

**SPECIFIC CLAIMS TRIBUNAL**

BETWEEN:

**BEARDY'S & OKEMASIS BAND #96 AND #97**

SPECIFIC CLAIMS TRIBUNAL		
TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES		
F I L E D	July 26, 2011	D É P O S É
Guillaume Phaneuf		
Ottawa, ON		2

**Claimant  
(Respondent)**

v.

**HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA**  
As represented by the Minister of Aboriginal Affairs and Northern Development Canada

**Respondent  
(Applicant)**

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**REQUEST FOR LEAVE TO FILE A NOTICE OF APPLICATION FOR  
THE RESOLUTION OF A PROCEDURAL ISSUE**

**Pursuant to Rules 29 and 30 of the  
*Specific Claims Tribunal Rules of Practice and Procedure***

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TO: **BEARDY'S & OKEMASIS BAND**  
As represented by Ron S. Maurice, of  
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File: 106.02

**I. Leave to file a notice of application**

Pursuant to Rules 30 and 34 of the Specific Claims Tribunal Rules of Practice and Procedure (“Rules”), leave is sought to make an application, at a time and place to be determined by the Specific Claims Tribunal (“Tribunal”), under Rule 29 for the resolution of a procedural issue.

**II. Relief sought – varying, dispensing with compliance or supplementing a rule**

- 1) an Order pursuant to Rule 4 varying, dispensing with compliance or supplementing the time for the filing of Canada’s Response as prescribed by Rule 42, and then only if required, until after the Tribunal has ruled on jurisdiction which will be posed in Canada’s Application to strike, pursuant to Section 17 of the *Specific Claims Tribunal Act* (“Act”).

**III. Grounds**

- 1) The *Act* and the Rules are designed to achieve the just, timely and cost-effective resolution of specific claims;
- 2) The Declaration of Claim (“Claim”) by the Beardys and Okemasis First Nation (“Claimant”) is premature in light of the requirements imposed by Sections 16 and 43 of the *Act*;
- 3) The Claim does not satisfy Section 14 of the *Act* because the:
  - a. Claimant has not suffered any losses as required by s. 14(1); and,
  - b. Claim does satisfy the requirements of s. 14(1) (a), (b) or (c).
- 4) Determining whether this Claim satisfies the requirements of Sections 16, 43 and 14 of the *Act*, and is therefore properly before the Tribunal, will facilitate the just, timely and cost-effective resolution of specific claims.

**IV. Argument in brief**

Allowing Canada’s Section 17 application to strike to precede the filing of Canada’s Response will facilitate the just, timely, and cost-effective resolution of this Claim. Canada’s application to strike will challenge two important jurisdictional defects in this Claim:

- 1) the present Claim is premature because it was considered and dealt with before the *Act* came into force; and,

- 2) the present Claim does not fall within one of the recognized grounds for a claim under Section 14 of the *Act* because it is a Claim for annuities and therefore the Claimant has not suffered a loss.

Resolving these jurisdictional matters first will be much more efficient for the Claimant, the Crown and the Tribunal.

#### **V. The filing of the claim**

The Claimant filed its Claim with the Tribunal on July 11, 2011.

Canada was served, albeit irregularly, with this Claim on July 18, 2011.

The Crown must now file its Response, pursuant to Rule 42, within 30 days after the date of service.

The Crown has the ability, as a matter of right, to apply to strike the present Claim pursuant to Section 17 of the *Act* on the grounds that the Tribunal does not have the jurisdiction to hear it.

#### **VI. Section 17 application to strike**

Canada's Section 17 application to strike will raise two important jurisdictional issues.

The first jurisdictional issue is prematurity. This Claim was dealt with prior to the *Act* coming into force and therefore has not been:

- i) submitted to the Minister pursuant to s. 16 of the *Act*; and,
- ii) rejected by the Minister pursuant to s. 43 of the *Act*.

The second jurisdictional issue is whether a claim for annuities, such as the present Claim, is a claim permissible under s. 14 of the *Act*. It is Canada's position that this Claim does not satisfy s. 14 because:

- i) the Claimant has not suffered a loss as required by s. 14(1); and,
- ii) failure to pay individual annuities to members of the Claimant is not a recognized ground under s. 14(1) (a), (b), or (c).

