Date: 20080418

Docket: T-1563-07

Citation: 2008FC513

Ottawa, Ontario, Friday, this 18th day of April 2008

PRESENT: MADAM PROTHONOTARY MIREILLE TABIB

BETWEEN:

ELI LILLY CANADA INC.,

Applicant

-and-

NOVOPHARM LIMITED and THE MINISTER OF HEALTH

Respondents

-and-

ELI LILLY AND COMPANY

Respondent Patentee

REASON FOR ORDER AND ORDER

[1] The matter before me probes the boundaries of the application of the concept of abuse of process in the context of proceedings under the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 as amended, (the "*Regulations*"), as established in *Sanofi-Aventis Inc. v. Novopharm Ltd.*, 2007 FCA 163. In particular, the motion before me brings up for determination whether abuse of process can be found where the

alleged abuse arises out of a prior decision of the Court from which an appeal is currently pending. For the reasons given below, I have come to the conclusion that it is not an abuse of process for Lilly to prosecute this application whilst it is actively pursuing an appeal of a prior, unfavorable decision against another generic.

The facts:

[2] The Respondent, Novopharm Limited ("Novopharm") served on the Applicant, Eli Lilly Canada Inc. ("Lilly") a notice of allegation in relation to its proposed raloxifene hydrochloride drug and, *inter alia*, Lilly's Patent no. 2,101,356 (the '356 Patent). Novopharm's NOA in respect of the '356 Patent includes allegations of non-infringement, as well as allegations of invalidity, citing approximately twelve grounds of invalidity, including lack of sound prediction.

[3] Lilly instituted the present application for a prohibition order, pursuant to section 6(1) of the *Regulations*, on August 24, 2007; Lilly's application takes issue only with Novopharm's allegations regarding the '356 Patent.

[4] On February 5, 2008, Justice Roger Hughes of this Court issued a judgment in Court file T-1364-05, another prohibition application involving Lilly and the '356 Patent, but with Apotex, rather than Novopharm as a respondent. The decision is reported as *Eli Lilly Canada v. Apotex Inc. et al.*, 2008 FC 142 (hereinafter the "*Apotex* decision"). In that case, Apotex had made the same allegation of invalidity of the '356 Patent for lack of

sound prediction as is made by Novopharm in the present matter. The Court, in the *Apotex* decision, held that Apotex's allegation of lack of sound prediction was justified, and on that basis, dismissed Lilly's application.

[5] Before the delays for appealing the *Apotex* decision had even expired, Novopharm served and filed the within motion, seeking the dismissal of Lilly's application pursuant to section 6(5)(b) of the *Regulations*. Novopharm relies on the Federal Court of Appeal's decision in *Sanofi-Aventis*, supra, to the effect that it is an abuse of process for a first person, having failed in a previous application to establish that an allegation of invalidity was not justified, to re-litigate the same allegation of invalidity when made in a second application by a different generic.

[6] By the time the motion was heard, Lilly had already filed a notice of appeal of the *Apotex* decision. Apotex has not yet received an NOC for its raloxifene hydrochloride drug, and I understand that there remain outstanding prohibition applications relating to other patents listed against the relevant drug product that would prevent Apotex from receiving an NOC before the appeal is heard. The situation is the same in Novopharm's case: a dismissal of this application will not automatically pave the way for the issuance of an NOC to Novopharm, as other relevant patents are currently the subject of prohibition applications.

The parties' positions:

[7] Lilly concedes that, but for the pending appeal, the facts of this matter are on all fours with the situation which existed in *Sanofi-Aventis*; Lilly further concedes that if, after all avenues of appeal have been exhausted, the *Apotex* decision is maintained, then the present application would indeed be an abuse of process and should properly be dismissed. It submits, however, that this application cannot be declared an abuse of process and dismissed unless and until all avenues of appeal of the *Apotex* decision have been exhausted.

[8] Novopharm, for its part, does concede that if the *Apotex* decision were to be eventually overturned on appeal, then any determination that the present application was an abuse of process could no longer stand, and that Lilly would then have recourse to have such a decision set aside (the precise procedural means to such redress was not identified, but use of Rule 399(b) was suggested). Novopharm argues, however, that the decision of this Court in *Sanofi-Aventis Canada Inc. v. Novopharm Ltd.*, 2006 FC 1135 (hereinafter, "*Sanofi-Aventis* (FC)", to distinguish it from the Court of Appeal decision upholding same), is determinative of the issue, and that a prior judgment of the Court is "final and binding" for the purpose of the principles of abuse of process notwithstanding ongoing appeals. It says it should not be made to await the outcome of all possible avenues of appeal, as this would create unnecessary delays, duplicative litigation and a real risk of inconsistent decisions.

