Federal Court of Appeal | Cour d'appel fédérale

Date: 20110214

Docket: A-240-10

Citation: 2011 FCA 58

CORAM: **SEXTON J.A.**
LAYDEN-STEVENSON J.A.
STRATAS J.A.

BETWEEN:

JANSSEN-ORTHO INC. and
DAIICHI SANKYO COMPANY, LIMITED

Appellants

and

APOTEX INC. and THE MINISTER OF HEALTH

Respondents

Heard at Toronto, Ontario on February 14, 2011

Judgment delivered from the Bench at Toronto, Ontario on February 14, 2011

REASONS FOR JUDGMENT OF THE COURT BY: LAYDEN-STEVENSON J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20110214

Docket: A-240-10

Citation: 2011 FCA 58

CORAM: **SEXTON J.A.**
LAYDEN-STEVENSON J.A.
STRATAS J.A.

BETWEEN:

JANSSEN-ORTHO INC. and
DAIICHI SANKYO COMPANY, LIMITED

Appellants

and

APOTEX INC. and THE MINISTER OF HEALTH

Respondents

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on February 14, 2011)

LAYDEN-STEVENSON J.A.

[1] The appellants, Janssen-Ortho Inc. and Daiichi Sankyo Company, Limited (collectively Janssen), appeal the order of Shore J. of the Federal Court (the judge) dated June 14, 2010, wherein the judge recused himself from sitting on this matter and remitted the matter to the Chief Justice of the Federal Court.

[2] The contextual background giving rise to the order can be summarily stated. Upon application by Janssen pursuant to subsection 6(1) of the *Patented Medicines* (*Notice of Compliance*) *Regulations*, S.O.R./93-133 (the Regulations) the judge granted an order for prohibition in relation to levofloxacin, the subject of Canadian patent no. 1,305,080 (the '080 Patent). This Court allowed an appeal of that order. In its judgment, this Court set aside the judge's order and remitted the matter to him for redetermination on the basis that there was no abuse of process on the part of the respondent Apotex Inc. in making the allegations found in its notice of allegation and in contesting the application for a prohibition order. The Court also instructed the judge to assess the evidence independently of any findings in *Janssen-Ortho v. Novopharm Limited*, 2006 FC 1234, 300 F.T.R. 166. After this Court released its judgment and reasons for judgment, the '080 Patent expired.

[3] Janssen sought to have the matter reconsidered while the respondent sought to have the matter dismissed for mootness. After receiving written submissions, the judge recused himself.

[4] Janssen argues that the judge erred by recusing himself because, in so doing, he contravened this Court's judgment. Further, he had insufficient grounds for the recusal. Despite the capable and articulate submissions of Janssen's counsel, we are of the view that the appeal should be dismissed.

[5] In *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at paragraphs 57-59 (*Wewaykum*), the Supreme Court noted that public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so. The essence of impartiality lies in the requirement that the judge approach the case to be adjudicated with an open mind.

[6] We agree with the respondent's written submission that this Court remitted the matter to the judge with the implicit expectation that his judicial function would be performed impartially. A judge cannot be faulted for recusing himself when he lacks the fundamental qualification at the heart of impartiality -- to be free of any leaning, inclination, bent or predisposition towards a particular result.

[7] Janssen maintains that the judge erred by recusing himself on the basis that he would reach the same conclusion as in his original decision and that doing so would constitute a lack of judicial independence. Janssen notes that judges are regularly and properly required to redetermine matters they have previously decided and that the judge's decision in this case was based on an erroneous understanding of his obligation to independently analyze the matter before him. Referring to the 2004 edition of the Canadian Judicial Council's publication, *Ethical Principles for Judges*, Janssen submits that the factors cited in the portion (E.19) titled "Former Clients", addressing conflict of interest and reasonable apprehension of bias, govern the propriety of recusals in all circumstances. According to Janssen, it is clear that there was no actual or reasonable apprehension of bias in this case.

[8] A reasonable apprehension of bias applies when a party applies for a judge's recusal, not when a judge has determined, on his own, that he lacks the necessary impartiality to decide a case. As the Supreme Court noted, at paragraph 62 of *Wewaykum*, where it can be established – here the judge has declared it – bias will inevitably lead to the disqualification of the judge. Further, at paragraph 64, the Supreme Court noted that the proof of actual bias is very difficult because the law does not countenance the questioning of a judge about extraneous influences affecting his mind.

[9] Janssen's arguments focus on the judge having the necessary state of mind to fairly redetermine the prohibition application, but recusing himself unnecessarily in spite of that state of mind. The only "evidence" of the judge's state of mind is found in his reasons for the recusal order. The judge's reasons state that he did not believe that he could redetermine the matter "without reaching the same conclusion through the same reasons." Although this Court's judgment did not preclude the judge from reaching the same conclusion, it did instruct him to redetermine the matter in a different manner than he had done earlier. The judge's reasons, read in totality and fairly interpreted, indicate that the judge believed he could not impartially redetermine the matter before him because he was already irrevocably committed to a particular conclusion for the same reasons he had given initially. We accept the judge's determination and have no basis upon which to doubt it.

[10] This particular matter presents a unique set of circumstances. We do not anticipate that judges or tribunals, when directed to reconsider or redetermine a matter, would have grounds for disqualification merely because they have considered the matter before. Something much more fundamental must be present to justify a recusal. Indeed, we find it hard to believe that judges or tribunals would declare themselves biased simply because they are being asked to reconsider or redetermine a matter. Recusals should be exceedingly rare in such circumstances.

[11] For the reasons given, the appeal will be dismissed with costs

"Carolyn Layden-Stevenson"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-240-10
(APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE SHORE, DATED JUNE 14, 2010, DOCKET NO. T-1508-05)	
STYLE OF CAUSE:	JANSSEN-ORTHO INC. and DAIICHI SANKYO COMPANY, LIMITED v. APOTEX INC. and THE MINISTER OF HEALTH
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	February 14, 2011
REASONS FOR JUDGMENT OF THE COURT BY:	(SEXTON, LAYDEN-STEVENSON & STRATAS JJ.A.)
DELIVERED FROM THE BENCH BY:	LAYDEN-STEVENSON J.A.

APPEARANCES:

Neil Belmore Greg Beach	FOR THE APPELLANT JANSSEN-ORTHO INC.
Michael Charles	FOR THE APPELLANT DAIICHI SANKYO COMPANY, LIMITED
David E. Lederman	FOR THE RESPONDENT APOTEX INC.
No appearance	FOR THE RESPONDENT MINISTER OF HEALTH

SOLICITORS OF RECORD:

Belmore McIntosh Neidrauer LLP	FOR THE APPELLANT JANSSEN-ORTHO INC.
Bereskin & Parr LLP	FOR THE APPELLANT DAIICHI SANKYO COMPANY, LIMITED
Goodmans LLP	FOR THE RESPONDENT APOTEX INC.
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT MINISTER OF HEALTH