Federal Court  Cour fédérale

Date: 20150626

Docket: T-2300-05

Citation: 2015 FC 799

Toronto, Ontario, June 26, 2015

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

APOTEX INC.

Plaintiff

and

ASTRAZENECA CANADA INC.

Defendant

ORDER AND REASONS

[1] The Defendant, AstraZeneca Inc., has brought this motion seeking a reconsideration of my Judgment in these proceedings dated May 11, 2012. AstraZeneca invokes Rule 399(2)(a) of this Court which permits variance of an Order under certain circumstances. For the Reasons that follow, I am dismissing this motion with costs.

[2] The basis for this motion is the finding by Justice Barnes of this Court in two combined actions brought by AstraZeneca, Court File No. T-1409-04 and T-1890-11 (Reasons cited at

2015 FC 322 and Judgment cited as 2015 FC 671) that Apotex, who is the Plaintiff in the action before me and Defendant in the actions before Justice Barnes, has infringed certain claims of Canadian Letters Patent No. 1,292,693 (the '693 Patent) by its manufacture, export, promotion and sale in Canada and elsewhere of certain of its omeprazole products. The Judgment of Justice Barnes, dated May 25, 2015, and has been appealed by Apotex to the Federal Court of Appeal and a cross-appeal has been filed by AstraZeneca. The decision of Justice Barnes is said by AstraZeneca to be a new matter that has arisen since the date of my Judgment dated May 11, 2012.

I. BRIEF HISTORY OF THIS ACTION AND ACTIONS T-1409-14 AND T-1890-11

[3] This action, T-2300-05, was brought by Apotex for recovery of loss, as provided for under section 8 of the *Patent Medicines (Notice of Compliance Regulations*, SOR/93-133 (*NOC Regulations*). Previously, Justice O'Keefe of this Court, in an application brought by AstraZeneca under the *NOC Regulations*, Court File No. T-2311-01, gave a decision, cited as 2004 FC 313, dismissing that application. AstraZeneca had asserted another patent in that application, Canadian Letters Patent No. 2,133,762 (the '762 Patent). Justice O'Keefe held that AstraZeneca had not persuaded him that Apotex's omeprazole product would infringe the '762 patent. Therefore, Apotex went to market with its omeprazole product and brought the present action pursuant to section 8 of the *NOC Regulations* for recovery of loss for the period of time it was kept off the market.

[4] In the present action, AstraZeneca raised, as part of its defence, a plea that Apotex was not entitled to damages (loss) because, even though O'Keefe J. had held that the '762 Patent

would not be infringed, Apotex would be infringing another AstraZeneca patent, namely the '693 Patent which was the subject of the actions subsequently brought to trial before Justice Barnes.

[5] The parties have, for some time, been contemplating the impact that the T-1409-04 and T-2300-05 proceedings may have on one another. This arose at a pre-trial conference held on September 22, 2011 as a result of which I issued an Order dated October 4, 2011. I repeat the entire text of the Order:

> *WHEREAS T-1409-04 is a patent infringement action brought by AstraZeneca Canada Inc. (AstraZeneca Canada) and AB Hassle against Apotex Inc. (Apotex) in respect of omeprazole;*
>
> *AND WHEREAS T-2300-05 is a section 8 action brought by Apotex against AstraZeneca Canada, in respect of omeprazole, in which AstraZeneca Canada raises patent infringement, as asserted in T-1409-04, as a defence to the section 8 claim;*
>
> *AND WHEREAS by Order dated May 3, 2010, the trials of T-2300-05 and T-1409-04 were scheduled to be heard together; however, by Order dated August 31, 2011, the March 2012 trial date in T-1409-04 was postponed such that T-2300-05 is expected to be heard and determined before T-1409-04;*
>
> *AND WHEREAS AstraZeneca Canada therefore brought a motion on September 20, 2011 for an Order, inter alia, to stay the proceeding or judgment in T-2300-05 until after issuance of judgment in T-1409-04;*
>
> *AND WHEREAS Apotex has agreed that it will not submit that the findings from T-1409-04 (or any appeal) are not applicable in T-2300-05 on the basis that such findings were made later in time or in another Court file or that the Court lacks jurisdiction;*
>
> *AND WHEREAS AstraZeneca Canada has agreed to withdraw without prejudice its aforesaid motion;*
>
> *AND WHEREAS Apotex has agreed that if appeals of the Judgments in T-1409-04 or T-2300-05 are brought, and if any*

implications arise therefrom relevant to paragraph 4, the parties can address such matters at that time;

AND UPON consent of the parties;

THIS COURT ORDERS that:

1. The trial in T-2300-05 shall commence on March 19, 2012 and shall be scheduled to last for three weeks, with 4 days of trial per week, ending on April 6, 2012. Evidence will be presented during the weeks of March 19 and 26. Closing arguments will be presented the week of April 2.