[9] Thus, the sole issue before me is whether the principles set out in the Court of Appeal's decision in *Sanofi-Aventis* apply regardless of pending appeals.

Are there binding precedents on this issue?

[10] The first question to be considered is whether, as argued by Novopharm, it has indeed been determined in *Sanofi-Aventis* (FC) that it is an abuse of process for a first person to proceed with a prohibition application, having failed on an allegation of invalidity in an earlier application, even when the decision in that earlier application is under appeal. It is important, in answering that question, to consider the litigation history in *Sanofi-Aventis*.

[11] That case concerned the drug ramipril and Canadian Patent No. 1,341,206. Novopharm had alleged that the '206 patent was invalid, *inter alia*, on the basis of lack of sound prediction. A similar allegation had already been made by Apotex and challenged by Sanofi-Aventis in a previous prohibition application. By Order dated September 20, 2006, the Federal Court found that Apotex's allegation was justified. Sanofi-Aventis' appeal of that decision was dismissed by the Federal Court of Appeal on February 13, 2006. On March 15, 2006, Novopharm brought a motion to dismiss the application that had been brought against it by Sanofi-Aventis on the basis of *res judicata* or issue estoppel, and that is was redundant, scandalous, frivolous or vexatious or otherwise an abuse of process.

[12] The motion was first heard by Prothonotary Milczynski, and dismissed by order dated May 8, 2006. At that time, Sanofi-Aventis had filed an application for leave to appeal to the Supreme Court the earlier, unfavourable decision in the Apotex application, and the leave application was still pending. Relying on the Supreme Court of Canada's decision in *Toronto (City) v. C.U.P.E., local 79*, 2003 SCR 63, [2003] 3 S.C.R. 77, my colleague held that Novopharm's motion was premature, as the principles of *res judicata*, issue estoppel and abuse of process required that there be a final decision, and that a decision is only final when all avenues of review or appeal have been exhausted or abandoned.

[13] On appeal from that decision, Justice Tremblay-Lamer criticized my colleague's decision in that regard (*Sanofi-Aventis* (FC) at par. 18):

> "[18] Further, Prothonotary Milczynski's May 8, 2006 Order was in my view clearly wrong in finding that a decision is only final for the purposes of paragraph 6(5)(b) of the Regulations when all available appeals have been exhausted. I agree with Novopharm that the Supreme Court of Canada's statement in *Toronto (City) v. Cupe*, [2003] 3 S.C.R. 77 on which the prothonotary relied, is *obiter* and cannot displace, the fundamental rule, which in my view, is that a court order stands and is final and binding unless and until it is reversed on appeal. (*Wilson v. The Queen*, [1983] 2 S.C.R. 594; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 871; *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 at para. 19; *Dableh v. Ontario Hydro*, [1994] O.J. No. 2771 (Ont. Gen. Div.) at para. 9). Further, the potential for inconsistent judgments may be resolved with the possibility of obtaining a stay of an execution of a judgment until the leave application from the Supreme Court of Canada has been decided. In the

> present case, however, the issue is moot as leave to appeal has been denied by the Supreme Court of Canada."

[14] However, I note that just as the passage of *Toronto v. C.U.P.E.* relied upon by the Prothonotary was held to be *obiter*, Justice Tremblay-Lamer's comment as to the finality of decisions for the purposes of Section 6(5)(b) when an appeal is pending is also *obiter*, as she herself recognized that that issue had become moot when it came to her, leave to appeal to the Supreme Court having then been denied. I therefore do not consider that the *dictum* of the Court in *Sanofi-Aventis* (FC) stands as a binding determination of law on that issue.

[15] Further, I note that Justice Tremblay-Lamer's conclusions in *Sanofi-Aventis* were based on her view that subsequent judges hearing prohibition applications would be bound by earlier decisions on the same allegations. The emphasis she put on the final and binding nature of decisions, even pending appeal, is to be understood in that context. However, the Federal Court of Appeal in *Sanofi-Aventis* specifically disagreed with the Judge's analysis that the proceedings were doomed to fail because the previous decision would have been binding in subsequent applications (at par. 29 and 30):

> "[29] In Tremblay-Lamer J.'s view, any court hearing Sanofi-Aventis' present application would be bound by Mactavish J.'s decision in the Apotex case. She therefore concluded the application was an abuse of process because it was "clearly futile" and that it was "plain and obvious" that it would have no chance of success.

