See paras. 41, 47-51, 54

Case Name:

Apotex Inc. v. Eli Lilly and Co.

Between
Apotex Inc., (Plaintiff) Appellant, and
Eli Lilly and Company and Eli Lilly Canada Inc., (Defendants) Respondents

[2015] O.J. No. 2278

2015 ONCA 305

334 O.A.C. 99

253 A.C.W.S. (3d) 691

2015 CarswellOnt 6472

Docket: C58293

Ontario Court of Appeal

D.H. Doherty, K.N. Feldman and R.A. Blair JJ.A.

Heard: September 10, 2014.
Judgment: May 5, 2015.

(61 paras.)

Commercial law -- Unjust enrichment -- Elements -- Deprivation -- Appeal by plaintiff from decision striking out its claim for unjust enrichment dismissed -- Respondent's patent kept appellant's generic drug out of market for two years -- When patent was found to be invalid, appellant was entitled under Patented Medicines Regulations to recover damages it suffered during two-year period -- In present action, appellant also sought to recover monopolistic profits respondent made over and above what appellant would have earned from sales of its generic drug at lower prices -- Appellant was never deprived of respondent's monopolistic profits because appellant would never have earned those profits.

Intellectual property law -- Patents -- Remedies -- Accounting of profits -- Appeal by plaintiff from

decision striking out its claim for unjust enrichment dismissed -- Respondent's patent kept appellant's generic drug out of market for two years -- When patent was found to be invalid, appellant was entitled under Patented Medicines Regulations to recover damages it suffered during two-year period -- In present action, appellant also sought to recover monopolistic profits respondent made over and above what appellant would have earned from sales of its generic drug at lower prices -- Appellant was never deprived of respondent's monopolistic profits because appellant would never have earned those profits.

Appeal by the plaintiff from a decision of the Divisional Court setting aside a decision of a motion judge refusing to strike the appellant's claim for unjust enrichment. The respondent marketed atomoxetine hydrochloride in the treatment of Attention Deficit Hyperactivity Disorder. The respondent owned the patent relating to this use of atomoxetine hydrochloride. The appellant's generic version of atomoxetine hydrochloride was, thus, kept out of the market for two years. When the respondent's patent was found to be invalid, the appellant became entitled under the Patented Medicines (Notice of Compliance) Regulations to recover the damages it suffered during the period it was excluded from the market. The appellant then commenced an action for unjust enrichment, claiming it was entitled to disgorgement of the monopolistic profits the respondent made on sales of the drug during the same two-year period, over and above what the appellant would have earned from sales of its generic drug at lower prices. The Divisional Court rejected the appellant's submission that because the respondent made false and misleading statements in its patent application and its patent was found to be invalid, the unjust enrichment claim was independent of the Regulations. The Court struck the claim for unjust enrichment on the basis that the appellant had not asserted an independent cause of action outside the ambit of the Regulations, as the impugned patent representations were made by the respondent on a form prescribed by the Regulations.

HELD: Appeal dismissed. The claim for unjust enrichment could not succeed since the appellant was never deprived of the portion of the respondent's revenues represented by its monopolistic profits because the appellant would never have earned those profits. This precluded reliance on unjust enrichment as a stand-alone cause of action as it was pleaded in the Statement of Claim. Even if the pleadings could be read as also seeking unjust enrichment as a restitutionary remedy for a tort committed against the appellant, this was not a case in which the exceptional remedy of disgorgement would be available. The pleading itself made a case for deprivation of the public of the difference between the appellant's prices and the respondent's monopolistic prices. Though the appellant was clearly deprived of revenues and sales, the pleading did not allege that it was deprived of those monopolistic profits. The appellant could not show that the monopolistic profits should have accrued to the appellant as a result of a legal entitlement or a contribution it made. The appellant was asking the court to designate it as the de facto beneficiary of the wrongfully-obtained monopolistic profits despite recognizing in its pleadings that it was the public that suffered actual deprivation as a result of the monopolistic pricing.

Statutes, Regulations and Rules Cited:

Patent Act, R.S.C. 1985, c. P-4, s. 60(1)

Patented Medicines (Notice of Compliance) Regulations, SOR/93-133, s. 4, s. 7(1), s. 7(2)(b), s. 8(1)

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 21.01(1)(b)

Appeal From:

On appeal from the judgment of Justice Lax, Justice Sachs and Justice Grace of the Divisional Court, dated September 19, 2013, with reasons reported at 2013 ONSC 5937.

Counsel:

David D. Conklin and Nando De Luca, for the appellant.

Patrick Smith and Todd J. Burke, for the respondents.

