Date: 20071129

Dockets: A-22-07
A-25-07

Citation: 2007 FCA 379

CORAM: **LINDEN J.A.**
SHARLOW J.A.
RYER J.A.

Docket: A-22-07

BETWEEN:

APOTEX INC.

Appellant

and

BRISTOL-MYERS SQUIBB COMPANY and
BRISTOL-MYERS SQUIBB CANADA INC.

Respondents

Docket: A-25-07

AND BETWEEN:

BRISTOL-MYERS SQUIBB COMPANY and
BRISTOL-MYERS SQUIBB CANADA INC.

Appellants

and

APOTEX INC.

Respondent

Heard at Toronto, Ontario, on November 26, 2007.
Judgment delivered at Toronto, Ontario, on November 29, 2007.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: LINDEN J.A.
RYER J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] These are two interlocutory appeals in connection with a patent infringement action by Bristol-Myers Squibb Company and Bristol-Myers Squibb Canada Inc. (collectively, "BMS")

against Apotex Inc. Both appeals concern a motion by Apotex for an order compelling certain answers in an examination for discovery. That motion was allowed in part by Prothonotary Aronovitch, whose order was appealed to the Federal Court. Both appeals were dismissed by Justice Martineau (his reasons are not reported). Both parties now appeal the decision of Justice Martineau. For the reasons that follow, I would dismiss both appeals.

Standard of review

[2] As the issues under appeal are not final to the determination of any issue in this case and involve the discretionary order of a prothonotary, Justice Martineau correctly said that he could not intervene unless the order was clearly wrong in the sense that the prothonotary's exercise of discretion was based on an error of law or a misapprehension of the facts. This Court cannot intervene unless Justice Martineau erred in law in applying those principles: *Merck & Co.* v. *Apotex Inc.*, 2005 FCA 488.

Background

[3] The patent in issue is Canadian Patent No. 1,198,436 (the "436 patent") which contains claims for a number of compounds made by a certain process. One of the claimed compounds is nefazodone. Nefazodone is the medicinal ingredient in a drug called Serzone, which was once marketed in Canada by BMS. For a period of time prior to the expiry of the 436 patent, Apotex manufactured and sold in Canada a drug containing nefazodone which was a generic version of the BMS product. It appears that the activity of Apotex in competing (or preparing to compete) with BMS gave rise to the claim of patent infringement.

[4] Apotex denies infringing the 436 patent and also counterclaims on the basis that the 436 patent is invalid. The claim of invalidity is based on a number of grounds, including an allegation of inutility. That is an allegation that the patented invention does not do what the patent specification promises that it will do (see *Consolboard Inc.* v. *MacMillan Bloedel (Saskatchewan) Ltd.*, [1981] 1 S.C.R. 504 at page 525). BMS denies the allegation of inutility.

[5] The allegation of inutility is expressed in two paragraphs in the pleadings of Apotex. The parties refer to this as a fresh allegation because it was added to the pleadings by an amendment. The fresh allegation was prompted by information that Serzone was withdrawn from the market in 2003. BMS says the withdrawal was voluntarily. Apotex says that the withdrawal is connected to a Health Canada notice dated November 10, 2003 referring to a Health Canada safety evaluation that found nefazodone to pose a risk of causing serious liver-related adverse effects.

[6] In early 2005, Prothonotary Aronovitch dealt with a motion by Apotex to require a better affidavit of documents in relation to the fresh allegations of inutility. Apotex was seeking an affidavit that would disclose:

(a) BMS internal memoranda, emails or documentation of any kind relating to the decision of BMS to withdraw its nefazodone product from the market;

(b) any memoranda, emails or other form correspondence between the BMS parties relating to the decision to withdraw their nefazodone product from the market;

(c) clinical data, laboratory results, statistical data or other documents prepared or used by BMS relating to the side effects of nefazodone generally or to the specific effects of its nefazodone product on the liver;

(d) letters, emails or other forms of communication between BMS and Health Canada or the Food and Drug Administration in the U.S. and similar communications between BMS and other regulatory or government authorities; and

(e) any other communications, memoranda or documents which provide information relating to, or insight into, the decision of BMS to withdraw the product from the market, including communications to health authorities, health care professionals, and the public.

