

Lantheus Medical Imaging Inc. (applicant/appellant) v. Atomic Energy of Canada Limited
(respondent/respondent)
(C55753; 2013 ONCA 264)

Indexed As: Lantheus Medical Imaging Inc. v. Atomic Energy of Canada Ltd.

Ontario Court of Appeal
Cronk, LaForme and Hoy, J.J.A.
April 29, 2013.

Summary:

Lantheus Medical Imaging Inc., an American pharmaceutical company, used medical isotopes produced by Atomic Energy of Canada Ltd.'s (AECL) nuclear reactor at Chalk River in the manufacture of its products. Lantheus suffered losses estimated at more than \$70 million as a result of the extended closure of AECL's reactor commencing in May of 2009. Lantheus sued its insurer for indemnification (US action). Lantheus sought information from AECL through a request under the Access to Information Act. Shortly after it filed that request, it obtained a Letter of Request (LoR) from the United States District Court (US court). The LoR sought the assistance of the Ontario courts in securing documents and viva voce testimony from AECL for use at the trial of the US action. Lantheus applied, under s. 60 of the Ontario Evidence Act (OEA), seeking an order giving effect in Ontario to the LoR. An application judge dismissed the application. Lantheus appealed

The Ontario Court of Appeal allowed the appeal and issued an order enforcing the LoR.

Crown - Topic 408

Statutes affecting the Crown - General principles - Application of provincial laws to federal Crown - Lantheus Medical Imaging Inc., an American pharmaceutical company, used medical isotopes produced by Atomic Energy of Canada Ltd.'s (AECL) nuclear reactor at Chalk River in the manufacture of its products - Lantheus suffered losses estimated at more than \$70 million as a result of the extended closure of AECL's reactor commencing in May of 2009 - Lantheus sued its insurer for indemnification (US action) - Lantheus sought information from AECL through a request under the Access to Information Act - Shortly after it filed that request, it obtained a Letter of Request (LoR) from the United States District Court (US court) - The LoR sought the assistance of the Ontario courts in securing documents and viva voce testimony from AECL for use at the trial of the US action - Lantheus applied, under s. 60 of the Ontario Evidence Act (OEA), seeking an order giving effect in Ontario to the LoR - An application judge concluded that the court did not have jurisdiction to enforce the LoR against AECL because it enjoyed Crown immunity - He dismissed the application - Lantheus appealed, arguing that the court had jurisdiction pursuant to s. 27 of the Crown Liability and Proceedings Act (CLPA) - At issue was whether s. 60 of the OEA bound the Crown - This turned on whether s. 60 was a "rule of practice or procedure" within the meaning of s. 27 of the CLPA or a "rule of evidence" - The Ontario Court of Appeal held that the application judge erred in interpreting the phrase "rules of practice and procedure" as restricted, in Ontario, to the Rules of Civil Procedure, thereby excluding any provincially enacted

statutory rules for evidence gathering - First, he did not recognize that the phrase "rules of practice and procedure" in the context of the CLPA had a broad meaning - Second, the Rules of Civil Procedure were supplementary in nature, and were by no means the only rules governing the practice and procedure of Ontario's courts - In the result, the court allowed the appeal and issued an order enforcing the LoR - See paragraphs 27 to 33.

Crown - Topic 408

Statutes affecting the Crown - General principles - Application of provincial laws to federal Crown - Lantheus Medical Imaging Inc., an American pharmaceutical company, used medical isotopes produced by Atomic Energy of Canada Ltd.'s (AECL) nuclear reactor at Chalk River in the manufacture of its products - Lantheus suffered losses estimated at more than \$70 million as a result of the extended closure of AECL's reactor commencing in May of 2009 - Lantheus sued its insurer for indemnification (US action) - Lantheus sought information from AECL through a request under the Access to Information Act - Shortly after it filed that request, it obtained a Letter of Request (LoR) from the United States District Court (US court) - The LoR sought the assistance of the Ontario courts in securing documents and viva voce testimony from AECL for use at the trial of the US action - Lantheus applied, under s. 60 of the Ontario Evidence Act (OEA), seeking an order giving effect in Ontario to the LoR - An application judge concluded that the court did not have jurisdiction to enforce the LoR against AECL because it enjoyed Crown immunity - He dismissed the application - Lantheus appealed, arguing that the court had jurisdiction pursuant to s. 27 of the Crown Liability and Proceedings Act (CLPA) - At issue was whether s. 60 of the OEA bound the Crown - This turned on whether s. 60 was a "rule of practice or procedure" within the meaning of s. 27 of the CLPA or a "rule of evidence" - The Ontario Court of Appeal held that s. 60 of the OEA was better understood as a rule of procedure - It was more akin to a procedure for obtaining pre-trial discovery than a rule of evidence - Rather than concerning admissibility or common law rules of evidence, it set out a procedure by which evidence could be gathered - Accordingly, the Crown was bound by s. 60 of the OEA pursuant to s. 27 of the CLPA - In the result, the court allowed the appeal and issued an order enforcing the LoR - See paragraphs 34 to 39.

