Federal Court of Appeal | Cour d'appel fédérale

Date: 20160420

Docket: A-501-15

Citation: 2016 FCA 121

Present: STRATAS J.A.

BETWEEN:

AMGEN CANADA INC. AND AMGEN INC.

Appellants

and

APOTEX INC. AND
THE MINISTER OF HEALTH

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on April 20, 2016.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] Apotex Inc. has brought a motion for an order dismissing this appeal as moot. The appellants, Amgen Canada Inc. and Amgen Inc. have responded. In Amgen's response, Amgen has raised an issue that Apotex did not address. If supported by the evidence, that issue may well prompt the Court to dismiss the mootness motion. But Apotex says that if it is permitted to offer evidence in reply, that issue will be eliminated.

[2] As we shall see, the Rules governing written motions do not expressly allow for evidence to be offered in reply. So Apotex has brought a motion within the mootness motion asking for leave to file this evidence in reply. Amgen opposes, submitting, among other things, that Apotex must satisfy the test for introducing fresh evidence on appeal. As is well-known, that test is a very difficult one to meet: *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212; *Shire Canada Inc. v. Apotex Inc.*, 2011 FCA 10, 414 N.R. 270; *Brace v. Canada*, 2014 FCA 92.

[3] For the following reasons, Apotex succeeds on its motion and an order shall be issued on the terms described below.

[4] These reasons will say little about the particular facts of this appeal, the mootness motion, and the nature of Apotex's reply evidence. A sweeping confidentiality order covers this appeal and this motion. In any event, a detailed description of the facts and evidence is unnecessary.

A. The *Federal Courts Rules*

[5] A party bringing a motion in writing under Rule 369 must serve a motion record compliant with Rule 364. That motion record must contain a notice of motion, evidence required for the motion and written submissions or, in the case of motions falling under Rule 366, a memorandum of fact and law.

[6] A party responding to the motion must serve a responding motion record compliant with Rule 365(2). That motion record must contain evidence required for the motion and written representations or, in the case of motions falling under Rule 366, a memorandum of fact and law.

[7] Rule 369(3) provides that a moving party may reply to a responding motion record by filing written representations in reply. The Rule does not allow for reply evidence to be filed. Therefore, on a motion in writing, a party must seek leave of the Court in order to file reply evidence.

[8] Although Rule 369(3) is silent on the matter, the Federal Courts do have the jurisdiction to allow the filing of reply evidence:

- Rule 55 allows the court in "special circumstances" to vary or supplement a rule. In certain cases, the need to file reply evidence can constitute a "special circumstance."

- Rule 3 requires the Rules to be interpreted and applied to "secure the just, most expeditious and least expensive determination of every proceeding on its merits." Sometimes reply evidence must be filed for reasons of procedural fairness and to ensure that the Court has the evidence it needs to adjudicate a matter on the merits.

- Rule 4—frequently called the "gap rule"—provides that where the Rules do not speak to a procedure, we can look by analogy to other rules. As far as analogies are concerned, Rule 312 allows for additional affidavits to be filed in applications and, as a matter of procedure, reply evidence can be offered at trials.

- The Federal Courts have certain plenary powers that allow it to regulate procedures: *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385 at paras. 35-38; *Philipos v. Canada (Attorney General)*, 2016 FCA 79 at para. 10; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50, 443 N.R. 378 at para. 36; *Mazhero v. Fox*, 2014 FCA 226 at para. 9. Procedural fairness and the need for the Court to have sufficient evidence before it to adjudicate a matter on the merits can trigger the use of plenary powers.

B. The principles to be applied

[9] Sometimes upon the filing of a responding motion record on a motion in writing, new issues arise. Or sometimes the responding motion record causes certain issues, understandably glossed over in the moving party's motion record, to assume markedly greater importance or to be transformed.

[10] In such circumstances, considerations of procedural fairness and the need to make a proper determination can require the Court to allow the filing of reply evidence in a motion in writing:

- *Procedural fairness*. Sometimes a party has to be given the opportunity to file evidence on an issue that it could not practically or meaningfully address earlier.

- *The need to make a proper determination*. Where an issue in the motion might determine its outcome, sometimes the Court must allow additional evidence to be filed so that it can decide that issue on the basis of all proper and relevant facts, not just one side's version of the facts.

[11] The filing of reply evidence on a motion is permitted only in "unusual circumstances" where procedural or substantive considerations such as these are live: *Johnson & Johnson Inc. v. Boston Scientific Ltd.*, 2009 FCA 155 at para. 2. But caution must be exercised.

[12] At trial, it is a well-known rule of evidence that a plaintiff cannot split its case by adducing evidence on reply that is merely confirmatory of the case in-chief: *Allcock, Laight & Westwood Ltd. v. Patten* (1966), [1967] 1 O.R. 18. Instead, reply evidence must relate to issues raised in the defence's case that were not raised in the plaintiff's case in-chief: *Halford v. Seed Hawk Inc.*, 2003 FCT 141 at paras. 14-15. Further, there is good reason to restrict the admission of evidence on reply. As Wigmore argued, allowing a wide range of evidence could be unfair to the respondent who had supposed the case in chief would be the entire case to meet. It could also

create an unending alternation of successive fragments of the case coming forward: John Henry Wigmore, *Evidence in Trials at Common Law*, revised by James H. Chadbourn (Toronto: Little, Brown and Co, 1976) v. 6 at p. 672.