> [30] While I agree with the motions judge that Sanofi-Aventis' application is an abuse of process, I must respectfully disagree with her conclusion that the reason for this finding is that Mactavish J's decision, which was upheld by the Court of Appeal, would be binding on the applications judge."

[16] In the Court of Appeal's analysis, it is not necessary that the earlier decision be binding on subsequent judges in order for re-litigation to constitute an abuse of process. Thus, the binding nature of a decision, even pending appeal, does not form the basis of the application of the principles of abuse of process in such cases, and may even be irrelevant to the analysis in some cases.

[17] Finally, it is clear that the question of whether a pending appeal prevents the first decision from being regarded as "final" or "binding" for the purpose of *res judicata*, issue estoppel or abuse of process is not well settled at law, and is the subject of many apparently conflicting decisions[1].

[18] I am therefore satisfied that there currently is no clear, binding precedent on this delicate issue.

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[1] See discussions in Lange, Donald J., *The Doctrine of Res Judicata in Canada*, 2nd ed., Butterworth, 2004, at pages 89-100, 160-164, 389-390, and in particular, at page 89: "There is an unresolved conflict in decision-making in this area of the law in Canada". Also, while there is a body of decisions of the Ontario Courts that have determined that decisions under appeal are nevertheless final for the purposes of issue estoppel, including *Dableh v. Ontario Hydro* (1994), 58 C.P.R. (3d) 237, [1994] O.J. No. 2771, decisions in this Court have appeared to not consider decisions final for the purpose of issue estoppel or abuse of process until all avenues of appeal had been exhausted: *Novopharm Ltd. v. Eli Lilly and Co.*, [1998] F.C.J. No. 1634 (*ratio decidendi* at par. 29 to 32); see also *Wells v. Canada (Minister of Transport)* (1993), 48 C.P.R. (3d) 308, *Cardinal v. Canada* (1991), 47 F.T.R. 203 (reversed in part on other grounds at (1993), 164 N.R. 301), *Starlight v. Canada* [2001] F.C.J. No. 1685, and *Nordic Laboratories Inc. v. Deputy M.N.R.* (1996), F.C.J. No. 1067 at par. 9.

The relevance of the pending appeal:

[19] It seems to me that the question of whether a decision under appeal should justify the dismissal of a second proceeding on grounds of abuse of process must, in all cases, be informed by a consideration of whether the outcome of the appeal would have any bearing on the first decision's effect on the second proceeding. For example, in a case of abuse of process by re-litigation of the same issues between the same parties, where it is the mere fact of multiple duplicative proceedings that gives rise to the abuse, the resolution of the appeal, irrespective of the result, will not generally lessen the abusive nature of the second proceeding. However, if, as here, the result of a successful appeal would be to void the first decision's effect as a cause of abuse of process in the second proceeding, a dismissal of the second proceeding as an abuse of process may be premature and lead to both injustice to the parties and unnecessary litigation to redress the injustice.

[20] One such example would be where the jurisdiction of the Court to render the initial decision is challenged on appeal. A second proceeding, involving the same issues in another forum, may well be an abuse of process assuming the validity of the first decision, but would clearly not be abusive if the first Court was found to have lacked jurisdiction. The fact situation in *Toronto v. C.U.P.E.*, supra, also provides an example of how the results of a pending appeal could affect the Court's conclusion as to the abusive nature of the second proceeding. There, an employee previously convicted of sexual assault was subsequently fired as a result of the assault. The employee's grievance of the

dismissal, in which he sought to challenge the employer's allegation of assault, was held to be an abuse of process in light of the prior conviction. There is no doubt in my mind that, had the employee's criminal conviction been appealed and reversed, his challenge as to whether or not the alleged abuse had taken place could not have been found abusive. In this light, Justice Arbour's express mention of the fact that the employee had exhausted all his avenues of appeal of the conviction, at par. 56 of the decision in *C.U.P.E.*, is likely significant.

[21] In the case at bar, both parties have expressly recognized that the outcome of Lilly's appeal of the *Apotex* decision would indeed affect the within proceedings: Lilly has expressly admitted that if the *Apotex* decision was ultimately upheld or was still standing when this application came for hearing on the merits, this application would stand to be dismissed. Novopharm for its part concedes that a successful appeal by Lilly would void the effect of the *Apotex* decision as grounds for dismissal for abuse of process. Thus, it is plain that the fact that an appeal of the *Apotex* decision has been filed and is being prosecuted cannot be ignored in determining whether this application should be dismissed as an abuse of process.

