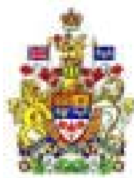
Federal Court of Appeal



Cour d'appel fédérale

Date: 20110623

Docket: A-180-11

Citation: 2011 FCA 211

CORAM: SHARLOW J.A.
TRUDEL J.A.
STRATAS J.A.

BETWEEN:

ASTRAZENECA CANADA INC. and
ASTRAZENECA AKTIEBOLAG

Appellants

and

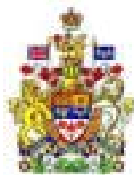
APOTEX INC.

Respondent

Heard at Toronto, Ontario, on June 23, 2011.

Judgment delivered from the Bench at Toronto, Ontario, on June 23, 2011.

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

Federal Court of Appeal  Cour d'appel fédérale

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on June 23, 2011)

STRATAS J.A.

[1] This is an appeal from an order dated April 29, 2011 of the Federal Court (*per* Justice Crampton), dismissing the appellants’ motion for an interlocutory injunction.

[2] The appellants sought to restrain the respondent and others from making, constructing, importing, exporting, using, selling to others to be used or offering to sell Apo-Esomeprazole and/or esomeprazole magnesium until the completion of a patent infringement trial.

[3] The Federal Court judge applied the well-known test in *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R.199 to the facts established in the evidence adduced before him, and dismissed the motion. In careful, clear and comprehensive reasons for judgment, he reviewed, weighed and assessed that evidence, making credibility findings that were central to his decision. He preferred much of the respondent's evidence, calling it "more analytically robust and persuasive," and, at various times, termed the appellants' evidence as "implausible," "speculative," "unsubstantiated," and "exaggerated." Based on the evidence before him which he analyzed carefully, he did not accept that the appellants had established irreparable harm.

[4] In our view, the Federal Court judge's decision to dismiss the motion was heavily fact-based. Absent some fundamental legal error, it can be set aside only on the basis of palpable and overriding error.

[5] Before us, the appellants submit that the Federal Court judge committed fundamental legal error by requiring them to establish a standard of harm that was impossible to meet. For example, they say that the Federal Court judge set the bar too high by holding that AstraZeneca Canada Inc. should have known and planned for the eventuality that their medicine would have been subject to

generic competition at some point. They also allege that the Federal Court judge said (at paragraph 80) that certain types of harms are not “cognizable” in law.

[6] On an overall reading of the Federal Court judge’s reasons, we conclude that he did not set the bar too high on the issue of irreparable harm. He did not say that certain types of harm were not “cognizable in law.” Rather (at paragraphs 100, 132 and 149) he found that the case before him was similar to other reported cases, where the courts found that the harms were not irreparable. In our view, it was open to him, based on the evidence before him and the credibility findings he made, to reach the conclusion that the appellants had not established irreparable harm as it has been defined in the cases. He did not accept that the appellants would suffer any damage that could not be compensated.

[7] Even if we could impugn the Federal Court judge’s findings on irreparable harm, he also based his decision on other accepted legal bases, such as the appellants’ failure to persuade him that the balance of convenience was in favour of granting the injunctive relief. Here again, we also see no reviewable error.

[8] Many of the appellants’ submissions in essence invited us to reweigh the evidence and reach factual conclusions that the Federal Court judge did not make. Under the deferential standard of review that must apply to findings of fact in this case, we must decline the invitation.

[9] For the foregoing reasons, we conclude that the Federal Court judge committed no reviewable error.

[10] The respondent sought a special order for costs in the amount of $20,000 plus reasonable disbursements based, among other things, on the filing of a memorandum that did not comply with the Rules and the numerous grounds asserted in it that had limited or no merit. The appellant disagreed with those bases, but accepted that costs should be awarded in a lump sum in the amount of $10,000 plus reasonable disbursements.

[11] We shall dismiss the appeal with costs fixed in the amount of $20,000, plus reasonable disbursements.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-180-11

(APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE PAUL CRAMPTON, DATED APRIL 29, 2011, DOCKET NO. T-1668-10)

STYLE OF CAUSE:	ASTRAZENECA CANADA INC. AND ASTRAZENECA AKTIEBOLA v APOTEX INC.
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 23, 2011
REASONS FOR JUDGMENT OF THE COURT BY:	(SHARLOW, TRUDEL & STRATAS JJ.A.)
DELIVERED FROM THE BENCH BY:	STRATAS J.A.

APPEARANCES:

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