Date: 20070724

Docket: A-262-07

Citation: 2007-FCA-261

CORAM: **NADON J.A.**
EVANS J.A.
PELLETIER J.A.

BETWEEN:

RATIOPHARM INC.

Appellant

and

PFIZER CANADA INC. and PFIZER INC. and THE MINISTER OF HEALTH

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on July 24, 2007.

REASONS FOR ORDER BY: EVANS J.A.

CONCURRED IN BY: NADON J.A.
PELLETIER J.A.

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REASONS FOR ORDER

EVANS J.A.

[1] This is a motion to be disposed of in writing pursuant to rule 369 of the *Federal Courts Rules* brought by the respondents, Pfizer Canada Inc. and Pfizer Inc. ("Pfizer"), to quash an appeal by ratiopharm inc. against an order of Justice Barnes of the Federal Court, dated April 26, 2007. The Judge granted a motion by ratiopharm to strike Pfizer's application for an order of prohibition.

[2] Pfizer says that, since the Judge granted ratiopharm the very relief which it had requested, this Court has no jurisdiction to hear the appeal: ratiopharm is appealing against the Judge's reasons,

not his order. Paragraph 52(*a*) of the *Federal Courts Act*, R.S. C. 1985, c. F-7, enables the Court to quash a proceeding in cases over which it has no jurisdiction. In the alternative, Pfizer submits that the appeal should be quashed in the exercise of the Court's inherent jurisdiction to prevent abuses of its process.

[3] Ratiopharm's appeal arises from Pfizer's application to the Federal Court under subsection 6(1) of the *Patented Medicines (Notice of Compliance) Regulations,* SOR/93-133 ("*PM(NOC) Regulations*") for an order prohibiting the Minister of Health from issuing a notice of compliance to ratiopharm in respect of its generic version of Pfizer's drug, NORVASC®, until the expiry of Canadian Patent 2,355, 493 ("493 Patent").

[4] Ratiopharm brought a motion to strike the application on the ground that the 493 Patent was not eligible to be listed on the patent register and that Pfizer's application was frivolous, vexatious, and an abuse of process.

[5] Justice Barnes granted ratiopharm's motion and struck Pfizer's application as it related to the 493 Patent, on the ground that the 493 Patent was ineligible to be listed on the patent register. However, he rejected ratiopharm's contention that the application should also be struck as frivolous, vexatious, and an abuse of process.

[6] It is trite law that, having been awarded all the relief that it requested, a party may not appeal because the Judge did not accept all the grounds relied on to obtain relief. Such an appeal would be

against the reasons of the Judge and not the order; subsection 27(1) of the *Federal Courts Act* provides for appeals to this Court against a "judgment" of the Federal Court, not against its reasons for judgment. Whether a determination by this Court that Justice Barnes erred in rejecting one of ratiopharm's arguments might assist ratiopharm, as it alleges, in other proceedings cannot confer jurisdiction on the Court and is therefore irrelevant.

[7] Ratiopharm advances two arguments in support of its contention that this appeal is within the jurisdiction of the Court.

[8] First, it says that Pfizer's motion to dismiss is premature because it (ratiopharm) has a motion pending before Justice Barnes for a reconsideration of his order. The motion requests that he amend it by dismissing ratiopharm's motion to strike under paragraph 6(5)(*b*) of the *PM(NOC) Regulations* ("frivolous, vexatious and an abuse of process"), and allowing it under paragraph 6(5)(*a*) (ineligibility of the patent to be listed on the patent register).

[9] I do not agree. Even if the order were to be amended by the Judge as requested, the result would be the same: ratiopharm's motion would be granted and Pfizer's application struck, the very relief requested by ratiopharm. An incorporation into the order of the grounds on which the order was made is merely a matter of form, not substance.

[10] Second, ratiopharm relies upon the decision of this Court in *Tommy Hilfiger Licensing Inc. v. International Clothiers Inc*. 2004 FCA 252, 32 C.P.R. (4th) 289, in which the plaintiff appealed,

despite having been largely successful at trial. However, *Tommy Hilfiger* is distinguishable from the present case, on the ground that the Trial Judge had not awarded the plaintiff/appellant all the relief that it had sought. The Trial Judge had dismissed the plaintiff's claim that the defendant had infringed the plaintiff's trade mark, and had refused an order that the defendant deliver up or destroy wares, the use of which would violate the plaintiff's rights.

[11] This Court allowed the plaintiff's appeal on the ground that the defendant had infringed the plaintiff's trade mark, and exercised its discretion to award the remedy (a declaration of infringement) which the Trial Judge should have awarded. In any event, the jurisdiction point was not argued because no-one appeared on the appeal for the respondent. Hence, *Tommy Hilfiger* does not support ratiopharm's contention that its appeal is within the Court's jurisdiction.

[12] Having concluded that ratiopharm's appeal is not against a judgment of the Federal Court, but against the reasons for judgment, and is thus not within this Court's jurisdiction under subsection 27(1), I need not consider Pfizer's alternative argument that ratiopharm's appeal should be quashed because it is frivolous, vexatious and an abuse of process.

[13] For these reasons, I would grant Pfizer's motion to quash and dismiss ratiopharm's appeal, with costs.

"John M. Evans"
J.A.

"I agree" M.Nadon
"I agree" J.D. Denis Pelletier

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-262-07
STYLE OF CAUSE:	*RATIOPHARM INC. v. PFIZER CANADA INC. and PFIZER INC. and THE MINISTER OF HEALTH*

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	Evans J.A.
CONCURRED IN BY:	Nadon J.A. Pelletier J.A.
DATED:	July 24, 2007

WRITTEN REPRESENTATIONS BY:

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Eric Peterson	FOR THE RESPONDENT, The Minister of Health

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