[7] By order dated April 4, 2005 (which the parties call the "Further and Better Order"), the Prothonotary granted the motion of Apotex in relation to the third category listed above, and dismissed it in relation to the other four categories. Specifically, the Further and Better Order required further and better affidavits listing:

> . . . all documents in BMS' possession, custody or control, regarding clinical data, laboratory results, statistical data or any other documents prepared or used by [BMS] relating to the side effects of nefazodone generally or to the specific effects of its nefazodone product on the liver.

[8] Apotex appealed the Further and Better Order. That appeal was dismissed by Justice Kelen on October 3, 2005 (2005 FC 1348). His decision was not appealed.

[9] The parties produced additional affidavits of documents pursuant to the Further and Better Order. Based on the affidavits produced by BMS, Apotex conducted a further examination for discovery of a witness for BMS, Dr. Ryan, as it was entitled to do.

[10] Dr. Ryan, on the advice of counsel for BMS, did not answer certain questions. Apotex moved for an order compelling answers. On October 4, 2006, Prothonotary Aronovitch disposed of that motion by allowing it in part. She ordered some questions to be answered, others to be answered only to the extent of producing documents, and others not to be answered.

[11] Both parties appealed the Prothonotary's order. On January 5, 2007, Justice Martineau dismissed both appeals. Both parties now appeal the decision of Justice Martineau.

[12] In the Apotex appeal there are eleven discovery questions remaining in issue. Apotex is seeking an order requiring Dr. Ryan to answer those questions, or to provide an answer in addition to the documents already ordered produced. In the BMS appeal there are six questions remaining in issue (including one that is also in issue in the Apotex appeal). BMS is seeking an order that it need not answer those six questions.

[13] I note parenthetically that BMS did not seek a stay of the Prothonotary's October 4, 2006 order, and that BMS has answered all of the questions that the order required it to answer, including those that are the subject of its appeal. Counsel for BMS said that the purpose of the BMS appeal is to preclude Apotex from using the answers to the disputed questions. No issue was raised as to

whether, if the BMS appeal succeeds, Apotex would necessarily be barred from using the answers or the information contained in the answers. I express no opinion on that point.

Analysis

(1) Preliminary issues

[14] It is convenient to deal with two issues on a preliminary basis. One issue relates to certain *obiter dicta* in the reasons for judgment of Justice Kelen referred to above. The other relates to comments made by the Prothonotary in her October 4, 2006 order about the scope of the Further and Better Order.

(1)(a) The *obiter dicta* of Justice Kelen

[15] In these appeals, both parties referred to statements made by Justice Kelen in his reasons for dismissing the Apotex appeal of the Further and Better Order (2005 FC 1348). Justice Kelen himself characterized those comments as *obiter dicta*. However, Apotex interprets them as a direction as to the documents that would have to be produced if requested in the next round of examinations for discovery. In support of that position, Apotex relies on the fact that Justice Kelen considered success on the appeal to be "divided" even though he dismissed it.

[16] BMS argues that the comments are simply *obiter dicta* with no binding effect on the pre-trial discovery process in this case. BMS relies on the fact that Justice Kelen did not vary the Further and Better Order. Nor did he say that he was making a direction or order relating to the production

of documents requested in the examination for discovery of Dr. Ryan in relation to the documents produced as the result of the Further and Better Order.

[17] In the absence of a clear indication from Justice Kelen that he intended his comments to be anything but *obiter dicta*, I agree with BMS that they cannot be taken as a direction or order.

(1)(b) The Prothonotary's interpretation of the Further and Better Order

[18] The Prothonotary's October 4, 2006 order contains the following comments:

> The contradiction between my Order of April 14, [*sic*] 2005 . . . and the Reasons of Justice Kelen dated October 3, 2005, is more apparent than real. Although I rejected the wholesale production of correspondence, e-mails, etc. relating to regulatory communications, I take the nature of the documentation ordered to be construed broadly to include hard, formal, factual data or information regarding the side effect profile of refazadone [*sic*] including studies, reports, summaries of data and formal submission made to regulatory agencies and directives, or formal requests, from regulatory agencies relating to the side effects of the drug, particularly on the liver (hepatic side effects).

[19] The "Order of April 14" is intended to be a reference to the Further and Better Order, which is quoted above. I repeat the quotation here for ease of reference:

> . . . all documents in BMS' possession, custody or control, regarding clinical data, laboratory results, statistical data or any other documents prepared or used by [BMS] relating to the side effects of nefazodone generally or to the specific effects of its nefazodone product on the liver.

