Intellectual Property Weekly Abstracts Bulletin — Week Of May 29, 2017

May 31, 2017

Decisions of Interest

Apotex's claims against current and former Ministers and civil servants working at the Ministry of Health is not struck for a lack of jurisdiction
Apotex Inc. v. Ambrose, 2017 FC 487

The Federal Court has refused to strike a claim brought by Apotex against current and former ministers and civil servants working at the Ministry of Health.

Apotex has brought its claim pursuant to paragraph 17(5)(b) of the *Federal Court Act*, which provides that the Federal Court has jurisdiction over "proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of the duties of that person as an officer, servant or agent of the Crown". Apotex's allegations relate to relief against officers of the Crown for claims of misfeasance in public office, negligence, conspiracy, defamation and monetary relief in public law.

As described by the Court, the background to this litigation involves several earlier decisions and the judicial reviews of those decisions. On September 30, 2014, products from two overseas Apotex plants were subject to an import ban by Health Canada. The Federal Court quashed the import ban on October 14, 2015 (*Apotex Inc v Canada (Health)*, 2015 FC 1161) finding that the Minister had acted for an improper purpose in implementing the ban *(i.e.*, to ease media and political pressure) and had failed to act in accordance with the principles of natural justice. The Court also ordered the Minster and Health Canada to retract the Public Statements.

In June 2015 Health Canada conducted inspections of the two plants and amended the terms and conditions of the first import ban. By Judgment dated June 15, 2016 (*Apotex Inc v Canada (Health),* 2016 FC 673), the Court declared the amendments unlawful, on the basis that it was “infected” by the improper purpose that had motivated the original Import Ban and that there was no evidence to support implementing or maintaining the amendments.

Health Canada also refused to issue further NOCs for products originating from the two plants. By Judgment dated March 27, 2017 (*Apotex v Canada*, 2017 FC 315), the Court found that Health Canada's continued refusal to grant NOCs for Apo-Varenicline and Apo-Sitagliptin, the only two products for which the TPD continued to require additional data integrity information as of the date of the hearing before the Federal Court, was neither improper nor unreasonable.

Ultimately, the Court refused to strike Apotex's claims for a lack of jurisdiction. The Court held that the rights to sell, import, and manufacture drugs are entirely created by federal statute. Furthermore, the *Food and Drugs Act* and *Regulations* were said to define the scope of the Minister's and Health Canada's authority and create the metric against which the lawfulness of their actions will be measured. On this basis, the Court did not find it was plain and obvious that the Federal Court lacks jurisdiction to hear the claims made against the individual defendants.

Appeal of a finding of non-infringement of a U.S. Patent dismissed
OrthoArm Incorporated v. GAC International LLC, 2017 ONCA 418

The Ontario Court of Appeal dismissed an appeal of the Trial Judge's decision finding that the Respondent had not infringed the Appellant's patent in respect of an orthodontic bracket. A brief background to the action is that the Appellant had licensed the worldwide rights to manufacture, use, market, and sell products covered by its U.S. Patent (the "715 Patent") to the Respondent. The Respondent later began to market and sell orthodontic brackets it had developed with a third party manufacturer. The Appellant alleged that these brackets were an extension of its original invention and were covered by the 715 Patent and commenced an action against damages and other relief for breach of a license agreement.

On appeal, the Appellant asserted that the Trial Judge erred in the application of relevant U.S. patent law principles in construing the claims in the 715 Patent, and in concluding that the products did not infringe the claims. The Court of Appeal applied a standard of correctness since the issue concerned only the Trial Judge's construction of the claims in the 715 Patent. The Court of Appeal dismissed the Appellant's arguments, including that the Trial Judge erred in equating the word "movable" with "slidable" and in failing to give these words their common, ordinary and distinct meanings. The Court of Appeal found that the Trial Judge did not ignore the fact that these two terms are different word with different meanings. The Court also noted that it is not sufficient to simply look at the words in isolation or in the abstract. Rather, the Court stated that words must be considered within the context, which is the specification. The Court of Appeal also dismissed the appeal in respect of the costs awarded to the Respondent.

Defendant satisfied the two threshold factors for the right to examine the assignors
Ocean Rodeo Sports v. Oyen, 2017 BCSC 876

The Court dismissed an application to strike three appointments to examine for discovery. The underlying action concerns a claim for negligence against a firm of solicitors arising from a missed filing date with respect to obtaining a U.S. patent. The Plaintiffs sought to strike the appointments for examination for discovery on the basis that they relate to individuals who are neither parties to the action, nor are they adverse in interest to the Defendants.

