Federal Court of Appeal  Cour d'appel fédérale

Date: 20130215

Docket: A-75-12

Citation: 2013 FCA 43

CORAM: **NADON J.A.**
SHARLOW J.A.
GAUTHIER J.A.

BETWEEN:

THE MINISTER OF HEALTH

Appellant

and

CELGENE INC.

Respondent

and

CANADIAN GENERIC PHARMACEUTICAL ASSOCIATION

Intervener

Heard at Ottawa, Ontario, on November 27, 2012.

Judgment delivered at Ottawa, Ontario, on February 15, 2013.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: SHARLOW J.A.
DISSENTING REASONS BY: NADON J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] This is an appeal from the decision of de Montigny J. of the Federal Court (the Judge), granting the application for judicial review of Celgene Inc. (Celgene) and quashing the decision of

the Minister of Health to refuse to register Celgene's drug THALOMID on the Register of Innovative Drugs.

[2] The main issue in this appeal is whether THALOMID contains a medicinal ingredient not previously approved, and as such falls within the definition of an "Innovative Drug" found in subsection C.08.004.1 (1) of the *Food and Drug Regulations*, C.R.C. c. 870 (the Regulations) that can benefit from the Data Protection Provisions (DPP) in the Regulations, particularly market exclusivity usually for a period of 8 years. For the reasons that follow, I would allow this appeal.

BACKGROUND

a. The history of thalidomide

[3] The medicinal ingredient in THALOMID is thalidomide. A drug containing this ingredient was first launched commercially by a German pharmaceutical company in October 1957. At the time, the drug was promoted for use for sleeplessness and other minor ailments suffered by pregnant women.

[4] In Canada, W.M.S. Merrell Company received approval for the sale of a drug including thalidomide under the brand name KEVADON on November 22, 1960. Frank W. R. Homer Limited received a similar approval for a drug including thalidomide under the brand name TALIMOL on October 11, 1961.

[5] In 1961 and 1962, thalidomide was dramatically withdrawn from the world market because of its teratogenicity or potential to produce fetal malformation. Thousands of babies across the globe were born with deformed or missing limbs or other horrible conditions. Many were born stillborn or died shortly after birth. (The Judge's reasons, at paragraph 5)

[6] The Department of Health ordered the permanent withdrawal of thalidomide from the Canadian market on April 6, 1962. Among other things, the withdrawal letter stated the following:

> With the withdrawal of this acceptance, thalidomide returns to the status of a new drug and must not be sold except to qualified investigators for the purpose of obtaining scientific and clinical information that could be used to support the safety of its use under conditions to be recommended by the manufacturer. Such sale does not include its sale through pharmacies.

(The Judge's reasons, at paragraph 6)

[7] As noted in a Health Canada publication reviewing the history of drug regulations in Canada, by 1951, manufacturers were required to file a New Drug Submissions (NDS) prior to marketing their drug but the Regulations then in force under the *Food and Drugs Act*, S.C. 1952-53 c. 38 (the *Act*) did not prevent the thalidomide tragedy of the early 1960s. This tragedy prompted a complete revision of the Regulations to strengthen the department's regulatory ability. The revision marked the first appearance of the requirement for manufacturers to submit evidence of efficacy in seeking a Notice of Compliance (NOC) (Health Canada, "Brief History of Drug Regulations in Canada", Appeal Book Volume 2, at page 277).

[8] Thalidomide was one of two drugs (the other one being lysergic acid diethylamide (LSD)), the sale of which was absolutely prohibited pursuant to the amendment enacted by Bill C-3 on December 20, 1962, (1st Sess., 25th Parl., 1962) placing thalidomide on Schedule "H" to the *Act*.

[9] In 1968, this Schedule "H" was replaced by one which contained a longer list of prohibited substances:

> 1: Thalidomide
> 2. Lysergic acid diethylamide
> 3. DET N,N-Diethyltryptamine and its salts
> 4. DMT N,N-Dimethyltryptamine and its salts
> 5. SMT (DOM) 4-Methy-2, 5-dimethoxyamphetamine
>
> SOR/68-411
> The Canada Gazette Part II, Volume 102, No. 18, September 25, 1968

[10] Then, in 1969, the scheme for dealing with other restricted substances was reconfigured and the drugs listed in 2 to 5 above (so-called street drugs) were included under Schedule "J" of the *Act* (SOR/69-417, the Canada Gazette Part II, Volume 103, No. 16, August 27, 1969). This left Thalidomide as the only drug listed in Schedule "H".

[11] In 1970, Thalidomide was moved to Schedule "F" of the *Act*, which listed drugs that were prohibited for sale in Canada. The old Schedule H now dealt only with "restricted drugs" as defined in Part IV of the *Act* and three new such drugs were added to the four already listed.

[12] In 1984, Thalidomide was deleted from Schedule "F" and it is not mentioned anywhere since then (SOR/84-566, The Canada Gazette Part II, Volume 118, No. 16, August 8, 1984)

[13] Despite its tragic history, thalidomide was eventually found to be effective in the treatment of leprosy and other related conditions (ENL), as well as a form of cancer. By 1994, Celgene Corporation was exclusively devoted to the commercialization of THALOMID to treat life threatening diseases, including cancer and ENL.

[14] In Canada, THALOMID was first available in 1995 through the Health Canada Special Access Program (SAP) which was designed to provide exceptional access to drugs not approved for sale in Canada and for which a manufacturer does not hold an NOC. These sales are exempt from the formal comprehensive scientific and medical review undertaken when products are reviewed for a full marketing authorisation. Recently, this Court confirmed in *Teva Canada Limited v. Canada (Minister of Health)*, 2012 FCA 106 (*Teva*), that an authorization under the SAP is not an approval within the meaning of the DPP in the Regulations.

[15] Thalidomide had never been approved in a drug in the U.S., and in July 1998, Celgene obtained a first approval to use it as THALOMID for acute treatment of the cutaneous manifestations of moderate to severe ENL. The approval by the U.S. Food and Drug Administration (FDA) was subject to the strongest restricted distribution system to prevent birth defects. This required Celgene to create the controlled distribution system known in the U.S. as the "S.T.E.P.S. ®" program. In Canada, the controlled distribution system of this drug is known as "Rev. Aid ®". In May 2006, the FDA approved THALOMID for the treatment of patients with newly diagnosed multiple myeloma (a form of cancer).

[16] Celgene claims that Health Canada expected it to file a NDS for THALOMID in view of its high profile, the high volume of requests under the SAP and because NOC approval would better ensure safety. In order to obtain such an NOC, Celgene filed what it described as highly sensitive preparatory and confidential information comprised in 180 volumes of data, including pharmacology and pharmacokinetic studies, toxicology studies (including toxicity, carcinogenicity and reproductive/development toxicity studies), clinical pharmacology studies and pivotal clinical trials. As noted by the Judge in his reasons at paragraph 23, it is the strictly confidential nature of this information that motivated Celgene to request that THALOMID be listed on the Register of "Innovative Drugs", (per C.08.004.1(9) of the Regulations).

[17] After hundreds of questions were answered and additional information was provided, an NOC for THALOMID was finally issued on August 4, 2010. At that time, the Minister advised Celgene that THALOMID would not be eligible for data protection because its medicinal ingredient, thalidomide, had been previously approved by the Minister in at least two drugs - KEVADON and TALIMOL.

