Federal Court  Cour fédérale

Date: 20160825

Docket: T-1440-14

Citation: 2016 FC 970

Ottawa, Ontario, August 25, 2016

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

BAYER INC. and
BAYER INTELLECTUAL PROPERTY GmbH

Applicants

and

FRESENIUS KABI CANADA LTD. and
THE MINISTER OF HEALTH

Respondents

ORDER AND REASONS

[1] This is a motion by the Respondent Fresenius Kabi Canada Ltd. [Fresenius] that I reconsider my Judgment dated May 27, 2016, in which the Court issued a prohibition order at the request of Bayer Inc. and Bayer Intellectual Property GmbH [Bayer] in respect of a Notice of Allegation [NOA] served by Fresenius concerning Canadian Patent No. 2,192,418 [the 418 Patent].

[2] The Court, in issuing prohibition, stated at para 7:

> [7] ….The determinative issue is the sufficiency of the NOA; I have found the NOA defective, because it does not contain the "detailed statement of legal and factual basis" for the alleged non-infringement which is required by law, namely subparagraph 5(3)(b)(ii) of the PM (NOC) Regulations. Had I not found the NOA defective, I would have dismissed this application because Bayer failed to establish on a balance of probabilities that the allegations of non-infringement are not justified.

[3] In summary, Fresenius seeks reconsideration because it alleges that the remedy of a prohibition order is inconsistent with the Reasons, and the Reasons overlook specific concessions made by Bayer in its argument. Fresenius says the Court found the NOA was insufficient only as it related to the allegation of non-infringement by importation, and granted a prohibition order, adding that such remedy is inconsistent with the Court's finding that the allegation of simple non-infringement was "the essence of Fresenius' allegation" in the NOA and was justified. Fresenius concludes that the case presents the type of inconsistency or oversight that the Court is empowered to correct under Rule 397 of the *Federal Courts Rules*, SOR/98-106. Fresenius requests that the Court exercise that power, issue the order that should have been made, and dismiss this application.

[4] Fresenius says that its motion does not seek to disturb the substance of the Reasons given by the Court, and asks that changes be made such that Bayer's prohibition application, instead of being granted, is dismissed. It also asks that the cost award be reversed such that costs are awarded to Fresenius instead of Bayer as in the existing decision.

[5] Bayer, on the other hand, says that Fresenius impermissibly asks the Court to re-write its Reasons and reverse its Judgment. Bayer says that Reasons cannot be re-written and that this Judgment cannot be reversed on a motion for reconsideration. Moreover, Bayer says that the Judgment was supported by detailed Reasons which accord fully with the Judgment. Bayer says no matter was overlooked or accidentally omitted. As a result, Bayer says reconsideration pursuant to Rule 397(1) is not available.

[6] Under Rule 397(1), the Federal Court may correct the terms of an order (including a judgment) only if one of the two following circumstances are satisfied:

a) the order does not accord with any reasons given for it; or

b) a matter that should have been dealt with has been overlooked or accidentally omitted.

[7] In my respectful opinion, Fresenius' request that the Court reverse its Judgment by supplementing, modifying or replacing its words is beyond the limited relief available under Rule 397 because the judgment accords with the reasons, and did not overlook or accidentally omit a matter. Rule 397(1) is therefore not available.

[8] In its Reasons of May 27, 2016, the Court held that Fresenius' NOA was defective because it did not contain the "detailed statement of legal and factual basis" for the alleged non-infringement which is required by law, namely subparagraph 5(3)(b)(ii) of the *PM (NOC) Regulations*. That defect was fatal to Frersenius' case and remains so notwithstanding its motion to reconsider. I was pointed to no law at the hearing, nor in this motion to reconsider, suggesting

that a NOA may be saved notwithstanding such fatal defect. The finding that Fresenius' NOA was defective, as stated in the Court's Reasons at para 76, "… disposes of this application; the Minister of Health may not issue a NOC where an applicant … has failed to comply with its duty to file the detailed statement required under subparagraph 5(3)(b)(ii) of the PM (NOC) Regulations. Therefore, Bayer is entitled to the prohibition order it seeks."