[20] BMS argues that the quoted comments in the Prothonotary's October 4, 2006 order represent an attempt by the Prothonotary to vary or expand the scope of the Further and Better

Order. I do not agree. In my view, the Prothonotary was stating her interpretation of the Further and Better Order so that it would not be contradicted by the order she was about to make. That is also how Justice Martineau read this passage, because he said this at page 4 of his order:

> [the Prothonotary] was mindful of the fact that the *obiter dicta* comments of Justice Kelen that were relied upon by [Apotex] as a basis for expanded discovery and document production were not legally binding while taking care to clarify the scope of authorized discovery in a manner that she felt did not contradict the *ratio decidendi* and fundamental rationale of her previous order for production, which was upheld on appeal.

[21] BMS also argues that, because the Further and Better Order was intended to allow the motion of Apotex only in relation to the third in the list of five categories of documents (see paragraph 6 above), it is wrong to interpret the Further and Better Order as being broad enough to include documents that would have fallen into one of the other four categories.

[22] In my view, BMS proposes an analysis that is too rigid. The five categories of documents listed in paragraph 6 are not airtight compartments. A document could be within more than one category. In such a case, there is room for the exercise of judicial discretion to assess whether it is more reasonable to consider the document to be primarily within the third category (and thus within the scope of the Further and Better Order), or primarily within one of the other categories (and thus a document that has been determined to be irrelevant for the purposes of pre-trial discovery).

[23] The language of the Further and Better Order is broad enough to include documents containing reports on clinical data, laboratory results and statistical data on the effects of Serzone on the liver. It is also broad enough to include such reports that relate to all side effects of nefazodone,

not only hepatic side effects. In addition, it includes documents regarding such reports, which would include internal and external correspondence about such reports. In my view, the Prothonotary's stated interpretation of the Further and Better Order is reasonable.

(2) Relevance

[24] As I understand the remaining issues on appeal, they relate to the question of relevance. There are two aspects of relevance in play. One relates to the determination of the promise of the 436 patent. The other relates more generally to the scope of pre-trial discovery. I will discuss both issues, and then discuss how they apply to the disputed questions in issue.

(2)(a) The promise of the 436 patent

[25] As mentioned above, the parties do not agree on what is promised in the 436 patent. Apotex says that the 436 patent promises that nefazodone causes minimal side effects or no harmful or untoward side effects. BMS says that if there is a promise about the side effects of nefazodone, the promise relates to sedation and blood pressure lowering and not liver function. BMS argues that the Prothonotary should have determined which view is correct, failing which Justice Martineau should have done so. BMS argues that in this appeal, this Court should do what they declined to do.

[26] The Prothonotary first addressed this point in the Further and Better Order. At that time, she said this:

> . . . I am not satisfied that side effects other than [sedation and blood pressure lowering] may not come within the promise of the patent […]. Accordingly, I will partially grant Apotex's request subject to the final determination as to relevance being left to the trial

> judge hearing the merits of the infringement action.

Justice Kelen, in upholding the Further and Better Order, found no error in this approach. The same approach underlies the Prothonotary's October 4, 2006 order, which was confirmed by Justice Martineau in the order now under appeal.

[27] The determination of the promise of the 436 patent is an aspect of patent construction, which is a question of law. Normally, patent construction is an exercise that requires the assistance of expert evidence. However, expert evidence is not always available when a question of patent construction arises in a pre-trial motion. A judge or prothonotary dealing with a pre-trial discovery motion may find it appropriate to determine a point of patent construction without the assistance of expert evidence. That could be the case if, for example, the patent is relatively simple or the parties agree. Generally, however, it is not an error of law for a judge or prothonotary dealing with a pre-trial discovery motion to defer questions of patent construction to the trial judge.

[28] In this case, counsel for BMS may well consider it a relatively simple matter to discern the promise of the 436 patent, and he invited the Court to do so. In my view, however, the specification of the 436 patent uses medical and scientific terms and describes concepts that are best understood with expert assistance. That is particularly so in the context of these appeals, where the parties have such different views on the question of what the promise of the 436 patent is.

[29] I conclude that the Prothonotary made no error in concluding that Apotex's interpretation of the promise of the 436 patent is an arguable point to be determined by the trial judge. Justice Martineau was correct to conclude that he had no basis for intervening with her order in that regard.

