

Federal Court



Cour fédérale

Date: 20111128

Docket: T-1259-11

Citation: 2011 FC 1377

Toronto, Ontario, November 28, 2011

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

**ASTRAZENECA CANADA INC. AND
ASTRAZENECA UK LIMITED**

Applicants

and

**TEVA CANADA LIMITED AND THE
MINISTER OF HEALTH**

Respondents

REASONS FOR ORDER AND ORDER

[1] This is a motion on behalf of the Applicants brought by way of an appeal from an Order of Prothonotary Aalto as Case Manager dated November 14, 2011, for:

- (a) An Order setting aside the Order of Prothonotary Aalto dated November 14, 2011;

- (b) Order for a reversal of evidence including requiring the Respondent Teva Canada Limited (Teva) to serve its evidence first with respect to the invalidity allegations related to Canadian Patent No. 2,251,944 (944 patent) in accordance with Schedule “A” attached to the Notice of Motion;
- (c) Costs of this motion below; and
- (d) Such further and other relief as this Honourable Court may deem just.

[2] This proceeding is brought under the *Patented Medicines (Notice of Compliance) Regulations* SOR/93-133. All such proceedings are Case Managed by a Prothonotary assigned for that purpose. In this case it is Prothonotary Aalto. The *Regulations* require that there be a final disposition of such proceedings within twenty-four (24) months from institution. Thus careful case management including co-operation between counsel, is essential.

[3] Often in such proceedings the order of presentation of evidence is reversed wherein the respondent, who is often asserting invalidity of the patent(s) at issue, puts in its case first by way of affidavit(s). The applicant then responds. There are several precedents where this has been ordered by a Case Management Prothonotary.

[4] In the present case the Prothonotary did not order reversal. The Prothonotary’s reasons make it clear that he considered carefully the submissions made by both parties weighed them and, on balance, determined that reversal would not be ordered. The evidence before the

Prothonotary consisted only of an affidavit of a law student in the offices of the Applicants' solicitors. Apparently the Applicants' Counsel submitted to the Prothonotary that they would limit the claims at issue in their affidavit as to infringement. However, the Applicants did not put in the record the claims to which their case would be limited. If the Applicants were going to limit the claims which they would be asserting it should have clearly put this on the record, not merely said in argument that they might do so later.

[5] Applicants' Counsel argued before Prothonotary Aalto and before me that, if the Respondent Teva were to put its evidence as to validity in first, the Applicants could, in response clearly focus their evidence to the precise prior art and other validity matters at issue. The Prothonotary understood this but, on balance, decided against the Applicants.

[6] Applicants' Counsel also argued that the Prothonotary misconstrued some facts. Given that there were very few facts actually in evidence on the record, what can be said is that the Prothonotary made some conclusions based on arguments and speculations raised by the parties. He did the best job he could given the record before him. No overriding misapprehension of the facts was made.

[7] This is not a case where the Prothonotary's decision makes a final determination of a matter vital to the issues. At best it might be speculated that the case may be more voluminous or complex than it should be.

[8] Case Management Prothonotaries should be allowed reasonable latitude to get on with the job which is a difficult one and requiring, in many instances, a judgment call based on the record and arguments made. Even if this Court may have come to a different result, in the absence of fundamental error in a determination of a matter vital to an issue, the Court should let a Prothonotary get on with the job.

[9] This appeal should not have been brought. No matter how disappointed the Applicants' Counsel may have been as to non-reversal, this is a circumstance where they should have simply got on with the job. I am satisfied that substantial costs, \$5000.00, are appropriate.

ORDER

FOR THE REASONS PROVIDED

THIS COURT'S ORDER is that:

1. The motion is dismissed;
2. The Respondent Teva is entitled to costs fixed in the sum of \$5000.00 payable by the Applicants forthwith.

“Roger T. Hughes”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1259-11

STYLE OF CAUSE: ASTRAZENECA CANADA INC. AND
ASTRAZENECA UK LIMITED V. TEVA CANADA
LIMITED AND THE MINISTER OF HEALTH

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 28, 2011

**REASONS FOR ORDER
AND ORDER:** HUGHES J.

DATED: November 28, 2011

APPEARANCES:

Vik G. Tenekjian	FOR THE APPLICANTS
Vincent de Grandpré	FOR THE RESPONDENT (TEVA CANADA LIMITED)
No Appearance	FOR THE RESPONDENT (THE MINISTER OF HEALTH)

SOLICITORS OF RECORD:

Smart & Biggar Toronto, Ontario	FOR THE APPLICANTS
Osler, Hoskin & Harcourt LLP Toronto, Ontario	FOR THE RESPONDENT (TEVA CANADA LIMITED)
Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT (THE MINISTER OF HEALTH)