Federal Court of Appeal  Cour d'appel fédérale

Date: 20150427

Docket: A-385-14

Citation: 2015 FCA 107

CORAM: **RYER J.A.**
NEAR J.A.
RENNIE J.A.

BETWEEN:

BERNARD CHARLES SHERMAN and
APOTEX INC.

Appellants

and

PFIZER CANADA INC., PFIZER INC. and
DOE Co. and all other entities unknown to the Plaintiffs
which are part of the PFIZER group of
companies

Respondents

Heard at Toronto, Ontario, on April 14, 2015.

Judgment delivered at Ottawa, Ontario, on April 27, 2015.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: RYER J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] This is an appeal from a decision of the Federal Court (2014 FC 825), in which Justice Brown dismissed as moot a motion to set aside an order of Prothonotary Milczynski dated July 14, 2014. In that decision, the Prothonotary ordered the production of certain documents by the appellants to the respondents.

[2] The appellants appealed the Prothonotary's order to the Federal Court. They did not seek to stay the order pending a decision by the Federal Court on their appeal. Rather, the appellants produced to the respondents documents falling within the ambit of the Prothonotary's order such that, by August 12, 2014 when the matter was heard before the Federal Court, the appellants had disclosed the vast majority of documents contemplated in the order. Justice Brown characterized the production to that date as being of "some 99.9% with discussions only as to the extent of compliance with one class of documents to be produced" (at para 4). By the time of the hearing of this appeal, all documents had been disclosed and production pursuant to the order was complete.

[3] Justice Brown decided that the appeal was moot on the ground that the order had been substantially complied with. Applying the factors laid down by the Supreme Court of Canada in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*], he also decided not to exercise his discretion to hear the appeal notwithstanding that it was moot. He determined that there was no longer an adversarial relationship between the parties with respect to the issue of production. He also determined that the issue in dispute was relatively commonplace in litigation and raised no unique legal point or question of public importance.

[4] In *Borowski* the court set forth the approach to be taken in case in which mootness is an issue. At paragraph 16, Sopinka J stated:

> The approach in recent cases involves a two step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear

> whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[5] Neither of the parties takes issue with this statement of the law.

[6] I turn to the question of whether the appeal was moot.

[7] In my view, the Federal Court judge made no reviewable error in concluding that the matter was moot. The appellants had asked the Judge to set aside the order and "hold that Apotex need not produce documents falling in the above noted categories." However, the appellants had complied with the order; they had done what the order required them to do. Setting aside all or portions of the order would not have undone the documentary production in question. Since the documents were already produced, success on appeal would have no practical effect on the parties.

[8] Support for this conclusion can be found in the decision of this Court in *Pharmascience Inc. v Canada (Minister of Health)*, 2003 FCA 333, at paras 28-29 [*Pharmascience*], where the Court found that, production of documents having been made, the appeal was moot. The British Columbia Court of Appeal reached the same conclusion in *Smith (Guardian ad litem of) v Funk*, 2003 BCCA 449. I do not find compelling the appellants' argument that this case is distinguishable on the basis that it involved production by third parties.

[9] The appellants have raised the decision in *Dywidag Systems International, Canada, Ltd. v Garford Pty Ltd.*, 2010 FCA 232 [*Dywidag*], in support of their argument that compliance with production requirements do not render an appeal from a production order moot. *Dywidag* is a dismissal of a motion to stay, pending appeal, an order of the Federal Court setting aside a prothonotary's order bifurcating a patent infringement action into liability and damages portions. The appellant complained that it would suffer irreparable harm from the disclosure of confidential business documents relating to the issue of damages. It also contended that if the order of the Federal Court was not stayed, its appeal seeking the reinstatement of the prothonotary's bifurcation order would be moot because documents relevant to the damages phase would have already been produced.

[10] I am unable to see where Justice Stratas, in *Dywidag*, either explicitly or implicitly, accepted that the mootness of the appeal would be determined solely on the fact that documents had been produced, as is the case before this Court. He observed that restoration of a bifurcation order would have many practical consequences, of which the production of documents was but one. He rejected the appellant's argument on mootness, noting that documents could be returned to the disclosing party if the appeal was allowed. He also noted that the appellants had failed to lead any evidence speaking to the irreparable harm that would arise from disclosure. Importantly, *Pharmascience* was not cited by the Court in *Dywidag*, reinforcing the conclusion that the focus of that decision on the issue of mootness was the narrow question of whether an appeal relating to a bifurcation order would be rendered moot by the production of documents relating to the damages phase.

[11] The appellants contend that, as they are under a continuing obligation to produce documents, the order is not spent and the underlying question of relevance remains a live issue. In my view, however, the continuing disclosure obligation arises by operation of the *Federal Courts Rules* (SOR/98-106) and related jurisprudence. A continuing obligation to disclose cannot resurrect a spent order. Further, the appellants have made this argument in the absence of any context – they have not identified any specific issue, document, or class of documents against which this argument may be tested. An assertion that there is an on-going issue of relevance does not distinguish this from other cases dealing with production. Relevance is always in issue in litigation, right up until the moment a trial judge makes a determination.

[12] The appellants point to the fact that they produced the documents to Pfizer without prejudice to their right to appeal. This is not determinative of the question of mootness. The appellants were under an obligation to produce the documents in question, a fact that was not altered by transmitting them under cover of a "without prejudice" letter. A unilateral assertion by one party that it is complying with an order without prejudice to its right to appeal does not preclude an argument that an appeal is moot.

[13] Finally, counsel for the appellants contend that to uphold the Federal Court judge's decision will spawn a host of stay applications pending appeals from interlocutory production orders. While worthy of concern, the prospect is unlikely. In the ordinary course of litigation, counsel on occasion reach an agreement allowing an appeal to proceed notwithstanding full or partial compliance with a production order. This is done because counsel recognize their responsibility to move litigation forward and that an appeal may meet with partial or no success.

While a court is not bound to hear an appeal that may be moot, agreements of this nature are to be encouraged. Unfortunately, in this case, no such agreement was reached.

[14] If there is no agreement, a stay application may be the inevitable consequence. This is, however, the work of the Court. The Court will not foreclose remedies open to the parties simply out of fear that it might generate more work.

[15] I turn to the question whether the Federal Court judge erred in the exercise of his discretion not to hear the appeal notwithstanding its mootness. In paragraphs 13 to 16 of his reasons, the Federal Court judge considered each of the *Borowski* criteria; existence of an adversarial context, judicial economy, the likelihood of the question reoccurring, and the absence of any public importance with respect to the production of documents dispute. I find no reviewable error in his decision to decline to hear the appeal having regard to his consideration of these criteria in the context of the case before him.

[16] For these reasons the appeal should be dismissed, with costs in the cause.

"Donald J. Rennie"

J.A.

“I agree”
C. Michael Ryer

“I agree”
D.G. Near

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

(APPEAL FROM THE ORDER OF MR. JUSTICE BROWN DATED 26-AUG-2014 IN FEDERAL COURT DOCKET NO. T-1660-11)

DOCKET:	A-385-14
STYLE OF CAUSE:	BERNARD CHARLES SHERMAN et al v PFIZER CANADA INC. et al
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 14, 2014
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	RYER J.A. NEAR J.A.
DATED:	APRIL 27, 2015

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