

Federal Court
of Appeal



CANADA

Cour d'appel
fédérale

Date: 20100303

Docket: A-431-09

Citation: 2010 FCA 68

**CORAM: LÉTOURNEAU J.A.
DAWSON J.A.
STRATAS J.A.**

BETWEEN:

BAYER BIOSCIENCE N.V.

Appellant

and

**MONSANTO TECHNOLOGY LLC,
MYCOGEN PLANT SCIENCE, INC.,
SYNGENTA PARTICIPATIONS A.G.**

Respondents

Heard at Ottawa, Ontario, on March 3, 2010.

Judgment delivered from the Bench at Ottawa, Ontario, on March 3, 2010.

REASONS FOR JUDGMENT OF THE COURT BY:

LÉTOURNEAU J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on March 3, 2010)

LÉTOURNEAU J.A.

[1] We are satisfied that the case management judge made no error justifying our intervention when he applied the Canderel test (*Canderel Ltd. v. Canada*, [1994] 1 F.C. 3, at paragraph 9) to the amendments proposed by the respondents to their respective pleadings.

[2] We are also satisfied that he made no error in principle when he concluded that it was not plain and obvious that the claims sought by these amendments could not succeed.

[3] The case management judge found that paragraph 14 of Monsanto's proposed amendments contained allegations based on assumptions and speculations which made it unacceptable in its actual form. He allowed a redrafting of that paragraph. The proposed amendment read:

14. Alternatively, but for the misleading Jansens declaration and Bayer's submissions related to it, the Commissioner would not have included Bayer in the conflict. As a result of its failure to respond to the examiner in good faith and to make full, frank and fair disclosure, Bayer was not entitled to participate in the conflict, and no standing in these proceedings.

[4] Paragraph 26 of Mycogen's proposed amendments, the appellant submits, is nearly identical to the wording of Monsanto's paragraph 14:

26. In the alternative, Bayer would not have been included in the conflict by the Commissioner but for its submission of the Jansens Declaration. As a consequence of its breach of duty to make full, frank and fair disclosure and to respond in good faith to the Examiner, Bayer is not entitled to participate in the conflict and does not have standing in these proceedings.

[5] Initially, the appellant contended that both paragraphs should have been struck and that it was an error to allow Monsanto to redraft its paragraph 14. At the hearing, the appellant asked that paragraph 26 be reworded.

[6] Rule 75 of the *Federal Courts Rules* authorizes a judge to allow amendments "on such terms as will protect the rights of all parties". It was open to the judge to require a rewording of the

impugned paragraph of Monsanto's proposed amendments since, as drafted, the allegations it contained could not be taken as true (see *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441, at paragraph 27) and were prejudicial to the appellant.

[7] That said, we are of the view that the judge should have imposed the same requirement to Mycogen with respect to its paragraph 26. We believe it is an oversight on his part that should be corrected.

[8] For these reasons, this appeal will be allowed to the limited extent of requiring Mycogen to redraft paragraph 26 of its proposed amendments so as to avoid assumptions and speculations. In all other respects, the appeal will be dismissed with costs payable to Monsanto and Mycogen.

“Gilles Létourneau”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-431-09

STYLE OF CAUSE: BAYER BIOSCIENCE N.V. v.
MONSANTO TECHNOLOGY LLC,
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SYNGENTA PARTICIPATIONS A.G.

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: March 3, 2010

**REASONS FOR JUDGMENT
OF THE COURT BY:** LÉTOURNEAU J.A.
DAWSON J.A.
STRATAS J.A.

DELIVERED FROM THE BENCH BY: LÉTOURNEAU J.A.

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