. Samad's evidence. I only rely on Dr. Samad's evidence to the extent it is consistent with the other ophthalmologists' evidence.

[105] I agree with the respondents that the slips by Mr. Leitch and the court reporter, considered in context, are not relevant to a confusion analysis.

[106] Evidence of actual trademark confusion is not required. Furthermore, Mr. Leitch's evidence that he is not aware of any instances of confusion in the United States, where the BYOOVIZ drug had been "sold concurrently" with the BEOVU drug for less than 6 months at the time he affirmed his affidavit, is not persuasive evidence that trademark confusion is unlikely.

[107] I decline to draw a negative inference on the basis that counsel did not permit Mr. Leitch to answer whether Biogen considered a name that was more similar to BEOVU than BYOOVIZ. I agree with Biogen that the refusal was proper and Mr. Leitch's opinion is not relevant.

Moreover, even if BYOOVIZ was the closest name to BEOVU in contention, I am not persuaded that choosing it as the brand for an anti-VEGF biosimilar amounted to an act of bad faith.

(f) *Conclusion on likelihood of confusion*

[108] I find Novartis has established that the respondents' use of the BYOOVIZ trademark would likely lead to the inference that the goods associated with it and those associated with the registered trademark BEOVU are manufactured and sold by the same person.

[109] As noted above, the test to be applied is a matter of first impression in the mind of a casual consumer somewhat in a hurry who, in this case, sees the BYOOVIZ mark at a time when he or she has no more than an imperfect recollection of the BEOVU mark, and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks. Applying this test, I find the BEOVU and BYOOVIZ trademarks are likely to be confused.

[110] In this case, the relevant universe of consumers includes patients, ophthalmologists, and pharmacists.

[111] The degree of resemblance between the marks is at least moderate in appearance and ideas suggested, and high in sound. Sound is a particularly important factor in this case because it is a key way that consumers, and especially patients, encounter the trademarks.

[112] While degree of resemblance is likely the most important factor in this case, the statutory factors of distinctiveness of the BEOVU trademark, the nature of the goods, and the nature of the trade are almost as important to the confusion analysis. In my view, it is the degree of resemblance considered in the context of these statutory factors and the surrounding circumstances that results in a likelihood of confusion.

[113] The BEOVU mark is inherently distinctive, and although it has been in use fewer than three years, the evidence establishes that the BEOVU trademark has acquired distinctiveness through use. As a coined word, BEOVU should be afforded a wider ambit of protection.

[114] The BYOOVIZ trademark is used with the same goods that are covered by the BEOVU registration. Furthermore, the specific BEOVU and BYOOVIZ drugs are highly similar if not identical in terms of how they are classified, administered, prescribed, handled, and distributed, which increases the likelihood of confusion. The protocols to prevent medication errors and ensure drugs are not confused prior to administration are not relevant considerations for the hypothetical first impression test for trademark confusion. While consumers are likely to be somewhat more alert and aware of the differences between the two marks given the prescription drug field, on balance the surrounding circumstances favour Novartis.

[115] In my view, the likelihood of confusion is higher when considered from the patient's perspective; however, I find Novartis has met its burden of establishing a likelihood of confusion for all relevant consumers.

[116] In conclusion, Novartis has established that use of the respondents' BYOOVIZ trademark infringes Novartis' rights in its registered BEOVU trademark, contrary to section 20 of the *TMA*. This finding is sufficient to grant Novartis' application. Nonetheless, I will briefly address Novartis' allegations regarding sections 7(b) and 22 of the *TMA*.

B. *Do the respondents' actions constitute passing off contrary to subsection 7(b) of the* TMA*?*

[117] To constitute passing off under subsection 7(b) of the *TMA*, Novartis must establish that it possesses goodwill in the BEOVU mark, that the respondents deceived the public by misrepresentation, and that Novartis suffered actual or potential damage through the respondents' actions: *Sadhu Singh Hamdard Trust v Navsun Holdings Ltd*, 2016 FCA 69 at para 20 [*Hamdard Trust 2016*], citing *Kirkbi AG v Ritvik Holdings Inc*, 2005 SCC 65 at para 66 and *Ciba-Geigy* at 132.

[118] Novartis has established that it possesses goodwill in the BEOVU trademark. The BEOVU trademark has been used in association with an anti-VEGF drug for more than three years and it is well known by ophthalmologists. The respondents argue that any goodwill associated with BEOVU has been diminished as a result of the safety concerns. However, the tort of passing off is not limited to trademarks with a sterling reputation. Even if safety concerns have damaged the reputation of the BEOVU drug, Health Canada has not withdrawn marketing approval and the drug still has a share of the anti-VEGF market. Negative publicity may have reduced the goodwill in the BEOVU mark, but did not extinguish it.

