Federal Court of Appeal

Cour d'appel fédérale

Date: 20100422

Docket: A-510-09

Citation: 2010 FCA 112

CORAM: **NOËL J.A.**
PELLETIER J.A.
DAWSON J.A.

BETWEEN:

ASTRAZENECA CANADA INC.,
IPR PHARMACEUTICALS, INC.,
ASTRAZENECA UK LIMITED and
SHIONOGI SEIYAKU KABUSHIKI KAISHA

Appellants

and

NOVOPHARM LIMITED

Respondent

Heard at Ottawa, Ontario, on April 20, 2010.

Judgment delivered at Ottawa, Ontario, on April 22, 2010.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: PELLETIER J.A.
DAWSON J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from the order of Hughes J. (the Federal Court Judge) striking out the Statement of Claim filed by AstraZeneca Canada Inc., IPR Pharmaceuticals Inc., AstraZeneca UK Limited and Shionogi Seiyaku Kabushiki Kaisha (the appellants). The Statement of Claim alleged that Novopharm Ltd. (the respondent) was currently infringing the appellants' patent by making or having made for it commercial quantities of the infringing product (current infringement), and will

infringe the appellant's patent upon successfully resisting the appellants' pending prohibition application, and obtaining a Notice of Compliance for its novo-rosuvastatin tablets (*quia timet* or future infringement).

[2] The Federal Court Judge found that the claim of current infringement was an abuse of process as it was based on bald allegations made without any evidentiary foundation. With respect to the future infringement, the Federal Court Judge found that the allegations were speculative in nature and lacked the degree of certainty required to support a *quia timet* action.

[3] The appellants take issue with both aspects of the Federal Court Judge's decision. They maintain that they pleaded sufficient material facts to support their claim of current infringement and satisfied the requirements for a *quia timet* action. The appellants add that beyond this, the Notice of Allegation (NOA) served by the respondent constitutes, in and of itself, an act of infringement and that this fact alone is sufficient to ground an action for infringement. As such, the claim cannot be said to be bereft of any chance of success.

[4] With respect to the alleged current infringement, the Federal Court Judge noted that the appellants had been asked to produce particulars about their claim and refused to do so. He dealt with the argument of the appellants, now being repeated before us, as follows (Reasons, paras. 15, 17 and 18):

> [15] … [the appellants] say that any question as to what the [respondent] has done or intends to do can be explored on discovery whereupon a satisfactory case can thereafter be made out. …

…

> [17] There are many decisions of this Court that state that an action cannot be brought on speculation in the hope that sufficient facts may be gleaned on discovery that will support the allegations made in the pleadings. Often this is referred to as a fishing expedition. …
>
> [18] The pleadings in the Statement of Claim in the present action that the [respondent] has acquired the medicine "for commercial use" and intends to sell it lacks any material facts to support the plea. Bald allegations such as these must be supported by material facts. It is not an answer to say that, given discovery, these facts can be ascertained. That is an abuse.

[5] I agree with the appellants that one must not confuse material facts, which must be pleaded and which in this case were pleaded, and the evidence by which those facts may be proven. However, it remains that an allegation made without any evidentiary foundation is an abuse of process. In this respect, the finding that the allegation of current infringement was an abuse of process was open to the Federal Court Judge on the record before him. I refer in particular to the appellant's refusal to provide particulars and its position that its case would be fleshed out after discovery.

[6] With respect to future infringement, the Federal Court Judge reviewed decisions of the Federal Court where allegations of infringing actions which had yet to materialize were struck on the basis that they were overly speculative (*Connaught Laboratories Ltd. v. SmithKline Beecham Pharma Inc.*, (1998) 86 C.P.R. (3d) 36; *Pfizer Research and Development Co. N.V./S.A. v. Lilly Icos LLC*, (2003) 27 C.P.R. (4th) 86; *GlaxoSmithKline Biologicals S.A. v. Novartis Vaccines and Diagnostics, Inc.*, 2007 FC 833). Referring to those decisions, he went on to hold (Reasons, para. 23):

> There is no material difference between the pleadings in the three cases referred to above and the pleadings in the present Statement of Claim. There has been a bit of "wordsmithing" done to the present Statement of Claim, however, put into a realistic perspective, all that is said is that if Novopharm prevails in the NOC proceeding after trial or appeal it will most probably get an NOC and then most likely commence to sell the patented drug in Canada. This pleading is not materially different from those that were struck out before by this Court.
>
> [My emphasis]

[7] This conclusion is based on a fair reading of the appellants' Statement of Claim and gives effect to the established proposition that a *quia timet* action must be based on more than mere possibilities.

[8] The appellants' final contention – i.e., that the NOA is in itself an act of infringement and that as this point has yet to be judicially considered, the claim cannot be said to be bereft of any chance of success – is not addressed by the Federal Court Judge. The respondent maintains that this is because the argument was not put to the Federal Court Judge and urges us not to deal with this argument on that ground.

[9] The fact that the argument was not addressed by the Federal Court Judge does suggest that it was not made or insisted upon by the appellants. In any event, what the appellants seek to raise is a novel act of infringement which would have to be specifically pleaded before it can be addressed. No such allegation is made in the Statement of Claim.

[10] I would dismiss the appeal with costs.

"Marc Noël"

J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Eleanor R. Dawson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-510-09
(APPEAL FROM AN ORDER OF THE HONOURABLE Mr. JUSTICE HUGHES OF THE FEDERAL COURT DATED NOVEMER 24, 2009, NO. T-1563-09.)	
STYLE OF CAUSE:	AstraZeneca Canada Inc., IPR Pharmaceuticals, Inc., AstraZeneca UK Limited and Shionogi Seiyaku Kabushiki Kaisha - and - Novopharm Limited
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	April 20, 2010
REASONS FOR JUDGMENT BY:	Noël J.A.
CONCURRED IN BY:	Pelletier J.A. Dawson J.A.
DATED:	April 22, 2010

APPEARANCES:

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Jonathan Stainsby Andrew McIntyre	FOR THE RESPONDENT

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