Federal Court of Appeal  Cour d'appel fédérale

Date: 20140224

Docket: A-221-13

Citation: 2014 FCA 50

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

BETWEEN:

VALEANT CANADA LP/VALEANT CANADA S.E.C. and VALEANT INTERNATIONAL BERMUDA

Appellants

and

THE MINISTER OF HEALTH and COBALT PHARMACEUTICALS COMPANY

Respondents

Heard at Toronto, Ontario, on November 13, 2013.

Judgment delivered at Toronto, Ontario, on February 24, 2014.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: EVANS J.A.
GAUTHIER J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20130224

Docket: A-221-13

Citation: 2013 FCA 50

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

BETWEEN:

VALEANT CANADA LP/VALEANT CANADA S.E.C. and VALEANT INTERNATIONAL BERMUDA

Appellants

and

THE MINISTER OF HEALTH and COBALT PHARMACEUTICALS COMPANY

Respondents

REASONS FOR JUDGMENT

STRATAS J.A.

[1] Valeant Canada LP / Valeant Canada S.E.C. and Valeant International Bermuda (collectively "Valeant") appeal from the order dated June 27, 2013 of the Federal Court (per O'Keefe J.): 2013 FC 720. Cobalt Pharmaceuticals Company ("Cobalt") cross-appeals.

[2] The Federal Court's order stems from a motion for disqualification brought by Valeant within an application for prohibition it has brought under the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 ("NOC Regulations"). That application was triggered by Cobalt serving a notice of allegation on Valeant.

[3] The Federal Court granted Valeant's motion. It disqualified Cobalt's in-house lawyer from any further involvement in the application before the Court on the ground that he could be presumed to have Valeant's confidential information.

[4] However, Valeant wanted more than just the disqualification of in-house counsel. It asked the Court to declare that Cobalt's notice of allegation – prepared by the law firm of Deeth Williams Wall LLP ("Deeth") – was invalid. It also sought relief related to that. Citing jurisdictional reasons, the Federal Court refused to grant Valeant any relief beyond the disqualification of in-house counsel.

[5] Valeant, dissatisfied, appeals. It says that the judge should have gone further and should have struck out the notice of allegation. Cobalt cross-appeals. It submits that the Federal Court erred in disqualifying its in-house counsel.

[6] For the reasons that follow – different from those of the Federal Court – I would dismiss both the appeal and the cross-appeal.

A. The basic facts

[7] On August 17, 2012, Valeant received a notice of allegation from Cobalt under the NOC Regulations in respect of Canadian Patent Nos. 2,242,224 and 2,307,547 and the medicinal ingredient diltiazem hydrochloride in extended-release tablets of 180, 240, 300 and 360 mg strengths compared to Valeant's TIAZAC® XC.

[8] Soon afterward, Valeant learned that Deeth purported to represent Cobalt and that it was involved in preparing the notice of allegation.

[9] Valeant was alarmed by this. Deeth was the law firm of its predecessor, Biovail, for many years until 2008. In the period leading up to 2008, Deeth had represented Biovail in five proceedings in the Federal Court relating to diltiazem hydrochloride, the same medicinal ingredient that is the subject-matter of the notice of allegation.

[10] The proceedings concerning diltiazem hydrochloride were subject to confidentiality orders. Aside from the matters covered by the confidentiality orders, Valeant believed that Deeth had other confidential information about its affairs and business strategies. Because Deeth had been its counsel for many years, Valeant also believed that Deeth continued to possess confidential communications covered by solicitor-client and litigation privilege.

[11] To Valeant, after years of acting as its predecessor's counsel, Deeth was now attacking it and its medicinal ingredient that it had earlier defended and was making improper use of confidential information. Valeant registered its objection with Deeth.

[12] Soon after receiving the objection, Deeth resigned as Cobalt's counsel.

[13] Valeant has brought an application prohibiting the Minister from issuing a notice of compliance in favour of Cobalt (file T-1805-12). Deeth has undertaken not to act further for Cobalt or to assist in any way in the application.

[14] I shall offer no comment concerning the conduct of Deeth or others in these circumstances. As will be explained later in these reasons, this Court does not have a satisfactory factual record to decide whether and to what extent any confidential information was misused in a material way. Further, Valeant might pursue other steps to restrain or redress any misuse of confidential information and it will be for other courts to assess the conduct of those involved in this matter.

[15] For present purposes, it is enough to say that Deeth's resignation as counsel and undertaking not to act or assist further did not satisfy Valeant. In Valeant's view, two problems remained:

- First, Cobalt employed one Mr. Migus as in-house counsel. During the last two years that Deeth represented Valeant's predecessor, Biovail in its patent litigation (2006-2008), Mr. Migus was employed by Deeth as a student-at-law and, later, as a lawyer. In Valeant's view, Mr. Migus was privy to its confidential information and

was tainted by conflict of interest. In its view, he must be disqualified from any further involvement in the application.