Crown - Topic 2885

Crown immunity - Exceptions - Benefit/burden or waiver exception - Lantheus Medical Imaging Inc., an American pharmaceutical company, used medical isotopes produced by Atomic Energy of Canada Ltd.'s (AECL) nuclear reactor at Chalk River in the manufacture of its products - Lantheus suffered losses estimated at more than \$70 million as a result of the extended closure of AECL's reactor commencing in May of 2009 - Lantheus sued its insurer for indemnification (US action) - Lantheus sought information from AECL through a request under the Access to Information Act - Shortly after it filed that request, it obtained a Letter of Request (LoR) from the United States District Court (US court) - The LoR sought the assistance of the Ontario courts in securing documents and viva voce testimony from AECL for use at the trial of the US action - Lantheus applied, under s. 60 of the Ontario Evidence Act (OEA), seeking an order giving effect in Ontario to the LoR - An application judge concluded that the court did not have jurisdiction to enforce the LoR against AECL because it enjoyed Crown immunity - He

dismissed the application - Lantheus appealed, arguing that the court had jurisdiction pursuant to s. 27 of the Crown Liability and Proceedings Act (CLPA) - At issue was whether s. 60 of the OEA bound the Crown - Lantheus advanced an alternative argument - It pointed to the evidence before the application judge that AECL had been involved in litigation, as plaintiff and defendant - Therefore, AECL had implicitly accepted the benefits of the OEA, which applied to all actions and other matters respecting which the Legislature had jurisdiction - The benefit/burden exemption to Crown immunity described in *Sparling v. Quebec* (1988 SCC), ignored by the application judge, therefore applied to s. 60 of the OEA - The Ontario Court of Appeal held that the benefit/burden exception did not apply - See paragraphs 49 to 54.

Practice - Topic 3741.2

Evidence - Letters rogatory (or letters of request) - When granted - Lantheus Medical Imaging Inc., an American pharmaceutical company, used medical isotopes produced by Atomic Energy of Canada Ltd.'s (AECL) nuclear reactor at Chalk River in the manufacture of its products - Lantheus suffered losses estimated at more than \$70 million as a result of the extended closure of AECL's reactor commencing in May of 2009 - Lantheus sued its insurer for indemnification (US action) - Lantheus sought information from AECL through a request under the Access to Information Act - Shortly after it filed that request, it obtained a Letter of Request (LoR) from the United States District Court (US court) - The LoR sought the assistance of the Ontario courts in securing documents and viva voce testimony from AECL for use at the trial of the US action - Lantheus applied, under s. 60 of the Ontario Evidence Act (OEA), seeking an order giving effect in Ontario to the LoR - An application judge concluded that Lantheus had not satisfied the applicable legal standard for the enforcement of letters rogatory in Ontario and dismissed the application - Lantheus appealed - The Ontario Court of Appeal allowed the appeal and issued an order enforcing the LoR - *Friction Division Products Inc. v. Du Pont (E.I.) de Nemours & Co.* (1986 Ont. H.C.J.) identified six, non-exhaustive factors for consideration in determining whether to enforce a LoR - The factors were "guideposts", not preconditions - Yet, the application judge's reasons revealed that he treated the factors as pre-conditions - The court applied the correct principles and factors and concluded that justice required that the LoR be enforced - See paragraphs 55 to 82.