The judgment of the Court was delivered by

K.N. FELDMAN J.A.:--

Overview

1 Eli Lilly and Company and Eli Lilly Canada Inc. ("Lilly") owned the patent relating to the use of atomoxetine hydrochloride in the treatment of Attention Deficit Hyperactivity Disorder. Lilly marketed its brand of this product under the name "Strattera". Lilly used the process established by the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133, enacted under the *Patent Act*, R.S.C. 1985, c. P-4 ("the PMNOC regulations"), to keep Apotex's generic version of atomoxetine hydrochloride out of the market for two years. Because Lilly's patent was later invalidated, Apotex became entitled under the PMNOC regulations to recover the damages it suffered during the period it was excluded from the market.

2 The issue on this appeal is whether Apotex also has a claim against Lilly for unjust enrichment that would entitle it to disgorgement of the monopolistic profits Lilly made on sales of Strattera during the same two-year period, over and above what Apotex would have earned from sales of its generic drug at lower prices.

3 On a motion brought by Lilly under rule 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the motion judge refused to strike Apotex's claim for unjust enrichment. The Divisional Court reversed the motion judge's decision and struck the claim, finding that it was plain and obvious that it could not reasonably succeed.

4 For the reasons that follow, I would dismiss the appeal.

Background

5 As this appeal arises in the context of a Rule 21 motion, the facts as pleaded in the Statement of Claim are taken to be true for the purpose of analyzing whether it is plain and obvious that the impugned claim cannot reasonably succeed.

6 Lilly obtained Patent No. 2,209,735 ("the '735 Patent") for the use of atomoxetine hydrochloride in the treatment of Attention Deficit Hyperactivity Disorder in March 2001. In December 2004, it obtained the required Notice of Compliance ("NOC") under the PMNOC regulations for its brand, Strattera, and entered the market as sole supplier. Pursuant to the PMNOC regulations, it later listed its patent on the Patent Register.

7 On October 10, 2008, Apotex's formulation of atomoxetine hydrochloride, Apo-Atomoxetine, became approvable under the *Food and Drug Regulations*, C.R.C., c. 870. In order to obtain its own NOC, Apotex first served a Notice of Allegation on Lilly, a procedure required by the PMNOC regulations when a patent is listed for the same drug. Apotex alleged that the '735 Patent was invalid on the grounds of, *inter alia*, anticipation, obviousness and inutility.

8 In response, Lilly commenced a prohibition proceeding against Apotex in the Federal Court for an order prohibiting the issuance of an NOC to Apotex, in accordance with s. 6 of the PMNOC regulations. The effect of the prohibition proceeding was to prevent Apotex from obtaining an NOC and gaining entry to the market for two years or until the disposition of the prohibition proceeding, whichever occurred earlier: PMNOC regulations, ss. 7(1), 7(2)(b).

9 Around the same time, another generic, Teva Canada Limited (then Novapharm Limited), began an action in Federal Court under s. 60(1) of the *Patent Act*, challenging the validity of Lilly's '735 Patent directly. On September 14, 2010, in the Teva action, the Federal Court declared the '735 Patent to be invalid, based on "want of disclosure" by Lilly in its original patent application: *Novopharm Ltd. v. Eli Lilly and Company*, 2010 FC 915, 87 C.P.R. (4th) 301, at para. 120. That decision was upheld by the Federal Court of Appeal: 2011 FCA 220, 94 C.P.R. (4th) 95, leave to appeal refused, [2011] S.C.C.A. No. 362. On September 21, 2010, as a result of the declaration of invalidity of the '735 Patent in the Teva action, which was an *in rem* finding, Apotex received its NOC for Apo-Atomoxetine.

10 Lilly's prohibition application against Apotex was dismissed on October 29, 2010, again based on the invalidation of the '735 Patent in the Teva action: *Eli Lilly Canada Inc. v. Apotex Inc.*, 2010

FC 1065, 89 C.P.R. (4th) 345. Apotex then became entitled to recover from Lilly, under s. 8(1) of the PMNOC regulations, the loss it suffered as a result of its exclusion from the market.

11 During the period when Apotex was prevented from entering the market, from October 10, 2008 through September 21, 2010, Lilly made sales of Strattera at monopolistic prices, earning revenue totalling approximately $70,000,000. The Statement of Claim alleges that Lilly made those sales at Apotex's expense and deprived Apotex of the ability to earn its own revenues. Apotex also pleads that those sales came at the expense of the public, who were forced to pay monopolistic prices for Strattera.