[18] Having considered detailed submissions by Celgene, the Minister confirmed the decision not to list Celgene's product on the "Innovative Drugs" Register. It is this final decision that was the subject of the application for judicial review before the Judge.

B. Legislative framework for Data Protection

[19] Under subsection 30(3) of the *Food and Drugs Act*, R.S.C. 1985, c. F-27, the Governor in Council is empowered to adopt provisions implementing Canada's international obligations under Article 1711(5) and (6) of *North American Free Trade Agreement Implementation Act* (NAFTA), and Article 39(3) of the *Trade Related Aspects of Intellectual Property Rights Agreement* (TRIPS). These provisions read as follows:

NAFTA	**ALÉNA**
1711. (5) If a Party requires, as a condition for approving the marketing of pharmaceutical or agricultural chemical products that utilize new chemical entities, the submission of undisclosed test or other data necessary to determine whether the use of such products is safe and effective, the Party shall protect against disclosure of the data of persons making such submissions, where the origination of such data involves considerable effort, except where the disclosure is necessary to protect the public or unless steps are taken to ensure that the data is protected against unfair commercial use.	1711. (5) Lorsqu'une Partie subordonne l'approbation de la commercialisation de produits pharmaceutiques ou de produits chimiques pour l'agriculture qui comportent des éléments chimiques nouveaux, à la communication de données non divulguées résultant d'essais ou d'autres données non divulguées nécessaires pour déterminer si l'utilisation de ces produits est sans danger et efficace, cette Partie protégera ces données contre toute divulgation, lorsque l'établissement de ces données demande un effort considérable, sauf si la divulgation est nécessaire pour protéger le public, ou à moins que des mesures ne soient prises pour s'assurer que les données sont protégées contre toute exploitation déloyale dans le commerce.
(6) Each Party shall provide that for data subject to paragraph 5 that are submitted to the Party after the date of entry into force of this Agreement, no person other than the person that submitted them may, without the latter's permission, rely on such data in support of an application for product approval during a reasonable period of time after their submission. For this purpose, a reasonable period shall normally mean	(6) Chacune des Parties prévoira, en ce qui concerne les données visées au paragraphe 5 qui lui sont communiquées après la date d'entrée en vigueur du présent accord, que seule la personne qui les a communiquées peut, sans autorisation de cette dernière à autrui, utiliser ces données à l'appui d'une demande d'approbation de produit au cours d'une période de temps raisonnable suivant la date de leur

not less than five years from the date on which the Party granted approval to the person that produced the data for approval to market its product, taking account of the nature of the data and the person's efforts and expenditures in producing them. Subject to this provision, there shall be no limitation on any Party to implement abbreviated approval procedures for such products on the basis of bioequivalence and bioavailability studies.

communication. On entend généralement par période de temps raisonnable, une période d'au moins cinq années à compter de la date à laquelle la Partie en cause a donné son autorisation à la personne ayant produit les données destinées à faire approuver la commercialisation de son produit, compte tenu de la nature des données, ainsi que des efforts et des frais consentis par cette personne pour les produire. Sous réserve de cette disposition, rien n'empêchera une Partie d'adopter à l'égard de ces produits des procédures d'homologation abrégées fondées sur des études de bioéquivalence et de biodisponibilité.

Trade Related Aspects of Intellectual Property Rights Agreement

Section 7: Protection of Undisclosed Information
Article 39

3. Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.

Accord sur les droits de propriété qui touchent au commerce

Section 7: Protection des renseignements non divulgués
Article 39

3. Lorsqu'ils subordonnent l'approbation de la commercialisation de produits pharmaceutiques ou de produits chimiques pour l'agriculture qui comportent des entités chimiques nouvelles à la communication de données non divulguées résultant d'essais ou d'autres données non divulguées, dont l'établissement demande un effort considérable, les Membres protégeront ces données contre l'exploitation déloyale dans le commerce. En outre, les Membres protégeront ces données contre la divulgation, sauf si cela est nécessaire pour protéger le public, ou à moins que des mesures ne soient prises pour s'assurer que les données sont protégées contre l'exploitation déloyale dans le commerce.

[20] The first set of Data Protection Provisions (DPP) were adopted in 1995 (SOR/95-411, now repealed). They applied as follows:

C.08.004.1. (1) Where a manufacturer files a new drug submission, an abbreviated new drug submission, a supplement to a new drug submission or a supplement to an abbreviated new drug submission for the purpose of establishing the safety and effectiveness of the new drug for which the submission or supplement is filed, and the Minister examines any information or material filed with the Minister, in a new drug submission, by the innovator of a drug that contains a chemical or biological substance not previously approved for sale in Canada as a drug, and the Minister, in support of the manufacturer's submission or supplement, relies on data contained in the information or material filed by the innovator, the Minister shall not issue a notice of compliance in respect of that submission or supplement earlier than five years after the date of issuance to the innovator of the notice of compliance or approval to market that drug, as the case may be, issued on the basis of the information or material filed by the innovator for that drug.

C.08.004.1. (1) Lorsque le fabricant dépose une présentation de drogue nouvelle, une présentation abrégée de drogue nouvelle ou un supplément à l'une de ces présentations en vue de faire déterminer l'innocuité et l'efficacité de la drogue nouvelle qui en est l'objet, et que le ministre examine les renseignements et le matériel présentés, dans une présentation de drogue nouvelle, par l'innovateur d'une drogue contenant une substance chimique ou biologique dont la vente comme drogue n'a pas été préalablement approuvée au Canada et s'appuie sur les données y figurant pour étayer la présentation ou le supplément du fabricant, il ne peut délivrer un avis de conformité à l'égard de cette présentation ou de ce supplément avant l'expiration du délai de cinq ans suivant la date à laquelle est délivré à l'innovateur l'avis de conformité ou l'approbation de commercialiser cette drogue, selon le cas, d'après les renseignements ou le matériel présentés par lui pour cette drogue.

[21] The current version of the DPP in the Regulations were adopted in 2006 and the relevant provision (C.08.04.1(1)) reads in part as follows:

"innovative drug"

"innovative drug" means a drug that contains a medicinal ingredient not previously approved in a drug by the Minister and that is not a variation of a previously approved medicinal ingredient such as a salt, ester, enantiomer, solvate or polymorph. (*drogue innovante*) [My emphasis]

« drogue innovante »

« drogue innovante » S'entend de toute drogue qui contient un ingrédient médicinal non déjà approuvé dans une drogue par le ministre et qui ne constitue pas une variante d'un ingrédient médicinal déjà approuvé tel un changement de sel, d'ester, d'énantiomère, de solvate ou de polymorphe. (*innovative drug*) [Mon souligné]

(2) This section applies to the implementation of Article 1711 of the North American Free Trade Agreement, as defined in the definition "Agreement" in subsection 2(1) of the

(2) Le présent article s'applique à la mise en œuvre de l'article 1711 de l'Accord de libre-échange nord-américain, au sens du terme « Accord » au paragraphe 2(1) de la *Loi de mise en œuvre de*

North American Free Trade Agreement Implementation Act, and of paragraph 3 of Article 39 of the Agreement on Trade-related Aspects of Intellectual Property Rights set out in Annex 1C to the World Trade Organization Agreement, as defined in the definition "Agreement" in subsection 2(1) of the *World Trade Organization Agreement Implementation Act*.

l'Accord de libre-échange nord-américain, et du paragraphe 3 de l'article 39 de l'Accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce figurant à l'annexe 1C de l'Accord sur l'Organisation mondiale du commerce, au sens du terme « Accord » au paragraphe 2(1) de la *Loi de mise en œuvre de l'Accord sur l'Organisation mondiale du commerce*.

