Federal Court of Appeal | Cour d'appel fédérale

Date: 20120425

Docket: A-401-11

Citation: 2012 FCA 129

CORAM: **EVANS J.A.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

TEVA CANADA LIMITED

Appellant

and

NYCOMED CANADA INC., NYCOMED GMBH AND NYCOMED INTERNATIONAL MANAGEMENT GMBH

Respondents

Heard at Toronto, Ontario, on April 25, 2012.

Judgment delivered from the Bench at Toronto, Ontario, on April 25, 2012.

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

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on April 25, 2012)

EVANS J.A.

[1] This is an appeal by Teva Canada Limited (Teva) from the Order of the Federal Court (T-368-08), dated October 11, 2011, in which Justice Beaudry (Judge) dismissed an appeal by Teva from an Order of Prothonotary Milczynski, dated August 25, 2011.

[2] The Prothonotary's Order struck out portions of Teva's statement of claim relating to losses, damages and harm incurred outside the period of liability as defined in subsection 8(1) of the *Patented Medicines (Notice of Compliance) Regulations* SOR/93-133 (Regulations), including damages for permanent loss of market share.

[3] We are all of the view that Teva's appeal must fail. It is plain and obvious that its claim for losses suffered outside the period prescribed by paragraphs 8(1)(*a*) and (*b*) of the Regulations cannot succeed on the present state of the law.

[4] The issue raised by Teva in response to the motion by the Respondents, Nycomed Canada Inc., Nycomed GmbH, and Nycomed International Management GmbH, to strike out paragraphs of Teva's pleadings has recently been decided by this Court in *Apotex Inc. v. Merck and Company Inc*., 2009 FCA 187, [2010] 2 F.C.R. 389 at paras. 92-102, leave to appeal refuse [2009] S.C.C.A. No. 347 (*Apotex*), and *Teva Canada Limited v. Sanofi-Aventis Canada Inc.* and *Sanofi-Aventis Deutschland GmbH*, 2011 FCA 149, leave to appeal refused [2011] S.C.C.A. No. 326 (*Teva Canada*).

[5] These cases decide that the Court does not require a full evidential record to be able to conclude that Teva's argument on the interpretation of the disputed aspect of section 8 is clearly without merit. Nonetheless, Teva says that the dissenting opinion of Justice Sharlow in *Teva Canada* demonstrates that it cannot be plain and obvious that its interpretation of section 8 of the Regulations has no prospect of succeeding.

[6] We do not agree. In our view, the relevant question for this Court is whether our *stare decisis* rules leave open the possibility that, if permitted to proceed to trial, the struck portions of Teva's claim could succeed on the existing law.

[7] Whatever the merits of Justice Sharlow's opinion, the issue raised by Teva on section 8 of the Regulations is now settled at the level of this Court by two recent decisions rendered in 2009 and 2011. The Court decided in *Teva Canada* (at paras. 5-6) that *Miller v. Canada (Attorney General)*, 2002 FCA 370, 293 N.R. 391 provides no basis for departing from the Court's decision in *Apotex*. In so concluding, the Court in *Teva Canada* made no error warranting a departure in the present case from this decision.

[8] We would make two responses to Teva's argument that, if the matter went to trial, the Supreme Court might ultimately reverse the decisions of this Court on the aspect of section 8 of the Regulations relevant to this appeal.

[9] First, the Supreme Court refused leave to appeal in both *Apotex* and *Teva Canada*.

[10] Second, the mere possibility that the Supreme Court might reverse the settled jurisprudence of this Court (even when there has been a dissent) is not sufficient to demonstrate that the Judge made a reversible error in dismissing the appeal from the Prothonotary's decision to strike the impugned portions of Teva's statement of claim. Were it otherwise, litigants with deep pockets would be likely to re-litigate, and seek to have tried, issues that have already been decided. This would unduly burden the Court's resources, and undermine the finality and stability of its jurisprudence.

[11] Teva's remedy is to apply again for leave to appeal to the Supreme of Court of Canada where Justice Sharlow's dissent can be considered again, and not to re-litigate in the Federal Court and in this Court a matter that has already been decided.

[12] For the above reasons, and for those given by Justice Dawson writing for the majority of the Court in *Teva Canada*, the Judge made no reversible error in striking the impugned portions of Tevas's statement of claim, and Teva's appeal to this Court will be dismissed with costs.

"John M. Evans"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-401-11
(APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE BEAUDRY DATED OCTOBER 18, 2011, DOCKET NO. T-368-08)	
STYLE OF CAUSE:	TEVA CANADA LIMITED v. NYCOMED CANADA INC., NYCOMED GMBH AND NYCOMED INTERNATIONAL MANAGEMENT GMBH
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 25, 2012
REASONS FOR JUDGMENT OF THE COURT BY:	(EVANS, DAWSON & STRATAS JJ.A.)
DELIVERED FROM THE BENCH BY:	EVANS J.A.

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