Federal Court of Appeal | Cour d'appel fédérale

Date: 20140501

Docket: A-95-14

Citation: 2014 FCA 112

Present: STRATAS J.A.

BETWEEN:

JANSSEN INC.

Appellant

and

ABBVIE CORPORATION, ABBVIE DEUTSCHLAND GMBH & CO. KG AND ABBVIE BIOTECHNOLOGY LTD.

Respondents

Heard at Toronto, Ontario, on April 29, 2014.

Order delivered at Ottawa, Ontario, on May 1, 2014.

REASONS FOR ORDER BY: STRATAS J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20140501

Docket: A-95-14

Citation: 2014 FCA 112

Present: STRATAS J.A.

BETWEEN:

JANSSEN INC.

Appellant

and

ABBVIE CORPORATION, ABBVIE DEUTSCHLAND GMBH & CO. KG AND ABBVIE BIOTECHNOLOGY LTD.

Respondents

REASONS FOR ORDER

STRATAS J.A.

[1] Janssen Inc. moves for an order staying or suspending the remedies phase of a trial in the Federal Court. For the following reasons, I dismiss the motion with costs.

A. Introduction

[2] Circumstances may prompt Janssen to move again for a stay. Some or all of the evidence filed on this motion, and no doubt more, may be filed in that future stay motion. Also certain matters remain to be decided by the Federal Court.

[3] Accordingly, these reasons shall be minimal in nature, dealing with the evidence and the law only to the extent necessary to determine this motion.

B. The trial in the Federal Court

[4] The respondents (collectively "AbbVie") sued Janssen in the Federal Court for patent infringement.

[5] On motion brought by Janssen, a Prothonotary of the Federal Court ordered that the trial be bifurcated. First, the Federal Court would try the liability issues. Later, if it found liability, it would try the issues relating to remedy.

[6] On January 17, 2014, following a trial on the liability issues, the Federal Court (*per* Justice Hughes) held that claims 143 and 222 of AbbVie's Canadian Patent No. 2,365,281 were valid and were infringed: 2014 FC 55.

[7] Janssen has appealed the Federal Court's decision on the liability issues to this Court. It is probable that the appeal will be ready for hearing within the month.

[8] However, the Federal Court's work in this matter is not done. The issues relating to remedy must be tried.

[9] A wrinkle here is that a Prothonotary of the Federal Court ordered that the remedy phase be further bifurcated:

- On May 12, 2014, the Federal Court will begin a trial on the issue whether Janssen should be enjoined from certain conduct, including the marketing and the selling of its medication, Stelara.

- In September 2015, the Federal Court will conduct a trial on the issue of damages arising from Janssen's infringement.

[10] Janssen appealed this further bifurcation to a judge of the Federal Court under Rule 51. That judge (again Justice Hughes) dismissed the appeal: 2014 FC 178. Janssen has appealed further to this Court. The appeal is pending.

C. The bottom line

[11] Janssen finds itself with two pending appeals in this Court and faces a trial on injunctive relief starting on May 12, 2014. If successful in this Court, the bottom line is that the trial on injunctive relief either should not happen, or should not have been separated from the damages issues.

D. The test for a stay

[12] The parties agree that in deciding this motion, the Court must consider three questions:

- Does Janssen have a serious issue to be tried on appeal?
- Will Janssen suffer some irreparable harm?
- Does the balance of convenience lie in Janssen's favour?

(*RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.)

[13] Janssen submits that this Court can grant the stay even if the answer to one of these questions is negative. It submits that the overall test is whether a stay is in the "interests of justice." So, for example, if Janssen has not shown irreparable harm, it may still be possible for the Court to grant the stay.

[14] I disagree. All three questions must be answered in the affirmative. Put another way, Janssen must establish all three requirements. I offer three reasons for this conclusion.

– I –

[15] Although in the leading case of *RJR-MacDonald* the Supreme Court is not explicit on the issue, it seems to regard an affirmative answer to all three questions to be essential for relief.

[16] Certainly that is the position in this Court: *Chinese Business Chamber of Commerce v. Canada*, 2006 FCA 178; *Glooscap Heritage Society v. Minister of National Revenue*, 2012 FCA 255 at paragraph 33.

[17] This Court is bound by these earlier authorities unless it is persuaded that they are "manifestly wrong": *Miller v. Canada (Attorney General)*, 2002 FCA 370. I have not been so persuaded.

– II –

[18] Janssen cites some authorities in support of its submission: *Domco Industries Ltd. v. Armstrong Cork Canada Ltd.*) (1981), 56 C.P.R. (2d) 198 (Fed. T.D.); *International Corona Resources Ltd. v. LAC Minerals Ltd.* (1986), 21 C.P.C. (2d) 252 (Ont. C.A.); *Longley v. Canada (Attorney General)*, 2007 ONCA 149. All are distinguishable. *Domco* and *International Corona*

predate *RJR-MacDonald*. *Longley* concerns the specific wording of an Ontario Rule different from any existing in the *Federal Courts Rules*.

– III –

[19] Each branch of the test adds something important. For that reason, none of the branches can be seen as an optional extra. If it were otherwise, the purpose underlying the test would be subverted.

[20] The test is aimed at recognizing that the suspension of a legally binding and effective matter – be it a court judgment, legislation, or a subordinate body's statutory right to exercise its jurisdiction – is a most significant thing: *Mylan Pharmaceuticals ULC v. AstraZeneca Inc.*, 2011 FCA 312 at paragraph 5. The binding, mandatory nature of law – which I shall call "legality" – matters. Indeed, it is an aspect of the rule of law, a constitutional principle: *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 at paragraph 58.

