

Federal Court of Appeal



Cour d'appel fédérale

**Date: 20110117**

**Docket: A-444-10**

**Citation: 2011 FCA 16**

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

**BETWEEN:**

**JANSSEN INC. AND  
JANSSEN PHARMACEUTICA N.V.**

**Appellants**

**and**

**MYLAN PHARMACEUTICALS ULC AND  
THE MINISTER OF HEALTH**

**Respondents**

Heard at Toronto, Ontario, on January 17, 2011.

Judgment delivered from the Bench at Toronto, Ontario, on January 17, 2011.

REASONS FOR JUDGMENT OF THE COURT BY:

SHARLOW J.A.

Federal Court of Appeal



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**REASONS FOR JUDGMENT OF THE COURT**  
**(Delivered from the Bench at Toronto, Ontario, on January 17, 2011)**

**SHARLOW J.A.**

[1] It is well established that an appeal from a judgment dismissing an application under the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 becomes moot once the notice of compliance is issued because it is no longer possible for the Court to prohibit the Minister from issuing the notice of compliance. That is clearly the case here. Therefore, the only issue is

whether, based on *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, and other relevant jurisprudence, this Court should hear the appeal despite its mootness.

[2] Despite the compelling and able submissions of Mr. Markwell, we are not persuaded that this moot appeal should be heard. We see nothing to distinguish this case from the many cases in which this Court has declined to hear a moot appeal in a proceeding under the *NOC Regulations*. We are all of the view that the question of patent law raised in this case is best determined in the context of an action for infringement of the patent in issue.

[3] For that reason, the motion to dismiss the appeal for mootness will be granted with costs.

"K. Sharlow"

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-444-10

**(APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE BARNES DATED  
NOVEMBER 10, 2010, DOCKET NO. T-175-09)**

**STYLE OF CAUSE:** JANSSEN PHARMACEUTICA  
N.V. v. MYLAN  
PHARMACEUTICALS ULC AND  
THE MINISTER OF HEALTH

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** January 17, 2011

**REASONS FOR JUDGMENT  
OF THE COURT BY:** SHARLOW J.A.  
DAWSON J.A.  
LAYDEN-STEVENSON J.A.

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

**APPEARANCES:**

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FOR THE RESPONDENTS