(3) If a manufacturer seeks a notice of compliance for a new drug on the basis of a direct or indirect comparison between the new drug and an innovative drug,

(*a*) the manufacturer may not file a new drug submission, a supplement to a new drug submission, an abbreviated new drug submission or a supplement to an abbreviated new drug submission in respect of the new drug before the end of a period of six years after the day on which the first notice of compliance was issued to the innovator in respect of the innovative drug; and

(*b*) the Minister shall not approve that submission or supplement and shall not issue a notice of compliance in respect of the new drug before the end of a period of eight years after the day on which the first notice of compliance was issued to the innovator in respect of the innovative drug.

(3) Lorsque le fabricant demande la délivrance d'un avis de conformité pour une drogue nouvelle sur la base d'une comparaison directe ou indirecte entre celle-ci et la drogue innovante :

a) le fabricant ne peut déposer pour cette drogue nouvelle de présentation de drogue nouvelle, de présentation abrégée de drogue nouvelle ou de supplément à l'une de ces présentations avant l'expiration d'un délai de six ans suivant la date à laquelle le premier avis de conformité a été délivré à l'innovateur pour la drogue innovante;

b) le ministre ne peut approuver une telle présentation ou un tel supplément et ne peut délivrer d'avis de conformité pour cette nouvelle drogue avant l'expiration d'un délai de huit ans suivant la date à laquelle le premier avis de conformité a été délivré à l'innovateur pour la drogue innovante.

(4) The period specified in paragraph (3)(*b*) is lengthened to eight years and six months if

(*a*) the innovator provides the Minister with the description and results of clinical trials relating to the use of the innovative drug in relevant pediatric populations in its first new drug submission for the innovative drug or in any supplement to that submission that is filed within five years after the issuance of the first notice of compliance for that innovative drug; and

(*b*) before the end of a period of six

(4) Le délai prévu à l'alinéa (3)*b*) est porté à huit ans et six mois si, à la fois :

a) l'innovateur fournit au ministre la description et les résultats des essais cliniques concernant l'utilisation de la drogue innovante dans les populations pédiatriques concernées dans sa première présentation de drogue nouvelle à l'égard de la drogue innovante ou dans tout supplément à une telle présentation déposé au cours des cinq années suivant la délivrance du premier avis de conformité à l'égard de cette drogue innovante;

years after the day on which the first notice of compliance was issued to the innovator in respect of the innovative drug, the Minister determines that the clinical trials were designed and conducted for the purpose of increasing knowledge of the use of the innovative drug in those pediatric populations and this knowledge would there-by provide a health benefit to members of those populations.

b) le ministre conclut, avant l'expiration du délai de six ans qui suit la date à laquelle le premier avis de conformité a été délivré à l'innovateur pour la drogue innovante, que les essais cliniques ont été conçus et menés en vue d'élargir les connaissances sur l'utilisation de cette drogue dans les populations pédiatriques visées et que ces connaissances se traduiraient par des avantages pour la santé des membres de celles-ci.

(5) Subsection (3) does not apply if the innovative drug is not being marketed in Canada.

(5) Le paragraphe (3) ne s'applique pas si la drogue innovante n'est pas commercialisée au Canada.

(6) Paragraph (3)(*a*) does not apply to a subsequent manufacturer if the innovator consents to the filing of a new drug submission, a supplement to a new drug submission, an abbreviated new drug submission or a supplement to an abbreviated new drug submission by the subsequent manufacturer before the end of the period of six years specified in that paragraph.

(6) L'alinéa (3)*a*) ne s'applique pas au fabricant ultérieur dans le cas où l'innovateur consent à ce qu'il dépose une présentation de drogue nouvelle, une présentation abrégée de drogue nouvelle ou un supplément à l'une de ces présentations avant l'expiration du délai de six ans prévu à cet alinéa.

(7) Paragraph (3)(*a*) does not apply to a subsequent manufacturer if the manufacturer files an application for authorization to sell its new drug under section C.07.003.

(7) L'alinéa (3)*a*) ne s'applique pas au fabricant ultérieur s'il dépose une demande d'autorisation pour vendre cette drogue nouvelle aux termes de l'article C.07.003.

(8) Paragraph (3)(*b*) does not apply to a subsequent manufacturer if the innovator consents to the issuance of a notice of compliance to the subsequent manufacturer before the end of the period of eight years specified in that paragraph or of eight years and six months specified in subsection (4).

(8) L'alinéa (3)*b*) ne s'applique pas au fabricant ultérieur dans le cas où l'innovateur consent à ce que lui soit délivré un avis de conformité avant l'expiration du délai de huit ans prévu à cet alinéa ou de huit ans et six mois prévu au paragraphe (4).

(9) The Minister shall maintain a register of innovative drugs that includes information relating to the matters specified in subsections (3)

(9) Le ministre tient un registre des drogues innovantes, lequel contient les renseignements relatifs à l'application des

and (4).

paragraphes (3) et (4).

C. The Federal Court Judge's Decision

[22] The Judge accepted the parties' submissions that questions of law before the Minister were to be reviewed on the standard of correctness.

[23] He then proceeded to apply the modern rule of statutory interpretation (paragraphs 26 and 27 of his reasons), noting particularly that as the DPP in the Regulations are intended to implement international treaty obligations. He explained that the said treaties are considered a primary aid to construction, even where there is no ambiguity in the Regulations.

[24] In that respect, he noted that, as discussed in *Apotex Inc., v. Canada (Minister of Health),* 2010 FCA 334 at paragraph 110, the relevant provisions of NAFTA and TRIPS "seek to provide protection to innovators in respect of 'undisclosed tests or other data' that they must provide to government entities in order to obtain approval for their new drugs". These treaties set out a scheme for protection against the unfair commercial use of such undisclosed data, the origination of which involved considerable effort. This is not disputed.

[25] However, the Judge rejected the Minister's position that this international scheme is meant to protect only those products that use "new chemical entities" (In French, "éléments chimiques nouveaux"), and that thalidomide is not a "new chemical entity" as it was approved for marketing and sale in Canada in the 1960s.

[26] At paragraph 33 of his reasons, he said:

> 33. There are a number of flaws with respect to that construction of the DPR [DPP]. First of all, thalidomide was not approved for any use prior to the issuance of the NOC. Indeed, it was included in Schedule "H" and then "F" of the Act and was therefore totally banned in Canada. This is not a case, therefore, where the data was collected for the different use of a drug already approved. The purpose of the DPR [DPP] in requiring that the drug not be previously approved is to ensure a company is not granted data protection for something in previous use and for which no innovation was required. This is made clear by the exclusion from the scope of data protection, in the definition of "innovative drugs", of variations or minor changes to a drug previously approved such as salts, esters, solvates, polymorphs or enantiomers. The Regulatory Impact Analysis Statement explicitly states that these exclusions are aimed at preventing an innovator from seeking additional data protection for a minor change to a drug. [My emphasis]

[27] He also noted at paragraph 35 of his reasons that "Celgene's innovation was to take something that was banned as dangerous and which had not been found to be safe and efficacious and to show it to be a useful, lifesaving drug".

