

Date: 20090310

Docket: A-84-08

Citation: 2009 FCA 65

Present: NOËL J.A.

BETWEEN:

ELI LILLY CANADA INC.

Appellant

and

**APOTEX INC. and
THE MINISTER OF HEALTH**

Respondents

and

ELI LILLY AND COMPANY LIMITED

Respondent/Patentee

Dealt with in writing without appearance of the parties.

Order delivered at Ottawa, Ontario, on March 10, 2009.

REASONS FOR ORDER BY:

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REASONS FOR ORDER

NOËL J.A.

[1] The appellant moves for an interim stay of the order of Hughes J. of the Federal Court in file T-1364-05 rendered on February 5, 2008 pending the disposition of the appeal from that order. The appeal is set to be heard two weeks from now (March 24, 2009) in Toronto.

[2] The appellant's concern is that the decision to be rendered by the Federal Court in another proceeding (file T-1617-07) which was heard on March 2 and 3, 2009 may render the present appeal moot. According to the appellant a quick ruling in this other proceeding, if it should favour Apotex, could allow for the issuance of a Notice of Compliance to Apotex thereby foreclosing the pursuit of the present appeal (*Pfizer Canada Inc. v. Apotex Inc.*, (2001), 11 C.P.R. (4th) 245, para. 21 (F.C.A.)).

[3] The appellant has provided no reasonable explanation for the fact that it delayed seeking the stay for more than one year. At the same time, it did not explain why it did not prosecute the present appeal more diligently so as to avoid the difficulty that it now seeks to address. In particular:

- (a) The appellant did not file its Notice of Appeal from the Hughes order until March 3, 2008;
- (b) The appellant requested and obtained an extension of over two weeks for the filing of its Agreement as to Appeal Book contents;
- (c) In its requisition for hearing filed on August 29, 2008, the appellant advised that it was not available on a single date between October 2008 and February 2009 for the hearing of a one-day appeal of the within matter;
- (d) On November 5, 2008, the Court Administrator contacted counsel for Apotex and the appellant and proposed dates in the last week of February for the hearing of the appeal. On the same day, counsel for Apotex advised that it was available on the dates proposed. The appellant, however, did not advise the Court Administrator that it was unavailable on the dates proposed until early December, approximately a month later;
- (e) On December 9, 2008, the Court Administrator again contacted counsel for Apotex, the Minister and the appellant and proposed that the appeal be heard in the week of March 23, 2009. On the same day, counsel for

Apotex, again, advised that it was available on the dates proposed. Counsel for the appellant did not respond for over a month.

- (f) On January 19, 2009, counsel for the appellant finally responded to the Court Administrator's call to confirm their availability.

[4] I recognize that there is a risk that absent the issuance of a stay, the appeal before this Court could be rendered moot. However, it is apparent that the appellant is wholly responsible for the predicament in which it finds itself. A stay is an exceptional remedy. It is not a substitute for a party's failure to see to its own interests. In the circumstances, it is appropriate that the appellant be left to bear this risk.

[5] The application is dismissed with costs.

“Marc Noël”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-84-08

STYLE OF CAUSE: ELI LILLY CANADA INC. and
APOTEX INC. and THE MINISTER
OF HEALTH and ELI LILLY AND
COMPANY LIMITED

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: NOËL J.A.

DATED: March 10, 2009

WRITTEN REPRESENTATIONS BY:

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Patrick Smith

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(Apotex Inc.)

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