- Second, in Valeant's view, Cobalt's notice of allegation was a direct product of Deeth's improper use of confidential information gathered from its earlier retainers with Valeant's predecessor, Biovail. Accordingly, the notice of allegation must be declared invalid.

[16] Valeant brought a motion for an order disqualifying Mr. Migus, declaring the notice of allegation invalid, and other relief related to the declaration.

B. The decision of the Federal Court

[17] The Federal Court disqualified Mr. Migus from any further involvement in the application. Mr. Migus had sworn an affidavit that he had worked on only one regulatory file relating to Valeant's predecessor, Biovail, and that he had no relevant confidential information about Biovail that arose from his employment at Deeth. To the Federal Court, this was not enough. It held that there was a presumption that lawyers at a firm working together will share confidences. To offset the presumption, it was necessary for confidentiality mechanisms and screens to be established to ensure that there was no spreading of confidential information.

[18] The Federal Court declined to declare the notice of allegation invalid and to grant relief related thereto. It held that it lacked the jurisdiction to do so. It cited this Court's decision in

Pharmacia Inc. v. Canada (Minister of National Health and Welfare) (1994), 58 C.P.R. (3d) 207 (F.C.A.).

[19] As mentioned above, Cobalt appeals the disqualification of Mr. Migus and Valeant appeals from the Federal Court's failure to declare the notice of allegation to be invalid and to grant relief related thereto.

C. Analysis: the disqualification of Mr. Migus

[20] Cobalt submits that this Court should set aside the Federal Court's order disqualifying Mr. Migus because it erred in principle. In particular, it submits that the Federal Court misunderstood and misapplied the test for disqualification set out in *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, reaffirmed in *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39.

[21] I agree that the Federal Court did not apply the *Martin* test exactly as set out by the Supreme Court. Nevertheless, the Federal Court reached the correct result.

[22] In *Martin, supra*, the Supreme Court held that in a disqualification motion two questions must be asked:

> (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand?

(2) Is there a risk the confidential information will be used to the prejudice of the client?

[23] On the first question, the Supreme Court held that in certain circumstances, one may infer that the lawyer received confidential information (at page 1260):

> In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant.

[24] When considering the first question in *Martin*, the Federal Court held that Deeth, the law firm, had received confidential information. In its words (at paragraph 18), "the law firm [Deeth] was privy to confidential information about some of the matters in issue in the present proceedings." However, the Federal Court did not ask itself whether Mr. Migus, the lawyer, had received confidential information. Instead, it attributed Deeth's confidential information to Mr. Migus by applying an inference that lawyers share confidences amongst one another, and that measures protecting against the misuse of confidential information had not been implemented (at paragraphs 19-20).

[25] In my view, the Federal Court should not have resorted to the inference. There was evidence before it showing that Mr. Migus had received confidential information of Valeant's predecessor, Biovail, when he was at Deeth. Mr. Migus reviewed confidential information of Biovail pertaining to diltiazem and a case related to the '224 Patent – the same medicinal ingredient and the same patent in issue in the Cobalt notice of allegation in this proceeding. See cross-examination of Mr. Migus, Appeal Book, vol. II at pages 828-830. Mr. Migus also admitted to reviewing Biovail's

records while at Deeth for the purposes of an access to information request filed concerning diltiazem.

[26] On the second *Martin* question – whether there is a risk that the confidential information held by Mr. Migus will be used to prejudice Valeant in the application – the Supreme Court stated that in some circumstances, disqualification will be automatic (at page 1261):

> A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail.

.

[27] In this case, Mr. Migus had confidential information and so his disqualification is automatic.

[28] It follows that there are no grounds to set aside the Federal Court's order disqualifying Mr. Migus. For these reasons, I would dismiss Cobalt's cross-appeal.

D. Analysis: Valeant's request for further remedies

[29] In its appeal to this Court, Valeant submits that the Federal Court should have gone further than disqualifying Mr. Migus – it should have declared the notice of allegation invalid and granted further relief related thereto.

[30] The Federal Court refused Valeant this further relief because it believed that it lacked jurisdiction to grant it. It relied upon this Court's decision in *Pharmacia*, *supra*. Valeant submits that the Federal Court erred: *Pharmacia* is distinguishable.

[31] I agree that *Pharmacia* is distinguishable.

[32] In *Pharmacia*, *supra*, the Court had before it an application for judicial review under subsection 6(1) of the NOC Regulations. This Court held that that statutory proceeding existed only to prohibit the Minister from granting a notice of compliance. In the context of that narrow statutory proceeding, a motion to strike a notice of allegation could not lie.

[33] This case is different. In this case, Valeant has brought a motion for disqualification – a concern over whether counsel has a conflict of interest – something that the Court can always consider, narrow statutory proceeding or otherwise. As a remedy on the motion in this case, Valeant seeks a declaration that the product of a conflict of interest, the notice of allegation, be declared to be invalid. The real issue before us is whether that remedy can and should be granted to redress the conflict of interest. On this record, it should not be granted. But I would go further and say it cannot be granted.