[119] The second element, misrepresentation, will be met if Novartis establishes that the respondents have used a trademark that is likely to be confused with the BEOVU mark: *Hamdard Trust 2016* at para 21, citing *Ciba-Geigy* at 136-137, 140. For the reasons given above, Novartis has established a likelihood of confusion. While the respondents point to differences in trade dress, the evidence does not establish that relevant consumers would rely on aspects of the packaging, apart from the trademarks, to distinguish between the BEOVU and BYOOVIZ products. Furthermore, the differences in the packaging and how the trademarks appear on the packaging and on marketing materials are small differences that would not significantly change the confusion analysis above, and would not tip the balance in the respondents' favour on the second element of the test for passing off.

[120] Novartis has established actual or potential damage as a result of the respondents' actions. In this regard, loss of control of the BEOVU trademark by use of a confusingly similar trademark is sufficient to establish actual or potential damage: *Cheung v Target Event Production Ltd*, 2010 FCA 255 at paras 24-28.

C. *Have the respondents used the BEOVU mark in a manner that is likely to have the effect of depreciating the value of the goodwill attaching to it, contrary to section 22 of the* TMA*?*

[121] Section 22 of the *TMA* prohibits the use of a registered trademark in a manner that is likely to have the effect of depreciating the value of the goodwill attaching to it.

[122] A cause of action under section 22 is "conceptually quite different" from a cause of action under section 20: *Veuve Clicquot* at para 46. To succeed under section 22, Novartis must

establish that: (i) the respondents used the BEOVU trademark with goods or services; (ii) the BEOVU trademark is sufficiently well known to have significant goodwill attached to it; (iii) the respondents used the BEOVU trademark in a manner likely to have an effect on the goodwill; and (iv) the likely effect would be to depreciate the value of the goodwill: *Ibid*.

[123] Novartis has not established a cause of action under section 22 of the *TMA*.

[124] I agree with the respondents that Novartis' section 22 claim fails at the first element because Novartis has not met its burden. While the first element of the section 22 test can be met even if the respondents use a trademark that is not identical to the BEOVU trademark, the respondents correctly point out that the test is different from confusing similarity. To meet the first element, Novartis must establish that the respondents' use of the BYOOVIZ trademark evokes a link, connection, or mental association in the consumer's mind with the registered trademark, or that the casual observer would recognize the respondents' BYOOVIZ trademark as Novartis' BEOVU trademark: *Veuve Clicquot* at paras 48-49. The Federal Court of Appeal has described the standard as requiring the use of the registered trademark "or something so closely akin to it so as to be understood as the other party's mark": *Venngo Inc v Concierge Connection Inc (Perkopolis)*, 2017 FCA 96 at paras 13, 80.

[125] In *Veuve Clicquot*, even though the respondent was using the distinguishing feature of the VEUVE CLICQUOT trademark, the appellant failed to meet its burden on the first element of the section 22 test. Novartis has not established that the casual observer would recognize the BYOOVIZ trademark as the BEOVU trademark or make the necessary link, connection, or

mental association to the registered BEOVU trademark, and for this reason, the section 22 claim must fail.

D. *What is the appropriate remedy, if any?*

[126] Novartis submits it is entitled to declaratory and permanent injunctive relief to prevent the respondents from violating their trademark rights.

[127] With respect to sections 20 and 7(b), Novartis seeks a permanent injunction restraining the respondents, "their parents, affiliates, subsidiaries and all other related companies and businesses and their respective and collective officers, directors, employees, agents, partners, successors, licensees, franchisees and assignees, as well as all others over whom any of the foregoing exercise authority or control" from using a trademark or trade name that is confusingly similar to BEOVU, including BYOOVIZ, in association with pharmaceutical preparations, and from directing public attention to their goods, services, or business in such a way as to cause or be likely to cause confusion with Novartis' goods, services, and business. Novartis also requests an order: (i) for delivery up or destruction of any materials that would be contrary to the Court's order; (ii) striking out the BYOOVIZ trademark application; and (iii) requiring the respondents to irrevocably withdraw or abandon all pending trademark applications comprising BYOOVIZ or any other mark confusingly similar to BEOVU.

[128] Novartis seeks $100,000 in damages and costs, together with pre- and post-judgment interest. Violations of the *TMA* are presumed to result in damage. Even without specific

evidence of lost sales or a quantification of lost goodwill, a Court may award at least nominal damages to a trademark owner, which is not necessarily a small amount.

[129] The respondents submit Novartis is not entitled to any claimed relief. Novartis has not proven any damage in respect of a drug that is effectively dead, and injunctive relief is not appropriate or in the public interest. Any injunction or other remedy significantly benefits Novartis through LUCENTIS, not BEOVU. Lower cost biosimilar drugs like BYOOVIZ are in the public interest. BYOOVIZ will be about 40% of the cost of LUCENTIS, which represents a significant saving for an overburdened healthcare system.

