

Date: 20090428

Docket: A-450-08

Citation: 2009 FCA 133

**CORAM: NOËL J.A.
PELLETIER J.A.
RYER J.A.**

BETWEEN:

BAYER INC.

Appellant

and

**THE MINISTER OF HEALTH and
THE ATTORNEY GENERAL OF CANADA**

Respondents

Heard at Ottawa, Ontario, on April 28, 2009.

Judgment delivered from the Bench at Ottawa, Ontario, on April 28, 2009.

REASONS FOR JUDGMENT OF THE COURT BY:

PELLETIER J.A.

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PELLETIER J.A.

[1] Notwithstanding Mr. Gaikis' able argument, we are not persuaded that the application judge erred in dismissing the application for judicial review.

[2] The essential question before the application judge was whether the '970 patent claimed a dosage form of the drug estradiol whose use had been approved by the issuance of a notice of compliance. We are satisfied that the application judge concluded that the "delivery system" described in the claims of the patent was in fact a novel means of maintaining the stability of the

drug to be administered by avoiding precipitation: see paras. 59 and 64 of his reasons. There is support for this view in the language of the patent disclosure which the application judge quoted at paragraph 57 of his reasons: "... Consequently certain transdermal delivery devices involving dissolved drugs have shown a tendency to exhibit precipitation of the drug during storage. This problem is at least in part attributable to formation hydrate forms of the drug. Accordingly this invention provides a method of inhibiting precipitation of a drug in the carrier of a transdermal drug delivery device... [emphasis in the reasons].

[3] In light of these findings we are of the view that the application judge correctly found that the '970 patent did not claim a dosage form but rather a form of a protective packaging: see para. 64 of his reasons.

[4] In the result, the appeal will be dismissed with costs.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-450-08

**(APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE RUSSELL,
DATED JULY 10, 2008, DOCKET NO. T-1518-07)**

STYLE OF CAUSE: *Bayer Inc. and The Minister of Health
and The Attorney General of Canada*

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: April 28, 2009

REASONS FOR JUDGMENT OF THE COURT BY: NOËL, PELLETIER, RYER, J.J.A.

DELIVERED FROM THE BENCH BY: PELLETIER, J.A.

APPEARANCES:

Gunars A. Gaikis
Nancy Pei

FOR THE APPELLANT

David Cowie

FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Smart & Biggar
Toronto, Ontario

FOR THE APPELLANT

John. H. Sims, Q.C.
Deputy Attorney General of Canada

FOR THE RESPONDENTS