The effect of the pending appeal in light of the considerations set out in *Sanofi-Aventis*:

[22] The Court of Appeal's decision in *Sanofi-Aventis* does, in my view, stand as a determinative statement that an attempt by a first person to re-litigate in a prohibition

application allegations of invalidity that have already been determined to be justified can amount to an abuse of process, even though the second proceeding involves a different generic. That said, it is equally clear that the Court of Appeal did not determine that every prohibition application involving the same patent must be deemed an abuse of process and dismissed as such so soon as the Court has dismissed a previous one on an invalidity issue. Not only did the Court of Appeal proceed by considering the specific circumstances of the case before it in light of the principles enunciated by the Supreme Court in *Toronto v. C.U.P.E.*, to determine whether they amounted to abuse of process, but it also considered whether the application of these principles in the circumstances would give rise to unfairness. It further clearly held that each case must be considered on its own facts, and that a determination in each situation requires balancing the effect of a proceeding on the administration of justice against the unfairness to a party from precluding it from bringing forward its case:

> "[40] While it is important in each case to ensure the application of the doctrine of abuse of process does not give rise to unfairness in the circumstances, in my view, no such unfairness would result in the present case."
>
> (…)
>
> "[50] […] In each situation, it is necessary to balance the effect of a proceeding on the administration of justice against the unfairness to a party from precluding it from bringing forward its case."
>
> (Emphasis mine)

[23] As mentioned above, the Court of Appeal's analysis proceeds from the clear understanding that an earlier decision between a first person and a generic is not binding

or determinative of the issues in a subsequent litigation involving another generic (*Sanofi-Aventis*, par. 31 and 38), and that it is indeed possible that the first person could be successful in a second application even if it failed in an earlier one. The Court found that it was that very likelihood that would threaten the integrity of the judicial process and thus give rise to an abuse of process (at par. 49). As for the fact that the application of the doctrine of abuse of process would deprive the applicant of that very possibility, the Court of Appeal held that there was no unfairness since the applicant retained its right to seek redress against subsequent generics through an infringement action. Other key factors considered by the Court in finding abuse in that case were the strain which proceedings under the *Regulations* put on the scarce resources of the Court, and the fact that the negative consequences of possible inconsistent results in repetitious NOC litigations are not outweighed by the corresponding benefit of a more accurate result (at par. 36 and 37).

[24] How then do these concerns inform the application of the doctrine of abuse of process to the circumstances of the case before me?

a) Possible inconsistent judgments:

[25] While Lilly's written representations are not entirely clear on that point, counsel for Lilly at the hearing made it quite clear that Lilly does not intend to pursue in this application a determination in respect of the allegation of lack of sound prediction

different from that reached by Justice Hughes in the *Apotex* decision unless Justice Hughes' determination has been overturned on appeal at the time of the hearing.

[26] More specifically, this means that if, by the time this application is heard, the *Apotex* decision as to lack of sound prediction has been reversed on appeal, then Lilly does intend to pursue a determination that this allegation is not justified. Indeed, it would not be an abuse of process for it to do so in those circumstances. If, on the other hand, at the time of hearing, the *Apotex* decision remains effective and binding pending outstanding appeals, Lilly would concede to the hearing Judge that, in the Court's discretion, the application should either then be dismissed as an abuse of process, or, if heard, determined so that it would follow the *Apotex* decision on the sound prediction issue, with or without the Judge pronouncing on the other allegations of the NOA, so that Lilly's rights of appeal continue to be preserved pending a final disposition of the *Apotex* decision. Needless to say, Lilly's representations included the understanding that this application would immediately be discontinued if the *Apotex* decision was upheld with all avenues of appeal exhausted.

[27] Lilly submits that in view of these representations, there is in fact no risk of inconsistent judgments if this matter is allowed to continue until all avenues of appeal of the *Apotex* decision are exhausted. Lilly's position in this matter stands in contrast with the situation that existed in *Sanofi-Aventis*. In that case, Sanofi-Aventis having failed through all avenues of appeal to have the earlier decision overturned, specifically wished to pursue the second proceeding with the sole aim of reaching a different result. Lilly's

position and aim here does not lead to the possibility of conflicting judgments. To the extent Lilly intends to dispute the correctness of the *Apotex* decision, it intends to do so by way of appeal of that order, as is its right and is proper.

