will not work "an injustice to the other party" that is "not capable of being compensated by an award of costs": *Canderel Ltd. v. Canada*, [1994] 1 F.C. 3 at p. 10, [1993] F.C.J. No. 777 (C.A.).

[27] In this Court, Teva stresses that pleadings amendments prompted by evidence obtained at discovery, such as the amendments it proposes here, are beneficial in that they can refocus and particularize points in controversy, thereby facilitating the trial of an action: *Dené Tha' First Nation v. Canada (Attorney General)*, 2008 FC 679, 168 A.C.W.S. (3d) 510 (Proth.); *Hoechst Marion Roussel Deutchland Gmbh v. Adir et Cie* (2000), 190 F.T.R. 233, 97 A.C.W.S. (3d) 891 (T.D.). It adds that Gilead has shown no prejudice it would suffer if the amendments are granted.

[28] But all that is potentially beside the point: it makes no sense for a court to allow an amendment that is doomed to fail. Here, Teva's proposed amendments advance new grounds supporting the relief sought. But if the grounds do not have some reasonable prospect of success, allowing them into the litigation does nothing other than to complicate and protract it needlessly and pointlessly.

[29] Unsurprisingly, the absence of a reasonable prospect of success is a well-established reason for a court to dismiss a motion for leave to amend: *Bauer Hockey Corp. v. Sport Maska Inc. (Reebok-CCM Hockey)*, 2014 FCA 158, 122 C.P.R. (4th) 97; *Visx Inc. v. Nidek Co.* (1996), 209 N.R. 342, 72 C.P.R. (3d) 19 at p. 24; and see also *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 at paras. 17-20 on the meaning of "reasonable prospect of success" in the context of motions to strike claims, a meaning that *Bauer* suggests (at para. 16) equally applies on the issue whether the Court should grant a proposed pleadings amendment.

[30] The standard of "reasonable prospect of success" is more than just assessing whether there is just a mathematical chance of success. In deciding whether an amendment has a reasonable prospect of success, its chances of success must be examined in the context of the law and the litigation process, and a realistic view must be taken: *Imperial Tobacco*, above at para. 25.

[31] In the jurisprudence, the requirement that the amendment have a reasonable prospect of success has become a threshold issue: see, *e.g.*, *Remo Imports Ltd. v. Jaguar Cars Ltd.*, 2005 FC 870, 41 C.P.R. (4th) 111 at para. 49. Normally, only if that threshold is crossed will the Court go further and investigate other matters, such as the prejudice the opposing party may suffer as a result of the amendment.

[32] In its analysis in support of the dismissal of the first motion, the Federal Court proceeded in that way, considering whether the proposed amendments had a reasonable prospect of success. The Federal Court found that it did not need to consider any other matters: at the outset, it found that Teva's proposed amendments had no reasonable prospect of success:

> In my view the amendments proposed by Teva have, on the evidence presented, no reasonable prospect of success. Even with a generous interpretation of the evidence put forward by Teva, there is no possibility that relief under section 53 of the *Patent Act* would be available.

(Para. 7 of the Federal Court's November 3, 2014 order.)

[33] On appeal to us, Teva submits that this finding is vitiated by legal error. Teva submits that the Federal Court improperly made it easier for courts to find that a ground has no

"reasonable prospect of success." Put another way, Teva says that the Federal Court has departed from the liberal approach that it must follow when considering whether to grant leave to amend pleadings.

[34] In this regard, Teva focuses upon the Federal Court's statement (at para. 6 of its order) that "[t]he landscape for permitting pleadings amendments has shifted somewhat since the Supreme Court of Canada decision in *Hryniak v. Mauldin*, 2014 SCC 7, [[2014] 1 S.C.R. 87]." The Federal Court added (also at para. 6) that "[a]lthough the guiding principle of a reasonable prospect of success remains in place, it is tempered by the competing concerns about access to justice, proportionality and judicial efficiency," concepts the Supreme Court emphasized in *Hryniak*.

[35] I reject Teva's submission. In referring to *Hryniak*, the Federal Court did not change the meaning of "reasonable prospect of success" and thereby commit legal error.

[36] Faced with a submission that a first-instance court applied improper principle, an appellate court must review in a holistic and fair way the reasons offered by the first-instance court against the record before it. Often first-instance courts do not describe the principles that bear upon their decisions in a perfectly precise or encyclopedic way. Yet, in many such cases, a holistic and fair review of their reasons against the record confirms they brought to bear all correct principles in their decision.

[37] That is the case here. Construing the reasons in a holistic and fair way, the Federal Court did not alter the "reasonable prospect of success" ground. Rather, it asked itself whether the proposed amendments had a reasonable prospect of success, added no gloss to that question, and found on the facts and the law that the amendments could not possibly succeed.

[38] In this regard, the Federal Court found (at para. 7) that "[e]ven with a generous interpretation of the evidence put forward by Teva, there is no possibility that relief under section 53 of the Patent Act would be available." The evidence proffered by Teva in support of its proposed pleadings amendment is concerned with the issue of obviousness at a time before the claimed invention was obtained and had nothing to do with what Gilead knew or believed when it filed its application or whether the efficacy of the untested compounds could be predicted from those that were tested and found to be useful. The Federal Court also found that Teva had taken too much from the scientists' statements, misinterpreting their import (at paras. 7 and 8). In its view, the scientists' statements, properly interpreted, were nothing more than expressions of scientific uncertainty during the inventive process and did not support Teva's proposed amendments. Finally, the Federal Court noted (at para. 5) that the proposed amendments raise very serious allegations of fraud that require strong supporting evidence.

[39] The Federal Court's analysis in this regard shows an understanding and application of proper legal principles. Further, its analysis of the facts before it and its application of the legal principles to those facts is not vitiated by palpable and overriding error.