[28] The Judge agreed with Celgene that, to make TRIPS and NAFTA obligations meaningful, the protection of "new chemical entities" must arise when approval is sought for a product containing an entity that does not have approval in a drug in a particular jurisdiction. Thus, a member country could not avoid the obligation to grant protection because the chemical entity in the product has been approved elsewhere or is otherwise known.

[29] Moreover, he went on to say that: "… it would similarly be inconsistent with these treaties to refuse data protection when a chemical entity is put to an entirely new use, on the basis of extensive and genuinely new data ensuring its effectiveness and safety. In the same way as variations of a drug not included in the definition of innovative drug, new uses of previously approved ingredients must be considered on a case-by-case basis to determine how innovative they are and whether the

data supporting them was ‘gathered at considerable cost which is not otherwise publicly available in that assembled form’ ” (Judge’s reasons at paragraph 36).

[30] Although he mentioned Celgene’s argument that an approval under the regulatory regime in place prior to 1963 is not an approval under the DPP, the Judge did not decide the issue, simply noting that this argument reinforces his conclusion that the prior approval of KEVADON and TALIMOL in this case should not stand in the way of data protection for THALOMID.

[31] At paragraph 46 of his reasons, he indicated that this conclusion is based on the following combined facts:

i. The prior approval of thalidomide was short lived and should never have been given at the time;

ii. Thalidomide was effectively banned until Celgene came up with its NDS for THALOMID; and,

iii. The 2010 NOC approval was granted for Celgene’s product on the basis of completely new studies and data.

[32] Lastly, although no evidence was presented in that respect, the Judge indicated that this case was obviously quite an exceptional one, and that his decision should therefore have a limited impact in the foreseeable future.

ANALYSIS

[33] This Court's role is to determine whether the Judge hearing the application for judicial review properly identified and applied the standard of review (*Prairie Acid Rain Coalition v. Canada*, 2006 FCA 31 at paragraph 14; *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23 at paragraph 18).

[34] The Judge applied the correctness standard to the Minister's interpretation of the definition of "innovative drug" in the Regulations (a pure question of law). In *Takeda Canada Inc. v. The Minister of Health*, 2013 FCA 13, this Court held that this is the appropriate standard of review to be applied to such questions.

[35] Whether the Judge correctly applied this standard essentially means that, to allow this appeal, this Court must agree with the Minister's interpretation of "innovative drug" and more particularly of the words "not previously approved in a drug by the Minister". (in French, " non déjà autorisé dans une drogue par le ministre ").

[36] The applicable principles of statutory interpretation are not in dispute. It is trite law that the words of an Act must be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

[37] As mentioned, THALOMID is a "new drug" within the meaning of the Regulations (at section C.08.001). Thus, the Minister's approval must be obtained before it can be sold in Canada. I

note that as Celgene was seeking an approval for a new indication for thalidomide, even if the 1960's approvals had not been withdrawn, THALOMID would still have fallen within the definition of "new drug"and would have been required to file voluminous data obtained as a result of considerable effort and expense.

[38] However, Celgene did not argue before the Minister and the Judge that it should qualify as an "innovative drug" because of the new use or indication for which it submitted its NDS for thalidomide. The parties indicated that the issue of whether a new indication or new use of an approved medicinal ingredient qualifies under the definition of "innovative drug" was not really argued before the Judge. In the circumstances, I agree that the Judge should have refrained from commenting on this question, which has never been the subject of adjudication. The comments at paragraphs 36-38 of his reasons should therefore be given no precedential value. This is especially so considering that: i) the definition of "innovative drug" and the relevant provisions of the treaties aforementioned refer only to the "medicinal ingredient" and the "chemical entity" in a drug, never to its use; and ii) he did not consider clearly relevant passages of the Regulatory Impact Analysis Statements (RIAS) (such as the passage of the RIAS dated October 5, 2006 cited and discussed at paragraphs 127 and 128 of Dawson J.A.'s reasons in *Takeda*, above, and the RIAS, dated October 5, 2004, Canada Gazette, Part II, Volume 138, No. 50 Page 3713, Note 1). Also, the periods of exclusivity granted for a "new indication or use" in the United States and the European Union are less than the minimum period set out in the relevant treaties. This would suggest that these parties understand that the provisions of these treaties do not cover such cases. All this militates against the view expressed by the Judge.

[39] It is not necessary to say more in this respect as this appeal does not require it.

[40] Turning back to the true question before us – Is thalidomide a "medicinal ingredient not previously approved in a drug by the Minister"?

[41] Here the dispute is not as in *Teva*, above, where the issue was what type of approval under the Regulations is covered by these words. Rather, what Celgene is asking the Court to say is that the word "approved" refers to the status of a medicinal ingredient in a drug at the time a NDS is submitted by the innovator. In this respect, Celgene focussed on thalidomide's status as a prohibited drug, i.e. a banned drug at the relevant time. It did not argue that this drug was never approved (i.e., that the approval was null *ab initio*). That said, the interpretation proposed by Celgene would necessarily apply to any drug in respect of which an approval (NOC) has been withdrawn because of a Minister's decision or even abandoned voluntarily before the filing of a second NDS for this drug.

[42] In the Minister's view, the word "approved" can only refer to the fact that an approval (more particularly a NOC) has been issued by the Minister. In any event, the Minister says that the word "approved" is qualified by the adverb "previously" which clearly support its view that one must look at an action which took place in the past rather than at the current status of the drug.

[43] "Previously" is defined in the *Oxford English Dictionary* (2d ed. (Oxford: Clarendon Press, 1989), Volume XII) as an adverb meaning "at a previous or preceding time, before, beforehand, antecently". The word "déjà" in French has more a complex definition. Its meaning depends on the

context, but it has only one common meaning with "previously". In that context, it is defined in the *Le Nouveau Petit Robert* (Paris : Dictionnaires Le Robert, 2002) as "auparavant, avant (cf., Une première fois*)".

[44] These words do not lend themselves easily to the construction proposed by Celgene, which in fact would require to construe "previously" as meaning "currently" or to read in the words "and currently" before the word "approved" in the definition.

[45] Still, Celgene submits that the Court should adopt its view and effectively read down the definition because its interpretation is more in line with the primary purpose and object of the scheme of the DPP and the relevant treaty provisions, which is to promote innovation and protect innovators against unfair use of their confidential data gathered at great cost. I do not accept that the purpose and object of the relevant provisions of NAFTA and TRIPS is as wide as Celgene suggests. In my view, the protection accorded to the confidential data discussed above is limited to certain innovations only.

[46] Recognizing that the legislator clearly intended to avoid any duplication of the market exclusivity period provided for in the DPP, Celgene argues that in this case, there would be no such duplication. That may well true in this case, but I cannot conclude that it would be true for all cases that could be affected by the interpretation proposed by Celgene.

[47] The signatories of these treaties have agreed to grant the minimum protections set out therein only in the context of approvals for the marketing of pharmaceutical and agricultural

products which utilize "new chemical entities". Celgene submits that this limitation does not apply in Canada because the Regulations make no reference to "new chemical entities" (Respondent's memorandum, at paragraph 61). I do not agree.

[48] In my view, the words "medicinal ingredient" as used in the Regulations are the equivalent of "chemical entity", as are the words "active ingredient" and "active moiety" in the American Regulations, "active substance" in the European Regulations, and "active component" in Australia. It is quite usual for the words of a treaty to be harmonized with the language used in one's own regulatory scheme.