(2)(b) Scope of pre-trial discovery

[30] In determining the propriety of a particular question posed in the examination for discovery of Dr. Ryan, the test is whether it is reasonable to conclude that the answer to that question might lead Apotex to a train of enquiry that may either advance its case or damage the case of BMS: *Apotex v. Canada*, 2005 FCA 217. For example, Apotex is entitled to ask any question that could elicit an admission by BMS as to a relevant fact, or that could elicit information about the existence of documents that have not been disclosed but that meet the test of relevance for the purposes of pre-trial discovery, as set out in the Further and Better Order, subject always to the overriding discretion of a prothonotary or judge to control abuses of the discovery process.

[31] In determining whether the test of relevance is met in a particular case, it is necessary to consider the allegation that the questioning party is attempting to establish or refute. In this case, Apotex is attempting to advance its allegation of inutility (based on its interpretation of the promise of the 436 patent as explained above), or to damage the position of BMS that denies the allegation of inutility.

[32] An allegation of inutility encompasses both a legal question (the construction of the patent as to what the patent promises) and a factual question (whether the promise has been kept). With

regard to the factual question, Apotex generally is entitled, for example, to attempt to elicit an admission by BMS that nefazodone causes liver dysfunction, or that BMS has evidence that is capable of proving or disproving that nefazodone causes liver dysfunction.

[33] BMS argues that some of the questions in issue in the Apotex appeal are more relevant to a product liability case, in which the issues of safety and efficacy of nefazodone are in issue, which is clearly not the case here. The difficulty with that argument is that the promise of the 436 patent, as Apotex interprets it, could involve facts similar to those that could be relevant in a product liability case. If Apotex is correct about the interpretation of the promise of the 436 patent (which as explained above is an arguable point), questions about the existence of serious side effects are proper questions because they may elicit relevant facts or admissions. On the other hand, a question that is intended to elicit information as to the opinion of BMS about the scope of the promise of the 426 patent is *prima facie* irrelevant because that opinion says nothing about the correct construction of the patent or whether the promise has been kept.

[34] Between those two extremes are questions that may or may not elicit information that is relevant at the discovery stage. For example, a question that is intended to elicit information about the reaction of BMS to a particular report of side effects may be irrelevant to the question of patent construction, but it may be a proper question to the extent that it may lead to a train of enquiry on the factual question of whether the promise of the patent was kept. However, even if the train of enquiry test is met, an issue may arise as to whether the question will elicit information that is outside the proper scope of the pre-trial discovery. In the case of a dispute as to the propriety of such

a question, there is room for the exercise of judicial discretion to weigh the potential value of the answer as evidence against the risk of abuse of the discovery process. That question may arise in a number of situations, one of them being the situation where, as in this case, a determination has already been made as to the relevance and irrelevance of certain categories of information.

[35] The task of distinguishing proper questions from improper ones requires consideration of the factual and procedural context of the case, informed by an appreciation of the applicable legal principles. The determination made by the judge or prothonotary at first instance will stand if it is reasonable, unless it is based on an error of law.

[36] The procedural history of this case dictates that, for the purposes of pre-trial discovery, any document that falls within the scope of the Further and Better Order is a relevant document. It follows that Apotex is entitled to disclosure of any document "regarding clinical data, laboratory results, statistical data or any other documents prepared or used by [BMS] relating to the side effects of nefazodone generally or to the specific effects of its nefazodone product on the liver." Therefore, to the extent that the Prothonotary's October 4, 2006 order required BMS to produce a document that meets the description in the Further and Better Order, the order must stand.

[37] Apotex argues that, on the same basis, any question asked in the examination for discovery of Dr. Ryan that falls within the scope of the Further and Better Order is also a proper question, and that the Prothonotary and Justice Martineau erred in failing to appreciate that principle. Apotex goes further and says that, although Justice Martineau cited the train of enquiry test, he does not say

whether he considered whether that test was met in relation to the factual aspect of the allegation of inutility, and for that reason it is open to this Court to consider that issue *de novo* (*Infonet Services Corp. v. Matrox Electronic Systems Ltd.*, 2004 FCA 162).

[38] In my view, there is no basis for concluding that Justice Martineau was unaware of the train of enquiry test or that he failed to consider that test in the context of the disputed questions in the Apotex appeal.

