

Federal Court



Cour fédérale

Date: 20100614

Docket: T-1508-05

Citation: 2010 FC 643

Ottawa, Ontario, June 14, 2010

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**JANSSEN-ORTHO INC.
and DAIICHI SANKYO COMPANY, LIMITED**

Applicants

and

**APOTEX INC. and
THE MINISTER OF HEALTH**

Respondents

REASONS FOR ORDER AND ORDER

[1] Out of respect for, and deference to, the majority judgment in *Apotex Inc. v. Janssen-Ortho Inc. and Daiichi Sankyo Company, Limited and the Minister of Health*, 2009 FCA 212, coupled with the independence needed to fulfil the responsibilities of a judge of this Court, to ensure both are attained without compromising either, the following decision was reached.

[2] To have done so requires an understanding of how the undersigned's decision was reached in *Janssen-Ortho Inc. and Daiichi Sankyo Company, Limited v. Apotex Inc. and the Minister of*

Health, 2008 FC 744. The first one hundred paragraphs of Reasons for Judgment endorsed the position of the Applicants. As was clearly stated, at the end of the last day of Court sessions, the position of one party on certain key aspects would be chosen over that of the other, as both parties had prepared two distinct comprehensive positions on certain specific aspects of the case.

[3] It is recalled, to paraphrase the undersigned, that to avoid being pedantic, acceptance of certain interpretations would be integral. The example given, in this regard, at the time is that, just as a woman may either be pregnant or not pregnant, when said to be expecting, as she cannot be halfway pregnant; when considered comprehensive one position of explanations would be chosen over another.

[4] Whereas on other matters, where required, variations, of interpretation in the pleadings would be dissected through judicial analysis, as needed. That, too, was done, as the parties were told, it would be.

[5] Thus, the next one hundred and fifty paragraphs of judicial analysis represented the undersigned's interpretation of the subject-matter in regard to elements which could not simply be endorsed. Therefore, the first one hundred paragraphs, together, with these additional one hundred and fifty paragraphs of reasons lead to the conclusions by which the 2008 Federal Court judgment of the undersigned was reached.

[6] In addition, as the judgment of the undersigned has been borne out in subsequent interpretation of the same subject-matter outside of Canada through U.K. judgments (*Generics (UK) Limited v. Daiichi Pharmaceutical Co. Ltd. And Daiichi Sankyo Co. Ltd.*, [2008] EWHC 2413 in the High Court of Justice, Chancery Division, Patents Court and also in *Generics (UK) Ltd v. Daiichi Pharmaceutical Co Ltd and Daiichi Sankyo Co Ltd*, [2009] EWCA Civ 646 in the Supreme Court of Judicature Court of Appeal (Civil Division) on Appeal from the High Court of Justice, Chancery Division, Patents Court) and by subsequent expert pronouncements and interpretations thereto, the undersigned is caught in a situation where he would either deviate from deference to the majority in the Federal Court of Appeal judgment, or from the judicial responsibility of independent analysis through the proverbial state of being between a rock and a hard place.

[7] Thus, after time and much reflection, subsequent to receiving the new written pleadings of the parties, the undersigned recognizes he cannot in good conscience, in the integrity of spirit necessary for intellectual honesty, required for the independence of a judge, sit on this matter, yet, again, without reaching the same conclusions through the same reasons. As a result, in fairness to the parties, the following decision has been reached in the Order below.

ORDER

THIS JUDGE ORDERS that he recuse himself from sitting on this matter; and that he remit to the Chief Justice of this Court the case to be heard by a different judge of this Court.

“Michel M.J. Shore”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1508-08

STYLE OF CAUSE: **JANSSEN-ORTHO INC.
and DAIICHI SANKYO COMPANY, LIMITED
v. APOTEX INC. and THE MINISTER OF HEALTH**

WRITTEN PROCEEDING: Ottawa, Ontario

**DATE OF WRITTEN
PROCEEDING:** June 14, 2010

**REASONS FOR ORDER
AND ORDER:** SHORE J.

DATED: June 14, 2010

Mr. Neil Belmore
Mr. Andrew McIntosh
Ms. Lindsay Neidrauer

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JANSSEN-ORTHO INC.

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Mr. Joshua Spicer

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DAIICHI SANKYO COMPANY, LIMITED

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