These are fundamentally important jurisdictional issues. The resolution of these issues will determine whether the present Claim, and other possible similar claims, can proceed before the Tribunal. As such, the determination of these issues in this Claim will be precedent setting. It is in the interests of this Claimant, the Crown, and the Tribunal for these jurisdictional issues to be dealt with first.

## VII. Varying, dispensing with compliance or supplementing a rule

Rule 4 permits the Tribunal to vary, dispense with compliance or supplement a Rule to secure the just, timely or cost-effective resolution of a claim.

Allowing an extension of time for the filing of Canada's Response until after the Tribunal has ruled on Canada's Section 17 application to strike makes efficient use of the Tribunal's resources. It also permits for the resolution of the preliminary jurisdictional issue which is fundamental to the Tribunal's purpose.

In considering an extension of time for the filing of Canada's Response, the following considerations are pertinent:

- i) the length delay, if any, will not be inordinate and, in this case, will be determined largely by the availability of the Tribunal to hear Canada's Section 17 Application to Strike;
- ii) Canada intends to further the resolution of this Claim through its Section 17 Application to Strike;
- iii) Canada has an arguable case on the Section 17 Application to Strike; and,
- iv) there will be no undue prejudice to the Claimant as a result of granting Canada an extension of time to file the Response.

In the event that Canada's Section 17 Application to Strike on jurisdictional ground is successful, this matter will no longer be before the Tribunal.

Based on the circumstances of this Claim, the just, most expeditious, and least expensive determination of the matter will be achieved if the Tribunal grants an extension of time for Canada's Response and hears Canada's Section 17 Application to Strike on jurisdictional grounds (see *Eli Lilly Canada Inc. v. Novopharm Ltd.* 2008 CarswellNat 2383, 2008 FC 875, at paragraph 19, where the Prothonary's decision to reverse the order of presentation of the evidence, as normally required under sections 306 and 307 of the *Federal Court Rules*, was found to be appropriate).

## VIII. Summary

Hearing Canada's application to strike before requiring Canada's Response will be much more efficient for the Claimant, Crown and Tribunal.

The resources of the Tribunal and the parties are finite and should be directed to resolving matters that meet the legislative requirements of the *Act*. A Response at this time would not be the most efficient use of resources.

**IX. Communication**

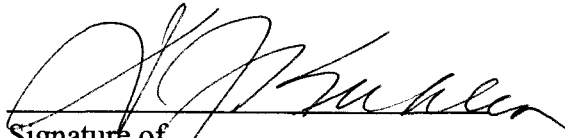
Applicant's address for service: Department of Justice (Canada)  
Prairies Regional Office (Saskatoon)  
10<sup>th</sup> Floor, 123 – 2<sup>nd</sup> Avenue South  
Saskatoon, SK S7K 7E6  
Attention: Daniel J. Kuhlen

Facsimile number address for service: (306) 975-6780

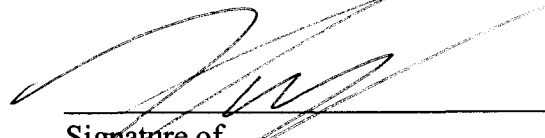
E-mail address for service: [saspeclaimtribbo@justice.gc.ca](mailto:saspeclaimtribbo@justice.gc.ca)  
Attention: Daniel J. Kuhlen

All of which is respectfully submitted.

Dated at the City of Saskatoon, in the Province of Saskatchewan, Canada, this 25<sup>th</sup> day of July, 2011.



Signature of  
Daniel J. Kuhlen  
Counsel for the Applicant Crown  
Department of Justice (Canada)  
Prairies Regional Office (Saskatoon)



Signature of  
David J. Smith  
Counsel for the Applicant Crown  
Department of Justice (Canada)  
Prairies Regional Office (Saskatoon)

2008 CarswellNat 2382, 2008 FC 875

2008 CarswellNat 2382, 2008 FC 875

Eli Lilly Canada Inc. v. Novopharm Ltd.