[39] The only remaining question is whether an error of law can be discerned from the decisions of Prothonotary Aronovitch in relation to the disputed questions in the Apotex appeal and the BMS appeal. I now turn to that question.

[40] The disputed questions are identified by the number used in the Prothonotary's October 4, 2006 order and by reference to the transcript of the examination of Dr. Ryan. I summarize them:

Reference		**Question**	**Prothonotary's Order**
8	43:17-19	Advise whether Bristol-Myers was receiving adverse reports with respect to potential liver side effects related to the use of Serzone.	Must be answered. (BMS seeks an order that it was not required to answer.)
9	45:12	Advise whether Bristol-Myers retains copies of the adverse reports.	Must be answered. (BMS seeks an order that it was not required to answer.)
11	45:21-23	Advise when the adverse reports were received and provide copies of the reports.	Must be answered to the extent that it requests copies of the reports referred to. (BMS seeks an order that it was not required to answer.)
12	47:20-22	Produce other studies to any other adverse reports, if there are any, regardless of	Must be answered to the extent that it requests reports that

		whether it happened before or after December 7, 2000.	relate to adverse side effects. (BMS seeks an order that it was not required to answer.)
17	48:13-16	After receiving document 27, (a scientific report sponsored by BMS entitled "Antidepressants and Liver Failure", undertaken to assess if nefazodone was associated with increased rate of acute liver failure compared to other antidepressants), was there a continuing basis for concern at Bristol-Myers U.S. that nefazodone had adverse effects different from other antidepressants?	Need not be answered. (Apotex seeks an answer.)
18	49: 14-5, 18-19	If there was a continuing basis for concern, what was the concern? Produce relevant documents associated with that concern.	Need be answered only to the extent that it requests copies of the documents associated with any concerns. (Apotex seeks an answer in addition to the documents.)
	59:21 - 60:7	To inquire of individuals in the U.S. who have information with respect to how the decision was made with respect to nefazodone and to produce documentation relating to the side effects of nefazodone on the liver and other side effects which may have led to the decision to not sell the product in the U.S.	Need only be answered insofar as it relates to the production of studies, reports, summaries of data and formal submissions made to or received from regulatory agencies in respect of side effects. (Apotex seeks an answer in addition to the documents.)
22	66:4-7	Advise if Bristol-Myers Pharmaceutical Institute (the organization within BMS that deals with drug discovery and development) retains data of the functions it performs.	Need not be answered. (Apotex seeks an answer.)
67	70:18-22	In regard to BMS U.S. communicating with the FDA about the withdrawal of Serzone, advise if there were any discussions with respect to the liver and side effects.	Need not be answered. However, if there was a formal submission to or from the FDA which refers to documents that contain factual information or summary data in connection with adverse side effects, the documentation must be produced. (Apotex seeks an answer in addition to the documents.)q
31	72:17-73:19	Advise if anyone at Bristol-Myers Squibb U.S. was aware of the 53 adverse reports that were recorded in Sweden and mentioned in a WHO adverse reaction newsletter, and if so, advise what action, in	Need not be answered. If, however, any BMS further action resulted in a study or report on hepatic side effects, they are to

		any, Bristol-Myers took in response to these.	be produced. (Apotex seeks an answer in addition to the documents.)
33	75:7-14	To make enquiries of people in the adverse reaction group or the Phase 4 clinical group if they ever received a copy of Report 19 from the WHO. To advise if they [BMS] were aware of the cases between 1995 and 1997 that are not referred to in the report and to advise what they did, if anything, about the adverse reactions.	Need not be answered. If, however, any BMS further action resulted in a study or report on hepatic side effects, they are to be produced. (Apotex seeks an answer in addition to the documents.)
45	81:9-18	With respect to the recommendation in the last sentence at the end of the article relating to Nefazodone Induced Critical Liver Failure, to confirm whether anyone at Bristol-Myers did anything about the recommendation that treatment with nefazodone should be "used diligently and patients monitored closely", and if so, to advise what was done.	Need not be answered. If, however, any BMS further action resulted in a study or report on hepatic side effects, they are to be produced. (Apotex seeks an answer in addition to the documents.)
47	84:11-13	With respect to the minutes of a meeting of New Zealand's Adverse Reactions Committee, advise if Bristol-Myers took or did anything regarding the statement made in respect of the rate of hepatic reaction with nefazodone.	Need not be answered. If, however, any BMS further action resulted in a study or report on hepatic side effects, they are to be produced. (Apotex seeks an answer in addition to the documents.)
59	92:11-12	With respect to the letter dated June 20, 2001 from BMS and Linson Pharmaceutical Inc. to health care professionals referring to 109 serious hepatic adverse events in temporal association with nefazodone, advise what action, if any, was taken by Bristol-Myers when they became aware of these reports.	Need not be answered. If, however, any BMS further action resulted in a study or report on hepatic side effects, they are to be produced. (Apotex seeks an answer in addition to the documents.)
63	97:3-9	Produce exchange of all correspondence between Bristol-Myers and the Swedish Medical Products Agency regarding requirements to include obligatory monitoring of liver enzymes of patients taking nefazodone on its labelling.	To be answered to the extent monitoring relates to side effects. (BMS seeks an order that it was not required to answer.)
64	98:3-6	Advise what information Bristol-Myers has with respect to the reported case of liver damage to patients in Sweden either by way of facts or documents.	Must be answered insofar as it requests the production of the documentation referred to therein. (Apotex seeks an answer in addition to the documents. BMS seeks an order that it was not required to answer.)

