Federal Court of Appeal | Cour d'appel fédérale

Date: 20201103

Docket: A-122-20

Citation: 2020 FCA 188

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

BETWEEN:

AMGEN INC. and AMGEN CANADA INC.

Appellants

and

PFIZER CANADA ULC

Respondent

Heard by online video conference hosted by the registry on November 3, 2020.
Judgment delivered from the Bench at Ottawa, Ontario, on November 3, 2020.

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

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on November 3, 2020).

STRATAS J.A.

[1] Before this Court is an appeal from a judgment dated April 16, 2020 of the Federal Court (*per* Southcott J.): 2020 FC 522. The Federal Court found claims 43-47 of the appellants' Canadian Patent No. 1,341,537 to be obvious and, thus, invalid. The appellants submit that the Federal Court committed reviewable error in applying the test for obviousness.

[2] The appellants concede that the Federal Court identified the correct legal test for obviousness: appellants' memorandum of fact and law at para. 24. However, the appellants submit the Federal Court erred by applying an incorrect principle, failing to consider a required element of a legal test and ignoring relevant factors: appellants' memorandum of fact and law at para. 28.

[3] In particular, the appellants submit that the Federal Court applied wrong legal standards as it applied the various factors in the test for obviousness. For example, the appellants submit that under the "extent of effort" factor, the Federal Court failed to consider whether trials were non-routine or prolonged and arduous. Instead, the appellants say, the Federal Court wrongly substituted a "creative" or "inventive" standard.

[4] In developing their submissions, the appellants take certain phrases from the Federal Court's reasons, analyze them in isolation, and parse them. This is not how appellate courts review the reasons of first-instance courts. We read the reasons of first-instance courts holistically in light of the record and the submissions made, making due allowance for awkward or colloquial expression and efforts to synthesize complex detail: *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3 at paras. 35 and 55; *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344 at para. 68; *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 431 N.R. 286 at paras. 49-51. When we do this in this case, we conclude that the Federal Court had a correct understanding of the legal factors to be considered and applied in the test for obviousness.

[5] Binding jurisprudence provides that the obviousness test is flexible and must be applied contextually to the facts and circumstances of each claim: *Apotex Inc. v. Sanofi-Synthelabo Canada Inc.*, 2008 SCC 61, [2008] 3 S.C.R. 265 at paras. 61-63; *Wenzel Downhole Tools Ltd. v. National-Oilwell Canada Ltd.*, 2012 FCA 333, 443 N.R. 173 at para. 105; *Astrazeneca Canada Inc. v. Mylan Pharmaceuticals ULC*, 2017 FC 142, 145 C.P.R. (4th) 371 at para. 39. This the Federal Court did, faithful to the legal authorities. It thoroughly assessed the credibility of the experts, expressed strong opinions and preferences on that subject and reached a conclusion of obviousness consistent with the views of the experts it preferred and consistent with the principles in the governing jurisprudence.

[6] The appellants seem to be relying on what the respondent has called a "cumulative effect" argument to try to show an extricable legal question. The appellants submit that as a matter of law, a series of obvious steps, viewed together, can be non-obvious for the purposes of the obviousness test. They say that the Federal Court erred in principle by applying the obviousness test without regard to this "cumulative effect" argument.

[7] We are not satisfied the Federal Court so erred. When the Federal Court's reasons are read fairly and in light of the record, we conclude that the Federal Court did not rule out a "cumulative effect" argument as a matter of law. The Federal Court simply did not accept the argument on the evidence in this case.

[8] In drafting its reasons, the Federal Court adopted what might be considered a "segmented approach" in its analysis of the obviousness factors. We consider this to be merely an artefact of the manner in which the case was argued.

[9] On occasion, however, an overly segmented approach can lead to error. The proper approach is to identify the genuine concept of obviousness as exemplified by the factors identified in the jurisprudence and then apply that concept with due attention to the factors. This, the Federal Court did, as is seen by its overall conclusion in paragraph 366 of its reasons. It might have been better if the Federal Court were more expansive and all-embracing in that overall conclusion. But we do not have a substantive concern with the sustainability of the Federal Court's conclusion on obviousness.

[10] In our view, at the root of the appellants' position is dissatisfaction with the result the Federal Court reached when it applied the law to the evidence before it. This is a question of mixed fact and law: *Apotex Inc. v. Pfizer Canada Inc.*, 2019 FCA 16, 163 C.P.R. (4th) 191 at para. 28; *Wellcome Foundation Ltd. v. Novopharm Ltd.*, (2000), 253 N.R. 297, 7 C.P.R. (4th) 330 (F.C.A.). Where, as here, there is no error in law or extricable principle, the standard of review is palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235*; Apotex* at para. 28.

[11] Palpable and overriding error is a high standard. This Court has said that under the palpable and overriding error standard it is not enough for an appellant to just pull at leaves and branches and leave the tree standing; the entire tree must fall: *South Yukon* at para. 46.

[12] The Federal Court did not commit palpable and overriding error. It considered and weighed all of the evidence before it, made clear credibility findings and applied the test for obviousness to the facts it found. Under the palpable and overriding error standard, this Court is forbidden from re-weighing the evidence that was before the Federal Court and arriving at a different conclusion: *Mahjoub* at paras. 79-80. In reality, the appellants' submissions are an attempt to have this Court do just that. This is not our role.

[13] In this case, even if we were to apply the legal test for obviousness to the evidence ourselves as if we were first-instance judges—which we are not supposed to do—we would reach the same result as the Federal Court. Putting this in a different way, under paragraph 52(*b*)(i) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, in an appeal we are entitled to make the judgment the Federal Court should have made; viewing the evidence in light of the Federal Court's credibility findings, we would make the same judgment the Federal Court made.

[14] Overall, we consider the Federal Court's reasons worthy of recognition for their attention to detail, their careful analysis of the rival experts and the thorough analysis throughout. We also recognize Ms. Hussey for her able argument on behalf of the appellants at the hearing of the appeal.

[15] We will dismiss the appeal with costs.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-122-20

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE SOUTHCOTT DATED APRIL 16, 2020, DOCKET NO. T-741-18

STYLE OF CAUSE:	AMGEN INC. and AMGEN CANADA INC. v. PFIZER CANADA ULC
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	NOVEMBER 3, 2020
REASONS FOR JUDGMENT OF THE COURT BY:	STRATAS J.A. GLEASON J.A. LASKIN J.A.
DELIVERED FROM THE BENCH BY:	STRATAS J.A.

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