[21] Therefore, a suspension or stay should be granted only after all three branches of the test, with their associated policies, favour a temporary suspension of legality.

[22] I shall illustrate this by examining the policies under each branch. Usefully, this also summarizes the law I must apply on this motion.

[23] On the need for a serious question to be tried, it is true that the threshold is "a low one" and "liberal": *RJR-MacDonald*, *supra* at page 337; *143471 Canada Inc. v. Quebec (Attorney General)*, [1994] 2 S.C.R. 339 at page 358, *per* La Forest J. (dissenting, with apparent concurrence on this point from the majority). There need only be a showing that the matter is not destined to fail or that it is "neither vexatious nor frivolous": *RJR-MacDonald*, *supra* at page 337. But this cannot be an optional extra. It would be strange, indeed, if legality could be suspended, even temporarily, in the face of a laughably weak or hopeless case.

[24] On the irreparable harm branch of the test, the moving party must demonstrate in a detailed and concrete way that it will suffer real, definite, unavoidable harm – not hypothetical and speculative harm – that cannot be repaired later: *Stoney First Nation v. Shotclose*, 2011 FCA 232 at paragraphs 47-49; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 at paragraphs 14-22; *Gateway City Church v. Canada (National Revenue)*, 2013 FCA 126 at paragraphs 14-16; *Glooscap Heritage Society*, *supra* at paragraph 31; *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25 at paragraph 12. Here again, it would be strange if a litigant complaining of harm it caused itself, harm it could have avoided or repaired, or harm it still can avoid or repair could get such serious relief. Similarly, it would be strange if vague assumptions and bald assertions, rather than detailed and specific evidence, could support the granting of such serious relief.

[25] Under the balance of convenience branch of the test, the public interest in favour of legality falls to be considered. In some cases, particularly those where a law affecting millions of people might be suspended, the public interest served by legality deserves much weight: *RJR-*

MacDonald, supra at pages 343-347. Where the public interest associated with legality is greater than the harm (irreparable or otherwise) or inconvenience to be suffered by the individual litigant, the individual litigant cannot be allowed to override legality.

[26] In the discussion above, I do not mean to imply that suspensions or stays are extraordinarily tough to get. Not at all: when each of the three branches of the test is met, relief is granted. But, indeed, each branch of the *RJR-MacDonald* test must be met. Each adds something essential to the analysis.

E. Applying the test for a stay

[27] Has Janssen met each branch of the test for a stay? Should the Federal Court be stopped at this time from embarking upon the remedial phase of the trial until this Court determines the appeals before it?

[28] I answer these questions in the negative. It is only necessary to examine the issue of irreparable harm.

F. Has Janssen established the presence of irreparable harm?

[29] Janssen brought the motion to bifurcate the liability and remedies issues. It got the order it sought: Order of Prothonotary Aalto dated September 26, 2011. In seeking the bifurcation

order, Janssen understood that one factor in favour of bifurcation was that the remedial phase would happen quickly, with, at most, only a "modest delay": see Order, pages 5 and 8.

[30] In short, Janssen got what it wanted and what it could reasonably expect – the prompt beginning of a remedial phase that would cause it to incur management time and legal and other costs. To the extent that this is harm, it is harm it brought upon itself by asking for bifurcation in these circumstances. It is avoidable harm.

[31] Janssen must point out some irreparable harm associated with bifurcation that is beyond the usual consequences of the bifurcation it sought and received: *Laperrière, supra* at paragraph 21. This it has not done.

[32] True, the issue of an injunction has been separated out and it is being dealt with more quickly than perhaps Janssen actually anticipated. But the action has been case-managed throughout. Janssen can hardly be surprised that after the determination of the liability phase, the case-management Prothonotary looked at the remedial phase and decided which remedial issues should be heard first, and when. To reiterate, in terms of bifurcation, Janssen got what it wanted and what it could reasonably expect.

[33] In its submissions on irreparable harm, Janssen emphasized the suffering of patients who will not be able to use its medication, Stelara. But at present, patients can still use Stelara. That may change depending on how the Federal Court determines the issue of injunction.

[34] The Federal Court might grant an injunction on terms that protect patients. It might grant an injunction on other terms that reduce or eliminate the harm to patients or, for that matter, other harms that Janssen could suffer. Or it might not grant the injunction at all. Right now, any harm to patients, or for that matter to Janssen, is speculative and hypothetical.

[35] On the issue of harm to patients, AbbVie submits that the only admissible irreparable harm is that suffered by the moving party: see, *e.g.*, *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 at page 128. Janssen disagrees and submits that such harm is admissible because the patients are dependent upon it, the moving party: see, *e.g., Holy Alpha and Omega Church of Toronto v. Attorney General of Canada*, 2009 FCA 265 at paragraph 17; *Glooscap Heritage Society, supra* at paragraph 34. Given my comments, above, I need not resolve this issue.

G. Disposition

[36] Janssen's motion will be dismissed with costs.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-95-14
MOTION DEALT WITH IN WRITING APPEARANCE OF PARTIES	
STYLE OF CAUSE:	JANSSEN INC. v. ABBVIE CORPORATION, ABBVIE DEUTSCHLAND GMBH & CO. KG AND ABBVIE BIOTECHNOLOGY LTD.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 29, 2014
REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	MAY 1, 2014

APPEARANCES:

Marguerite F. Ethier Alexandra Wilbee	FOR THE APPELLANT
Sarit Batner Fiona Legere	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Lenczner Slaght Royce Smith Griffin LLP Toronto, Ontario	FOR THE APPELLANT
McCarthy Tétault LLP Toronto, Ontario	FOR THE RESPONDENTS