2. Any agreement as to facts and documents and an agreed statement of issues shall be filed by February 6, 2012.

3. Any agreed to discovery read-ins shall be filed by March 5, 2012.

The trial in T-2300-05 will be heard on all issues and if the Court finds the defences raised in paragraph 60 of the Sixth Amended Statement of Defence and Counterclaim (Infringement Defences) are viable in law, then any Judgment in T-2300-05 finding liability will be reserved until the final disposition of T-1409-04, and in the event that Apotex is found to infringe a valid patent in T-1409-04, the parties will be given the opportunity to make further submissions to the Court as to the applicability and impact, if any, of the findings of infringement from T-1409-04 in the within action. The foregoing is without prejudice to Apotex's ability to proceed with a reference following the initial finding of liability in T-2300-05 or the ability of AstraZeneca to bring a motion to stay the Judgment in T-2300-05 or any subsequent appeal.

[6] When the matter came to trial before me and, after having heard the parties, I gave Reasons and a Judgment on May 11, 2012 (cited as 2012 FC 559). I dealt in my Reasons with the matters raised by AstraZeneca in its present motion as Issue #5 and Issue #12. I repeat part of what I wrote there:

ISSUE #5

Whether the alleged infringement of the '693 Patent is relevant in law, including whether it is relevant as a defence, to the section 8 claim of Apotex (including

> *possible set-off damages) (and if so, see para. 4 of Order of October 4, 2011)?*

[140] AstraZeneca's position is that the alleged infringement is relevant in law as a defence to section 8(1) (as well as section 8(5)), since the statutory stay would not have caused damages for infringing sales because Apotex would have been liable to AstraZeneca for damages for such sales. Therefore, there is no "loss suffered".

[141] Apotex's position is that the alleged infringement of the '693 patent is not relevant in law to Apotex's claim in any respect. AstraZeneca's new allegation at trial that the defence of infringement is relevant under subsection 8(5) was never pleaded and, in any event, was without foundation.

[142] The question as to whether infringement of a patent by a generic can provide a viable defence to a claim for compensation by that generic under section 8(5) of the NOC Regulations was considered very recently by the Federal Court of Appeal in Apotex Inc v Merck & Co Inc, 2011 FCA 364 (referred to in argument by Counsel as "Lovastatin"). In that case, there had been a finding by a Trial Judge of this Court (Merck & Co v Apotex Inc, 2010 FC 1265) affirmed by the Court of Appeal (2011 FCA 363) in an action for infringement of a patent (Canadian Patent No. 1,161,380) that some but not all the Apotex product infringed that patent. In Lovastatin supra, Apotex was claiming compensation for loss under section 8(5) of the NOC Regulations. Merck asserted that the finding of infringement precluded that claim. The Federal Court of Appeal found that there was no preclusion; however there may exist a basis for reducing compensation arising out of any ex turpi causa consideration. Evans JA for the Court wrote at paragraphs 36 to 38:

> *36 I do not accept Merck's submission that the Court should read into this provision limiting words to the effect, "unless the second person's claim is based on the loss that is has suffered by being prevented from infringing the first person's patent earlier." The presumption against reading words into a statutory text may be rebutted when demanded by context and legislative objective. In my view, it is not necessary to read an ex turpi causa exception into subsection 8(1) in order to prevent patent infringers from unjustly recovering compensation from a first person.*

> *37 This is because subsection 8(5) confers a broad discretion on the court when assessing the amount of compensation that the second person must pay. It provides that the court "shall take into account all matters that it considers relevant to the assessment of the amount," including any conduct by either party that contributed to the delay in the disposition of the first person's application for prohibition. In my view, this provision enables the Court to determine in its discretion whether, and to what extent, a second person's claim for compensation should be reduced, or eliminated.*
>
> *38 The Court's broad discretion under subsection 8(5) allows it, when considering arguments based on ex turpi causa, to have regard to the factual situation in its entirety, including its nuances. In the present case, one such nuance is that not all the tablets sold by Apotex were found in the infringement action to contain lovastatin made by the infringing process. A court is likely to find it easier to apply the ex turpi causa principle through an exercise of judicial discretion than through the definition of liability. Discretion enables the court to assess the appropriate amount of compensation payable (including nil) in a manner that properly takes account of all the relevant facts.*
>
> ...

