

**Date: 20081015**

**Docket: A-457-07**

**Citation: 2008 FCA 308**

**CORAM: LÉTOURNEAU J.A.  
SHARLOW J.A.  
PELLETIER J.A.**

**BETWEEN:**

**SANDOZ CANADA INC.**

**Appellant**

**and**

**BAYER HEALTHCARE AG and  
BAYER INC.**

**Respondents**

Heard at Toronto, Ontario, on October 15, 2008.

Judgment delivered from the Bench at Toronto, Ontario, on October 15, 2008.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**SHARLOW J.A.**

**Date: 20081015**

**Docket: A-457-07**

**Citation: 2008 FCA 308**

**CORAM: LÉTOURNEAU J.A.  
SHARLOW J.A.  
PELLETIER J.A.**

**BETWEEN:**

**SANDOZ CANADA INC.**

**Appellant**

**and**

**BAYER HEALTHCARE AG and  
BAYER INC.**

**Respondents**

**REASONS FOR JUDGMENT OF THE COURT**  
**(Delivered from the Bench at Toronto, Ontario, on October 15, 2008)**

**SHARLOW J.A.**

[1] Sandoz Canada Inc. appeals the order of Justice O’Keefe (2007 FC 964) confirming the order of Prothonotary Lafrenière striking paragraphs 24 to 27 of its Statement of Defence and Counterclaim.

[2] Sandoz filed an Amended Statement of Defence and Counterclaim removing those paragraphs and replacing them with new paragraphs 29 to 33.

[3] A motion to strike the new paragraphs was granted by Prothonotary Milczynski. Her order was reversed by Justice Barnes (2007 FC 1068). Therefore, the current Amended Statement of Defence and Counterclaim is as filed.

[4] Bayer has appealed the order of Justice Barnes (Appeal No. A-488-07), but in that appeal Bayer does not challenge new paragraphs 29 to 33. Therefore, the appeal of the order of Justice O'Keefe is moot and will be dismissed with costs in the cause.

[5] We note the concern of Sandoz that the reasons of Justice O'Keefe, read together with the reasons of Justice Barnes, may give Bayer a basis for arguing at trial that the April 19, 1989 declaration is not admissible at all in relation to the allegation that the patent claims are broader than the invention made or disclosed. Counsel for Bayer confirms that he believes he is entitled to argue at trial that Sandoz is estopped from arguing for the admissibility of the declaration in relation to that allegation. In our view, nothing in the reasons of Justice O'Keefe or Justice Barnes is conclusive on the question of the admissibility of the declaration. The question of the admissibility of the declaration is deferred to the trial judge.

"K. Sharlow"

---

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-457-07

**APPEAL FROM THE ORDER OF THE FEDERAL COURT (O'KEEFE, J.) DATED  
SEPTEMBER 26, 2007, DOCKET NO. T-762-06**

**STYLE OF CAUSE:** *SANDOZ CANADA INC. v. BAYER HEALTHCARE AG and  
BAYER INC.*

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** OCTOBER 15, 2008

**REASONS FOR JUDGMENT OF  
THE COURT BY:** (LÉTOURNEAU, SHARLOW & PELLETIER JJ.A.)

**DELIVERED FROM THE  
BENCH BY:** SHARLOW J.A.

**APPEARANCES:**

Warren Springings  
Robert Shapiro  
Paula Bremner

FOR THE APPELLANT

Peter Choe  
James Blonde

FOR THE RESPONDENTS

**SOLICITORS OF RECORD:**

Hitchman and Springings  
Barristers and Solicitors  
Toronto, Ontario

FOR THE APPELLANT

Gowling Lafleur Henderson LLP  
Barristers and Solicitors  
Toronto, Ontario

FOR THE RESPONDENTS