12 Apotex claims four heads of relief in its Statement of Claim: (1) relief under the Ontario *Statute of Monopolies*, R.S.O. 1897, c. 323[1], and the *Statute of Monopolies*, 1623 (U.K.), 21 Jac. 1, c. 3[2]; (2) relief under s. 8 of the PMNOC regulations; (3) relief under the *Trade-marks Act*, R.S.C. 1985, c. T-13; and (4) relief based on Lilly's unjust enrichment. The only head of relief at issue on appeal is the unjust enrichment claim.

13 Section 8(1) of the PMNOC regulations provides that where the application of the person relying on the patent (in this case Lilly) is dismissed, that person is liable to the person that was kept out of the market (in this case Apotex) "for any loss suffered" during the period commencing when the NOC would have been issued and ending on the date the application was withdrawn, discontinued, dismissed or reversed.

14 Apotex is therefore entitled under s. 8(1) of the PMNOC regulations to seek compensation from Lilly for the losses it suffered during the exclusion period. However, in its unjust enrichment claim, Apotex seeks to recover the monopolistic profits Lilly earned during that period as a result of Apotex's exclusion from the market, an amount that Apotex would never have earned selling its generic product.

15 To support its claim for unjust enrichment, Apotex pleads: (1) it suffered a deprivation by the delay in the issuance of the NOC for its generic product; (2) Lilly enjoyed a corresponding benefit by an extension of its market exclusivity equivalent to Apotex's delay, resulting in a windfall to Lilly; and (3) there is no juristic reason for Lilly to retain that windfall. Apotex alleges that the delay was caused by the fact that Lilly "consciously took advantage of the PMNOC Regulations in listing the '735 Patent and in commencing and prosecuting the above-noted Prohibition Proceeding." Under the "*Trade-marks Act*" heading of its Statement of Claim, Apotex asserts that Lilly made "materially false and misleading" statements and representations in the context of the prohibition proceeding and in listing the '735 Patent on the Patent Register.

16 Finally, Apotex pleads that it is entitled to a remedy in unjust enrichment over and above its right to recovery of its losses under s. 8(1) of the PMNOC regulations because:

> In the absence of a disgorgement of this unjust enrichment, every patentee would have an incentive to use the *PMNOC Regulations* in all cases to unjustly delay

> entry of every generic product at the expense of the Generic, in the knowledge that the revenues made by it would exceed the damages for which it will be liable for the delay caused to the Generic.

17 Lilly moved to strike a number of the claims in the Statement of Claim including the claim for unjust enrichment. The motion judge dismissed the motion to strike the *Trade-marks Act* claim and the unjust enrichment claim. The *Statute of Monopolies* claims are being heard separately. With regard to the unjust enrichment claim, the motion judge found that all three requirements for unjust enrichment had been pleaded by Apotex and that it was not plain and obvious that s. 8 of the PMNOC regulations operates as part of a complete code that limits plaintiffs from enforcing other existing rights or causes of action.

18 Lilly was granted leave to appeal to the Divisional Court only in respect of the unjust enrichment claim. The Divisional Court disagreed with the motion judge's view of the operation of the PMNOC regulations. It found that the regulations do constitute a complete code of remedies arising out of their operation, though the court recognized that there could be another remedy for a cause of action that is "totally independent" of the regulatory regime. The court struck Apotex's claim for unjust enrichment on the basis that Apotex had not asserted an independent cause of action outside the ambit of the PMNOC regulations, as the impugned representations were made by Lilly on a form prescribed by the regulations.

Issue

19 The issue on appeal is whether the Divisional Court was correct to strike Apotex's claim for unjust enrichment under rule 21.01(1)(b) on the basis that it was plain and obvious that it had no reasonable prospect of success: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 17.

20 In order to succeed in a claim for unjust enrichment, a plaintiff must prove three components: (1) an enrichment of or benefit to the defendant; (2) a corresponding deprivation of the plaintiff; and (3) the absence of a juristic reason for the enrichment: *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, at para. 32.

21 Though Apotex has pleaded the constituent elements of unjust enrichment, these are legal conclusions and are therefore subject to examination on a Rule 21 motion to strike. The question is whether the facts as pleaded, assumed to be true, could support a successful unjust enrichment claim: *Imperial Tobacco*, at para. 22.

Analysis

(a) The parties' positions on this appeal

22 This is not the first case in which Apotex has tried to claim unjust enrichment against an

original patentee. Apotex has sought to make this same claim in a number of cases both in the Federal Court and in the Ontario Superior Court of Justice.[3] The two main issues that previous cases have focused on were: (1) whether the PMNOC regulations are a "complete code" that precludes generic companies, through common law or equitable causes of action, from recovering more than is provided for under s. 8; and (2) whether the provisions of the PMNOC regulations provide a "juristic reason" for the monopoly period that is granted to the patent claimant, making a claim for unjust enrichment unsustainable.

