

Federal Court



Cour fédérale

Date: 20170818

**Docket: T-1379-13
T-1468-13
T-1368-14**

Citation: 2017 FC 775

Ottawa, Ontario, August 18, 2017

PRESENT: The Honourable Mr. Justice Fothergill

Docket: T-1379-13

BETWEEN:

**BAYER INC. and BAYER PHARMA
AKTIENGESELLSCHAFT**

**Plaintiffs
Defendants by Counterclaim**

and

COBALT PHARMACEUTICALS COMPANY

**Defendant
Plaintiff by Counterclaim**

**Dockets: T-1468-13
T-1368-14**

AND BETWEEN:

**BAYER INC. and BAYER PHARMA
AKTIENGESELLSCHAFT**

**Plaintiffs
Defendants by Counterclaim**

and

APOTEX INC.

**Defendant
Plaintiff by Counterclaim**

ORDER AND REASONS

I. Overview

[1] The Defendants have brought motions to strike portions of the Plaintiffs' Statements of Issues. In the alternative, the Defendants request particulars.

[2] A Statement of Issues must be read within the broader context of the proceedings as a whole. Viewed in this light, the disputed portions of the Statements of Issues disclose reasonable causes of action. They are sufficiently clear to allow for intelligent responses, and further particulars are not required at this time.

[3] The motions are therefore dismissed. Given the legitimacy of some of the concerns raised by Apotex and Cobalt regarding overbreadth and ambiguity in the Statements of Issues, no costs are awarded.

II. Background

[4] On September 7, 2016, this Court held that Canadian Patent No. 2,382,426 [the 426 Patent], which is owned by the Plaintiff Bayer Pharma Aktiengesellschaft and licensed by the Plaintiff Bayer Inc. [collectively Bayer], was valid and infringed by the Defendants Apotex Inc.

[Apotex] and Cobalt Pharmaceuticals Company [Cobalt] (*Bayer Inc v Apotex Inc*, 2016 FC 1013 [liability phase]).

[5] On October 27, 2016, this Court ordered that Bayer could, after due inquiry and reasonable discovery, “elect either an accounting of the profits of Apotex and Cobalt or all damages sustained by reason of Apotex’s and Cobalt’s infringement of the 426 Patent” (*Bayer Inc v Cobalt Pharmaceuticals Company*, 2016 FC 1192). Bayer’s remedy will be determined at a future stage of the proceedings [remedies phase].

[6] On June 15, 2017, pursuant to the direction of Prothonotary Martha Milczynski, Bayer served and filed its Statements of Issues in the remedies phase. Apotex and Cobalt take issue with certain portions of the Statements of Issues, and each brings a motion to strike those portions. Alternatively, they ask that Bayer provide particulars.

III. Analysis

[7] A Statement of Issues is tantamount to a pleading. It defines the matters in issue and therefore delineates the scope of discovery. A pleading will be struck only in exceptional circumstances where it is plain and obvious that it: (a) discloses no reasonable cause of action; (b) is immaterial, redundant, scandalous, frivolous or vexatious; (c) may prejudice or delay the fair trial of the action; or (d) is otherwise an abuse of process (*Federal Courts Rules*, SOR/98-106, r 221(1); *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17).

[8] A Statement of Issues must be read within the broader context of the proceedings. Vague or poorly-drafted pleadings need not be struck or re-drafted if they can be comprehended by a mind willing to understand. A mind willing to understand is one informed by the full context of the proceedings, including the parties named, the claims pleaded, the remedies sought, and any prior judgment or order (*Astrazeneca Canada Inc v Apotex Inc* (July 27, 2015), Ottawa, Court File Nos. T-1409-06 and T-1890-11 (Fed Ct)).

[9] There are only two Defendants in these proceedings: Apotex and Cobalt. The judgment of this Court in the liability phase is confined to the validity of the 426 Patent and its infringement by Apotex and Cobalt. Bayer's Statements of Issues must be read and understood in this context.

A. *Affiliates*

[10] Paragraphs 10(a)(ii), 10(b), 10(b)(iii), 10(b)(iv) and 10(b)(v) of Bayer's Statements of Issues seek an accounting of the profits of Apotex's and Cobalt's affiliates. Apotex and Cobalt say that all references to "affiliates" should be struck. They maintain that if Bayer wished to obtain remedies against their affiliates, then the affiliates should have been named as additional defendants. They also argue that the plea is vague and undefined: it does not specify which affiliates are alleged to have profited from Apotex's and Cobalt's infringement of the 426 Patent, or in what manner.

[11] Should Bayer elect an accounting of Apotex's and Cobalt's profits, the profits will necessarily be confined by the scope of the proceedings to those that accrued to the named

defendants, either directly or indirectly. I agree with Bayer that the Defendants are in the best position to know which of their affiliates (if any) generated profits from sales of the infringing products, and if any of those profits ultimately flowed through to Apotex and Cobalt.

[12] Given the complexity of many corporate structures, particularly of large multinational entities such as the Defendants, Bayer should be afforded reasonable latitude in its discovery of whether any of Apotex's or Cobalt's affiliates generated profits as a result of the sale of infringing products, and whether any of those profits ultimately accrued to the Defendants. I am not persuaded that the inclusion of affiliates in the Statement of Issues fails to disclose a reasonable cause of action. Any vagueness or ambiguity may be resolved with reference to the constraints imposed by the scope of the Court's judgment in the liability phase.

[13] This aspect of the relief sought by Apotex and Cobalt must therefore be denied.