Eli Lilly Canada Inc., Applicant and Novopharm Limited and the Minister of Health, Respondents and Eli Lilly and Company Limited, Respondent/Patentees

Federal Court

D. Tremblay-Lamer J.

Heard: July 14, 2008

Judgment: July 16, 2008

Docket: T-703-08

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Counsel: Mr. Jay Zakaib, Mr. Scott Robertson, for Applicant

Mr. Andy Radhakant, for Respondents

Subject: Intellectual Property; Civil Practice and Procedure

Intellectual property --- Patents — Actions for infringement — Practice and procedure — Discovery — Time for production

Respondent drug company produced new drug — Respondent filed notice of allegation with respect to new drug — Applicant company applied to determine whether respondent's allegations of non-infringement and invalidity was justified — Applicant served notice of motion requesting schedule for application — Prothonotary set schedule for introduction of evidence and cross-examinations — Respondent brought appeal from prothonotary's decision — Appeal dismissed — Prothonotary reasonably deviated from usual schedule mandated by federal rules — Prothonotary had jurisdiction to reverse order of presentation of evidence — Schedule was altered for purpose of achieving least expensive and most expeditious determination of issues on merits in manner remained just — Prothonotary understood facts surrounding present litigation and considered all relevant factors — Prothonotary specifically addressed appreciable savings in time and costs for parties and court which would result by requiring respondent to file its evidence on invalidity first.

**Cases considered by D. Tremblay-Lamer J.:**

*Abbott Laboratories Ltd. v. Canada (Minister of Health)* (2007), 2007 FC 1291, 2007 CF 1291, 2007 CarswellNat 5169, 2007 CarswellNat 4375 (F.C.) — referred to

*Astrazeneca Canada Inc. v. Apotex Inc.* (2008), 2008 FC 537, 2008 CarswellNat 1248 (F.C.) — referred to

*Bristol-Myers Squibb Co. v. Apotex Inc.* (2008), 2008 FC 824, 2008 CarswellNat 2097 (F.C.) — referred to

*Lundbeck Canada Inc. v. Ratiopharm Inc.* (2008), 2008 FC 579, 2008 CarswellNat 2170 (F.C.) — referred to

*Merck & Co. v. Apotex Inc.* (2003), 246 F.T.R. 158 (note), 2003 CarswellNat 3738, 2003 FCA 438, 28 C.P.R. (4th) 491, 2003 CAF 438, 2003 CarswellNat 4475, 312 N.R. 273 (F.C.A.) — considered

*Merck & Co. v. Apotex Inc.* (2003), 2003 FCA 488, 2003 CarswellNat 4080, 30 C.P.R. (4th) 40, 315 N.R. 175, [2004] 2 F.C.R. 459, 246 F.T.R. 319 (note), 2003 CarswellNat 4501, 2003 CAF 488 (F.C.A.) — referred to

*Purdue Pharma v. Pharmascience Inc.* (2007), 62 C.P.R. (4th) 449, 2007 CF 1196, 2007 CarswellNat 3993, 2007 FC 1196, 2007 CarswellNat 5655 (F.C.) — referred to

*Sawridge Band v. R.* (2006), 2006 FCA 228, 2006 CarswellNat 1662, 351 N.R. 144, 2006 CarswellNat 3254, 2006 CAF 228, (sub nom. *Sawridge Band v. Canada*) [2006] 4 C.N.L.R. 279 (F.C.A.) — considered

**Rules considered:**

*Federal Courts Rules*, SOR/98-106

Generally — referred to

R. 3 — considered

R. 55 — referred to

R. 306 — considered

R. 307 — considered

R. 385 — referred to

R. 385(1)(a) — considered

**Regulations considered:**

*Patent Act*, R.S.C. 1985, c. P-4

*Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133

Generally — referred to

APPEAL by respondent from decision scheduling introduction of evidence and cross-examinations.

***D. Tremblay-Lamer J.:***

1 This is an appeal motion by Novopharm Limited (Novopharm) to set aside or vary paragraphs 1 through 5 of the order of Prothonotary Tabib dated June 24, 2008.

2 This appeal arises from an application respecting Canadian Patent No. 2,214,005 (the 005 Patent) which is owned by Eli Lilly and Company Limited.