[9] With respect, this motion is in effect a motion to reargue the application. However, that is not the purpose of a motion to reconsider. The Reasons and the Judgment are consistent, and I am unable to identify any slip in drawing it up. In particular, I am satisfied now, as I was then, that the Judgment issued expresses the intention of the Court. If it is in error, it is for the Federal Court of Appeal to make such determination on an appeal.

[10] Fresenius argues in its correspondence that reconsideration is an appropriate, just, and most expeditious avenue for reconsideration of this Court's Judgment. While a motion to reconsider may be more expeditions than an appeal as a means to have a judgment or order set aside, I am unable to agree, nor did I hear it argued although it is the result of such logic, that Rule 397 is a substitute for the appeal rights created by the *Federal Courts Act*, R.S.C., 1985, c. F-7.

[11] This Court is *functus officio* other than as allowed under Rule 397. It is well accepted, and indeed the parties agree that Rule 397 may not be used to reverse that which has already been ordered; *Yukon Forest Corporation v. Canada*, 2006 FCA 34 at paras. 39 and 40; *Taker v Attorney General of Canada*, 2012 FCA 83 at paras 4 and 5.

[12] In my respectful view, the relief sought by Fresenius may only be granted by the Federal Court of Appeal. In this connection, I note that the motion to reconsider was filed on June 3, 2016. Subsequently, Fresenius did in fact file a Notice of Appeal to the Federal Court of Appeal on June 24, 2016. Fresenius sent a letter to the Court stating that in the event of a final determination of its motion to reconsider in Fresenius' favour, its appeal will become moot and Fresenius will take the necessary steps to discontinue it. Fresenius is not in any way prejudiced in its motion to reconsider by subsequently instituting an appeal; I mention the appeal because that is the proper course for Fresenius to pursue instead of this motion to reconsider.

[13] It is inappropriate for this Court to go further in these reasons for dismissing this motion. To do so would directly trespass on the jurisdiction of the Federal Court of Appeal to correct errors, should it find them in this matter. It is inappropriate for me to sit on review of my own Reasons; to do so would permit a disguised method of appeal contrary to the scheme of the Rules and the *Federal Court Act*: *Tucker v Canada*, 2001 FCT 334 at paras. 7 – 12. If the Court is wrong in this matter it is for the appeal to decide. I also note that a "matter" for the purposes of Rule 397(1)(b) has been found to be an element of the relief sought, as opposed to an argument raised before the Court; *Lee v Canada (Minister of Citizenship and Immigration)*, 2003 FC 867 at paras 3 to 4, and 7.

[14] Therefore, the motion for reconsideration is dismissed.

[15] Costs should follow the event. Therefore, Bayer will have its costs of this motion payable by Fresenius. The parties may seek further direction regarding costs by written submissions filed within 15 days of the date of this Judgment if necessary.

ORDER

THIS COURT'S JUDGMENT is that:

1. The motion for reconsideration is dismissed.

2. Bayer shall have its costs of this proceeding payable by Fresenius. The parties may seek further direction regarding costs by written submissions filed within 15 days of the date of this Order if necessary.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1440-14
STYLE OF CAUSE:	BAYER INC. ET AL v FRESENIUS KABI CANADA LTD. ET AL

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, WITHOUT APPEARANCE OF THE PARTIES

ORDER AND REASONS:	BROWN J.
DATED:	AUGUST 25, 2016

WRITTEN REPRESENTATIONS BY:

Peter Wilcox Mark Edward Davis	FOR THE APPLICANTS BAYER INC. AND BAYER INTELLECTUAL PROPERTY GMBH
Tim Gilbert Sana Halwani Andrew Moeser Zarya Cynader	FOR THE RESPONDENT FRESENIUS KABI CANADA LTD.

SOLICITORS OF RECORD:

Belmore Neidrauer LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS BAYER INC. AND BAYER INTELLECTUAL PROPERTY GMBH
Gilbert's LLP Barristers and Solicitors Toronto, Ontario	FOR THE RESPONDENT FRESENIUS KABI CANADA LTD.
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT THE MINISTER OF HEALTH