[148] This solution accords with what may properly be done in the present situation. A Court hearing the pending infringement action, if it concludes that the patent is valid and has been infringed by Apotex in making the omeprazole drug that is the subject of these proceedings, can at that time craft a remedy that is appropriate, having in mind any compensation awarded in these proceedings. It would be unconscionable for the present proceedings to come to a halt or for this Court to refuse to award compensation simply because another action on another patent was pending. To do so would be simply to encourage such actions to be brought. The best way to deal with the matter is as I have set out above.

...

ISSUE # 12

Whether any of the matters are the subject of Issues 5 to 7 and 9 are relevant factors to consider pursuant to section 8(5) of the NOC Regulations?

[175] AstraZeneca's position is that the following factors are relevant to the assessment of any compensation pursuant to s. 8(5):

> *Issue #5 – Alleged infringement, insofar as it would be an unlawful activity.*
>
> *Issue #6 – Apotex did not have approval to market Apo-Omeprazole made at its commercial manufacturing site, Torpharm, during the asserted period of liability. Apotex never had an intention to market out of its approved Signet facility.*
>
> *Issue #7 – See Issues #6 and #9*
>
> *Issue #9 – Apotex's duty to mitigate its damages by serving the NOA at the earliest opportunity.*

[176] Apotex's position is that with respect to Issue #5, AstraZeneca failed to plead that infringement has any relevance to subsection 8(5) of the NOC Regulations. With respect to Issues #6 and #7, to the extent that AstraZeneca is reliant on the principle of ex turpi causa to establish relevance to subsection 8(5) of the NOC Regulations, ex turpi causa was not pleaded. With respect to Issue #9, the position is as set out with respect to that Issue.

[177] Subsection 8(5) of the NOC Regulations permits the Court, in assessing the amount of compensation, to take into account "all matters that it considers relevant, including any conduct of the first or second person which contributed to the delay or disposition of the application".

[178] In dealing with Issues #5, #6, #7 and #9, I have made determinations that AstraZeneca has failed to make out a case in each instance. Should I, nonetheless, take into consideration any suggestion that AstraZeneca may have raised a sufficient argument that somehow Apotex's claim must be reduced or eliminated?

[179] Subsection 8(5) affords judicial discretion in awarding compensation for loss under subsection 8(1). Those matters relating to the exercise of such discretion which are specifically set out in subsection 8(5) relate to factors contributing to the delay or disposition of the matter. One can readily assume that if a party, by unwarranted procedural games or foot dragging, delayed the disposition of an application brought in this Court; that would

clearly be a factor to be considered under subsection 8(5). Procedural games or foot dragging are not at issue here. Should discretion be more broadly defined? I adopt the point of view expressed by the late Tom (Lord) Bingham in his lecture originally given November 2006 at Cambridge and in Lord Bingham, "The Rule of Law" (2008) 8(1) JSIJ 121 at pages 127 and 128:

> *My second sub-rule is that questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion. Most modern commentators would not share to the full Dicey's hostility to the exercise of official discretions. In the immigration field, for example, judges have routinely and gratefully invited the Secretary of State to exercise his discretion to grant leave to enter or remain to applicants who do not meet the tests for entry laid down in the immigration rules but whose personal history or circumstances demand sympathetic consideration. But the essential truth of Dicey's insight stands. The broader and more loosely-textured a discretion is, whether conferred on an official or a judge, the greater the scope for subjectivity and hence for arbitrariness, which is the antithesis of the rule of law. This sub-rule requires that a discretion should ordinarily be narrowly defined and its exercise capable of reasoned justification. These are requirements which our law, in my opinion, almost always satisfies, because discretion imports a choice between two possible decisions and orders, and usually the scope for choice is very restricted.*

[180] While subsection 8(5) of the NOC Regulations may not be restricted only to actions which contribute to the delay in proceedings, it is not so broad as to encompass any factor that a party or a judge chooses to raise. Here the factors raised by AstraZeneca in respect of Issues #5, #6, #7 and #9 have all been determined against it. Discretion does not afford some sort of consolation prize for having lost or for having given the matter a good try. Having lost on those issues, I will not permit AstraZeneca to have them considered as a matter of judicial discretion.