[49] This view is supported by the following note in the RIAS dated October 5, 2004, explaining the use of the word "medicinal ingredient":

> Although the NAFTA and TRIPS agreements use the term "new chemical entity", "new medicinal ingredient" is used here to correspond to the terminology already used in the *Food and Drugs Regulations*.

[50] The word "new" (or "nouveau" in French) is defined in the *Canadian Oxford Dictionary* (Don Mills: Oxford University Press, 2001) as:

> a) of recent origin or arrival;
>
> b) made, invented, discovered, acquired or experienced recently or now for the first time.

[51] The parties agree that, read in the context of a provision dealing with approval of pharmaceutical product for marketing in the territory of a signatory state, "new" does not mean "unknown", "made", "invented" or "discovered recently". In my view, it can reasonably be

understood to mean submitted for approval for the first time to the appropriate authority in the territory of a signatory state.

[52] No evidence or foreign case law has been submitted to show that such an interpretation would be at odds with the general understanding of the signatories. Nor was any such evidence or case law produced to establish that other parties to these treaties consider banned drugs or drugs for which a previous approval for marketing has been withdrawn as "new" within the meaning of the provision under review.

[53] When Celgene sought an approval for THALOMID in 1998 in the U.S., thalidomide qualified as a new active substance as it had never been approved in 1960s in that country.

[54] My understanding of the relevant treaties is in line with the construction proposed by the Minister. It also reads harmoniously with subsections 3 (*a*) and (*b*) of the DPP, which provide that the period of exclusivity starts on "the day on which the first NOC was issued to the innovator".

[55] The fact that Celgene had to submit a considerable amount of confidential data gathered at great cost does not, in and of itself, justify stretching the language of the definition of "innovative drug". It is only one of two necessary pre-requisites for the application of the treaties' provisions.

[56] Parliament had the power to extend the protection granted under the DPP to other "new drugs" as defined in the Regulations, which also require the filing of similarly substantial

confidential data. From the definition adopted, in my view, it is clear that the legislator chose not to do so.

[57] That is not to say that I assume that the legislator had banned drugs in mind when he made his choice and adopted the definition of "innovative drug" in the Regulations.

[58] At the hearing, the parties confirmed that there was no evidence as to how many drugs have been banned throughout the years and how many NOCs have been withdrawn or abandoned.

[59] It is obvious that the Judge was troubled by what he perceived as a great injustice. He said at paragraph 42:

> It is equally clear that safety and effectiveness are the main considerations with respect to a drug approved for public use. This is indeed the position that was taken by the Minister in *Teva Canada Limited*, above at para 21. Would it then be fair to say that a drug, the approval of which has been withdrawn for safety reasons, should nevertheless be considered as having been previously approved? In my view, such a finding would be entirely perverse.

[60] Still, it appears that he was not prepared to simply exclude from the definition, all drugs in respect of which an NOC had been withdrawn. As noted, in paragraph 28 above, he justified his conclusion on the basis of combined facts, setting stricter parameters to the application of the exclusion.

[61] Although I recognize the exceptional history of thalidomide, I do not see any cogent legal basis to create an exception even using the strict parameters set out by the Judge.

[62] The change in the regulatory regime that occurred in 1963 may have been major, but the issue with thalidomide was not in respect of its efficacy, which was the most important change to the requirements introduced in 1963 [SOR/63-386]. How many other changes in the regulatory requirements throughout the years since then could be argued to be significant enough to warrant another exception to the rule?

[63] Should Courts have to inquire as to why a NOC was suspended or withdrawn? Should a drug be treated differently depending on whether its NOC was withdrawn because it was based on inaccurate or even fraudulent data, as opposed to an alleged error by the regulatory authority of the time?

[64] What if a drug is banned after the innovator enjoyed six months of exclusivity on the market before the revocation of its NOC? Should it be treated in the same way as a banned drug that enjoyed one, two or three years of market exclusivity?

[65] If I were to read the words "and currently" into the DPP, it could well open the door to all kinds of unintended scenarios.

[66] Celgene insisted before us that "facts do matter". I agree, but as the adage goes "hard facts often make bad law".

[67] I would allow this appeal with costs. I would set aside the judgment of the Federal Court and, rendering the judgment which ought to have been rendered, I would dismiss the application for judicial review with costs.

"Johanne Gauthier"

J.A.

« I agree
K. Sharlow”

NADON J.A. (Dissenting)

[68] I have carefully reviewed the reasons of my colleague Gauthier J.A. and, with respect, I cannot agree with her disposition of the appeal. I would dismiss the appeal and affirm the judgment of de Montigny J. in its result.

[69] This appeal is about the interpretation of the phrase "previously approved" in the definition of an "innovative drug", as defined in subsection C.08.004.1(1) of the *Food and Drug Regulations*, C.R.C. c. 870 ("the *Regulations*"), and whether that phrase should encompass a medicinal ingredient that briefly satisfied Canadian regulatory requirements before its approval was revoked. Gauthier J.A. concludes that the fact that the medicinal ingredient thalidomide once received the regulatory green light in Canada means that it was previously approved for the purposes of the *Regulations*, despite the outright ban that quickly replaced that approval and effectively persisted for 33 years. In her view, courts should not inquire into why a notice of compliance (NOC) was suspended or revoked, but should strictly construe the phrase "previously approved". Further, my colleague sees the contrary interpretation as leading to any number of unintended scenarios. I do not agree.

[70] The 1962 legislative response to the thalidomide tragedy introduced a new schedule to the *Food and Drugs Act*, R.S.C. 1985, c. F-27 ("the *Act*") to expressly prohibit the sale of thalidomide. This legislation, and its successors, have made thalidomide both generally unavailable in Canada and unavailable to serve as a Canadian reference product for drug manufacturers. Accordingly, thalidomide was unable to appropriately occupy the space carved out for an "innovative drug" within the overall scheme of the *Regulations*. The key fact that the Minister of Health

communicated an expectation that Celgene should submit a New Drug Submission (NDS) to obtain regulatory approval, as opposed to an Abbreviated New Drug Submission (ANDS), belies an underlying belief that thalidomide was, although not strictly innovative, best suited to occupy the space set out for an "innovative drug" within the *Regulations*. In Gauthier J.A.'s opinion, interpreting the term "previously" to mean "currently" inappropriately stretches the meaning of the term and could lead to inadvertent consequences. Yet, as I will demonstrate below, concluding that thalidomide was indeed previously approved is at odds with the manner in which the *Regulations* prescribes roles for innovative and generic drugs.

[71] Considering the 1960 and 1961 approvals of KEVADON and TALIMOL, respectively, as sufficient to bar thalidomide from achieving innovative drug status in Canada disregards the intention of the *Regulations*. The Patented Medicine (Notice of Compliance) regime demarcates separate roles for innovative and generic drugs, and their manufacturers. Drugs are either innovative—drugs containing medicinal ingredients or indications appearing in the Canadian market for the first time, or generic—versions of innovative drugs made by non-research based companies, which achieve approval through an abbreviated compliance mechanism by demonstrating bioequivalence to the innovative drug. Since thalidomide was not on the Canadian market prior to its reintroduction by Celgene, and therefore not available to serve as a reference product for a generic manufacturer, it follows that the more appropriate space for thalidomide to occupy is that of an innovative drug. It is not, as the Minister suggests, most appropriate to conclude that it should occupy neither.

