

Federal Court of Appeal	 CANADA	Cour d'appel fédérale
-------------------------	---	-----------------------

Date: 20100608

Docket: A-379-09

Citation: 2010 FCA 153

**CORAM: NADON J.A.
SHARLOW J.A.
LAYDEN-STEVENSON J.A.**

BETWEEN:

PHARMASCIENCE INC.

Appellant

and

**AVENTIS PHARMA INC.,
AVENTIS PHARMA DEUTSCHLAND GmbH,
SCHERING CORPORATION and
THE MINISTER OF HEALTH**

Respondents

Heard at Toronto, Ontario, on June 8, 2010.

Judgment delivered from the Bench at Toronto, Ontario, on June 8, 2010.

REASONS FOR JUDGMENT OF THE COURT BY:

SHARLOW J.A.

Federal Court of Appeal	 CANADA	Cour d'appel fédérale
-------------------------	---	-----------------------

Date: 20100608

Docket: A-379-09

Citation: 2010 FCA 153

**CORAM: NADON J.A.
SHARLOW J.A.
LAYDEN-STEVENSON J.A.**

BETWEEN:

PHARMASCIENCE INC.

Appellant

and

**AVENTIS PHARMA INC.,
AVENTIS PHARMA DEUTSCHLAND GmbH,
SCHERING CORPORATION and
THE MINISTER OF HEALTH**

Respondents

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on June 8, 2010)

SHARLOW J.A.

[1] This is an appeal and cross appeal of the order of Justice Zinn dated September 15, 2009 (2009 FC 915). The order granted the motion of Pharmascience Inc. to set aside the prohibition orders issued by Justice Snider in T-482-03 (*Aventis Pharma Inc. v. Pharmascience Inc.*, 2005 FC

340, affirmed 2006 FCA 299) and by Justice Mactavish in T-2300-06 (*Sanofi-Aventis Canada Inc. v. Pharmascience Inc.*, 2008 FC 782) under the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133. Pharmascience also sought an order dismissing the prohibition applications but Justice Zinn dismissed that part of the motion. Pharmascience has appealed Justice Zinn's refusal to dismiss the prohibition applications. Aventis Pharma Inc. and Aventis Pharma Deutschland GmbH have cross appealed his decision to set the prohibition orders aside.

[2] Justice Zinn set aside the two prohibition orders because of the judgment of Justice Snider in *Sanofi Aventis Canada Inc. v. Apotex Inc.* (2009 FC 676, appeal pending) after a trial of infringement claims made by the Aventis parties and Schering Corporation against Apotex Inc. and Novopharm Inc. in relation to claims 1, 2, 3, 4 and 12 of Canadian Patent No. 1,341,206 (the "206 patent"). Both respondents denied infringement and counter claimed for a declaration of invalidity of those claims. Justice Snider granted that declaration. The claims that Justice Snider declared invalid were the only claims of the 206 patent in issue in the prohibition proceedings.

[3] In the motion before Justice Zinn, Pharmascience sought to set aside the prohibition orders because the Minister had refused to issue a notice of compliance in the face of those orders, given that Justice Snider had declared invalid some but not all of the claims of the 206 patent. Pharmascience also sought to have the prohibition applications dismissed so that it would be in the best position to claim damages under section 8 of the *NOC Regulations*. Justice Zinn set aside the prohibition orders but declined to dismiss the prohibition applications.

[4] When Justice Zinn set aside the two prohibition orders, he rendered them ineffective as of the date of the order which meant that there was nothing precluding the Minister from issuing a notice of compliance to Pharmascience. That notice of compliance was issued with no objection from Aventis, which had consistently taken the position that a notice of compliance could be issued to Pharmascience solely on the basis of Justice Snider's declaration of invalidity.

[5] The Aventis parties argue that the issuance of the notice of compliance has rendered the appeal moot. Pharmascience argues that the appeal is not moot because the point to be determined in the appeal is whether Justice Zinn should have dismissed the prohibition applications, thereby arguably giving rise to a claim for damages under section 8 of the *NOC Regulations*. We are all of the view that the appeal is not moot, but the cross appeal is.

[6] The order under appeal was a discretionary order that must stand absent an error of law or a wrongful exercise of discretion (*AB Hassle v. Apotex*, 2008 FCA 416 at paragraph 21). We have not been persuaded that the record discloses any such error on the part of Justice Zinn in relation to any of the issues raised on the appeal. On the contrary, we agree with his decision not to dismiss the prohibition applications, substantially for the reasons he gave.

[7] For these reasons the appeal and cross appeal will be dismissed. As success is divided, no costs will be awarded.

“K. Sharlow”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-379-09

(AN APPEAL FROM THE ORDER OF MR. JUSTICE ZINN, DATED SEPT. 15, 2009, IN COURT FILE NOS. T-482-03 AND T-2300-06)

STYLE OF CAUSE: PHARMASCIENCE INC. v.
AVENTIS PHARMA INC. ET. AL.

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 8, 2010

REASONS FOR JUDGMENT OF THE COURT BY: (NADON, SHARLOW & LAYDEN-STEVENSON JJ.A.)

DELIVERED FROM THE BENCH BY: SHARLOW J.A.

APPEARANCES:

Donald H. MacOdrum FOR THE APPELLANT

Gunars A. Gaikis FOR THE RESPONDENT,
Timothy O. Stevenson AVENTIS

Marc Richard FOR THE RESPONDENT,
SCHERING

Eric O. Peterson FOR THE RESPONDENT, THE
MINISTER OF HEALTH

SOLICITORS OF RECORD:

Lang Michener LLP FOR THE APPELLANT
Barristers & Solicitors
Toronto, Ontario

Smart & Biggar
Barristers & Solicitors
Toronto, Ontario

FOR THE RESPONDENT,
AVENTIS

Gowling LaFleur Henderson LLP
Barristers & Solicitors
Toronto, Ontario

FOR THE RESPONDENT,
SCHERING

Myles J. Kirvan
Deputy Attorney General of Canada

FOR THE RESPONDENT, THE
MINISTER OF HEALTH