

Federal Court of Appeal



Cour d'appel fédérale

Date: 20201105

**Dockets: A-396-19
A-397-19**

Citation: 2020 FCA 191

**CORAM: STRATAS J.A.
GLEASON J.A.
LASKIN J.A.**

BETWEEN:

HOSPIRA HEALTHCARE CORPORATION

Appellant

and

**THE KENNEDY TRUST FOR
RHEUMATOLOGY RESEARCH**

Respondent

AND BETWEEN:

**HOSPIRA HEALTHCARE CORPORATION,
CELLTRION HEALTHCARE CO., LTD,
CELLTRION, INC., PFIZER CANADA INC.
and PFIZER CANADA ULC**

Appellants

and

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

Respondents

Heard by online video conference hosted by the Registry on November 5, 2020.
Judgment delivered from the Bench at Ottawa, Ontario, on November 5, 2020.

REASONS FOR JUDGMENT OF THE COURT BY:

GLEASON J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on November 5, 2020).

GLEASON J.A.

[1] The appellants, collectively termed Pfizer, appeal from two orders of the Federal Court, 2019 FC 1252 and 2019 FC 1253 (*per* Phelan, J.), which were made in a bifurcated patent infringement and validity action. In the first order, the Federal Court judge dismissed an appeal from an order of a prothonotary, disallowing a proposed amendment to Pfizer’s Statement of Issues in the damages phase. In the second order, the Federal Court judge dismissed a second motion by Pfizer to amend its Statement of Issues to assert the same claim that had been disallowed by the prothonotary, albeit set out in greater detail in Pfizer’s proposed amendments the second time.

[2] By way of background, in the liability phase of the proceeding, Pfizer was found to have infringed a patent through the manufacture, sale and use of a drug called Inflectra (*Hospira Healthcare Corporation v. Kennedy Trust for Rheumatology Research*, 2018 FC 259, varied in 2020 FCA 30). It also had a second drug, Remsima. During the liability phase of the proceedings, Pfizer took the position that Remsima was the same as Inflectra in material respects and the liability trial proceeded on that basis. During the damages phase of the proceedings,

Pfizer sought to amend its Statement of Issues, in exchange for consenting to certain amendments proposed by the respondents. In its proposed amendments at issue in this appeal, Pfizer asserted that Remsima was a non-infringing alternative, which it claimed disentitled the respondents to damages.

[3] Before Prothonotary Milczynski, who had case managed the proceeding throughout, the matter proceeded as if it were a motion to strike Pfizer's proposed amendment to its Statement of Issues. In an order issued June 14, 2019 (*Hospira Healthcare Corporation v. The Kennedy Trust for Rheumatology Research* (June 14, 2019), T-396-13 (F.C.)) Prothonotary Milczynski refused Pfizer's proposed amendment for two reasons: first, because it was devoid of any material facts, and second, because it ran counter to the positions taken by Pfizer up to that point in the proceedings.

[4] The Federal Court judge had conducted the trial of the liability phase and was seized with the trial of the damages phase. In his order dismissing the appeal from the prothonotary, the Federal Court judge held that Pfizer had not established any error of law or any palpable and overriding error of fact or of mixed fact and law in the prothonotary's order. In his companion order dismissing Pfizer's second motion to amend its Statement of Issues, the Federal Court judge held, among other things, that the proposed amendments could not be allowed since they were radical departures from Pfizer's previous positions in the proceeding and were therefore abusive.

[5] While Pfizer has raised numerous issues before us, we need only consider one. The Federal Court did not err in relying on its knowledge of the proceeding to characterize Pfizer's proposed amendments as a radical departure from its positions taken in the liability phase, and there was ample factual basis to support this characterization. While there may well be cases where a party may set out an alternative for the first time as part of the "but for" world in the damages phase of a patent infringement matter, this is not one of them. Here, the Federal Court determined that the proposed amendments undercut the basis upon which the proceeding had taken place, a finding open to it. Such amendments are abusive (see, for example, *Merck & Co., Inc. v. Apotex Inc.*, 2003 FCA 488, [2004] 2 F.C.R. 459 at para. 47).

[6] These appeals will therefore be dismissed, with costs.

"Mary J.L. Gleason"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS: A-396-19, A-397-19

STYLE OF CAUSE: HOSPIRA HEALTHCARE CORPORATION v. THE KENNEDY TRUST FOR RHEUMATOLOGY RESEARCH

AND BETWEEN

HOSPIRA HEALTHCARE CORPORATION, et al. v. THE KENNEDY TRUST FOR RHEUMATOLOGY RESEARCH, et al.

PLACE OF HEARING: HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY

DATE OF HEARING: NOVEMBER 5, 2020

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

DELIVERED FROM THE BENCH BY: GLEASON J.A.

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