23 Lilly's position is that the issues raised on this appeal are identical to those already decided by the Federal Court of Appeal and this court, where Apotex's "identical" or "nearly identical" unjust enrichment claims have been struck under Rule 21 or dismissed under Rule 20. It argues that this court should uphold the Divisional Court's decision to strike the unjust enrichment claim on the basis that the allegations arise from the PMNOC regulations, which constitute a complete statutory code regulating how drugs are brought to market, and a valid juristic reason for Lilly to retain, and not be obliged to disgorge, its profits.

24 Apotex's position is that its claim for unjust enrichment in this case arises outside the PMNOC regulations because, as alleged in its Statement of Claim, it is not based on the dismissal of the prohibition proceeding. Rather, the claim is based on misrepresentations Lilly made when it obtained and then listed the '735 Patent, and on Lilly's conscious decision to nevertheless rely on its patent to invoke the prohibition proceeding. It argues that Lilly is therefore disentitled from relying on and obtaining the advantage of the PMNOC regulatory scheme and the limited remedy under s. 8.

25 Further, Apotex argues that because this case is distinguishable on its facts from other decided cases as a result of the finding of patent invalidity and the allegations of misrepresentation, the PMNOC regulations cannot provide a valid juristic reason for Lilly to be immune from an unjust enrichment claim.

(b) The two bases upon which other courts have decided the unjust enrichment issue

(i) "Complete code"

26 The Federal Court of Appeal has dismissed Apotex's claim for unjust enrichment in nearly identical contexts. The reasoning related to the jurisdiction of the Federal Court to grant equitable relief under s. 20(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, and the exercise of that jurisdiction in the face of s. 8 of the PMNOC regulations. Section 20(2) provides:

> 20(2) The Federal Court has concurrent jurisdiction in all cases, other than those mentioned in subsection (1) [where it has exclusive jurisdiction], in which a remedy is sought under the authority of an Act of Parliament or at law or in equity respecting any patent of invention, copyright, trade-mark, industrial design or topography referred to in paragraph (1)(*a*).

27 In *Apotex Inc. v. Eli Lilly Canada Inc.*[4], 2011 FCA 358, 98 C.P.R. (4th) 323, leave to appeal denied, [2012] S.C.C.A. No. 78, Noël J.A. refused to exercise the court's equitable jurisdiction to allow a remedy beyond s. 8 for a claim that was tied to the PMNOC regulations. He explained, at para. 18, that s. 8 reflects the decision of Parliament "to strike a balance between the need for patent protection on the one hand and the timely entry of lower priced drugs on the market, on the other." The remedy available to a generic company in the event that its exclusion from the market is found to have been wrongful therefore represents a compromise. Further, Parliament's intention to limit a generic company's recovery to actual losses sustained was made explicit by the 2006 amendments to the PMNOC regulations, which removed the word "profits" from the available remedies under s. 8: *Regulations Amending the Patented Medicines (Notice of Compliance) Regulations*, SOR/2006-242. The accompanying explanation in the Regulatory Impact Analysis Statement (RIAS) confirmed that the purpose of the amendment was to preclude the argument that "profits" referred to the profits of the patentee. Noel J.A. reproduced, at para. 21, the relevant conclusion in the RIAS:

> [T]he Government is aware of a number of ongoing section 8 cases in which it is argued that in order for this provision to operate as a disincentive to improper use of the PM(NOC) Regulations by innovative companies, the term "profits" in this context must be understood to mean an accounting of the innovator's profits ... [T]he Government believes that this line of argument should no longer be open to generic companies that invoke section 8.

28 In various proceedings, Apotex has raised this very objection, namely, that the compromise struck under s. 8 does not sufficiently deter a patentee from wrongfully keeping a generic out of the market through the prohibition proceeding process -- a process that allows the patentee to retain the monopolistic profits it earned during the exclusionary period.

29 Noël J.A. responded, at para. 23, that because Parliament had made a policy decision:

> [W]hatever jurisdiction the Federal Court has under subsection 20(2) of the *Federal Courts Act* to provide equitable relief, it cannot be used to grant a remedy which s. 8 was intended to exclude (compare *Radio Corp. of America v. Philco Corp. (Delaware)* (1966), 48 C.P.R. 128 (S.C.C.), at 136; see also *Zaidan Group Ltd. v. London (City)* (1990), 71 O.R. (2d) 65 (Ont. C.A.), at 69, aff'd [1991] 3 S.C.R. 593 (S.C.C.)), unless a cause of action independent of the operation of s. 8 is alleged. Here, no such cause of action has been pled. The result is that Apotex' claim for disgorgement of profits cannot possibly succeed.