[13] Much guidance can also be found in the case law that has developed under Rule 312 concerning the admission of additional affidavits in applications. Additional affidavits are permitted only where it is "in the interests of justice": *Atlantic Engraving Ltd. v. LaPointe Rosenstein*, 2002 FCA 503, 299 N.R. 244 at paras. 8-9. That means that the Court must have regard to whether:

- the evidence will assist the court (in particular, its relevance and sufficient probative value);

- admitting the evidence will cause substantial or serious prejudice to the other side;

- the evidence was available when the party filed its affidavits or it could have been discovered with the exercise of due diligence.

(*Holy Alpha & Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 101 at para. 2; *Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 88 at para. 6; *House of Gwasslaam v. Canada (Minister of Fisheries & Oceans)*, 2009 FCA 25, 387 N.R. 179 at para 4.) I note that this Court has applied these same factors in deciding whether a reply affidavit should be permitted to be filed in an application for leave to appeal under Rule 355, a rule that, like Rule

369(3), does not explicitly allow reply affidavits: *Quarmby v. National Energy Board of Canada*, 2015 FCA 19.

C. Adding conditions and making directions

[14] Rule 53 gives the Court the discretionary power to add any conditions to an order or make any directions that are just. On a motion for leave to file reply evidence, the parties should make submissions on whether, in light of the above considerations or in order to alleviate any prejudice, the Court should add conditions or make directions. For example, should provision be made for cross-examination of a deponent whose affidavit is being offered in reply? Is this the sort of exceptional situation where sur-reply evidence and associated cross-examinations are required? What is the time limit for these procedural steps?

[15] In exercising its discretion concerning conditions and directions, the Court must keep front of mind the requirement that proceedings generally—and motions in particular—must be conducted efficiently and fairly. Here again, Rule 3 must be mentioned: proceedings and motions are to be determined "on [their] merits" but "just[ly]…expeditious[ly] and [in a way that is] least expensive."

[16] Procedures leading up to any judicial determination should be like a smooth highway leading directly to the destination. When the Court has to make an order concerning procedures, it should be nothing more than a small curve, not a set of potholes slowing everyone down—or worse—a detour.

D. Applying these principles to this case

[17] The issue is whether Apotex should be permitted to file reply evidence in the mootness motion and whether any conditions should be added or directions made.

[18] The issue is not whether Apotex should be allowed to file new evidence on the appeal. Accordingly, the cases Amgen cites (mentioned in para. 2 above), regarding the admission of fresh evidence on appeal, are irrelevant.

[19] In my view, the principles set out above support making an order allowing Apotex to file reply evidence in the mootness motion.

[20] To recap, the respondent's motion record in the mootness motion raises an issue that the moving party, Apotex, has not raised in chief in its original motion record. For that reason, Apotex has not yet filed evidence relevant to this issue. I am persuaded that the evidence Apotex proposes to file—a brief affidavit— is relevant to this issue.

[21] The need for the Court to make a proper determination weighs heavily in this case. The issue raised by Amgen is material and has the potential to affect the outcome of the mootness motion. If Apotex is not permitted to file its reply evidence, the Court might decide the mootness motion on an erroneous basis and work an injustice.

[22] I have also considered carefully whether Apotex should have been alert to the issue raised by Amgen and should have addressed it in chief in its original motion record. On the facts of this case, I consider this a close call. However, I am persuaded that the issue raised by Amgen in its responding record is new or has achieved an importance that Apotex could not have been reasonably anticipated when it filed its original motion record.

[23] In my view, an order allowing Apotex to file reply evidence will not work procedural unfairness or prejudice to Amgen, especially in light of the additional conditions I intend to impose.

[24] I have also considered whether Apotex, in not addressing the issue in chief, was engaging in the sort of unacceptable, tactical conduct that courts cannot countenance, especially given the litigation culture change prescribed by the Supreme Court of Canada in *Hryniak v. Maudlin*, 2014 SCC 7, [2014] 1 S.C.R. 87. As was said in *Apotex Inc. v. Bristol-Myers Squibb Company*, 2011 FCA 34, 91 C.P.R. (4th) 307 at para. 37, "[t]hose who disrespect the rules and their aims [set out in Rule 3] can hardly expect courts to smile upon them when they look for a favourable exercise of discretion under those rules": see also *Pfizer Canada Inc. v. Apotex Inc.*, 2014 FCA 54, 117 C.P.R. (4th) 401 at para. 10. On this record, Apotex's failure to deal fully with the issue now raised by Amgen in its responding record cannot be said to be the product of unacceptable tactics.

[25] Amgen asks for the opportunity to cross-examine the deponent of the reply affidavit Apotex files. This is fair. I will provide for this in my order.

[26] Amgen asks for the ability to file evidence on the mootness motion by way of surreply. Given the narrowness of the issue being addressed on reply, the narrowness of the reply evidence and Amgen's ability to put documents to the deponent on cross-examination, I am not convinced at this time of the need for surreply evidence.

[27] The narrowness of the issue being addressed on reply and the brief nature of the reply evidence suggest that the cross-examination will be brief and can be completed in the very near future.

[28] After the cross-examination is completed or the time for conducting a cross-examination has expired, Apotex shall file a reply record containing the reply evidence, the transcripts of any cross-examination, exhibits marked on the cross-examination, and any answers to undertakings.

[29] For clarity and to ensure that there is no later misunderstanding, the evidence in the reply record is admissible only on the mootness motion, not the appeal.

[30] In her discretion, the Judicial Administrator may refer to me any motions to answer refused questions on cross-examination. Upon the filing of the supplementary record, she may send the mootness motion to me for determination.

E. Disposition

[31] Apotex's motion to file reply evidence is granted with conditions attached. An order shall issue in accordance with these reasons. There shall be no costs of the motion.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-501-15
STYLE OF CAUSE:	AMGEN CANADA INC. AND AMGEN INC. v. APOTEX INC. AND THE MINISTER OF HEALTH

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	APRIL 20, 2016

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