[181] Therefore, in answer to Issue #12, I find that none of the matters which are the subject of any of Issues #5, #6, #7 or #9 are relevant factors to consider pursuant to subsection 8(5) of the NOC Regulations.

[7] My Judgment in that action was:

> *JUDGMENT*
>
> *FOR THE REASONS PROVIDED:*
>
> *THIS COURT'S JUDGMENT is that:*
>
> 1. *Apotex is entitled to be compensated for loss suffered by it by reason of the proceedings taken by AstraZeneca in T-2311-01 for the period from January 3, 2002 until December 30, 2003 under the provisions of subsection 8(1) of the NOC Regulations;*
>
> 2. *There is no basis for an exercise of judicial discretion under subsection 8(5) of the NOC Regulations to reduce or refuse an award of such compensation;*
>
> 3. *A Reference shall be conducted in accordance with the Order dated February 20, 2008 herein, paragraphs 1(a), 2, 4,5, and 6; and*
>
> 4. *Costs shall be addressed by the parties as set out in the reasons herein.*
>
> *"Roger T. Hughes"*
> *Judge*

[8] AstraZeneca appealed my decision. In its Judgment dated March 11, 2013, the Federal Court of Appeal said simply:

> *"The appeal is dismissed with costs".*

[9] In the Reasons of the Federal Court of Appeal, cited as 2013 FCA 77, Sharlow J.A. (for the panel) wrote, in part:

> *[2] Justice Hughes stated the facts in detail in his reasons, and they need not be repeated. It is sufficient to set out the two questions that Astrazeneca believes were incorrectly answered by Justice Hughes. They are:*

> 1. *Is it relevant to the section 8 claim that Astrazeneca has sued Apotex for infringement of the patent in issue and the infringement trial has not yet been completed?*
>
> 2. *Is it relevant to the section 8 claim that during the period in respect of which section 8 damages are claimed, Apotex intended to manufacture its product at a manufacturing site other than the one mentioned in its then pending regulatory submission?*

[3] Justice Hughes concluded that in the circumstances of this case, the answer to both questions is no.

[4] The first question arose when Astrazeneca asked Justice Hughes to delay the determination of section 8 damages in this case because its claim against Apotex for damages for infringement has not yet been determined. We note the jurisprudence to the effect that in assessing section 8 damages, the judge has the discretion under subsection 8(5) to reduce the damages based on an argument of ex turpi causa which could include an infringement claim (Apotex Inc. v. Merck & Co. Inc., 2011 FCA 364, at paragraphs 36 to 38). In this case, however, there has been no judicial determination that Apotex has infringed the patent, or would have done so but for the mandatory statutory stay during the prohibition proceedings.

[5] Justice Hughes had the discretion to refuse the request of Astrazeneca to delay the proceedings, and he did so. We have not been persuaded that the record discloses any basis upon which this Court should intervene.

[6] The fundamental reason for Justice Hughes' decision on this point is stated as follows at paragraph 148 of his reasons:

> *A Court hearing the pending infringement action, if it concludes that the patent is valid and has been infringed by Apotex in making the omeprazole drug that is the subject of these proceedings, can at that time craft a remedy that is appropriate, having in mind any compensation awarded in these proceedings.*

[7] We agree with this statement. It will be for the judge trying the infringement action to ensure that overall, taking both

> *proceedings together, a party is compensated for its provable loss, if any, on proper principles, no more and no less.*
>
> ...
>
> *[9] For these reasons, the appeal will be dismissed with costs.*

[10] In the two other actions, T-1409-04 and T-1890-11, AstraZeneca has asserted that Apotex's omeprazole products infringe the '693 Patent. These two actions differ only slightly, principally another Plaintiff was added in the later action; most of the procedural aspects were dealt with in T-1409-04. The trial of those actions was heard as one by Justice Barnes. On May 25, 2015, he released a Judgment (amending an earlier one released March 16, 2015) holding that Apotex had infringed certain claims of the '693 Patent. The quantification of damages had been bifurcated. In part, that amended Judgment read:

> *1. Subject to paragraph 8 below and subject to a determination of Apotex's pleaded experimental and regulatory use defence, with respect to both Court Files Nos. T-1409-04 and T-1890-11, it is declared that Claims 1, 5, 6, 13 and 19 of Canadian Letters Patent 1,292,693 ("693 patent") are valid and have been infringed by Apotex Inc. ("Apotex") by its manufacture, export, promotion and sale in Canada and elsewhere of its omeprazole capsule products, including its coated omeprazole pellets (subject to exceptions as regards to claim 13);*
>
> *2. With respect to Court File No. T-1890-11 only, it is declared that Apotex induced infringement of Claims 1, 5, 6, 13 and 19 of the 693 patent by its customers and by end-users throughout Canada;*
>
> ...
>
> *8. With respect to Court File No. T-1890-11 only, it is declared that AstraZeneca AB is statute barred from obtaining relief for any infringing activity and any activity constituting inducing infringement that took place before November 22, 2005 and AstraZeneca AB's claims for relief in respect of such activity before November 22, 2005 are dismissed; and*

[11] Apotex has appealed from this Judgment to the Federal Court of Appeal and AstraZeneca has cross-appealed. Infringement of the ‘693 patent is very much an issue to be dealt with by the Court of Appeal.

II. THE AMENDMENT SOUGHT IN THIS ACTION

[12] AstraZeneca now moves before me asking that I amend my Judgment dated May 11, 2012 in the following manner, as indicated by the underlined and struck out portions:

> *1. Apotex is entitled to be compensated for loss suffered by it by reason of the proceedings taken by AstraZeneca in T-2311-01 for the period from January 3, 2002 until December 30, 2003 under the provisions of subsection 8(1) of the NOC Regulations, and in determining said loss, the reference Judge may have regard to the Judgement of Justice Barnes dated March 16, 2015 in Court Files T-1409-04 and T-1890-11;*
>
> *2. The reference Judge may have regard to the Judgment of Justice Barnes dated March 16, 2015 in Court Files T-1409-04 and T-1890-11 in exercising discretion ~~There is no basis for an exercise of judicial discretion~~ under subsection 8(5) of the NOC Regulations to reduce or refuse an award of such compensation;*
>
> *3. A Reference shall be conducted in accordance with the Order dated February 20, 2008 herein, paragraphs 1(a), 2, 4, 5 and 6; and*
>
> *4. Costs shall be addressed by the parties as set out in the reasons herein.*

III. THE MOTION IS PREMATURE

[13] Prematurity is not the principal reason why I am dismissing the motion to amend my Judgment as I will dismiss it on substantive grounds as discussed later; however, whatever may be said about this motion, the simple fact is that it is premature. The whole basis of the motion is

the Judgment of Justice Barnes holding that Apotex has infringed the '693 Patent. As set out in paragraph 2 of AstraZeneca's Written Representations filed in support of this motion:

> *2. In particular, AstraZeneca asks that Justice Hughes reconsider his Judgment dated May 11, 2012 pursuant to Rule 399(2) of the Federal Courts Rules. AstraZeneca asks that the reconsidered Judgment direct that the reference Judge, in determining Apotex's loss under section 8, may take into account the finding of Justice Barnes that Apotex has infringed Canadian Patent No. 1,292,693 ("693 patent") by its manufacture, export, promotion and sale of its omeprazole capsule products. A proposed draft Judgment is attached as "Schedule A".*

[14] Justice Barnes' decision is final as far as the Federal Court is concerned; however, Apotex has filed an appeal from that decision and AstraZeneca has cross-appealed. The matter of infringement of the '693 Patent is very much a live issue in the Federal Court of Appeal and, depending on what happens there, the Supreme Court of Canada may become seized with the issue. To repeat a quote ascribed to the late Yogi Berra "*It ain't over till its over*".

[15] Therefore, regardless as to the other issues, the motion is premature as the infringement issue has not yet been fully and finally determined at all levels of the Court system.