3 On March 18, 2008, Novopharm served a Notice of Allegation (NOA) in respect of the 005 Patent and its own 5 mg, 15 mg and 20 mg olanzapine orally disintegrating tablets. In response to the NOA, Eli Lilly Canada Inc. (Eli Lilly) commenced an application on May 2, 2008 pursuant to the *Patented Medicines (Notice of Compliance) Regulations*, in order to determine whether Novopharm's allegations of non-infringement and invalidity are justified.

4 On May 9, 2008, Eli Lilly served a Notice of Motion requesting a schedule for the application.

5 On June 19, 2008 the motion was heard by Prothonotary Tabib and a decision was rendered on June 24, 2008 in which she ordered, *inter alia*, that:

1. Novopharm's evidence on the issue of invalidity shall be served and filed no later than August 18, 2008.
2. Lilly's evidence shall be served and filed no later than October 2, 2008.
3. Novopharm's evidence on non-infringement shall be served and filed no later than December 1, 2008.
4. Cross-examinations on affidavit shall be completed no later than 90 days following service and filing by Novopharm of a notice that it has filed all its evidence on non-infringement, or the expiration of the time provided in paragraph 3 of this order.
5. The parties have leave to serve and file a requisition for hearing 10 days after the service of Novopharm's evidence on infringement or the expiration of time for doing so.

6 The issue for determination on this motion is whether the above paragraphs 1 through 5 of the June 24 order should be varied or set aside and replaced.

7 The present case deals with scheduling matters: the order of the presentation of evidence and the time allotted to each party to present evidence. Scheduling matters are discretionary in nature (*Bristol-Myers Squibb Co. v. Apotex Inc.*, 2008 FC 824 (F.C.)). It is well established that discretionary orders of prothonotaries should be left undisturbed unless the questions in the motion are "vital to the final issue of the case" or the prothonotary's order is "clearly wrong" (*Merck & Co. v. Apotex Inc.*, 2003 FCA 488, [2003] F.C.J. No. 1925 (F.C.A.), at para. 19).

8 On the issue of the order of presentation of evidence, Novopharm submits that Prothonotary Tabib made significant errors in principle and improperly exercised her judicial discretion when, without jurisdiction or any basis for doing so, she imposed a schedule that departs significantly from the procedure required by sections 306 and 307 of the *Federal Courts Rules*, SOR/98-106 (the Rules).

9 Pursuant to these provisions, an applicant shall serve and file its supporting affidavits and documentary exhibits within 30 days after the issuance of a notice of application and a respondent shall serve and file any



supporting affidavits and documentary exhibits within 30 days after service of the applicant's affidavits.

10 While the aforementioned provisions explicitly set out the procedure to be followed in presenting evidence, there are also additional provisions in the Rules which provide for a measure of flexibility in their application and interpretation. Of particular importance, s. 385(1)(a), pertaining to the powers of a case management judge or prothonotary, establishes that they shall deal with all matters that arise prior to the trial or hearing of a specially managed proceeding and may "give any directions that are necessary for the just, most expeditious and least expensive determination of the proceeding on its merits". Section 3 also states that the Rules are to be interpreted and applied in such a way as "to secure the just, most expeditious and least expensive determination of every proceeding on its merits". Further, s. 55 allows the Court to vary a rule or dispense with compliance in special circumstances.

11 In a recent line of cases, these provisions have been interpreted as permitting a case management prothonotary to vary the order of the presentation of evidence where he is satisfied that it is necessary for the just, most expeditious and least expensive determination of the proceedings (*Lundbeck Canada Inc. v. Ratiopharm Inc.*, 2008 FC 579 (F.C.); *Astrazeneca Canada Inc. v. Apotex Inc.*, 2008 FC 537, [2008] F.C.J. No. 681 (F.C.); *Abbott Laboratories Ltd. v. Canada (Minister of Health)*, 2007 FC 1291, [2007] F.C.J. No. 1660 (F.C.); *Purdue Pharma v. Pharmascience Inc.*, 2007 FC 1196, [2007] F.C.J. No. 1568 (F.C.)).

12 Novopharm cites the case of *Merck & Co. v. Apotex Inc.*, 2003 FCA 438, [2003] F.C.J. No. 1725 (F.C.A.) wherein the Federal Court of Appeal, in the context of discovery rights, stated that the "general words" of sections 3 and 385 of the Rules are not sufficient to override a party's other specific rights that have been clearly spelled out elsewhere in the Rules. Novopharm submits that this principle is equally applicable in the present case where the specific language of sections 306 and 307 of the Rules should not be subordinate to the general language of sections 3 and 385.

