Federal Court of Appeal | Cour d'appel fédérale

Date: 20211201

Docket: A-317-21

Citation: 2021 FCA 235

Present: **GLEASON J.A.**

BETWEEN:

FIBROGEN, INC.

Appellant

and

AKEBIA THERAPEUTICS, INC. and OTSUKA CANADA PHARMACEUTICAL INC.

Respondents

Heard at Ottawa, Ontario, on November 26, 2021.

Order delivered at Vancouver, British Colombia, on December 1, 2021.

REASONS FOR ORDER BY: GLEASON J.A.

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REASONS FOR ORDER

GLEASON J.A.

[1] The appellant has appealed from the Order of the Federal Court (*per* Barnes, J.), issued with reasons on November 4, 2021 in *Akebia Therapeutics, Inc. v. FibroGen, Inc.*, 2021 FC 1179, and has brought a motion for a stay of that Order pending appeal and for certain other relief, including a request for relief on an interim basis until the appellant's motion for a stay

may be determined. These Reasons deal only with the request for an interim stay of the Federal Court's Order until such time the motion for the stay pending appeal is disposed of.

[2] Given the unique facts in this matter and the urgency of the situation, the interim stay is granted for the reasons below, which, given the circumstances, are necessarily brief.

[3] In the Order under appeal, the Federal Court ordered that motion materials that the respondents had filed with that Court would be unsealed within 30 days (*i.e.* on December 6, 2021) unless a redacted public version of them were filed in the interim. The Federal Court also determined that only certain portions of a witness statement from one of the appellant's witnesses, Dr. Volkmar Guenzler-Pukall, dated January 25, 2021, and of the affidavit of another, Dr. Todd Seeley, dated January 22, 2021, (collectively, the Fact Witness Statements) were confidential and subject to restrictions from disclosure under a confidentiality agreement that the parties entered into in connection with patent litigation before the Federal Court.

[4] The Fact Witness Statements were provided by the appellant to the respondents during the pre-trial disclosure process before the Federal Court. They were also designated as being confidential by the appellant under the confidentiality agreement. Unless the Federal Court ordered otherwise, this designation prevented the Fact Witness Statements from being used for purposes other than the litigation before the Federal Court. The terms of the confidentiality agreement provide that disputes about whether documents have been properly designated as confidential are to be heard by the Federal Court.

[5] In its appeal and before the Federal Court, the appellant asserts and asserted that the Fact Witness Statements are subject to the implied undertaking rule. The appellant also claims in its appeal that the Federal Court erred in finding that the Fact Witness Statements were not shielded from disclosure under the terms of the parties' confidentiality agreement for several reasons, including the fact that, by then, the issue had become moot because the parties had settled their patent action before the Federal Court.

[6] Two months after the settlement, the respondents brought a motion, seeking to have large portions of the Fact Witness Statements declared to have been improperly designated as confidential under the parties' confidentiality agreement with a view to using the Statements in ongoing American litigation between the parties. In connection with this motion, the respondents put unredacted versions of the Fact Witness Statements before the Federal Court. In accordance with the terms of the parties' confidentiality agreement, they were filed under seal. Before the Federal Court, the parties agreed that only portions of the Fact Witness Statements would be protected from disclosure under the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 and have agreed on what such portions are.

[7] In the Order under appeal, the Federal Court declined to deal with the appellant's arguments related to the implied undertaking rule and, as noted, ruled in the respondents' favour in respect of the arguments premised on the confidentiality agreement.

[8] Unless the Federal Court's Order is stayed, unredacted versions of the Fact Witness Statements will be placed on the public Court file on December 6, 2021, unless redacted versions are filed before that date. In either event, by virtue of the terms of the Order, a large portion of the Fact Witness Statements will become publicly available on December 6, 2021, unless a stay is issued by this Court.

[9] On November 15, 2021, the appellant filed its Notice of Appeal and requested the respondents' consent to a stay pending appeal of the Federal Court's Order. In the subsequent exchanges between the parties, the respondents indicated that they would not consent to the stay and advised that their clients had already made some use of the Fact Witness Statements subsequent to the release of the Federal Court's Order. It is not clear from the materials now before this Court what precisely has been done by the respondents with the Fact Witness Statements.

[10] The appellant served its motion for a stay pending appeal and interim relief late in the day on November 24, 2021, and I directed that it could be filed on November 26, 2021, even though one affidavit still needed to be notarized. The respondents filed a letter detailing their position on the points in issue on November 26, 2021, and during a case conference convened on an urgent basis on November 26, 2021, counsel for the parties made submissions in respect of the request for interim relief.