30 The effect of this decision is that the Federal Court will not use its equitable jurisdiction to allow a generic to pursue a claim for disgorgement that arises out of the operation of the PMNOC regulations, because that would effectively thwart the intent of Parliament that the remedy under s. 8 is the exclusive remedy in the event of wrongful exclusion from the market under the regulations.

However, the court did not close the door to an action for disgorgement that may arise independent of the PMNOC regulations.

31 The Divisional Court reached a similar conclusion in this case. It also rejected Apotex's submission that because Lilly made "false and misleading" statements in its patent application and its patent was found to be invalid, its claim is independent of the PMNOC regulations. To the contrary, because the impugned representations were made on forms prescribed under s. 4 of the PMNOC regulations, the Divisional Court concluded that the claim arose from the regulations.

32 The issue of whether s. 8 is a "complete code" that precludes the assertion of other remedies was also addressed by Smith J. in *Low v. Pfizer Canada Inc.*, 2014 BCSC 1469[5], in the context of a class action lawsuit involving the drug Viagra. The patent for Viagra had been declared invalid based on non-disclosure in a separate prohibition proceeding brought by Pfizer against the generic drug manufacturer, Teva, in response to Teva's application for an NOC.

33 In *Low*, the class plaintiffs are individuals who purchased Viagra during the period commencing when Teva filed its NOC application in 2006 and ending when the patent was declared invalid by the Supreme Court of Canada in 2012[6]. They assert, as Apotex asserts here, that the patentee wrongly obtained and relied on the patent, with the effect that the public paid an inflated price for the drug while Teva was excluded from the market. One of the causes of action asserted was unjust enrichment.

34 On a pre-certification motion, Pfizer argued that the *Patent Act* and the PMNOC regulations constitute a complete code and provide no remedy for members of the public. Smith J. rejected the complete code argument, at least in respect of the rights of consumers. He found, at para. 34, that although the legislation provides no right of action for consumers, neither does it expressly or implicitly bar a consumer action "if the conduct that was in breach of statute is also relevant to a common law cause of action."

35 To summarize, the Divisional Court in this case and the Federal Court of Appeal have both held that the *Patent Act* and PMNOC regulations constitute a complete code with respect to available remedies for a breach of the *Patent Act* or its regulations. However, the British Columbia Court of Appeal in *Low* rejected that proposition, at least to the extent that it would preclude a potential common law right of action by consumers.

(ii) Juristic reason

36 In *Apotex Inc. v. Abbott Laboratories Ltd.*, 2013 ONCA 555, this court considered whether the provisions of the PMNOC regulations provide a juristic reason for a patentee to retain its excess monopolistic profits and pay the generic only the amount of the loss it suffered during the period it was wrongly excluded from the market.

37 In upholding Quigley J.'s decision to grant summary judgment to Abbott and dismiss Apotex's

claim for unjust enrichment (2013 ONSC 356, 107 C.P.R. (4th) 332), this court held, at para. 6, that because the monopolistic profits earned by Abbott were due to the operation of the PMNOC regulations, which gave Abbott the right to be in the market to the exclusion of Apotex, "[t]hose regulations constitute a valid juristic reason for [Abbott's] profits and revenues for the period in question. This precludes [Apotex's] claim for disgorgement." Apotex argues that *Abbott* is not determinative of the issue before this court, as it does not address whether the PMNOC regulations can provide a valid juristic reason for the enrichment of a patent holder that obtains and lists its patent through misrepresentation.

38 Smith J. accepted a similar argument in *Low*. In discussing whether the *Patent Act* and its regulations constituted a juristic reason that would negate a claim against Pfizer by consumers for unjust enrichment, he held that if, on the facts as proved, the patent was "wrongfully obtained through knowing and deliberate non-disclosure, amounting to an abuse of the system", that "may be sufficient to exclude the patent legislation as a sufficient juristic reason": at para. 85. Smith J. therefore found that the pleadings could disclose a cause of action in unjust enrichment.

(c) Corresponding deprivation

39 Regardless of any potential merit of the "complete code" and "juristic reason" arguments on the facts as alleged by Apotex in this case, in my view there is a fundamental flaw in Apotex's claim for unjust enrichment that makes this doctrine unavailable to Apotex, irrespective of the nature of Lilly's conduct that may be proved at a trial. The flaw is in the second requirement for a claim of unjust enrichment: a corresponding deprivation.