The Court noted that the three persons the Defendants seek to discover, or examine for discovery, were assignors of some right to the invention to the Plaintiff, the assignee. Therefore, the issue before the Court, was whether Rule 7-2(7) of the *British Columbia Rules* should be given a more broad interpretation as sought by the Defendants to capture the three individuals. The Court stated that there are two threshold factors for the right to examination of an assignor: 1) the party proposing to conduct the examination must establish that the person to be examined has assigned a right or an interest in property that is relevant to the action or a right of an action itself to be entitled to an examination; and 2) the assignor must show some material evidence relating to an issue in the action that might be obtained from the person it seeks or they seek to examine. The Court concluded that there was a right for the Defendants to examine the three individuals. However, the Court limited it to questions as to the nature of the invention itself and any contribution directly or indirectly that the three individuals may have made to the instructions that were given to the solicitor.

Court of Appeal dismisses appeal of decision granting summary judgment
Composite Technologies Inc. v. Shawcor Ltd., 2017 ABCA 160

The Court of Appeal of Alberta dismissed the Plaintiffs' appeal of Hillier J.'s decision confirming the Master's Order, which summarily dismissed the Plaintiffs' claims. The essence of the Plaintiffs' claim was that the Defendants unlawfully used the Plaintiffs' technology for the manufacture of flexible composite pipe. The consolidated action also contained a claim that one of the individual Defendants had breached a confidential relationship with Composite Technologies and disclosed confidential information relating to the technology for the manufacture of flexible composite pipe to one of the corporate Defendants.

Importantly, prior to commencing the action, the Plaintiff Composite Technologies and the Plaintiff Proflex Pipe Corporation entered into a technology transfer agreement in respect of the flexible composite pipe technology. In addition, the Registrar of Corporations dissolved the Plaintiff Proflex Pipe in 2006.

In the underlying decision, the Defendants had applied for and were granted summary judgment, and the Plaintiffs' claims were dismissed. The Master granted the relief requested for two reasons: 1) the Plaintiff Proflex Pipe was not a legal entity and had no right to commence an action; and 2) the other Plaintiffs had no interest in the intellectual property that they sought to protect. This decision was confirmed on appeal by Hillier J. In addition to the Master's conclusions, Hillier J. found that, as of July 1, 2006 (the day before the Registrar of Corporations dissolved Proflex Pipe), the Plaintiff Composite Technologies did not have any remaining interest in the technology. Furthermore, Hiller J. rejected the Plaintiffs' argument that he should have allowed them to amend their claim to ask for rectification of the technology transfer agreement as "[t]he failure to file an application [for rectification] or to set out wording to rectify the contract before the Master or on appeal supports the inference that it is a late strategy seeking to avoid summary dismissal".

After reviewing the merits of the Appellants' argument, the Court of Appeal found none of them to be compelling. For example, the Court of Appeal noted that the Plaintiffs never applied for a rectification application, and even if they had, they would have not been in a much better position given the law on rectification. The Court of Appeal also found, among other things, that the technology transfer agreement was not invalid

because of the Plaintiff Composite Technologies' failure to give shareholders notice of the proposed transaction.

Action concerning U.S. patent dismissed for want of jurisdiction
Sgromo v Scott et al., 2017 ONSC 2524

The Ontario Superior Court dismissed the within action for want of jurisdiction. The Plaintiffs claim, among other things, a declaration that the transfers of certain American patents were ineffective, a declaration that the patents belong to the individual plaintiff, a claim for disgorgement of profits made from the patents, and claims for injunctive relief. In coming to its conclusion to dismiss the action, the court dealt with the forum selection clauses in the various agreements at issue, *jurisdiction simpliciter* and prior arbitration, litigation and settlements in California.

Supreme Court Updates

Apotex Inc. v. AstraZeneca Canada Inc. et al. (F.C.) (Civil) (By Leave) (37478)

The Supreme Court of Canada has announced that judgment in Apotex's application for leave to appeal the decision reported in 2017 FCA 9 (our summary here) will be delivered on Thursday, June 1, 2017.

Industry Updates

Health Canada released a Notice — Interim Implementation of International Council for Harmonisation (ICH) Integrated Addendum to ICH E6(R1): Guideline for Good Clinical Practice E6(R2).

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