[28] On careful consideration, it is Novopharm's position which, if adopted, is more likely to lead to inconsistent judgments and to threaten the integrity of the administration of justice: The dismissal sought by Novopharm on this motion, if it would at this time achieve a consistency of result between Lilly's first application against Apotex and the present one, could well in future prove to be at odds with the ultimate results in the Apotex matter, should Lilly's appeal be successful. Worse yet, such an outcome would put the Court in the unenviable and even embarrassing position of having to backtrack on its earlier determination that this proceeding constitutes an abuse of process, should the *Apotex* decision be overturned on appeal.

[29] I therefore find that allowing Lilly's application to proceed pending the appeal of the *Apotex* decision would not lead to the risk of inconsistent judicial decisions in the circumstances of this case.

[30] My conclusion, that allowing this application to proceed at this time would not likely lead to the possibility of inconsistent results, would appear to preclude a finding of abuse of process. Nevertheless, for the sake of completeness, it is appropriate to consider the other factors held to be relevant in *Sanofi-Aventis*, including whether the dismissal sought by Novopharm in this case could give rise to unfairness in the circumstances.

b) Unfairness:

[31] I note that the Court of Appeal in *Sanofi-Aventis* found that precluding a first person from pursuing a prohibition proceeding amounting to abuse does not result in unfairness to an innovator, because relief against the generic against whom prohibition proceedings are curtailed remains available in the form of an action for infringement. The situation here is no different, and that form of unfairness does not arise.

[32] However, unfairness of another kind would arise.

[33] Despite their summary nature, decisions of the Federal Court in proceedings under the *Regulations* are subject to appeal as of right. The only circumstances in which this right of appeal can be curtailed is where, following a dismissal, an NOC is issued to the generic, at which point the appeal may be declared moot. As mentioned above, it appears that other pending prohibition applications will likely prevent the issuance of an NOC to Apotex until the appeal is determined. The same would be true for Novopharm if this motion were granted.

[34] To dismiss the within application as abusive even while Lilly is exercising its right to challenge the correctness of the *Apotex* decision by way of appeal would run the risk of depriving Lilly of the benefit of its right of appeal as to the merits of the *Apotex* decision.

[35] If successful on appeal, Lilly will obtain a prohibition order against Apotex, and will not need to pursue relief by way of action. Although Novopharm concedes that Lilly would then likely be able to set aside a dismissal order in this matter – assuming Novopharm has not by then obtained its NOC – the 24 month window of opportunity to prosecute this application to a prohibition order afforded by the statutory stay will have shrunk to insignificance. Novopharm would not, at the hearing before me, either commit to a consent revocation of a dismissal order in the event of a reversal of the *Apotex* decision, nor to an extension of the 24-month stay to allow the determination of this application in such an event.

[36] While neither party argued the wider issue of fairness to other generic or non-parties, it bears noting that a summary dismissal of the present application would hardly be fair to Apotex either. Indeed, Apotex would remain bound to defend the merits of Justice Hughes' decision on appeal and be exposed to a prohibition order, while Novopharm would gain the benefit of Justice Hughes' decision, without the scrutiny of appellate review on the merits. Novopharm may further stand to get a "free pass", despite a possible reversal of the *Apotex* decision, if it should happen to obtain its NOC before a dismissal order can be reversed or before the merits of this application can subsequently be determined.

[37] Nor do I find that there can be any unfairness to Novopharm in allowing this application to continue. Concerns about the unfairness to a second generic of having to litigate the merits of a prohibition proceeding where another generic has successfully

defended a similar application do not form part of the factors mandated to be considered by the Court of Appeal in *Sanofi-Aventis*. To the extent prejudice to a party forced to re-litigate an issue already decided has been considered, it has only been when that litigant was a party to the prior proceeding. Novopharm has not been a party to earlier litigations involving this patent, and is not being "twice vexed" by this application. To the extent the ongoing litigation proves to have been in vain in the event the *Apotex* decision is finally upheld on appeal, Novopharm may seek relief by way of costs.

[38] Further, I do not accept Novopharm's argument to the effect that it would be unfair for it to be made to wait until the exhaustion of all the avenues of appeal in the Apotex matter before being able to rely on the *Apotex* decision.

[39] Novopharm is not being made to wait for anything. It has no right in principle to be put on an equal footing with Apotex, or any other generic, with respect to the effective result of a prohibition application and the issuance of an NOC. It has no entitlement to the same result as obtained by Apotex, or to benefit from it. The principles of abuse of process, as analyzed and applied by the Court of Appeal in *Sanofi-Aventis*, put the emphasis first and foremost on the interests of the administration of justice, and not on any concept of fairness to other generics.