40 I acknowledge that this was not the basis of the Divisional Court's decision nor was it relied upon by the respondent in its factum or addressed by the respondent in oral argument. However, the court raised and discussed the issue with counsel for the appellant in oral argument, and it arises squarely as a legal issue on this appeal.[7]

41 Put simply, Apotex was never deprived of the portion of Lilly's revenues represented by its monopolistic profits because Apotex would never have earned those profits. This precludes reliance on unjust enrichment as a stand-alone cause of action, as it is pleaded in the Statement of Claim. Further, even if Apotex's pleadings could be read as also seeking unjust enrichment as a restitutionary remedy for a tort committed against it, this is not a case in which the exceptional remedy of disgorgement would be available.

42 In the Statement of Claim, Apotex does not plead that it was deprived of Lilly's monopolistic profits. Nor could it. In fact, Apotex pleads that Lilly's sales came "at the expense of Apotex who was kept off the market and thereby deprived of the ability to earn its own revenues", and also that "those sales also came at the expense of the public who was forced to pay monopolistic prices for Strattera." In other words, the pleading itself makes a case for deprivation *of the public* of the difference between Apotex's prices and Lilly's monopolistic prices. Though Apotex was clearly deprived of revenues and sales, the pleading does not allege that Apotex was deprived of those

monopolistic profits.

43 The Supreme Court of Canada recently discussed the elements of unjust enrichment in *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660, at paras. 148-158. With respect to the first and second elements, the enrichment and the corresponding deprivation, the court explained, at para. 151, that they are "the same thing from two different perspectives" or "two sides of the same coin." These elements are "properly understood to connote a transfer of wealth": at para. 152. Since "the purpose of the doctrine of unjust enrichment is to reverse unjust transfers of wealth", the first question the court asked in that case was whether the government was enriched at the plaintiffs' expense. The court affirmed that the government's gain had to correspond to the plaintiffs' loss for the unjust enrichment claim to succeed.

44 In the family law context, courts have recognized that there need not be quantifiable equivalence between the enrichment and the deprivation. In *Pettkus v. Becker*, [1980] 2 S.C.R. 834, Dickson J. applied the doctrine of unjust enrichment to find that a constructive trust arose where unmarried spouses each contributed to the successful establishment of a bee-keeping business and the purchase of property. The court held that the elements of unjust enrichment that formed the basis for the constructive trust -- enrichment and corresponding deprivation -- were satisfied by Ms. Becker's contribution of unpaid labour over 19 years under the reasonable expectation that she had an interest in the farm. The court explained that a "causal connection" must exist between the enrichment and the deprivation. It stated, at p. 852:

> For the unjust enrichment principle to apply it is obvious that some connection must be shown between the acquisition of property and corresponding deprivation. On the facts of this case, that test was met. The indirect contribution of money and the direct contribution of labour is clearly linked to the acquisition of property, the beneficial ownership of which is in dispute.

45 In Peter D. Maddaugh and John D. McCamus, *The Law of Restitution*, loose-leaf (2014-Rel. 14) (Toronto: Canada Law Book, 2004), the authors explain, at pp. 3-23 to 3-24, that "[a]lthough there was no equivalence between the value of Ms. Becker's efforts and Mr. Pettkus' benefits, those benefits did result from or, in the Court's words, there existed a 'causal connection' between the services provided by the plaintiff and the benefits enjoyed by the defendant." Where that benefit should have accrued to the plaintiff, the "corresponding deprivation" factor will be met.

46 In the present case, Apotex cannot show that Lilly's monopolistic profits should have accrued to it as a result of a legal entitlement or a contribution it made. The family law cases following *Pettkus* are therefore not applicable, nor are the traditional unjust enrichment cases involving transfers of wealth.

47 Apotex also points to some cases where a remedial claim for disgorgement of profits has been awarded despite the absence of any quantifiable loss to the plaintiff. These cases arise where a

defendant has committed an underlying legal wrong against a plaintiff, and the ordinary damages remedy for the underlying wrong is inadequate. The "wrong" in these contexts typically consists of a breach of fiduciary duty or a breach of trust, and in some instances has involved criminal conduct, breach of contract or a tort committed against the plaintiff. Courts that have applied this restitutionary remedy in non-fiduciary contexts have explained that it is limited to exceptional cases, emphasizing that restitution damages are employed infrequently: see, e.g., *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] S.C.R. 601, at para. 25, referred to by Winkler C.J.O. in *Cassano v. Toronto Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401, at para. 27.

48 For example, in *Attorney General v. Blake*, [2000] UKHL 45, [2001] 1 A.C. 268, a former member of the Secret Intelligence Service ("SIS") of Great Britain disclosed valuable secrets to the Soviet Union. He was convicted of spying, and ultimately defected to the U.S.S.R. As an employee of the SIS, he had signed an undertaking not to divulge any official information that he acquired in the course of his employment. While living in the Soviet Union, he wrote a book disclosing former state secrets -- although by then, much of the information was no longer secret. The Attorney General sued Blake for breach of contract and sought disgorgement of his profits.