[11] During those submissions, the respondents advised that they would need at least the full 10 days available under the *Federal Courts Rules*, SOR/98-106, to serve and file responding

materials on the stay motion, which is reasonable given the size of the appellant's stay motion record, the issues it raises and the pending trials counsel for the respondents are shortly scheduled to conduct.

[12] The respondents submit that the request for interim relief should be refused, largely because the appeal does not raise a serious issue and because the appellant was dilatory in seeking relief. There was also some suggestion that it would be pointless to issue the requested interim relief as the respondents had already disclosed the Fact Witness Statements, presumably for use in connection with the American litigation, making the appeal moot. In their letter, the respondents also took the position that the appellant would suffer no irreparable harm if the stay were refused and that the balance of convenience favoured refusal of the requested relief.

[13] For the requested interim relief to be granted, the appellant must satisfy the test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311, namely, establish that: there is a serious issue to be tried, the appellant would suffer irreparable harm if the stay were refused, and that the balance of convenience favours granting the stay.

[14] The test for a serious issue is not an onerous one, particularly in the present circumstances. As Nadon, J.A. noted recently in *Western Oilfield Equipment Rentals Ltd. v. M-I L.L.C.*, 2020 FCA 3, 171 C.P.R. (4th) 285 at paragraph 8:

> [8] […] the first part of the test […] requires the appellants to show that their appeal raises a serious issue. In *RJR-MacDonald Inc*., at paragraph 54 of its

> reasons, the Supreme Court made it clear that "[t]he threshold is a low one". In other words, once the Court is satisfied that […] the appeal is neither vexatious nor frivolous, the Court should move on to consider the second and third branches of the test. The fact that the Court might be of the view that the party seeking the stay will not succeed on its appeal is an irrelevant consideration. In the words of the Supreme Court at paragraph 55 of *RJR-MacDonald*, "[a] prolonged examination of the merits [of the case] is generally neither necessary nor desirable."

[15] I find that the appellant has raised sufficiently serious issues, particularly insofar as concerns the claimed breach of the implied undertaking rule and its mootness issue, to warrant issuing a stay until such time as the motion for the longer stay pending appeal is determined, as at this stage, these issues cannot be said to be frivolous or vexatious. In short, I am not convinced that the issues of mootness and breach of the implied undertaking rule are so devoid of merit that the requested interim stay should be refused with the consequence that the appellant's appeal would be rendered nugatory.

[16] In so ruling, however, I wish to make it clear that I have assessed these issues purely in the context of a short stay on an interim basis, which seeks, so far as possible, to preserve the *status quo* until the motion for a stay pending appeal is decided. My finding on serious issue therefore does not finally settle the point, and in my view, it would remain open to the judge hearing the motion for the stay pending appeal to reach a different conclusion on whether the issues raised in the appeal are sufficiently serious so as to warrant a longer stay pending the disposition of the appeal.

[17] Insofar as concerns irreparable harm, a refusal of the requested stay would render the appellant's appeal nugatory. As in *Double Diamond Distribution Ltd. v. Crocs Canada, Inc.*,

2019 FCA 243, 320 A.C.W.S. (3d) 367 at paragraph 10, this is a sufficient basis for finding there to be irreparable harm, particularly in the absence of any suggestion from the respondents as to a need for further use of the documents before the stay pending appeal can be decided.

[18] Given the foregoing, the balance of convenience also favours granting the interim stay, especially given the impact of its refusal on the appellant's appeal and the short duration of the interim stay.

[19] Turning to the alleged delay of the appellant, I do not find the time it took the appellant to bring these issues before the Court provides a basis to refuse the requested relief. Indeed, the appellant in my view moved expeditiously and advised the respondents within 10 days after the date of the Federal Court's Order of its intention to seek a stay. I fail to see any prejudice resulting to the respondents from the time it thereafter took to bring this request before the Court, particularly as the respondents will preserve their full rights to argue the merits of the motion for the longer stay pending appeal in their responding materials.

[20] On this point, I believe it fair that the respondents should have until January 14, 2022, if they wish, to file their responding materials in light of the length of the appellant's motion materials and the nature of the issues raised in the motion for a stay.

[21] Finally, as concerns the suggestion that these issues are moot because the Fact Witness Statements have already been disclosed, there is insufficient evidence before the Court to

establish this and, in any event, I would be loath to find what is alleged to have been a violation of the implied undertaking rule a basis for refusing to afford the requested relief.

[22] I will therefore grant the interim relief requested by the appellant in its Notice of Motion and remit the issue of costs on this request to the judge seized with the motion for the stay pending appeal.

"Mary J.L. Gleason"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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