Federal Court of Appeal | Cour d'appel fédérale

Date: 20201203

Dockets: 20-A-21
20-A-25

Citation: 2020 FCA 208

CORAM: **NOËL C.J.**
STRATAS J.A.
LOCKE J.A.

Docket: 20-A-21

BETWEEN:

APOTEX INC.

Applicant

and

ALLERGAN INC. and ALLERGAN PHARMACEUTICALS INTERNATIONAL LIMITED

Respondents

Docket: 20-A-25

AND BETWEEN:

PHARMASCIENCE INC.

Applicant

and

BAYER INC. and BAYER INTELLECTUAL PROPERTY GMBH

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on December 3, 2020.

REASONS FOR ORDER BY: THE COURT

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REASONS FOR ORDER

THE COURT

[1] Before this Court are two motions for leave to appeal from a Prothonotary's interlocutory order made under the *Patented Medicines (Notice of Compliance) Regulations*, S.O.R./93-133, as amended.

[2] The requirement to obtain leave to appeal interlocutory orders under the *Regulations* is new as of September 2017: *Regulations,* s. 6.11; *Regulations Amending the Patented Medicines (Notice of Compliance) Regulations, 2017,* S.O.R./2017-166.

[3] Since that time, in many motions for leave to appeal under the *Regulations*, parties have made submissions concerning the grounds or criteria on which leave to appeal should be granted. In the two motions before the Court, parties have also addressed this issue.

[4] This Court has never issued reasons settling this jurisprudential point. This is because the settled practice of this Court for reasons of expedition and judicial economy is not to give reasons when deciding leave motions.

[5] However, this Court has departed from this practice in circumstances of extreme exceptionality: see, *e.g.*, *Raincoast Conservation Foundation v. Canada (Attorney General)*, 2019 FCA 224.

[6] In order to provide guidance on this jurisprudential point, this Court is exceptionally providing these one-time, brief reasons concerning these leave motions. These reasons shall be filed in 20-A-21 and a copy in 20-A-25.

[7] In our view, an applicant for leave to appeal an interlocutory order under the *Regulations* must show a fairly arguable case taking into account the standard of review. But the applicant must also show that the issue raised is capable of having a direct impact on the overall success or failure of the case. Our reasons for this are as follows.

[8] The normal standard for granting leave to appeal to this Court under Rule 352 is a "fairly arguable case": see, *e.g.*, *Lukács v. Swoop Inc.*, 2019 FCA 145 at para. 19; *Lufthansa German Airlines v. Canadian Transportation Agency*, 2005 FCA 295, 346 N.R. 79 at para. 9; *Canada (Minister of Human Resources Development) v. Rafuse*, 2002 FCA 31, 222 F.T.R. 160 at para. 12; *Martin v. Canada (Minister of Human Resources Development)* (1999), 252 N.R. 141 (F.C.A.).

[9] The evaluation of a "fairly arguable case" must take place bearing in mind the appellate standard of review: in related contexts, see *Hébert v. Wenham*, 2020 FCA 186 at paras. 11-14 and *Raincoast Conservation Foundation v. Canada (Attorney General)*, 2019 FCA 224 at para. 16. In particular, the applicant must show that it can arguably overcome any deferential standard that applies in the appeal.

[10] Thus, in practical terms, a party moving for leave to appeal can make out a fairly arguable case more easily under correctness review than under review for palpable and overriding error. Showing that something arguably fails correctness review—*i.e.*, is arguably wrong—is one thing. Showing that something arguably fails review for palpable and overriding error—*i.e.*, the arguable presence of one or more obvious errors which individually or collectively may affect the outcome of the matter—is quite another. See *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331; *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344 at paras. 58-74.

[11] The considerable deference this Court gives to case management orders adds to the burden the applicant for leave to appeal must surmount.

[12] In deciding an application for leave to appeal, the Court must keep in mind that good counsel, in pursuing the interests of their clients, tend to characterize something as an error of law or of extricable principle when, in fact, it is nothing of the sort. The Court must scrutinize the alleged error to see if it is, despite what counsel says, a factually suffused matter that can be set aside only for palpable and overriding error: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 at paras. 49-50.

[13] A fairly arguable case is the usual and default standard for motions for leave to appeal. This merely confirms that there is no sense granting leave to an appeal that is very unlikely to succeed. But sometimes legislation providing for motions for leave to appeal requires the

applicant for leave to show more: *e.g.*, *Raincoast* at paras. 9-16. To find out whether this is so, we must interpret the legislation in light of its text, context and purpose: see, *e.g.*, *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193 and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559.

[14] Doing this, we conclude that the *Regulations* require an applicant to show more than just arguability. The 2017 amendments to the *Regulations* were aimed at expedition and preventing unnecessary appeals. They removed the ability of a party to appeal interlocutory decisions as of right. They also permitted appeals to go directly to this Court, bypassing one level of court. These suggest that only interlocutory matters of prime significance and materiality should be given leave and, even then, they must be dealt with quickly. The Regulatory Impact Analysis Statement confirms and underscores this: see Canada Gazette Part II, v. 151, Extra No. 1 (September 7, 2017) at 34.

[15] Thus, an applicant for leave to appeal must also persuade the Court that its decision on the interlocutory appeal will have a direct impact on the overall success or failure of the case.

[16] By way of illustration, leave should be denied where the Prothonotary has upheld a party's refusal to answer questions and the answers to the questions will not have a direct impact on the success or failure of the case. This is all the more so where, either as part of an assessment of proportionality or otherwise, the Prothonotary has commented on the relationship between a question and the issues that the case will turn upon. This is usually a factually suffused assessment calling for deference.

[17] In this case, both motions fail to satisfy the test for leave. Both are not fairly arguable, particularly given the appellate standard of review. One is an orthodox, factual and discretionary application of Rule 249 while the other is a straight-forward, discretionary discovery issue. Looking at the true character of the alleged errors, the Court concludes that neither involves an issue of law or extricable legal principle. This Court is satisfied that if leave were granted, its decision would not have a direct impact on the overall success or failure of the cases.

[18] Therefore, we will dismiss the leave motions with costs.

"Marc Noël"
C.J.

"David Stratas"
J.A.

"George R. Locke"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	20-A-21 AND 20-A-25
DOCKET:	20-A-21
STYLE OF CAUSE:	APOTEX INC. v. ALLERGAN INC. *ET AL.*
AND DOCKET:	20-A-25
STYLE OF CAUSE:	PHARMASCIENCE INC. v. BAYER INC. *ET AL.*

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	THE COURT
DATED:	DECEMBER 3, 2020

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