Cases Noticed:

R. v. Eldorado Nuclear Ltd.; R. v. Uranium Canada Ltd., [1983] 2 S.C.R. 551; 50 N.R. 120; 1 O.A.C. 243, refd to. [para. 1].
Lantheus Medical Imaging Inc. v. Zurich Am. Ins. Co., No. 10 Civ. 9371 (JPO) (JLC), refd to. [para. 4].
Temelini v. Ontario Provincial Police Commissioner et al. (1999), 120 O.A.C. 380; 44 O.R.(3d) 609 (C.A.), refd to. [para. 12].
Friends of the Oldman River Society v. Canada (Minister of Transport and Minister of Fisheries and Oceans), [1992] 1 S.C.R. 3; 132 N.R. 321, refd to. [para. 12].
Pacific Western Airlines Ltd., Re, [1978] 1 S.C.R. 61; 14 N.R. 211; 2 A.R. 539, refd to. [para. 12].
Fecht v. Deloitte & Touche (1996), 28 O.R.(3d) 188 (Gen. Div.), affd. (1997), 97 O.A.C. 241; 32 O.R.(3d) 417 (C.A.), refd to. [para. 39].

Morguard Investments Ltd. et al. v. De Savoye, [1990] 3 S.C.R. 1077; 122 N.R. 81, refd to. [para. 40].
Hilton v. Guyot (1895), 159 U.S. 113, refd to. [para. 40; footnote 4].
R. v. Hape (L.R.), [2007] 2 S.C.R. 292; 363 N.R. 1; 227 O.A.C. 191; 2007 SCC 26, refd to. [para. 40].
Al Fayed v. Central Intelligence Agency (2000), 229 F. 3d 27 (D.C. Cir.), refd to. [para. 41].
R. v. Zingre, Wuest and Reiser, [1981] 2 S.C.R. 392; 38 N.R. 272; 10 Man.R.(2d) 62, refd to. [para. 42].
Sparling v. Quebec, [1988] 2 S.C.R. 1015; 89 N.R. 120; 20 Q.A.C. 174, refd to. [para. 49].
Wheeler v. Ontario (2005), 75 O.R.(2d) 113 (Div. Ct.), refd to. [para. 53].
France (Republic) v. De Havilland Aircraft of Canada Ltd. et al. (1991), 49 O.A.C. 283; 3 O.R.(3d) 705 (C.A.), refd to. [para. 58].
Friction Division Products Inc. v. Du Pont (E.I.) de Nemours & Co. (No. 2) (1986), 56 O.R.(2d) 722 (H.C.), refd to. [para. 60].
Connecticut Retirement Plans and Trust Funds v. Buchan et al. (2007), 225 O.A.C. 106; 2007 ONCA 462, refd to. [para. 61].
OptiMight Communications Inc. v. Innovance Inc. et al. (2002), 155 O.A.C. 202; 2002 CarswellOnt 510 (C.A.), refd to. [para. 61].
Pecarsky et al. v. Lipton Wiseman Altbaum & Partners (1999), 96 O.T.C. 178 (Sup. Ct.), refd to. [para. 61].
Treat America Ltd. v. Nestlé Canada Inc. (2011), 282 O.A.C. 311; 340 D.L.R.(4th) 707; 2011 ONCA 560, refd to. [para. 61].
Fecht v. Deloitte & Touche (1996), 28 O.R.(3d) 188 (Gen. Div.), affd. (1997), 97 O.A.C. 241; 32 O.R.(3d) 417 (C.A.), refd to. [para. 63].

Statutes Noticed:

Crown Proceedings and Liability Act, R.S.C. 1985, c. C-50, sect. 27 [para. 15].
Ontario Evidence Act, R.S.O. 1990, c. E-23, sect. 60 [para. 10].

Authors and Works Noticed:

Bryant, Lederman & Fuerst, *The Law of Evidence in Canada* (3rd Ed. 2009), p. 3 [para. 36].
McNairn, C.H.H., *Governmental and Intergovernmental Immunity in Australia and Canada* (1977), pp. 11, 12 [para. 53].
Paccioco & Stuesser, *The Law of Evidence* (6th Ed. 2011), p. 2 [para. 35].
Sullivan, R., *Sullivan on the Construction of Statutes* (5th Ed. 2008), pp. 1 to 18 [para. 24].

Counsel:

H. Scott Fairley and Brett Harrison, for the appellant;
Don Jack and Matthew Diskin, for the respondent.

This appeal was heard on February 4, 2013, by Cronk, LaForme and Hoy, J.J.A., of the Ontario Court of Appeal. The following judgment of the Court of Appeal was delivered by Hoy,

J.A., on April 29, 2013.

Appeal allowed.

Editor: Anick Ouellette-Levesque