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Appeal court allows patent conspiracy allegations to proceed

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On June 14, the Federal Court of Appeal reversed a decision of the Federal Court that struck out a claim by Apotex Inc. that an assignment of a patent by Shionogi & Co. Ltd. to Eli Lilly and Company was a conspiracy to limit competition unduly contrary to s. 45 of the *Competition Act*.¹

Apotex raised the claim as part of its defence and counterclaim in a patent infringement action started by Eli Lilly and Shionogi in 1997. Eli Lilly and Shionogi claim that Apotex breached their patents over certain intermediates used to make the antibiotic Cefaclor. Apotex had earlier obtained compulsory licences of the process patent for Cefaclor, but not for the intermediates.

The nub of Apotex's claim is that Eli Lilly bought Shionogi's patent over processes for making Cefaclor in order to revive a monopoly over the drug that it lost when Shionogi obtained its process patents. Apotex claims that this agreement between Eli Lilly and Shionogi constitutes a conspiracy contrary to s. 45 of the *Competition Act*.

In October 2003, Hugessen J. struck out Apotex's *Competition Act* claim. He applied the Federal Court of Appeal's conclusion in *Molnycke AB v. Kimberly-Clark of Canada Ltd.*² that a mere assignment of patent rights cannot violate s. 45.

The Federal Court of Appeal disagreed. Rothstein J.A., writing for the court, pointed out that in *Molnycke*, there was no change in the number of patent-holders before and after the assignment. The assignment merely transferred the patent to another company. By contrast, before Shionogi assigned its patents to Eli Lilly, there were *two companies* with commercially viable processes for making Cefaclor; after the assignment, there was only one.

Thus, Rothstein J.A. concluded, *Molnycke* did not preclude Apotex's claim. The court remanded the matter to the motions judge to consider whether the issues can be resolved on summary judgment, or must proceed to trial.

While the Federal Court of Appeal's decision (correctly, in our view) implicitly affirms the principle that intellectual property should be treated, for competition law purposes, like any other kind of property, Apotex's claim relies on a very expansive reading of s. 45. A patent is, in a sense, a means of production, like a factory. If Apotex's theory is correct, then an acquisition of a competitor's factory could constitute a criminal conspiracy if it lessened competition unduly. While s. 45(1)(a) in particular³ might be read this way, the scheme of the *Competition Act* is to deal with acquisitions of businesses under the merger provisions, which are civil, rather than under the criminal conspiracy provisions.

¹ *Eli Lilly & Co. v. Apotex Inc.*, 2004 FCA 232, [2004] F.C.J. No. 1049

² (1991), 32 C.P.R. (3d) 493

³ Section 45(1)(a) reads as follows:

45. (1) Every one who conspires, combines, agrees or arranges with another person

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product, [...]