49 The House of Lords ordered an accounting of profits. The court referred to this as an "exceptional" case of breach of contract, akin to a breach of fiduciary duty, where the normal remedies were inadequate and where deterrence of others was an important factor, thereby justifying the imposition in this case of the remedy of a full accounting of profit.

50 A similar approach was taken by the British Columbia Court of Appeal in *ICBC v. Lo*, 2006 BCCA 584, 278 D.L.R. (4th) 148. In that case, a driving school owner and an employee of the British Columbia motor vehicle licensing agency conspired in a scheme where the driving school owner accepted bribes from unqualified students to obtain driving licenses, which were then issued by the licensing agency employee for a fee. The court held that both the licensing agency employee and the driving school owner were required to disgorge and account to the Insurance Corporation of British Columbia ("ICBC") for all the monies they received in the illegal scheme.

51 The court reasoned, at paras. 59-60, that because the driving school owner had knowingly assisted a breach of trust against ICBC, and his assistance was "essential" to the bribery scheme, there was a "clear causal connection" between the wrongdoing to ICBC and the enrichment of both defendants. The driving school owner -- although not in a trust relationship with ICBC -- "exposed ICBC to a substantial risk of loss through accidents caused by unqualified drivers": at para. 63. The court found that it would be equally inequitable to allow the driving school owner to profit from the illegal scheme as it would the licensing agency employee. Therefore, the court concluded that there was a "proper foundation" for a claim of unjust enrichment against him.

52 Academic commentators have taken different approaches to try to reconcile the two forms of unjust enrichment -- the traditional "transfer of wealth" cases and the remedial "profiting from wrong" cases -- within a coherent conceptual framework. Kevin McGuinness, in C. Graham, ed.,

Halsbury's Laws of Canada -- Restitution, (Toronto: LexisNexis, 2012), at p. 645, differentiates between "substantive" and "remedial" restitution. Where disgorgement of profit is sought as a *remedy* for an independent legal wrong rather than asserted as a cause of action for unjust enrichment, the three components of unjust enrichment, including the "corresponding deprivation" factor, need not be met: McGuinness, at p. 606. On the other hand, Maddaugh and McCamus view the two categories of unjust enrichment -- "unearned windfall" (classic unjust enrichment) and "recovery of the profits of wrongdoing" (remedial disgorgement) -- as two rationales within a single broad principle: at pp. 3-4 to 3-6. In the second category, the "corresponding deprivation" factor is satisfied because the wrongdoer's gain was "made possible through the infliction of an injury upon or the infringement of an interest of the plaintiff" and therefore the enrichment was "at the plaintiff's expense": at p. 3-7.

53 In my view, cases relied upon by Apotex involving disgorgement of the "profits of wrongdoing", such as *Blake* and *ICBC*, are not applicable in Apotex's case. First, Apotex has pleaded unjust enrichment as a distinct cause of action based on the windfall earned by Lilly due to the operation of the PMNOC regulations. However, the portion of the windfall that is not compensable under s. 8 of the PMNOC regulations, the monopolistic profit, was not in any way transferred from Apotex or lost by Apotex. Therefore, the unjust enrichment claim as a stand-alone cause of action must fail on the ground that there is no corresponding deprivation.

54 Second, even if it could be argued that Apotex has pleaded the elements of an underlying legal wrong -- such as misrepresentation or abuse of process -- and is seeking restitutionary unjust enrichment as a remedy, this is not a case where the extraordinary remedy of disgorgement of profits to Apotex is available.

55 This is not a bilateral context where Apotex is the only party that has been wronged by Lilly. Effectively, Apotex is asking the court to designate it as the *de facto* beneficiary of the wrongfully-obtained monopolistic profits despite recognizing in its pleadings that it was the public that suffered actual deprivation as a result of the monopolistic pricing. Unlike the plaintiffs in the "profiting from wrong" cases discussed above, Apotex is not positioned as the sole party with a legitimate right to "enforce" or "deter" the underlying wrong. The pecuniary interests of consumers, and potentially other generic companies, are also implicated. Lilly did not owe Apotex an equitable duty, nor is this case akin to the "exceptional" breach of contract cases where courts award restitution damages to a plaintiff in order to prevent a defendant from exploiting a bilateral agreement to its advantage.

56 Further, remedial unjust enrichment is an exceptional remedy that should not be invoked unless other available remedies are inadequate. The remedial unjust enrichment cases cited by Apotex all involve contexts where the ordinary remedies were insufficient to address the injury committed against the plaintiff's interest. In contrast, generic companies can be made whole through the process established under s. 8 of the PMNOC regulations, which requires significant compensation to be made by patent holders in the event of wrongful market exclusion.