[72] Moreover, the phrase "previously approved" cannot be intended to apply as suggested by Gauthier J.A. or the Minister of Health, *i.e.*, because the drug was once allowed to be sold in Canada, it remains previously approved even after its sale was disallowed. This view of the phrase leads to an incoherent result. After being removed from the market by legislative decree in 1962, thalidomide was not "previously approved" by either a common sense understanding of the term, or by the definition offered in previous case law. The approval was revoked. For all intents and purposes, the manner in which thalidomide has been treated has amounted to a nullification of any previous approval. Accordingly, it should be considered to meet the definition of an "innovative drug" and be entitled to data protection.

[73] In these reasons, I begin by briefly discussing how the legislative treatment of thalidomide has prevented its use in Canada since 1962. I then survey relevant case law from this Court and the Federal Court, discussing other judicial interpretations of the phrase "previously approved" and how this interpretation fits into the innovative drug regime. I depart from the contextual approach of de Montigny J. (the judge) to more explicitly consider whether the revocation of thalidomide's ministerial approval amounts to a nullification and conclude that it does. Finally, I address the argument of whether the changes to Canada's drug approval regulations, which were precipitated by the thalidomide tragedy itself, impact whether a drug approved under the 1955 *Regulations* should still be considered approved under the modern scheme. I conclude that this does not matter: the withdrawal of the approval is sufficient to determine that thalidomide should not be considered previously approved. This analysis leads me to the conclusion that the appeal should be dismissed.

a. Legislative History of Thalidomide

[74] Gauthier J.A. surveys the legislative history at paragraphs 3 – 18 of her reasons. This history demonstrates that various legislative mechanisms were in place to prohibit use of thalidomide in Canada from 1962 until 1984. As indicated by the letter from the Minister of Health my colleague quotes at paragraph 6 of her reasons, the 1962 withdrawal caused thalidomide to revert to the status of a new drug. The tragic circumstances that accompanied the use of thalidomide also provided the impetus for extraordinary measures to be taken in the House of Commons: the *Act* was amended with a new schedule that expressly prohibited the use of thalidomide in Canada. Illustrating the deeply felt effects of thalidomide in Canada, the Respondent quotes from the member from Simcoe East, Mr. P.B. Rynard from House of Commons debate on October 26, 1962 as saying the following:

> Thalidomide is no longer the name of a drug; it is the name of a tragedy that forces one to think of the accidental deaths of hundreds of children across Canada every year.

[75] Parliament's many legislative responses over the years also demonstrate the unique situation presented by thalidomide. It was the only medicinal ingredient to ever be expressly prohibited alongside various illegal street drugs; it, at times, received its very own sections and schedules within the *Act*; and it persisted within the *Act* even after dramatic overhauls further modified the administration of restricted substances—relegating those street drugs that were previously considered alongside it to other pieces of legislation.

[76] Even more importantly, the prohibition was consistent and complete. There were no gaps in this legislative scheme and no opportunities for manufacturers to return thalidomide to the Canadian

marketplace. Before us, the Appellant suggested that after thalidomide was removed from Schedule F in 1984, it was no longer expressly prohibited in Canada. Neither party made submissions on why thalidomide was taken out of the *Act* or where Health Canada came to see its place within the larger regulatory scheme. Regardless, the Special Access Programme (SAP), further described below, was already in place by 1984. Therefore, thalidomide would have been theoretically available through SAP since its express prohibitions were removed. This means there has always been some method of regulating thalidomide within the existing scheme. THALOMID was first made available through the SAP in 1995. By that time, it had been absent from the Canadian market for 33 years.

[77] Because thalidomide reverted to the status of a "new drug" with the 1962 withdrawal, it would nonetheless have been unavailable for doctors to generally prescribe or to serve as a Canadian reference product for a generic manufacturer. In order to be generally prescribed by physicians or available other than through the SAP, thalidomide would have required the submission of an NDS and to receive the corresponding approvals. Moreover, physicians would not have been particularly interested in prescribing thalidomide until its therapeutic value was once again demonstrated. It was only with the research efforts of Celgene in the early 1990s that thalidomide became a viable treatment option for ailments including severe erythema nodosum leprosum (ENL) and multiple myeloma. As my colleague mentions, THALOMID was approved in the United States for the treatment of ENL in 1998. As thalidomide had never before been approved for use in the United States, no similar situation arose.

[78] I now turn my attention to the access through the SAP and what use of this programme means for the interpretation of the phrase "previously approved."

B. The Meaning of Previously Approved

[79] Since the amendments to the *Regulations*, only a few cases have dealt with the concept of an innovative drug and the appropriate interpretation of its definition. Fewer still specifically address the meaning of the phrase "previously approved." However, in *Teva Canada Ltd. v. The Minister of Health and Sanofi-Aventis Canada Inc.*, 2012 FCA 106 (*Teva*), this Court did consider the meaning of the term "previously approved" in the definition of an "innovative drug", albeit in different circumstances. *Teva* had contested the Minister's decision to list the drug Eloxatin on the register of innovative drugs and the corresponding grant of data protection that accompanied it. The key question was whether thousands of ministerial authorizations to use Eloxatin for emergency treatment under the SAP constituted previous approval within the scope of the *Regulations*. If these authorizations were considered tantamount to previous approval, Eloxatin would not be entitled to receive data protection under the *Regulations*.

[80] This Court affirmed the decision of the Federal Court and concluded that Eloxatin was indeed entitled to data protection: the uses permitted under the SAP did not amount to previous approval of the drug under the *Regulations*. For a unanimous court, Stratas J.A. explained the architecture and wording of the *Regulations* and how this interpretation was consistent with Canada's treaty obligations. The appeal was dismissed.

[81] *Teva* illustrates two important points. First, it delineates how the SAP fits into the scheme of the *Regulations*. Stratas J.A. describes the programme as follows:

> [25] The Special Access Programme is different. It allows for the use of certain drugs despite the absence of data and studies demonstrating the safety and efficacy of the drug.

[26]The Programme is set out in sections C.08.010 and C.08.011 of the Regulations under the heading "Sale of New Drug for Emergency Treatment."

[27] This Court has described the Special Access Programme in the following way:

> [4] … [T]he Director (Assistant Deputy Minister, Health Products and Food Branch, Health Canada) may authorize the sale of a new drug to a physician under the Special Access Programme ("SAP") for the emergency treatment of a patient.
>
> ….
>
> [10] When requesting Health Canada for an authorization under the SAP, a physician must: (i) describe the patient's medical condition; (ii) explain why the medicine is the best choice for treating the condition; and (iii) provide data on the use, safety and efficacy of the medicine requested. If granted, an SAP authorization authorizes, but does not require, a manufacturer to sell a specified quantity of the medicine to the requesting physician for the emergency treatment of a specified condition of a named patient under the care of the physician. The physician must report to Health Canada on the use of the medicine, including any adverse effects.
>
> [11] SAP authorizations…are normally granted for serious or life-threatening conditions when conventional treatments have proved ineffective or are not suitable for the particular patient. Typically, medicines authorized under the SAP are treatments of last resort and are not subject to the same level of scrutiny for safety and efficacy as medicines for which an NOC has been issued. Nonetheless, Health Canada reviews the SAP request and any other available data on the new medicine in order to "manage the risk" of its use.

See *Hospira Healthcare Corp. v. Canada (Attorney General),* 2010 FCA 345 (CanLII), 2010 FCA 345; see also *Canada (Attorney General) v. Celgene Corporation*, 2009 FCA 378 (CanLII), 2009 FCA 378, aff'd 2011 SCC 1 (CanLII), 2011 SCC 1, [2011] S.C.R. 3.