[40] Novopharm chose the timing for serving its Notice of Allegation, and chose to not restrict itself to allegations of lack of sound prediction. Even while claiming entitlement to the benefit of the *Apotex* decision, it chose to keep in reserve for further litigation, if

the *Apotex* decision is ultimately overturned, all the allegations made in its NOA, including re-litigating lack of sound prediction on the basis of better evidence than led by Apotex. Novopharm does not have to do so. It is open to it, if it wishes to gain the benefit of the *Apotex* decision without delay, to withdraw all allegations other than lack of sound prediction, and to join issue with Lilly on the basis of Justice Hughes' decision. To the extent a hearing on the merits would still be necessary, it can be held promptly, and in an eventual appeal, Novopharm will be in step with Apotex, if that is where fairness lies. To the extent Novopharm chooses to exercise its right to the longer, but more complete path to the resolution of its NOA, section 8 of the *Regulations* affords relief for losses suffered from resulting delays in obtaining its NOC. Novopharm cannot complain of the unfairness of the natural consequences of the choices it makes.

c) The drain on judicial resources:

[41] Proceedings under the *Regulations* do consume a disproportionate amount of judicial resources, not only in terms of hearing time on the merits, but in terms of interlocutory incidents and case management. Clearly, allowing the matter to proceed will represent a burden on the Court's time and resources, even if the issue of lack of sound prediction is not to be litigated with a view to contradicting the results in the Apotex matter.

[42] Yet, the possibility that the *Apotex* decision could be reversed on appeal must be taken into consideration, along with what would then happen to this proceeding. As

recognized by Novopharm, there would likely be a motion to set aside the dismissal order followed by a full litigation of all allegations raised in this application. Not only would the burden on the Court not be avoided, but the burden would be magnified by the additional pressure of having to process the application to a determination in a fraction of the usual 24 month period. The drain on judicial resources would likely be worse. In the circumstances, I doubt the desire to preserve judicial resources, when they stand to be expended in any event, justifies a finding of abuse of process in this case.

d) The benefit of a more accurate decision:

[43] As stated by Justice Arbour in *Toronto v. C.U.P.E.* (at par. 52):

> "(…) proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result."

[44] Not only is there no real risk of inconsistent judgments, but allowing the possibility that proper review of the *Apotex* decision by way of appeal could occur before this matter is ready for hearing on the merits would in fact add to the eventual determination of this matter the benefit and certainty of a more accurate result, as tested by appellate review. I therefore cannot find that this proceeding constitutes an abuse of process at this stage, in these circumstances.

Conclusion:

[45] Lilly is seeking a review of the earlier decision in the Apotex matter by way of appeal; this appeal is likely to be determined before the hearing of this application on its merits and before either Apotex or Novopharm is in a position to receive an NOC. In the circumstances, I am satisfied that Lilly's prosecution of this application is not an attempt to improperly re-litigate the result of the Apotex matter in the hopes of obtaining a different result. It is not an abuse of process, but an appropriate exercise of the process provided under the *Regulations*, which is consistent with the exercise of the right of appeal afforded to it in respect of the *Apotex* decision.

[46] I would add that, were it not for the particular nature of prohibition proceedings under the *Regulations*, and in particular, the constraints imposed on the parties and the Court by the 24 month stay within which these proceedings operate, the appropriate course of action in the circumstances would have been to stay this application pending the determination of the appeal in the Apotex matter. Indeed, I note that in the case of *Dableh v. Ontario Hydro*, [1994] O.J. 2771, where abuse of process by re-litigation was found to exist "unless and until" a pending appeal of a previous decision was successful, the Court did not order the dismissal of the action, but merely stayed the action pending disposition of the appeal. Unfortunately, this Court cannot extend the 24-month period without the parties' consent, or a finding that the respondent has failed to reasonably cooperate in the prosecution of the application. Neither is a given in this matter. As a result, staying this application pending determination of the appeal in the Apotex matter

would potentially lead to prejudice to both parties, as well as increased and unwarranted pressure on the Court's resources should Lilly's appeal be successful. This leaves as sole options the dismissal of the application or its continuation pending appeal. Of the two, I am convinced that the latter is the lesser evil to the interests of the parties and of the administration of justice.

ORDER

1. The motion of the Respondent, Novopharm Limited, is dismissed with costs.

"Mireille Tabib"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1563-07
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