FORM 337 — NOTICE OF APPEAL
Federal Court Rules, 1998, Rule 337

Court File No.: A-385-17

FEDERAL COURT OF APPEAL

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

GALDERMA CANADA INC.

Respondent

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at Toronto.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Court Rules, 1998* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the *Federal Court Rules,* instead of serving and filing a notice of appearance.

Copies of the *Federal Court Rules,* information concerning the local offices of the Court and other necessary information may be obtained on request to the

Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

SHIRLEY ACIRC
REGISTRY OFFICER
AGENT DU GREFFE

November 21, 2017 *Issued by:* _____
(Registry Officer)

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APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the Judgment of the Honourable Mr. Justice Phelan ("Judge") dated November 9, 2017, which allowed the application for judicial review and quashed the decision of the Patented Medicines Price Review Board ("Board"). T-83-17

THE APPELLANT ASKS that:

(i) the Judgment of Justice Phelan be set aside;

(ii) the costs of this appeal and of the hearing in the Federal Court be awarded to the Appellant; and

(iii) such further and other grounds as this Honourable Court permits

THE GROUNDS OF APPEAL are as follows:

1. Section 27(1) of the *Federal Courts Act;*

2. The Judge erred in quashing the decision of the Board and by finding that the Board's decision was unreasonable;

3. The Judge erred in law and fact in finding that the Board has no jurisdiction over Galderma Canada Inc. ("Galderma") and that Galderma was not obligated to comply with certain disclosure requirements under the *Patent Act* and corresponding Regulations with respect to Differin, notwithstanding Canadian Patent No. 2,478,237 (the "237 Patent");

4. The Judge erred in fact in finding that the parties agreed that Differin (0.1% adapalene) and Differin XP (0.3% adapalene), which each contain the same single active ingredient and which each are indicated for the treatment of dermatological disorders, are different "medicines" with separate uses and distinct formulations;

5. The Judge erred in law and fact in finding that the "medicines" at issue were the consumer end products – Differin and Differin XP - rather than adapalene (the same, sole active ingredient of both end products);

6. The Judge erred in law and fact by misapplying the analysis required by the Federal Court of Appeal's decision in *ICN Pharmaceuticals v. Canada (Patented Medicines Prices Review Board)*, [1997] 1 F.C. 32; ("*ICN*");

7. The Judge erred in law and fact in finding that the Board misapprehended the question it was required to address. The Board properly apprehended the question before it; i.e. the second part of the test from *ICN,* which is: Does the invention (disclosed in the 237 Patent) pertain to Differin (0.1% adapalene)?

8. The Judge erred by failing to apply the "merest slender thread test" between the "invention" disclosed in the patent and the "medicine," contrary to *ICN,* which establishes this very low threshold necessary for the Board's jurisdiction under the *Patent Act.* In so doing, the Judge elevated the threshold firmly established by *ICN;*

9. The Judge erred in law and fact in finding that the Board failed to take account of the paramount purpose of the provisions of the *Patent Act* and Regulations at issue;

10. The Judge erred in law by disregarding the proper statutory context of sections 79 - 103 of the *Patent Act.* In particular, the Judge erred in law by failing to follow the direction of the Federal Court of Appeal in *Canada (Attorney General) v. Sandoz Canada Inc.*, 2015 FCA 249 ("*Sandoz*"). In *Sandoz,* this Honourable Court determined that the purpose of sections 79 – 103 of the *Patent Act* is to protect consumers from the excessive pricing of patented medicines, and not to prevent patent holders from pricing their patented medicines excessively *per se.* In other words, the focus must always be on those being protected. Accordingly, in finding that the overriding purpose of the legislative provisions at issue is to ensure that patent holders cannot take undue advantage of their monopolies, the Judge erred in law by focusing on

those in a position to cause the mischief instead of focusing on those in need of protection from such mischief, i.e. consumers;

11. The Judge erred by failing to address the presumption of reasonableness that is afforded to the Board when interpreting sections 79 – 103 of the *Patent Act*. Despite concluding that the proper standard of review of the Board's decision was reasonableness, the Judge ultimately applied a correctness standard without assessing the necessary factors or applying a contextual analysis to determine whether the presumption of reasonableness for the Board's interpretation of sections 79 – 103 of the *Patent Act* was rebutted in this instance;

12. The Judge erred in law by failing to defer to the Board's reasonable interpretation of subsection 79(2) of the *Patent Act* and by instead applying a restrictive interpretation of "medicine" and "pertains to," contrary to *ICN;*

13. The Judge erred in fact by finding that the Board had not looked at the 237 Patent as a whole.

14. The Judge erred by concluding that the Board did not address or reasonably interpret the "invention" as required by subsection 79(2) of the *Patent Act* and by finding that the Board did not determine the "invention" in the 237 Patent;

15. The Judge erred in law by requiring the Board to construe the claims of the 237 Patent in order to determine the invention, contrary to *ICN;*

16. The Judge erred in law by conflating the concepts of "claim" and "pertain" and thereby erred by concluding that the Board's analysis of "pertains" under subsection 79(2) was unreasonable;

17. The Judge erred in finding the Board's decision was "less transparent as it ought to be;"

18. Such further and other grounds as counsel may advise and this Honourable Court permit.

19. The Appellant proposes that this appeal be heard in Toronto.

November 21, 2017

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