Date: 20080415

Docket: A-458-07

Citation: 2008 FCA 138

Present: **SEXTON J.A.**

BETWEEN:

RANBAXY LABORATORIES LIMITED

Appellant

and

PFIZER CANADA INC.,
WARNER-LAMBERT COMPANY, LLC and
THE MINISTER OF HEALTH

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on April 15, 2008.

REASONS FOR ORDER BY: SEXTON J.A.

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REASONS FOR ORDER

SEXTON J.A.

[1] In a NOC proceeding, the Federal Court on September 11, 2007 granted an order of prohibition to Pfizer Canada Inc. and Warner-Lambert Company, LLC ("Pfizer *et al.*") against Ranbaxy with respect to Canadian Patent No. 2,220,018 (the "018 Patent") and dismissed a request for an order of prohibition with respect to Canadian Patent No. 2,220,455 (the "455 Patent"): *Pfizer Canada Inc. v. Canada (Minister of Health)* 2007 FC 898. Both patents were related to the drug LIPITOR, an anti-cholesterol drug. The NOC proceeding results from Ranbaxy's application to the Minister of Health for approval to sell its drug, Ran-Atorvastatin, into Canada.

[2] Ranbaxy has appealed the order with respect to the 018 Patent and Pfizer has cross-appealed the order with respect to the 455 Patent.

[3] The appeal was filed on October 9, 2007 and some of the memoranda of fact and law have been served and filed. The last one must be filed by April 29, 2008 and a requisition for hearing must be filed twenty (20) days later.

[4] Apotex Inc. ("Apotex") seeks leave to intervene in this appeal. Apotex launched its motion to intervene on March 13, 2008, although they learned of the decision in question in November 2007.

[5] One of Ranbaxy's bases for its allegation of non-infringement was that the intermediates purported to infringe the 018 Patent (and used to make LIPITOR) were used in India, not Canada. Therefore, so the argument went, the Canadian 018 Patent could not be infringed. Justice Snider rejected this argument, applying the following excerpt from the United Kingdom High Court of Justice's decision of *Saccharin Corp. Ltd. v. Anglo-Continental Chemical Works, Ltd* (1900), 17 R.P.C. 307 (Ch.) at 319:

> If the patented process were the last stage in the production of the article sold, the importation and sale of the product would, in my opinion, plainly be an infringement. Does it make it any the less an infringement that the article produced and sold is manufactured by the use of the patented process which is subjected to certain other processes? In my opinion it does not. By the sale of saccharin, in the course of the production of which the patented process is used, the Patentee is deprived of some part of the whole profit and advantage of the invention, and the importer is indirectly making use of the invention.

[6] Apotex strenuously disagrees with this aspect of Justice Snider's decision, specifically arguing that the *Saccharin* doctrine ought to have no application in Canada at all. However, Apotex fears its position would not be represented by Ranbaxy, suggesting that "…Ranbaxy's position on the appeal is extremely narrow: Ranbaxy argues that Snider J. was only incorrect to the extent that a patent claims what can be characterized as a chemical intermediate."

[7] Apotex has been sued for patent infringement by Eli Lilly in an unrelated patent and is scheduled to commence a 95 day trial on April 21, 2008. Apotex claims that an issue in that trial will be affected by the decision in the present appeal. Specifically it alleges that:

> If this Court simply rejects the statement of the law of Snider J. concerning the extra-territorial scope of patent rights, it is certain that the entirety of the claim against Apotex will be dismissed. If this Court departs from the reasons of Snider J., and judicial comity is observed, the manner of assessing Apotex's liability will change. A partial resolution of the extra-territoriality issue by this Court, as would occur if Apotex is not permitted to intervene, would result in Apotex being compelled to appeal its trial decision and ask this Court to revisit the territoriality issue in a few short months, on the basis of a misdirected or academic factual record. [Emphasis in original.]

[8] Ranbaxy takes no position on the notice to intervene by Apotex, but says the motion should be "dealt with urgently so as not to delay the timing of the main appeal".

[9] Pfizer *et al.* opposes the motion. Specifically they say that the legal issue raised by Apotex has not been raised by the parties to the appeal and that Apotex, if allowed to intervene, would be seeking to have this Court answer a legal question which was not raised by any of the parties. They

further say that this question was not raised by Ranbaxy in its NOA nor was it addressed in the decision below, nor is it addressed in the parties' factums in this Court.

[10] Pfizer *et al.* further argues that Apotex's participation would disrupt and delay the appeal and that Apotex, although having known about the decision under appeal for several months has waited until the "eve of its trial" against Eli Lilly to bring this motion.

[11] Contrary to the submissions of Apotex, it is far from clear that a decision by this Court in the NOC appeal between two parties unrelated to Apotex would absolutely resolve the issue in the infringement action between Apotex and Eli Lilly. As a majority of this Court stated, in *Eli Lilly Canada Inc. v. Novopharm Ltd.* 2007 FCA 359 (leave to appeal refused, [2008] S.C.C.A. No. 9):

> NOC proceedings were never intended to be substitutes for an infringement action: *Merck Frosst Canada Inc. v. Canada (Minister of National Health and Welfare)* (1994), 55 C.P.R. (3d) 302 (F.C.A.) at 319 (leave to appeal to the S.C.C. dismissed [1994] S.C.C.A. 330); *Pfizer, supra* at paragraph 17. Similarly, it is inappropriate to rely on NOC proceedings to set binding precedent on controversial and uncertain questions in patent law (see *Sanofi-Aventis, supra*, at paragraph 49). NOC proceedings are supposed to be summary in nature and do not lend themselves to such determinations. [Emphasis added.]

I do not wish to be understood as commenting at all on the proposition cited by Justice Snider. It would simply be preferable for the larger issue squarely raised by Apotex to be determined in the litigation in which it is presently engaged with Eli Lilly.

[12] Indeed, if Apotex were allowed to intervene, one would expect Eli Lilly to require the same relief. It would be difficult for this Court to exclude Eli Lilly if Apotex was allowed to transport the main issue in its proceeding with Eli Lilly into this appeal. Allowing both Apotex and Eli Lilly to

intervene would undoubtedly complicate and delay the appeal, keeping in mind that there is no agreement by the present parties to the appeal that the issue raised by Apotex is pertinent to the appeal.

[13] This Court has emphasized - time and again – that NOC proceedings are intended to be summary in nature and of short duration. Allowing intervention in NOC proceedings should be done only in the clearest of cases and only where it is clearly warranted. Such is not the case here. See *Eli Lilly v. Novopharm* 2007 FCA 329, Docket A-274-07.

[14] For these reasons, the application to intervene by Apotex should be dismissed with costs.

"J. Edgar Sexton"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-458-07
STYLE OF CAUSE:	*Ranbaxy Laboratories Limited v. Pfizer Canada Inc., Warner-Lambert Company, LLC and The Minister of Health*

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	Sexton J.A.
DATED:	April 15, 2008

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