B. *Foreign Profits*

[14] Paragraphs 10(a)(ii) and 10(b)(iv) of Bayer's Statements of Issues seek an accounting of profits made "abroad" by Apotex, Cobalt and their affiliates. Paragraph 10(b)(ii) refers to profits arising from "foreign sales". Apotex and Cobalt argue that the territorial scope of the 426 Patent is confined to Canada. They say that these pleas should be struck because sales and profits generated entirely outside of Canada are necessarily beyond the scope of the Court's judgment in the liability phase. They also object that Bayer has pleaded no material facts in support, and say that the pleas are vague and undefined.

[15] Bayer relies on *AlliedSignal Inc v Dupont Canada Inc* (1998), 78 CPR (3d) 129 at para 33 [*AlliedSignal*], aff'd (1999), 86 CPR (3d) 324 (FCA) for the following proposition:

...the right to claim lost profits is not circumscribed by the territorial limitations of the *Patent Act* to profits made on sales within Canada. The patentee has a right to be compensated for all damages flowing from the infringement of the patent within Canada, which may include profits lost on sales outside of Canada.

[16] Apotex and Cobalt note that *AlliedSignal* concerned a claim for damages, not an accounting of profits. I agree with Apotex and Cobalt that it is unclear how products wholly manufactured and sold abroad could be said to infringe the Canadian 426 Patent, even if the profits ultimately accrued to the Defendants. Apotex and Cobalt do not contest the inclusion in the Statements of Issues of profits arising from the manufacture of the infringing products in Canada or their export abroad. They acknowledge that profits derived from infringing products manufactured outside of Canada are subject to an accounting if they were subsequently sold within Canada.

[17] Again, the inclusion of foreign sales and sales made abroad in Bayer's Statements of Issues must be understood in the context of the proceedings as a whole. Discovery is necessarily constrained by the territorial limits of the 426 Patent. If there is a nexus between foreign sales and infringement of the 426 Patent, then they are legitimately subject to discovery. If not, then the inclusion of foreign sales and sales made abroad is redundant. Redundancies or mere surplus statements that do not cause prejudice need not be struck from pleadings (*Discount Car & Truck Rentals Ltd v Enterprise Rent-A-Car Co* (1997), 76 CPR (3d) 39 at para 6).

[18] Apotex and Cobalt argue that they are prejudiced by the inclusion of overly-broad subject areas in the Statements of Issues, because they may be required to submit to time-consuming, expensive and intrusive discovery. Given the relatively narrow scope of the 426 Patent, and the clearly-defined range of products that may be said to infringe, this concern is no more than speculative. It should be possible to address it effectively by means of refusals, with recourse to a Prothonotary if needed.

[19] This aspect of the relief sought by Apotex and Cobalt is therefore denied.

C. *Directly or Indirectly*

[20] Paragraph 10(b) of Bayer's Statements of Issues seeks an accounting of profits that arise "directly or indirectly" from the infringing activities. Apotex and Cobalt say that the nature and extent of any alleged indirect profits are unclear and undefined.

[21] In response, Bayer relies on *Beloit Canada Ltée/Ltd v Valmet Oy* (1992), 45 CPR (3d) 116 at para 10 (FCA) for the proposition that Bayer is entitled to profits or damages that arose indirectly:

We can see no reason in principle why a patentee, whose property has been wrongly appropriated through infringement, should not recover *all* the profits, direct and indirect, derived by the infringer from his wrongful infringement ...

[Emphasis original.]

[22] Bayer states that this position is also supported by *Monsanto Canada Inc v Schmeiser*, 2004 SCC 34 at para 43.

[23] Bayer's claim for an accounting of any "indirect" profits Apotex and Cobalt may have realised from the sale of the infringing products must once again be understood within the context of the litigation as a whole. Viewed in this light, it is not plain and obvious that a claim for recovery of indirect profits has no reasonable prospect of success. Any unreasonable discovery is best addressed by means of refusals, with recourse to a Prothonotary if needed.

D. *Promotion*

[24] Paragraph 10(b)(i) of Bayer's Statements of Issues seeks an accounting of Apotex's and Cobalt's profits arising from the "promotion" of drospirenone /ethinyl estradiol tablets. I share Apotex's and Cobalt's puzzlement regarding the possibility of generating profits from promotion in the absence of a related sale. Indeed, Bayer says in its written representations that "[o]ffering for sale includes promotion".

[25] As previously discussed, redundancies or mere surplus statements that do not cause prejudice need not be struck from pleadings. Any unreasonable discovery is best addressed by means of refusals, with recourse to a Prothonotary if needed.

E. *Alternative Relief: Particulars*

[26] In the alternative, Apotex and Cobalt request particulars concerning foreign sales and indirect profits to enable them to respond to the allegations intelligently.

[27] The purpose of particulars is to provide the opposing party with sufficient information to know the case to be met, and to prepare a full and meaningful response (*Chen v R*, 2006 FC 389 at para 8). Particulars will not be ordered unless they are necessary for pleading, and are outside the requesting parties' knowledge (*Windsurfing International Inc v Novaction Sports Inc* (1987), 18 CPR (3d) 230 at para 17 (FCTD), citing *Flexi-Coil Ltd v Smith Roles Ltd* (1979), 42 CPR (2d) 180 (FCTD)).

[28] I am not persuaded that the particulars sought are outside the knowledge of Apotex and Cobalt. Having regard to the confines of the proceedings as a whole, and when read with a mind willing to understand, Bayer's Statements of Issues are sufficiently clear to allow for intelligent responses. Further particulars are therefore not required at this time.

IV. Conclusion

[29] The motions to strike portions of Bayer's Statements of Issues and for further particulars are dismissed. However, given the legitimacy of some of the concerns expressed by Apotex and Cobalt regarding overbreadth and ambiguity in the Statements of Issues, this is not an appropriate case for costs.

ORDER

THIS COURT ORDERS that the motions are dismissed without costs to any party.

“Simon Fothergill”

Judge