[28] Drugs available under the Special Access Programme are not founded upon data and studies that, in the Minister's view, have established safety and effectiveness. Rather, they are made available in emergency situations as a treatment of last resort where conventional treatments have failed or are unavailable. As this Court has already held, sales under the Special Access Programme alone are not evidence of a determination by the Minister of the safety and efficacy of a drug: *Hospira*, supra at paragraph 6. Indeed, it is theoretically possible that drugs available under the Special Access Programme are not entirely safe or effective, but, owing to the grievous circumstances of the patient, they may have some upside and are worth the

> risk. Authorizations under the Special Access Programme are best seen as compassionate permissions, not as approvals for the drug.

[82] This understanding of the SAP demonstrates that the drugs being accessed through the programme cannot be considered to be approved for use in Canada. These drugs do not have an NOC and they have not received the scrutiny regarding safety and efficacy that is associated with acquiring one. It follows that since thalidomide was being accessed through the SAP, it was not approved for use in Canada. The necessary implication is it cannot be "previously approved." A common sense interpretation of the phrase cannot lead to the conclusion that a one-time approval, quickly revoked and replaced with a prohibition that has remained consistently in force since 1962 is sufficient to be called "previous approval."

[83] Additionally, this supports the conclusion that thalidomide, after being found to be unsafe, can no longer be considered as having been "previously approved" for an approval process based on safety. Since its therapeutic use became known in the 1990s, thalidomide has only been available through the SAP. As indicated in *Teva*, it is "theoretically possible" that drugs under the SAP are "not entirely safe or effective." In this situation, thalidomide had definitively found to be unsafe in 1962 and had not gone through additional regulatory approvals necessary to reverse that finding.

[84] Second, *Teva* is helpful in defining what "previously approved" means in the context of the *Regulations* as a codification of Canada's treaty obligations under the *North American Free Trade Agreement* and the *Trade Related Aspects of Intellectual Property Rights Agreement*. This is instructive, particularly since the Appellant makes arguments about how section C.08.004.1 should be read based on Canada's treaty obligations. The Appellant focuses on how data protection is limited to new chemical entities in the treaties and how the Governor in Council subsequently integrated this concept into Canadian law through its definition of "innovative drug." The Respondent replies that the spirit of the data protection provisions in NAFTA and TRIPS is to provide protection for data that is gathered through considerable effort and to guard against its unfair commercial use. Thus, the data set produced on thalidomide is captured by this purpose. At paragraph 42 of her reasons, Gauthier J.A. does not accept that the object and purpose of these provisions is as broad as the Respondent suggests.

[85] In my opinion, however, Gauthier J.A.'s treatment of international instruments is ultimately unhelpful. Quite simply, this case turns on whether thalidomide can be considered to be previously approved. It is that phrase that should be the focus of our attention. Stratas J.A. addresses very similar submissions in the *Teva* decision:

> [36] As mentioned in paragraph 16, above, Teva emphasizes that the treaty provisions require consideration of whether the drug contains a new chemical entity, whether the drug submission contains undisclosed data necessary to determine safety and efficacy, and whether the data involved considerable effort. That may be true, but that does not shed direct light on the meaning of "previously approved" in subsection C.08.004.1(1) of the *Regulations*.
>
> [37] Of more relevance to the meaning of "previously approved" is the repeated mention in these treaty provisions of the concept of marketing approval or, as Teva puts it, market authorization. Article 1171, paragraphs 5 and 6 of the *North American Free Trade Agreement* obligate Canada to protect data necessary for "approving of marketing" of pharmaceutical products for at least five years from when Canada granted "approval to the person that produced the data for approval to market its product." Article 39, paragraph 3 of the *Trade Related Aspects of*

> *Intellectual Property Rights Agreement* similarly refers to data required "as a condition of approving the marketing of pharmaceutical" products. In Canada, market approval under the *Regulations* means the issuance of a notice of compliance and a drug information number.
>
> [38] Given that the definition of "innovative drug" in subsection C.08.004.1(1) of the *Regulations* was intended to implement these treaty provisions, "previously approved" in subsection C.08.004.1(1) must mean a previous marketing approval, *i.e.*, the previous issuance of a notice of compliance and a drug information number. If someone has previously received a notice of compliance and a drug identification number for a particular drug, providing that person with data protection would go beyond the scope of the treaty provisions. Accordingly, the definition of "innovative drug" in subsection C.08.004.1(1) does not include drugs that have been "previously approved."

[86] Based on this reasoning, the fact that thalidomide's NOC was revoked supports the conclusion that it should not be held to have been previously approved. Without its NOC, thalidomide is unable to satisfy the requirements for market approval in Canada. It is impossible to accept that thalidomide has nonetheless been previously approved without having market approval.

[87] At paragraph 89 of its submissions, the Respondent argues that the *Teva* case stands for the proposition that approval by the Minister is a two-step process that includes determinations of both safety and effectiveness. In this view, a finding by the Minister that a drug is both safe and effective is a condition precedent to the granting of market approval. The Respondent therefore argues that it is inconsistent to deny data protection to THALOMID because KEVADON and TALIMOL were specifically found to be unsafe. This determination leaves the condition precedent unsatisfied.

[88] While this argument may overstate how the Minister's authorization operates within the regime, it does illustrate an important difference between the current regulatory regime and the regime that was in place when approvals were granted to KEVADON and TALIMOL. In 1960, some of the requirements that a drug now must meet in order to be permissible in Canada were

absent from the regulatory scheme. As discussed below, approvals under previous versions of regulations generally remain in force unless expressly contrary direction is provided. Nonetheless, I am unable to accept that the very drug that provided the impetus to change the *Regulations* could now be denied data protection by a decades-old approval that was swiftly rescinded. It cannot be that when thalidomide was removed from the Canadian market, with much fanfare, it could still have been considered as having been "previously approved."

[89] Therefore, the question to ask is not whether the change in scheme negates the previous approval, but instead whether the 1962 withdrawal constituted an altogether nullification of regulatory approval, such that thalidomide could never be considered "previously approved." At paragraph 41 of his reasons, the judge declines to comment on whether the prior approvals were nullified. He writes:

> [41] I do not think it necessary to determine, for the purposes of this application for judicial review, whether the withdrawal from the market of KEVADON and TALIMOL amounted to the nullification of Health Canada's prior approvals of thalidomide.

[90] This determination may not have been required for the contextual, purposive approach taken by the judge, however, determining whether it was nullified is paramount for the determination of whether thalidomide remains "previously approved" in the context of the definition of an innovative drug. In my view, the combination of the above legislative history and the manner in which the SAP functions is sufficient evidence to conclude that the steps taken by the Minister and Parliament in 1962 nullified the approval that was once extended to KEVADON and TALIMOL. This conclusion therefore allows data protection to be extended to thalidomide: the "previously approved" condition in the definition of innovative drug has not been met.