57 In *Apotex Inc. v. Sanofi-Aventis*, 2014 FCA 68, 125 C.P.R. (4th) 403, aff'd, 2015 SCC 20, the Federal Court of Appeal concluded, at para. 107, that s. 8 of the PMNOC regulations should be applied in a way that "strives to compensate adequately and fairly the generic manufacturers", while avoiding "windfalls". The court cited *Ratych v. Bloomer*, [1990] 1 S.C.R. 940, at p. 962, for the proposition that "it is a fundamental principle of tort law that an injured person should be compensated for the full amount of its loss, but no more": at para. 109. This line of reasoning, recently affirmed by the Supreme Court, not only suggests that adequate compensation can be achieved by s. 8, but also that overcompensation should be avoided in this regulatory context.

58 Apotex argues that restricting a generic company's remedy to its actual losses under s. 8 creates an incentive for patentees to misuse the PMNOC regulations in order to make and retain windfall profits. While this argument raises important policy concerns, there are at least two answers to it.

59 First, there may be other potential mechanisms to ameliorate the alleged disincentive, such as disgorgement to the parties who actually suffered the loss equivalent to the windfall -- namely, the members of the public who purchased the drug during the monopoly period. The class action in *Low* is an example.

60 Second, unlike in the "profiting from wrong" cases discussed above, there is a legislatively-enacted incentive structure that forms the context of this dispute. As the Federal Court of Appeal has observed, the s. 8 scheme was developed by Parliament as a compromise between the interests of the public in encouraging research and development of new patentable drugs and in encouraging generics to market drugs at lower prices. Parliament "has considered whether generic companies should be entitled to the disgorgement of first persons' profits in the circumstances contemplated by section 8, and has excluded this remedy ... This is a legislative policy issue with respect to which the will of Parliament is paramount": *Apotex Inc. v. Eli Lilly Canada Inc.*, 2011 FCA 358, 98 C.P.R. (4th) 323, at para. 22, leave to appeal refused, [2012] S.C.C.A. No. 77 and No. 78. If the legislative balance is flawed, it is open to Parliament to reconsider the incentive structure, taking into account all relevant factors including any competing public policy concerns.

Conclusion

61 I would dismiss the appeal with costs of the appeal and the leave motion to Lilly, fixed at the agreed-upon amount of $17,500 inclusive of disbursements and HST. The parties have agreed that the costs below of $22,932.75 and $15,000 would follow.

K.N. FELDMAN J.A.
D.H. DOHERTY J.A.:-- I agree.
R.A. BLAIR J.A.:-- I agree.

1 *An Act concerning Monopolies, and Dispensation with penal laws, etc.*, R.S.O. 1897, c. 323

2 *An Act concerning Monopolies, and Dispensation with Penal Laws, and the Forfeitures thereof, 1623* (U.K.), 21 Jac. 1, c. 3.

3 See, e.g., *Apotex Inc. v. Abbott Laboratories Ltd.*, 2013 ONSC 356, aff'd, 2013 ONCA 555; *Apotex Inc. v. Eli Lilly Canada Inc.*, 2009 FC 693, 76 C.P.R. (4th) 361 (Prothonotary Tabib), aff'd, 2011 CarswellNat 6086, (18 April 2011), Ottawa, T-656-09 (F.C.) (Heneghan J.), aff'd, 2011 FCA 358, leave to appeal refused, [2012] S.C.C.A. No. 78; *Apotex Inc. v. Nycomed Canada Inc. and Nycomed GmbH*, (18 April 2011), Ottawa, T-1786-08 (F.C.) (Heneghan J.), aff'd, 2011 FCA 358, leave to appeal refused, [2012] S.C.C.A. No. 77.

4 This appeal also disposed of another matter, *Apotex Inc. v. Nycomed Canada Inc. and Nycomed GmbH* (A-173-11), affirming *Apotex Inc. v. Nycomed Canada Inc. and Nycomed GmbH* (18 April 2011), Ottawa, T-1786-08 (F.C.) (Heneghan J.). The appeals were heard together but not consolidated. Leave to appeal was also refused: [2012] S.C.C.A. No. 77.

5 This decision has been appealed to the British Columbia Court of Appeal, and the hearing of the appeal is scheduled for September 2015.

6 *Pfizer Canada Inc. v. Novopharm Ltd.*, 2012 SCC 60, [2012] 3 S.C.R. 625.

7 Paragraphs 30 and 31 of the reasons of the motion judge suggest that this argument was raised by Lilly on the motion and rejected by the motion judge.