[41] I will deal first with the BMS appeal. The six disputed questions in that appeal are items 8, 9, 11, 12, 63 and 64. Having reviewed the record, I conclude that it was reasonable for the Prothonotary to conclude that each of those questions will result in the production of documents that fall within the scope of the Further and Better Order. It follows that the Prothonotary did not err in law in requiring those questions to be answered.

[42] The eleven disputed questions in the Apotex appeal are items 17, 18, 22, 30, 31, 33, 45, 47, 59, 64 and 67. The Prothonotary concluded that the questions in items 17 and 22 need not be answered, and that the other disputed questions were to be answered only insofar as they requested certain documents. In my view, each of these questions involves similar issues and lead to the same disposition. I will discuss item 17 only. The same analysis applies to all of the remaining questions.

[43] Item 17 asks whether BMS had “a continuing basis for concern” about certain studies. Apotex argues that this question could elicit an answer that could reveal whether the adverse effects referred to in the studies represented a defect in the invention as claimed. BMS argues that the question as posed could only elicit an opinion of BMS that is irrelevant to the allegation of inutility.

[44] The difficulty with the position of BMS is that it assumes that the only aspect of the inutility allegation is the question of patent construction. As explained above, there is also a factual aspect of the inutility allegation of Apotex that permits factual questions about the existence of side effects. Those questions are not necessarily answered fully by clinical studies and other hard data alone. The

opinions, concerns and actions of BMS may also be relevant, in that they may lead to a train of enquiry about those factual questions.

[45] However, the position of Apotex also presents a difficulty because it discounts the Further and Better Order. In my view, Prothonotary Aronovitch was correct to ask whether the disputed question in item 17 would elicit an answer falling within one of the four categories that she had previously determined to be irrelevant at the pre-trial discovery stage. If she concluded reasonably that the answer was yes, then it was within her discretion to find such a question to be improper, even if it was also arguable that the chain of enquiry test was met or that the answer might also fall within the scope of the Further and Better Order.

[46] In relation to item 17, Prothonotary Aronovitch considered these competing considerations and resolved them in favour of BMS. In my view, that conclusion was reasonable and a proper exercise of her discretion. Justice Martineau was correct not to intervene. I reach the same conclusion with respect to all of the remaining disputed questions in the Apotex appeal.

Conclusion

[47] I would dismiss both appeals, and I would award no costs.

"K. Sharlow"
J.A.

"I agree
A.M. Linden"
J.A.

"I agree
C. Michael Ryer"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS: A-22-07 & A-25-07

(AN APPEAL FROM THE ORDER OF MARTINEAU J., DATED JANUARY 5, 2007, IN FEDERAL COURT FILE NUMBER: T-2078-00)

STYLE OF CAUSE: BETWEEN: APOTEX INC. v. BRISTOL-MYERS SQUIBB COMPANY and BRISTOL-MYERS SQUIBB CANADA INC.

AND BETWEEN: BRISTOL-MYERS SQUIBB COMPANY and BRISTOL-MYERS SQUIBB CANADA INC. v. APOTEX INC.

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 26, 2007

REASONS FOR JUDGMENT: SHARLOW J.A.

CONCURRED IN BY: LINDEN J.A.
RYER J.A.

DATED: NOVEMBER 29, 2007

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