IV. ITS NOT MY JUDGMENT ANYWAY

[16] My Judgment, now sought to be revised, was considered and affirmed by the Federal Court of Appeal. Once the Court of Appeal has pronounced its Judgment, it is for that Court, not this, to correct or reconsider that Judgment. This has been made very clear by the Federal Court of Appeal in *Grenier v The Queen*, 2008 FCA 63 at paragraph 6. I repeat what I wrote in *Pfizer Canada Inc. v Canada (Minister of Health)*, 2009 FC 1165 at paragraphs 9 and 10:

> *[9] This statutory provision does not say that the Federal Court of Appeal judgment is a judgment of the Federal Court, it says that it is a judgment that the Federal Court should have given. The judgment remains that of the Federal Court of Appeal. The Federal Court of Appeal per Trudel J.A., in Grenier v. The Queen, 2008 FCA 63 wrote at paragraph 6 (in part):*
>
> > *a. the trial court cannot correct a judgment it has rendered if the judgment has been the subject of a Court of Appeal judgment, and I would add, still less if it is being implemented or has been implemented, and the conclusions sought were included in those considered by the appeal (see Rule 399 of the Federal Courts Rules; Déziel v. Canada, 2005 TCC 70);*
>
> *[10] While I appreciate that Grenier was addressing a situation where a trial court was attempting to correct its own judgment, not that of a court of appeal, this principle is clear, once the Court of Appeal has disposed of the matter, it is for that Court not this one, to deal with that disposition.*

[17] Counsel for AstraZeneca cited jurisprudence in the Ontario Superior Court and Court of Appeal dealing with Rules 59.06(2) and 37.14(4) of those Courts. In particular, reliance was placed upon the decisions of the Ontario Court of Appeal in *Aristocrat v Aristocrat* (2004), 73 OR (3d) 275, *Mehedi v 2057161 Ontario Inc.* (2014), 123 OR (3d) 73 and *Warren v Gilbert*, 2010 ONCA 295 for the proposition that, if all the Court of Appeal did was to affirm the decision of the lower Court, then it is the lower Court that should deal with any amendment to its judgment.

[18] Apotex's Counsel sought to distinguish the Ontario Rule and the jurisprudence relied upon from the *Grenier* decision of the Federal Court of Appeal. These distinctions are small. However, it remains that, in the Federal Court system, the law is as pronounced in *Grenier*; it is the Federal Court of Appeal not the Federal Court that must deal with amendments to a

Judgment once the Federal Court of Appeal has pronounced its Judgment even if just to affirm the Federal Court.

V. EVEN IF IT'S NOT TOO SOON AND EVEN IF I COULD, I WON'T BECAUSE THERE IS NO SUBSTITUTE BASIS FOR DOING SO

[19] This is the principal reason why I am dismissing this motion.

[20] AstraZeneca wants me to amend paragraph 1 of my Judgment to add words to the effect that the Reference Judge may have regard to Justice Barnes' decision. That is really a matter for argument and not for a Judgment.

[21] The second amendment sought is to paragraph 2 of my Judgment which, in effect, would be to reverse what I said. In paragraph 2, as it now stands, I said there was no basis for the exercise of judicial discretion. AstraZeneca wants me to reverse this and say that there is discretion having regard to Justice Barnes' decision.

[22] Rule 399(2)(a) states that the Court may set aside or vary an order by reason of a matter that arose or was discovered subsequent to the making of the order:

(2) On motion, the Court may set aside or vary an order *(a) by reason of a matter that arose or was discovered subsequent to the making of the order; or* *…*	*(2) La Cour peut, sur requête, annuler ou modifier une ordonnance dans l'un ou l'autre des cas suivants :* *a) des faits nouveaux sont survenus ou ont été découverts après que l'ordonnance a été rendue;* *…*

[23] As stated by Justice Gauthier (as she then was) in *Eli Lilly Canada Inc. v Apotex Inc.*, 2010 FC 952 (aff'd 2013 FCA 282) at paragraph 35, the discretion given to the Court in Rule 399(2) is exceptional; the Court should exercise such discretion with great care.

[24] In my decision of May 11, 2012 (2012 FC 559), I expressly considered the scenario where Apotex might be held to infringe another patent. I have set out portions of my Reasons earlier where I considered the matter at length. The Federal Court of Appeal reviewed my reasoning at paragraphs 2 to 8 of its Reasons (2013 FCA 77), as set out earlier, and agreed with me.

[25] The only thing that has now happened is that the "might happen" scenario considered by me and the Court of Appeal has become a reality. That makes no difference. The "reality" has already been considered and a determination made. Nothing changes.

