Date: 20060329

Docket: T-416-05

Citation: 2006 FC 385

Ottawa, Ontario, March 29, 2006

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

PURDUE PHARMA

Applicant

and

NOVOPHARM LIMITED and
THE MINISTER OF HEALTH

Respondents

REASONS FOR ORDER AND ORDER

[1] This is a motion by the applicant appealing a discretionary Order of Prothonotary Tabib dated February 13, 2006 (Order under Appeal). In the Order under Appeal, Prothonotary Tabib:

a) dismissed the applicant's motion for an Order preventing the respondent Novopharm Limited (Novopharm) from relying on certain portions of its affidavits;

b) dismissed the applicant's motion for leave to file new evidence;

c) awarded costs to the respondent.

[2] The applicant alleges that Prothonotary Tabib erred in law in her decision, and that this Court should therefore consider the issues *de novo.*

I. Issues

[3] The applicant raises the following issues:

a) Did Prothonotary Tabib err in law in applying the test set out in *Canadian Tire Corp. v. P.S. Partsource Inc.*, 2001 FCA 8, [2001] F.C.J. No. 181 (F.C.A.) (QL) to determine whether the respondent should be entitled to rely on portions of its affidavits?

b) Did Prothonotary Tabib err in law in requiring the applicant to establish that the reply evidence it intended to file would "serve the interests of justice" instead of determining whether or not it was "in the interests of justice to file reply evidence"?

c) Did Prothonotary Tabib err in law in awarding costs to the respondent?

[4] For the following reasons, the answer to all three questions is negative and the appeal shall be dismissed.

II. Standard of Review

[5] The decision under appeal is a discretionary order of a prothonotary. Such decisions ought only to be disturbed by a motions judge where

a) the prothonotary improperly exercised his or her discretion on a question vital to the final issue of the case;

b) the decision is clearly wrong, in that the exercise of discretion was based upon a wrong principle or a misapprehension of the facts (*Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450 at 461, *Merck & Co. v. Apotex Inc* (2003), 30 C.P.R. (4th) 40 at 53 (FCA)).

[6] The applicant has not argued that the order under appeal deals with questions vital to the final issues of the case. It therefore has the onus of establishing that Prothonotary Tabib's decision was clearly wrong.

III. Analysis

a) Did Prothonotary Tabib err in law in applying the test set out in *Canadian Tire Corp. v. P.S. Partsource Inc.*, 2001 FCA 8, [2001] F.C.J. No. 181 (F.C.A.) (QL) to determine whether the respondent should be entitled to rely on portions of its affidavits?

[7] The applicant argues that the correct test to be applied in regard to a motion to ignore evidence in proceedings brought pursuant to the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 (the Regulations) was clearly set out by the Federal Court of Appeal in *AB Hassle v. Canada (Minister of National Health and Welfare)* (2000), 7 C.P.R. (4th) 272.

[8] With respect to the applicant's submissions, I cannot detect any "clear test" in *AB Hassle* that is less stringent than that set out in *Partsource* regarding motions to strike. The principles set out in both of these decisions are not incompatible, and they can and should rather be read together.

[9] A motion to ignore evidence and a motion to strike are practically indistinguishable. It is relevant to note that in similar proceedings brought pursuant to the Regulations, the Federal Court of Appeal has relied on *Partsource* in *AstraZeneca Canada Inc. v. Apotex Inc.*, 2003 FCA 487, [2004] 2 F.C.R. 364 (C.A.), and cited both *Partsource* and *A.B. Hassle* in *Mayne Pharma (Canada) Inc. v. Aventis Pharma Inc*., 2005 FCA 50, [2005] F.C.J. No. 215 (F.C.A) (QL). Justice Eleanor Dawson also relied on both *Partsource* and *A.B. Hassle* in *GlaxoSmithKline Inc. v. Genpharm Inc.* (April 23, 2002) T-1755-01 (FCTD)).

[10] I therefore conclude that Prothonotary Tabib did not err in applying the test set out in *Partsource*.

b) Did Prothonotary Tabib err in law in requiring the applicant to establish that the reply evidence it intended to file would "serve the interests of justice" instead of determining whether or not it was "in the interests of justice to file reply evidence"?

[11] The applicant alleges that Prothonotary Tabib erred in requiring it to satisfy the Court that the evidence it intended to file would "serve the interests of justice". The applicant urges that it needed only demonstrate whether it was in the interests of justice to allow reply evidence, and that this is a significantly lower threshold than that required by the test applied by the Prothonotary.

[12] Rule 312 of the *Federal Courts Rules*, SOR/98-106 gives the Court a discretionary power to allow parties to file supplementary evidence. In *Mazhero v. Canada (Industrial Relations Board)*, 2002 FCA 295, [2002] F.C.J. No. 1112 (F.C.A.) (QL), Justice John M. Evans wrote that

applications for judicial review were summary proceedings that should be determined without undue delay, and that the discretion of the Court to permit the filing of additional material should be exercised with great circumspection.

[13] In *Atlantic Engraving Ltd. v. Lapointe Rosenstein*, 2002 FCA 503, [2002] F.C.J. No 1782 (F.C.A.) (QL), Justice Marc Nadon stated that the Court may allow the filing of additional evidence if the following requirements are met:

a) the evidence to be adduced will serve the interests of justice;

b) the evidence will assist the Court;

c) the evidence will not cause substantial or serious prejudice to the other side;

d) the evidence was not available at an earlier date.

[14] I disagree with the applicant on this issue, and agree with the respondent that the applicant is attempting to make a distinction where there is no difference. Prothonotary Tabib did not require it to tender the affidavits it proposed to file, but dismissed its motion because it could not provide it with a sufficient indication of what this evidence would establish.

[15] In any event, the words of Justice Nadon in *Atlantic Engraving* lead me to conclude that Prothonotary Tabib did not err in requiring the applicant to demonstrate that the further evidence it sought to file “will serve the interests of justice.”

c) Did Prothonotary Tabib err in law in awarding costs to the respondent?

[16] The applicant argues that Prothonotary Tabib erred in awarding costs to the respondent because she found that the applicant had not provided guidance to the respondent of the evidence it intended to file. The applicant submits that it was not required to do so by the jurisprudence of this Court.

[17] After reading Prothonotary Tabib's reasons, I cannot agree with the applicant. The reasons clearly show that costs were awarded to the respondent because of the Court's disapproval of the applicant's behaviour in the course of the proceedings, including its failure to give sufficient indications as to the substance of the further evidence it sought permission to adduce. In light of my findings regarding the second issue in this case, I do not think that Prothonotary Tabib erred in awarding costs to the respondent.

ORDER

THIS COURT ORDERS that the appeal is dismissed, with costs.

"Michel Beaudry"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-416-05
STYLE OF CAUSE:	**PURDUE PHARMA and NOVOPHARM LIMITED and THE MINISTER OF HEALTH**
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APPEARANCES:

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