Federal Court of Appeal | Cour d'appel fédérale

Date: 20190620

Docket: A-336-18

Citation: 2019 FCA 188

CORAM: **BOIVIN J.A.**
RENNIE J.A.
GLEASON J.A.

BETWEEN:

JANSSEN INC., JANSSEN BIOTECH, INC., CILAG GmbH INTERNATIONAL, CILAG AG and THE KENNEDY TRUST FOR RHEUMATOLOGY RESEARCH

Appellants

and

PFIZER CANADA INC., HOSPIRA HEALTHCARE CORPORATION, CELLTRION HEALTHCARE CO. LTD., CELLTRION, INC. and INNOMAR STRATEGIES, INC.

Respondents

Heard at Ottawa, Ontario, on June 20, 2019.
Judgment delivered from the Bench at Ottawa, Ontario, on June 20, 2019.

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

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on June 20, 2019).

GLEASON J.A.

[1] The appellants appeal from the portions of the order of the Federal Court (*per* Southcott J.) in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2018 FC 992, in which the Federal Court dismissed the appellants' motion under Rule 233 of the *Federal Courts Rules*, SOR/98-106 for an order requiring production of documents from a non-party.

[2] The Federal Court held that it had discretion under Rule 233 as to whether to order the requested production. In the exercise of that discretion, the Federal Court denied the appellants' request for several reasons, including: (1) the production request was premature because it was made before the parties opposite had completed their initial documentary production and before any oral examinations had taken place; (2) it appeared that many of the documents that the appellants sought could be obtained from an opposing party, which had a contractual right to them, but would receive the documents in a format where irrelevant personal information was redacted; and (3) the documents in the non-party's possession contained irrelevant personal information about people who were not involved in the litigation and would need to be redacted to protect such information.

[3] The appellants submit that the Federal Court erred because they say that Rule 233 is mandatory and requires the Court to order disclosure of documents from a non-party whenever the criteria set out in the Rule are met. They also say that the Federal Court erred in declining to strike the affidavit of the representative of the non-party because he failed to produce the documents requested in the direction to attend that the appellants served on him. The appellants

contend that without this evidence there was no basis for the Federal Court's factual findings and that the decision must be set aside for this reason as well.

[4] On the latter point, we see no reviewable error having been committed by the Federal Court in declining to strike the impugned affidavit in the circumstances of this case. To hold otherwise would require a party disputing an order for production to produce the very documents in dispute before the return of the motion.

[5] As concerns the appellants' arguments on the merits of the Federal Court's decision, we cannot accept the appellants' position. Both the wording of the Rule and the relevant case law recognize that the Court possesses discretion under Rule 233 to grant what may be characterized as an exceptional remedy to require that a stranger to litigation produce documents to a party involved in a proceeding before the Court.

[6] Rule 233(1) is cast in permissive terms. It provides:

On motion, the Court may order the production of any document that is in the possession of a person who is not a party to the action, if the document is relevant and its production could be compelled at trial. [emphasis added]	La Cour peut, sur requête, ordonner qu'un document en la possession d'une personne qui n'est pas une partie à l'action soit produit s'il est pertinent et si sa production pourrait être exigée lors de l'instruction. [mon soulignement]

[7] Similar wording elsewhere in the Rules or the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 has been interpreted as conferring discretion, provided the conditions precedent to its exercise are met: see, e.g., *Horizon Pharma PLC v. Canada (Health)*, 2015 FC 744 at para. 30; *Novartis Pharmaceuticals Canada Inc. v. Abbott*

Laboratories Ltd. (2000), 7 C.P.R. (4th) 264 (F.C.A.) at paras. 12-15. Ontario courts have reached a similar conclusion in interpreting the provision in Ontario's *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 governing disclosure from non-parties and have held that even if the conditions listed in the Rule for disclosure are met, the court retains discretion to grant or refuse disclosure: see, e.g. *Philip Services Corp. v. Deloitte & Touche*, 2015 ONCA 60 at paras. 8, 10, 330 O.A.C. 148.

[8] The Federal Court therefore did not err in concluding that it has discretion under Rule 233.

[9] Nor did the Federal Court commit a palpable and overriding error in exercising that discretion.

[10] Contrary to what the appellants submit, it was open to the Federal Court to consider the availability of the information sought from other parties to the action and Rule 238 of the *Federal Courts Rules* (dealing with third party examinations) does not foreclose consideration of this issue on a non-party production request. In short, the mere fact that availability of the documents is not listed in Rule 233 as a relevant factor for the Court to consider, but is listed in Rule 238, does not prevent the Court from considering availability of the documents through the normal discovery process as being a factor that weighs against ordering production from a non-party. Given its exceptional nature, common sense would dictate that third party production should not be ordered where it is not necessary.

[11] We also are of the view that the Federal Court did not err in considering the privacy interests in the documents sought by the appellants. Indeed, the case law recognizes that such interests may be weighed in appropriate cases, as was noted by this Court in *BMG Canada Inc. v. Doe*, 2005 FCA 193, [2005] 4 F.C.R. 81 at para. 42 and by the Supreme Court of Canada in *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157 at paras. 36-37, 207 N.R. 81. Once again, the Federal Court reached what we would characterize as a common sense conclusion that non-parties' privacy interests should not be impacted or a non-party put to the expense of redacting documents when it was not clear that the appellants could not receive what they sought from a party to the litigation in a form where the personal information was already redacted.

[12] In closing, the small slice of this litigation to which we have been exposed seems to demonstrate an unfortunate lack of cooperation, which no longer has its place in litigation, if indeed it ever was appropriate. We would urge counsel and the parties to re-read the decision of the Supreme Court of Canada in *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, 2014 SCC 7. We also note that to the extent the non-party is in possession of documents that the appellants have not obtained that are relevant to the litigation before the Federal Court, if the non-party does not cooperate in their production, it is of course open to the appellants to seek to compel their production and to the Federal Court to make the appropriate costs awards.

[13] We will accordingly dismiss this appeal. In the circumstances, we decline to make an order of costs.

"Mary J.L. Gleason"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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