VI. DOES THE *VIRGIN* CASE MAKE A DIFFERENCE?

[26] AstraZeneca cites the decision of the United Kingdom Supreme Court in *Virgin Atlantic Airways v Zodiak Seats U.K. Limited*, [2013] UKSC 46 as a "*useful analogy to the present case*".

[27] The *Virgin* case is the result of the peculiar patent system that exists in Europe and the United Kingdom. In the United Kingdom, persons can receive and subsequently enforce a patent granted by the United Kingdom Patent Office. Enforcement of such a patent is through the Courts of the United Kingdom which Courts can give final judgment as to infringement and validity of the patent.

[28] As an alternative, a party may be granted a patent by the European Patent Office (EPO). That patent then is to be enforced by the Courts of the national countries who are members of the European patent system in which country infringement is said to have occurred. The United Kingdom is one such country; thus, the Courts of the United Kingdom can make judgments affecting the validity and infringement of a European patent.

[29] The validity of a European patent can also be challenged in the EPO provided the challenge is filed promptly. The Technical Board of Appeal is the final authority in the EPO. Just to make things more complicated, the Technical Board of Appeal can remove or amend claims of a European patent.

[30] The *Virgin* case in the United Kingdom dealt with a European patent having many claims directed to the modular seating/sleeping accommodation (sarcophagi) found in many business class sections of modern passenger aircraft. The patent was simultaneously being enforced in the United Kingdom Courts and being reviewed by the EPO.

[31] The United Kingdom Court of Appeal held that the Defendant Zodiak's sarcophagi infringed certain claims of the patent and awarded £49 million in damages. Subsequently, the EPO Technical Board of Appeal removed the claims said to be infringed from the patent. This mess came before the United Kingdom Supreme Court in the case cited above.

[32] That Court determined, as set out in the Reasons delivered by Lord Sumption with whom the other judges agreed (including Lord Neuberger in separate Reasons, see paragraph 69) at paragraph 35:

> *35 ...Accordingly, where judgment is given in an English court that a patent (whether English or European) is valid and infringed, and the patent is subsequently retrospectively revoked or amended (whether in England or at the EPO), the defendant is entitled to rely on the revocation or amendment on the enquiry as to damages.*

[33] The *Virgin* case has been commented upon by Prothonotary Lafrenière (2014 FC 883) and myself (2014 FC 1058) in *Merk & Co. v. Apotex Inc.*; it is based on a very peculiar aspect of United Kingdom and European law with no real parallel here. In *Virgin*, the same patent was at issue in the EPO and the United Kingdom Courts. When the claims found to be infringing by the United Kingdom Courts were removed from the patent by the EPO, there was nothing left upon which infringement, hence damages, could be founded.

[34] In the present case, Justice Barnes found a different patent to be infringed, not the patent at issue here. The possibility of such a finding was, as I have previously discussed, already canvassed in my earlier Reasons and those of the Federal Court of Appeal.

[35] The *Virgin* case does not assist in the determination of the issue here.

VII. WAS THIS MOTION BROUGHT PROMPTLY?

[36] Apotex argues that a motion such as this must be brought promptly, as soon as the new matter has arisen. The jurisprudence is to that effect. Apotex argues that AstraZeneca "*waited two and a half months to deliver its motion record*".

[37] Not quite so. Justice Barnes amended his Judgment on May 25, 2015. This motion was filed June 1, 2015. There is no unreasonable delay in bringing this motion although I have held it to be premature.

VIII. CONCLUSION AND COSTS

[38] In conclusion, for all the Reasons stated above, this motion must be dismissed. Apotex is entitled to its costs at the Column III level which I fix at the amount suggested by Apotex's Counsel, namely, $3,500.00 inclusive of disbursements and taxes.

ORDER

THIS COURT'S ORDER is that:

1. The motion is dismissed;

2. Apotex is entitled to costs to be paid by AstraZeneca fixed in the sum of $3,500.00 inclusive of disbursements and taxes.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2300-05
STYLE OF CAUSE:	APOTEX INC. v ASTRAZENECA CANADA INC.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 24, 2015
ORDER AND REASONS:	HUGHES J.
DATED:	JUNE 26, 2015

APPEARANCES:

Andrew Brodkin	FOR THE PLAINTIFF (Responding Party)
J. Sheldon Hamilton Mark Biernacki	FOR THE DEFENDANT (Moving Party)

SOLICITORS OF RECORD:

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