[130] In my view, the requested declaratory relief is unnecessary. Novartis has not established that a declaration of infringement or passing off would have any practical benefit or utility in this case: *Lululemon Athletica Canada Inc v Campbell*, 2022 FC 194 at para 27, citing *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 11.

[131] While an injunction is an equitable, discretionary remedy (*Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at paragraphs 22-23), injunctive relief is typically granted when there is a finding that intellectual property rights have been violated.

[132] I will first address Novartis' request for an order striking out the BYOOVIZ trademark application or requiring the respondents to withdraw it. The respondents state the Court lacks jurisdiction to strike out the BYOOVIZ application, which is not an entry on the trademarks register. I find it is unnecessary to decide this jurisdictional point. Novartis' request to strike out

or expunge the BYOOVIZ trademark application is based on section 18(1)(e) of the *TMA*; however, Novartis has not established the BYOOVIZ application was filed in bad faith.

[133] Novartis has established that the respondents have contravened sections 20 and 7(b) of the *TMA*, and I am satisfied this Court should grant corresponding injunctive relief. The respondents were aware of the BEOVU drug and trademark registration when they chose the BYOOVIZ trademark, and they proceeded despite Novartis' objection. I disagree with the respondents that injunctive relief is inappropriate on the basis that such relief would benefit Novartis through LUCENTIS, or would not be in the public interest. The injunction will not affect the respondents' ability to market the same LUCENTIS biosimilar, although they will have to do so in association with a different brand. I appreciate that there is a process for Health Canada to approve a new name, and the respondents contend it could take a year. However, the respondents did not ask for a stay of injunctive relief, nor have they established that injunctive relief should be stayed for a period of time in view of Health Canada's requirements.

[134] Novartis seeks an injunction against the respondents and other groups of entities or individuals, including all affiliated companies, officers, employees and licensees. I am not satisfied that it is necessary to include all the groups of entities and individuals in this case. It is the respondents who are authorized to sell the BYOOVIZ-branded drug in Canada, and in my view it would be sufficient to enjoin the respondents and their licensees.

[135] Novartis has not filed evidence of actual monetary loss resulting from the use of the BYOOVIZ mark by the respondents. However, Novartis submits a trademark owner has a right

to monetary damages even if there is no specific evidence of lost sales: *Toys "R" Us (Canada) Ltd v Herbs "R" Us Wellness Society*, 2020 FC 682 at para 67. They request $100,000 as compensation and as a deterrent for others contemplating similar activities: *Decommodification LLC v Burn BC Arts Cooperative*, 2015 FC 42 at para 14.

[136] The Court may award nominal damages without proof of actual damage; however, I am not satisfied that the award in this case should be $100,000. I would assess a reasonable award of nominal damages to be $20,000.

[137] I find Novartis is entitled judgment granting the following relief:

A. The respondents and their licensees are permanently enjoined from using the BYOOVIZ trademark in association with pharmaceutical preparations for use in ophthalmology or pharmaceutical preparations for prevention and treatment of ocular disorders and diseases, or any other trademark or trade name that is confusingly similar to the registered BEOVU trademark.

B. The respondents and their licensees shall deliver-up to Novartis, or destroy under oath, or alter, any goods, packaging, labels, and advertising materials in their possession, power, or control that are or would be contrary to the injunction above.

C. The respondents shall pay Novartis damages in the amount of $20,000.

[138] The parties asked for the opportunity to make written submissions on costs. If the parties cannot agree on costs, they may file written submissions. Novartis shall deliver its

cost submissions within 15 days of this decision. Biogen and Samsung shall deliver their submissions within 15 days of receiving Novartis' submissions. Each party's submissions shall be five pages or less, not including any draft bill of costs or list of authorities.

JUDGMENT in T-1664-22

THIS COURT'S JUDGMENT is that:

1. This application is allowed.
2. The respondents and their licensees are permanently enjoined from using the BYOOVIZ trademark in association with pharmaceutical preparations for use in ophthalmology or pharmaceutical preparations for prevention and treatment of ocular disorders and diseases, or any other trademark or trade name that is confusingly similar to the registered BEOVU trademark.
3. The respondents and their licensees shall deliver-up to Novartis, or destroy under oath, or alter, any goods, packaging, labels, and advertising materials in their possession, power, or control that are or would be contrary to the injunction above.
4. The respondents shall pay Novartis damages in the amount of $20,000.
5. In the event the parties are unable to agree, costs remain to be determined.
6. This judgment bears interest at a rate of 2.5%.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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