13 However, as stated by Prothonotary Aronovitch in *Lundbeck*, above, at para. 20, rule 307 confers a procedural rather than a substantive right and the "inversion of the order of evidence also does not work a procedural inequity where the respondent can show that it requires a right of reply, and has the opportunity to do so".

14 I would also add that reversing the order of evidence was explicitly contemplated by the Practice Directive of this Court effective January 7, 2008. Thus, I am of the view that Prothonotary Tabib had the jurisdiction to reverse the order of the presentation of evidence.

15 Novopharm submits in the alternative, that if Prothonotary Tabib did have jurisdiction to reverse the order of the presentation of evidence she acted upon a wrong principle and made an error of law in failing to consider or properly consider the factors set out in the prior jurisprudence on the subject.

16 The jurisprudence reveals that in determining whether a reversal of the order of presentation of the evidence is appropriate, the primary consideration is that it must be for "the purpose of achieving the least expensive and most expeditious determination of the issues on the merits in a manner that remains just". (*Purdue Pharma*, above, at para. 8). Accordingly, reversing the order should not affect "the substantive rights of the parties and the fairness of their procedural rights". (*Lundbeck*, above, at para. 19; *Purdue Pharma*, above, at para. 8). Further, when reversing the order, "substantial savings in time, expense and resources, both of the Court and of the parties would have to be expected". (*Purdue Pharma*, above, at para. 20; see *Astrazeneca*, above at para. 10).

17 After reviewing Prothonotary Tabib's order, I am satisfied that she understood the facts surrounding the

present litigation and considered all relevant factors. As Justice Evans stated in *Sawridge Band v. R.*, 2006 FCA 228, [2006] F.C.J. No. 956 (F.C.A.), at para. 21:

(...) this Court is very reluctant to interfere with decisions made by a judge in the course of managing a matter prior to trial, particularly one as complex, lengthy and difficult as this one. As a result of living with the matter over time, the case management judge will have acquired an overall understanding of it which an appellate court, on the basis of hearing an appeal on a particular issue, cannot possibly match in either depth or breadth.

18 Prothonotary Tabib, as the case management prothonotary, was particularly well positioned to apprehend the circumstances of this case. She has managed other proceedings between these parties and with other respondents regarding the patents for olanzapine and thus understands the approaches taken by the parties and the complex factual matrix involved. Through her experience she has developed a level of expertise in these matters.

19 Turning now to the Prothonotary's decision, after having read the written record and heard oral submissions from both parties, Prothonotary Tabib determined that a reversal of the order of presentation of the evidence was appropriate. In her reasons she indicated that based on the particular facts, the just, most expeditious and least expensive determination of the issues in this application will likely be achieved if Novopharm files its evidence on its allegation of invalidity first, that Eli Lilly then files its evidence on invalidity and non-infringement at the same time, and that Novopharm's evidence on non-infringement be delivered last. She also specifically addressed the appreciable savings in time and costs for the parties and for the Court which would result by requiring Novopharm to file its evidence on invalidity first, as the issues would thus be substantially narrowed.

20 Accordingly, I can find no error of law in the decision in question, nor can I find anything clearly wrong in the Prothonotary's exercise of her wide grant of discretion.

21 Concerning the issue of the time allocated to the parties to file their materials, I similarly find that Prothonotary Tabib was not clearly wrong. She accepted most of the uncontested evidence put forward by Dr. Bugay and was satisfied that a period of 105 days was reasonably necessary for Eli Lilly to serve and file its evidence on infringement. Further, she accepted the representations of counsel for Novopharm at the hearing that a period of 60 days would be reasonably necessary to serve and file its affidavits on invalidity, if it were required to do so before the applicant filed its evidence, and also that it would require 60 days following service of Eli Lilly's evidence on infringement in which to respond.

22 For the foregoing reasons, the appeal of the Prothonotary's order is dismissed

**Order**

*THIS COURT ORDERS that the appeal of the prothonotary's order is dismissed.*

*Appeal dismissed.*

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