Federal Court of Appeal | Cour d'appel fédérale

Date: 20110308

Docket: A-211-09

Citation: 2011 FCA 86

CORAM: **BLAIS C.J.**
SHARLOW J.A.
STRATAS J.A.

BETWEEN:

APOTEX INC.

Appellant

and

MINISTER OF HEALTH and
ATTORNEY GENERAL OF CANADA

Respondents

Heard at Toronto, Ontario, on March 8, 2011.

Judgment delivered from the Bench at Toronto, Ontario, on March 8, 2011.

REASONS FOR JUDGMENT OF THE COURT BY: SHARLOW J.A.

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REASONS FOR JUDGMENT OF THE COURT
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SHARLOW J.A.

[1] Apotex Inc. is appealing the judgment of Justice Phelan (2009 FC 452) dated May 5, 2009. That judgment dismissed the application of Apotex for judicial review of the refusal of the Minister of Health to issue a notice of compliance for ASA 81 mg enteric coated tablets ("Apo-ASA"). Apotex had sought the notice of compliance on the basis of an abbreviated new drug submission in which the Canadian reference product was Bayer ASA 81 mg enteric coated tablets ("Bayer-ASA").

[2] According to subsection C.08.002.1(1) of the *Food and Drug Regulations*, C.R.C. c. 870, an abbreviated new drug submission may be filed if certain conditions are met. Subsection C.08.002(2) sets out the required contents of an abbreviated new drug submission. Those provisions read in relevant part as follows:

C.08.002.1 (1) A manufacturer of a new drug may file an abbreviated new drug submission for the new drug where, in comparison with a Canadian reference product,	**C.08.002 (1)** Le fabricant d'une drogue nouvelle peut déposer à l'égard de celle-ci une présentation abrégée de drogue nouvelle si, par comparaison à un produit de référence canadien :
(*a*) the new drug is the pharmaceutical equivalent of the Canadian reference product;	*a*) la drogue nouvelle est un équivalent pharmaceutique du produit de référence canadien;
(*b*) the new drug is bioequivalent with the Canadian reference product, based on the pharmaceutical and, where the Minister considers it necessary, bioavailability characteristics;	*b*) elle est bioéquivalente au produit de référence canadien d'après les caractéristiques pharmaceutiques et, si le ministre l'estime nécessaire, d'après les caractéristiques en matière de biodisponibilité;
(*c*) the route of administration of the new drug is the same as that of the Canadian reference product; and	*c*) la voie d'administration de la drogue nouvelle est identique à celle du produit de référence canadien;
(*d*) the conditions of use for the new drug fall within the conditions of use for the Canadian reference product.	*d*) les conditions thérapeutiques relatives à la drogue nouvelle figurent parmi celles qui s'appliquent au produit de référence canadien.
(2) An abbreviated new drug submission shall contain sufficient information and material to enable the Minister to assess the safety and effectiveness of the new drug, including the following:	**(2)** La présentation abrégée de drogue nouvelle doit contenir suffisamment de renseignements et de matériel pour permettre au ministre d'évaluer l'innocuité et l'efficacité de la drogue nouvelle, notamment :
…	…
(*c*) evidence from the comparative studies conducted in connection with	*c*) les éléments de preuve, provenant des études comparatives menées dans

the submission that the new drug is	le cadre de la présentation, établissant que la drogue nouvelle :
…	…
(ii) where the Minister considers it necessary on the basis of the pharmaceutical and, where applicable, bioavailability characteristics of the new drug, bioequivalent with the Canadian reference product as demonstrated using bioavailability studies, pharmacodynamic studies or clinical studies …	(ii) d'autre part, si le ministre l'estime nécessaire d'après les caractéristiques pharmaceutiques et, le cas échéant, d'après les caractéristiques en matière de biodisponibilité de celle-ci, est bioéquivalente au produit de référence canadien selon les résultats des études en matière de biodisponibilité, des études pharmacodynamiques ou des études cliniques; …

[3] In this case, the Minister considered it necessary for Apotex to establish bioavailability with the reference product. Apotex does not challenge that aspect of the Minister's decision. Its abbreviated new drug submission included evidence intended to prove bioavailability.

[4] The Minister has published a document entitled the "Report B Guidelines" dealing with the methodology for bioequivalence studies for enteric coated drugs. Apotex conducted the required tests, which included both a "fasted" study and a "fed" study. The results of fasted study met the bioequivalence standards in the Report B Guidelines, but the results of the fed study did not, in that it included two subjects for which the data did not meet those standards.

[5] Apotex tried on numerous occasions to persuade the Minister that the data relating to those two subjects should be disregarded as "outliers" (anomalies that ought to be disregarded on scientific grounds). However, the Minister was not persuaded. Apotex also tried to persuade the Minister that despite the results of the bioavailability study, there was sufficient evidence that Apo-ASA was safe and effective. The Minister rejected those arguments.

[6] Apotex brought an application for judicial review challenging the Minister's decision to refuse to issue a notice of compliance for Apo-ASA. Justice Phelan dismissed the application for judicial review. In this appeal, Apotex asks for an order reversing the judgment of Justice Phelan, requiring the Minister to reconsider the refusal to grant the notice of compliance, and directing that the reconsideration disregard the failure of the bioavailability study to meet the Report B Guidelines.

[7] We agree with the Minister that all of the arguments of Apotex on this appeal are based on the incorrect premise that it was open to the Minister to assess the safety and efficacy of Apo-ASA without requiring proof of bioequivalence between Apo-ASA and Bayer-ASA.

[8] Pursuant to subparagraph C.08.002.1(2)(*c*)(ii) of the *Food and Drug Regulations*, the Minister cannot issue a notice of compliance for Apo-ASA on the basis of an abbreviated new drug submission naming Bayer-ASA as the Canadian reference product unless bioequivalence is demonstrated between Apo-ASA and Bayer-ASA. That is because a notice of compliance for a new product based on an abbreviated new drug submission is intended to recognize that the new product and the reference product are the same in certain material respects, including bioequivalence. In other words, even if a proposed new product is safe and effective, it cannot be approved through an abbreviated new drug submission if it is not bioequivalent to the reference product.

[9] As to whether bioequivalence has been proved in this case, that is a question of fact to be determined by the Minister, reviewable by the Federal Court on the standard of reasonableness. Justice Phelan correctly identified and applied that standard of review to that question. Contrary to

the submissions of Apotex, the record does not disclose that Justice Phelan misunderstood or misapplied the law relating to the fettering of Ministerial discretion. Specifically, the factual conclusions stated by Justice Phelan in paragraphs 30-32 of his reasons were reasonably open to him on the record.

[10] For these reasons, this appeal will be dismissed with costs.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-211-09
(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE PHELAN, DATED MAY 5, 2009, IN FEDERAL COURT FILE NO. T-394-08)	
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DELIVERED FROM THE BENCH BY:	SHARLOW J.A.

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