[34] Valeant submitted that this Court has a plenary power to "investigate, detect and, if necessary, redress abuses of its own processes": *Minister of National Revenue v. RBC Life Insurance Co.*, 2013 FCA 50 at paragraph 36. It submitted that in these circumstances, this Court can and should invalidate the notice of allegation, a document filed before the Court that is the product of the misuse of information and an improper conflict of interest.

[35] Valeant's submission founders in part upon that last mentioned point: we are not persuaded on the record before us that the notice of allegation is the product of the misuse of information and an improper conflict of interest. In particular, I note the following points:

- There is no evidence in this record that Valeant's confidential information was actually used in the preparation of the notice of allegation. At this point there are only speculations and inferences.

- I am not satisfied from a review of the notice of allegation itself that confidential information has actually been misused. On its surface, much of it appears to be based on facts that are objectively known and discoverable, and matters of law. This is not to say that confidential information was not misused. Simply put, I am not persuaded one way or the other.

- Even if I could find that confidential information was misused, it is impossible for me to know from the record the extent to which confidential information was used in preparing the notice of allegation. In the circumstances, a declaration that the notice of allegation is invalid might be a remedy that overshoots the mark.

- The record before us is a paper record, not the sort of full record that would be created in an action for breach of fiduciary duty or misuse of confidential information – a proceeding that would have the advantage of full discovery and trial.

[36] I would add that both *Martin*, *supra* and *McKercher*, *supra* stand for the proposition that motions for disqualification give rise to the remedy of disqualification and not the sort of relief Valeant seeks.

[37] First, satisfying the test for disqualification in *Martin* does not inexorably lead to the relief Valeant seeks – invalidating the notice of allegation. The second question under the *Martin* test asks only whether there is a *risk* of confidential information being used to the prejudice of the client. It does not ask whether confidential information has actually been used to prejudice the client.

[38] Second, neither *Martin* nor *McKercher* suggests or even hints that motions for disqualification can be used to redress actual misuses of confidential information and take the place of actions for breach of fiduciary duty and misuse of confidential information – actions that are tried on the basis of the advantages and protections associated with full discovery and trial. Indeed, in *Martin* the Supreme Court noted that "the use of confidential information" is "usually not susceptible of proof" on a motion such as this (at page 1259).

[39] Third, on its own terms, *Martin* was only about "the standard to be applied in the legal profession in determining what constitutes a disqualifying conflict of interest," not whether the sort of relief Valeant seeks here can be granted on a motion for disqualification: *Martin* at page 1239; see also pages 1243 and 1249. *McKercher* goes even further. There, the Supreme Court observed (at paragraph 62) that motions for disqualification were aimed at "*prevent[ing]* misuse of confidential information" [my emphasis]. Indeed, in *McKercher* (at paragraph 62), the Supreme Court

recognized that "disqualification is generally the only appropriate remedy, subject to the use of mechanisms that alleviate this risk as permitted by law society rules."

[40] I leave open whether there might be an exceptional case where the Court's plenary power to redress an abuse of process might be triggered and justify the sort of additional relief sought in this case: *RBC Life Insurance Company*, *supra*. However, as mentioned in paragraph 35, above, the evidentiary record in this case is insufficient to trigger that power.

[41] In conclusion, the Federal Court was right to dismiss Valeant's request for invalidation of the notice of allegation and for related relief – but for different reasons.

E. Postscript

[42] Subject to any applicable limitation periods, Valeant is free to pursue whatever steps are available to it to restrain or redress the alleged misuse of its confidential information. These reasons should not be taken as expressing any comment on the merit of those steps, if pursued.

F. Disposition

[43] For the foregoing reasons, I would dismiss the appeal and the cross-appeal. In the Federal Court, success was divided and so that Court did not award costs. Neither party challenged that exercise of discretion in this Court. Here again, success was divided. Accordingly, I would not award costs.

"David Stratas"
J.A.

"I agree
John M. Evans J.A."

"I agree
Johanne Gauthier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-221-13

APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE O'KEEFE DATED JUNE 12, 2013, DOCKET NO. T-1805-12

STYLE OF CAUSE:	**VALEANT CANADA LP/VALEANT CANADA S.E.C. and VALEANT INTERNATIONAL BERMUDA v. THE MINISTER OF HEALTH and COBALT PHARMACEUTICALS COMPANY**
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 13, 2013
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	EVANS and GAUTHIER JJ.A.
DATED:	FEBRUARY 24, 2014

APPEARANCES:

Andrew Skodyn	FOR THE APPELLANTS
Paula Bremner	FOR THE RESPONDENT, COBALT PHARMACEUTICALS

SOLICITORS OF RECORD:

Lenczner Slaght Royce Smith Griffin LLP Toronto, Ontario	FOR THE APPELLANTS
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT, THE MINISTER OF HEALTH
Sim, Lowman, Ashton & McKay LLP Toronto, Ontario	FOR THE RESPONDENT, COBALT PHARMACEUTICALS