

Date: 19980703

Docket: T-2274-93

IN THE MATTER OF an application for an order of prohibition pursuant to section 55.2(4) of the *Patent Act* and section 6 of the *Patented Medicines (Notice of Compliance) Regulations*

BETWEEN:

**SCHERING CANADA INC. and
SCHERING CORPORATION**

Applicants

- and -

**NU-PHARM INC. and
THE MINISTER OF HEALTH AND WELFARE**

Respondents

REASONS FOR ORDER

REED, J.:

[1] This is an application, filed September 20, 1993, for an order of prohibition pursuant to section 6(1) of the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133, to prohibit the Minister from issuing a Notice of Compliance ("NOC") to Nu-Pharm under section C.08.004 of the Food and Drug Regulations. The NOC in question relates to 10 mg tablets and 1 mg/ml oral liquid

syrup of a drug known as loratadine and 5 mg loratadine/120 mg pseudoephedrine tablets. An order of prohibition is sought until after the expiration of Canadian Letters Patent 1,160,230 ("_230_") and 1,272,480 ("_480_").

[2] The respondent, Nu-Pharm, has not filed any evidence to rebut the applicants' evidence that the Notice of Allegation served by Nu-Pharm is not justified. Nu-Pharm missed the deadline for doing so and Mr. Justice Rothstein denied its application for an extension of time within which to file such evidence. Nu-Pharm subsequently abandoned its appeal of that decision.

[3] On April 24, 1996, Nu-Pharm brought a motion to dismiss the within application or permanently stay the application for judicial review. Alternately, it sought an order allowing it to withdraw its Notice of Allegation and directing the applicants to discontinue the within application. Nu-Pharm had withdrawn its new drug submission to which the within application relates on February 22, 1996. This motion was adjourned *sine die* on April 29, 1996.

[4] The only issue on the hearing of this application, then, is the appropriate disposition of the application. The applicant argues that the appropriate disposition is the issuance of an order of prohibition despite the fact that the new drug submission to which it relates has been withdrawn and such order may to a significant extent be purposeless.

[5] Counsel for the respondent, on the other hand, argues that the appropriate disposition is a dismissal of the application for mootness. He concedes that such dismissal should be on terms that would preclude the respondent filing a (fresh) new drug submission that is the same as that which was withdrawn. The exact terms of the condition to be attached to such dismissal, however, was not a matter upon which counsel could agree.

[6] I have decided that even though the order may to some degree be pointless, since the new drug submission to which it relates has been withdrawn, that I should dispose of the within application by issuing the order the applicants request. Two factors lead me to this conclusion: (1) the respondent earlier commenced a motion for dismissal for mootness but that motion was not pursued; and (2) the withdrawal of the new drug submission only occurred after the respondent had missed the time limits for the filing of its evidence in this proceeding.

[7] An order will issue accordingly.

Judge

OTTAWA, ONTARIO
July 3, 1998