[91] Regardless, the judge goes on to use similar rationale in the context of his purposive approach. He is alive to the key issue involving Canadian reference products: the *Regulations* carve out a specific home for new drugs as acting as the comparator for subsequent generics. The NDS/ANDS scheme reflects these dual roles. The fact that thalidomide was unavailable to serve as a reference product is important as the Respondent did not have any other manner of getting its drug approved in Canada. It had no comparator to demonstrate bioequivalence with: it had to start from scratch and create a data set to prove to the Minister that thalidomide was safe and effective. Acknowledging this fact, the judge writes:

> [42] It is equally clear that safety and effectiveness are the main considerations with respect to a drug approved for public use. This is indeed the position that was taken by the Minister in *Teva Canada Limited*, above at para 21. Would it then be fair to say that a drug, the approval of which has been withdrawn for safety reasons, should nevertheless be considered as having been previously approved? In my view, such a finding would be entirely perverse. It is apparent that the approvals should never have been granted in view of the absence of data relating to the severe deleterious effects of the drug. This is precisely why KEVADON and TALIMOL could not be considered as "Canadian reference products" for the purpose of an ANDS. Even if these products were not voided but only withdrawn from sale, it remains that Canadians could not benefit from the discovery and development of thalidomide unless and until new medicines could be approved on the basis of new information and data demonstrating their safety and efficacy.

[92] The paragraph he cites from *Teva* states the following:

> [21] As for drug identification numbers, no manufacturer may sell a drug in dosage form unless one has been assigned: *Regulations* at subsection C.01.014(1). A drug identification number is an eight-digit numerical code that identifies drug product characteristics including manufacturer, brand name, medicinal ingredient, strength of the medicinal ingredient, pharmaceutical form, and route of administration. Through the drug identification number, a drug can readily be tracked or recalled in the event of an adverse drug reaction in the population.

[93] The Appellant disputes the argument respecting Canadian reference products. At paragraph 47 of her submissions, she argues that whether something can serve as a reference product is not important for the definition of an innovative drug, because not all new drugs are innovative drugs.

The Appellant goes on to argue, at paragraph 49, that the determination that thalidomide cannot serve as a Canadian reference product is separate from the definition of innovative drug. The Appellant invokes the drug DEXILANT from the case *Takeda Canada Inc. v. The Minister of Health et al.*, 2011 FC 1444 (*Takeda*) and suggests that there is no reason that it could not serve as a reference product, despite not receiving data protection.

[94] In my respectful opinion, this approach is unhelpful in the instant case. While reference products and innovative drugs are separate definitions within the *Regulations*, they are necessarily related. Because there was no available drug to serve as a reference, the Respondent had to submit an NDS to obtain approval for thalidomide. Indeed, the Appellant specifically requested it and the Respondent undertook to produce 180 volumes of data in order to satisfy the request. The absence of a reference product supports the view that there is no prior approval, justifies the way in which the Respondent proceeded in this case, and bolsters the rationale for extending data protection.

C. Changes to the Regulatory Framework

[95] The manner in which Canada's regulatory framework has been modified over the past half-century was largely precipitated by the thalidomide tragedy itself. The additional criterion of efficacy was introduced in 1963 in a direct response [SOR/63-386]. Still, the changes in the regulatory process that stemmed from that watershed moment, and further modifications in the intervening years, do not negate the approvals that were given under previous legislative schemes, *i.e.*, drugs that were previously approved for use in Canada are not invalidated merely on the changes in regulatory structure or the inclusion of new conditions precedent. The Respondent has consistently suggested that because the 1963 amendment to the *Regulations* adds the consideration

of efficacy before the granting of a regulatory approval, it marks a bright line between previous schemes and the current one and lessens the value of the approval that thalidomide received under the 1955 version of the *Regulations*.

[96] The Appellant submits that the judge correctly dismissed the Respondent's argument to this effect. The Respondent argues, at paragraph 93 of its memorandum, that the judge never actually made this determination:

> At paragraph 46, he did not make a determination on the point but did acknowledge it as an argument reinforcing the conclusion that the prior approvals should not stand in the way of data protection in this case. This again shows that Justice de Montigny considered a number of factors in applying a purposive interpretation.

[97] The "Related Provisions" addendum to the *Food and Drug Regulations* provides the associated SOR/2006-241 in an effort to clarify any questions around the transition or coming into force of the *Regulations*:

> 2. Section C.08.004.1 of the *Food and Drug Regulations*, as it read immediately before the coming into force of these Regulations, applies to a drug in respect of which a notice of compliance was issued before June 17, 2006.

[98] In my view, while the judge agreed that the general rule is that prior approvals persist irrespective of subsequent legislative changes, he remained alive to the possibility that thalidomide is worthy of being granted an exception to the general rule. This is clear when he writes:

> [45] The Minister is no doubt correct that, generally speaking, the ministerial approval to which a legislative or regulatory provision refers, need not have been made under the current version of that provision. Since there is nothing in the definition of "innovative drug" to suggest that an approval made under an earlier version of the *Regulations* cannot come within the meaning of "approved", all that matters should therefore be that the Minister approved the drug, based on the requirements of the regulatory framework in effect at the time of the determination.

> [46] It is not entirely clear, however, how far this rule should apply when prior approval has been given pursuant to a scheme that has been substantively and significantly modified over the years. Be that as it may, I am of the view that it is, at the very least, an argument reinforcing the conclusion that prior approvals of KEVADON and TALIMOL should not stand in the way of data protection for a later approved product. Submissions filed post-1963 necessarily include new and more extensive data, including data relating to efficacy, as compared to data filed in a pre-1963 submission. This, combined with the fact that 1) prior approval for thalidomide was short-lived and should never have been given at the time, 2) this new drug was effectively banned until Celgene came up with its NDS for THALOMID, and 3) approval was granted for Celgene's product on the basis of completely new studies and data, militate in favour of a declaration that THALOMID is an "innovative drug" and eligible for listing on the Register maintained pursuant to the DPR.

[99] The judge's purposive interpretation is helpful, and concurrent in result, but is not determinative for the disposition of this appeal. The result arrived at by the judge can be affirmed simply with reference to the meaning of "previously approved" in the definition of innovative drug, the manner in which thalidomide has been treated under the SAP, and the jurisprudence of this Court in *Teva*. The withdrawal of the previous approval, in my view, is sufficient to allow THALOMID to receive data protection in accordance with the *Regulations*.

[100] Finally, it should be noted that, on appeal, the Appellant repeatedly raised the argument that allowing the Respondent data protection for THALOMID would set a dangerous precedent, opening the floodgates to any number of other drug companies that would try to attain data protection for drugs with an inconsistent Canadian approval history. This would in turn disadvantage the generic drug industry and the consumer by allowing innovative drug companies to unfairly extend data protection over drugs that had been approved under the former regime. It could, the Appellant argued, have the effect of unduly extending patent rights by employing data protection as an alternative means of granting a monopoly to an innovator.

[101] With respect, the fact situation of thalidomide is highly unusual and unlikely to reoccur. It was the only therapeutic drug listed in Schedule H (later Schedule F) of the *Act* and has a tragic history associated with no other drug. The only other drugs that received similar legislative treatment were street drugs (*e.g.*, LSD, DET, DMT) that would never have received regulatory approval. Any precedent set by this decision is necessarily narrow in scope and does not generate these slippery slope concerns.

Disposition

[102] For all of these reasons, I would dismiss the appeal with costs.

"M. Nadon"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-75-12
(APPEAL FROM A JUDGMENT OF THE FEDERAL COURT (DE MONTIGNY J.) DATED FEBRUARY 6, 2012, DOCKET NO. T-148-11)	
STYLE OF CAUSE:	Minister of Health v. Celgene Inc. et al
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	November 27, 2012
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	SHARLOW J.A.
DISSENTING REASONS BY:	NADON J.A.
DATED:	February 15, 2013

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