

Federal Court of Appeal



Cour d'appel fédérale

Date: 20131001

Docket: A-74-13

Citation: 2013 FCA 231

**CORAM: SHARLOW J.A.
MAINVILLE J.A.
NEAR J.A.**

BETWEEN:

MYLAN PHARMACEUTICALS ULC

Appellant

and

**BRISTOL-MYERS SQUIBB CANADA CO.,
MERCK SHARP & DOHME CORP., AND THE
MINISTER OF HEALTH**

Respondents

Heard at Toronto, Ontario, on October 1, 2013.

Judgment delivered from the Bench at Toronto, Ontario, on October 1, 2013.

REASONS FOR JUDGMENT OF THE COURT BY:

SHARLOW J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on October 1, 2013).

SHARLOW J.A.

[1] Mylan Pharmaceuticals ULC is appealing the judgment of Justice Barnes (2013 FC 48) awarding the respondents (collectively Bristol Myers) costs of \$45,000 plus harmonized sales tax and reasonable disbursements payable in accordance with reasons issued concurrently.

[2] The costs were awarded in respect of a judgment (2012 FC 1142) that disposed of an application by Bristol Myers under the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133, for an order prohibiting Mylan from selling a certain drug until the expiry of two patents. The prohibition application was granted in respect of only one of the patents, which expired on July 29, 2013. That was a partial win for Bristol Myers. If Bristol Myers had succeeded in respect of the second patent, the prohibition order would have been in force until February 2, 2018. That was a partial win for Mylan, because no prohibition order kept it from the market after July 29, 2013. Another outcome of the application was that there was no successful attack on the validity of either patent.

[3] In their submissions in the Federal Court, Bristol Myers claimed costs of over \$90,000 and disbursements of almost \$400,000. Mylan argued that no costs should be payable at all, or that any costs awarded to Bristol Myers should be set off against the costs awarded to Mylan.

[4] Justice Barnes rejected the notion of awarding no costs and instead awarded Bristol Myers approximately 50% of the costs it claimed, plus disbursements except certain disbursements relating to expert evidence tendered by Bristol Myers.

[5] A decision on costs is discretionary and will not be disturbed on appeal unless the decision is based on an error in principle or is plainly wrong (see *Bell Helicopter Textron Canada Limitée v. Eurocopter, société par actions simplifiée*, 2013 FCA 220, paragraphs 7 and 8). In this appeal, Mylan alleges that Justice Barnes erred in principle in three respects.

[6] First, Mylan argues that Justice Barnes was obliged as a matter of law to award costs to neither party because of the divided success. While that is a common outcome in cases of divided

success, it is not an outcome mandated by an immutable principle of law. Justice Barnes considered that alternative and rejected it for reasons that he explained.

[7] Mylan also argues that Justice Barnes ignored the settled principle that the success of a legal proceeding is determined by reference to its practical result and the remedies sought. In our view, Justice Barnes made no such error. He was clearly aware of the practical result of the proceeding and the remedies sought. Although his assessment of those factors does not accord with Mylan's, we see no error in principle.

[8] Finally, Mylan argues that Justice Barnes penalized Mylan for making arguments that did not find favour with the Court. We see no indication that Justice Barnes did any such thing.

[9] We have considered Mylan's suggestion that awards such as this one provide an incentive to generic drug manufacturers to issue multiple notices of allegation rather than one where more than one patent is involved. The record affords this Court no factual foundation for assessing the validity of that argument. However, we note that the judges and prothonotaries of the Federal Court have significant experience with such matters. We have no doubt that if they perceive that litigants are conducting themselves in a manner that is unjustifiably inefficient, they are well equipped to respond on a case by case basis through appropriate case management and in the matter of costs.

[10] This appeal will be dismissed with costs.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-74-13

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE BARNES OF THE FEDERAL COURT OF CANADA DATED JANUARY 21, 2013, DOCKET NO. T-2072-10

DOCKET: A-74-13

STYLE OF CAUSE: MYLAN PHARMACEUTICALS
ULC v. BRISTOL-MYERS SQUIBB
CANADA CO., MERCK SHARP &
DOHME CORP., AND THE
MINISTER OF HEALTH

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 1, 2013

REASONS FOR JUDGMENT OF THE COURT BY: SHARLOW J.A.
MAINVILLE J.A.
NEAR J.A.

DELIVERED FROM THE BENCH BY: SHARLOW J.A.

APPEARANCES:

Vincent M. de Grandpré FOR THE APPELLANT

Jordana Sanft FOR THE RESPONDENTS
Amy E. Grenon

SOLICITORS OF RECORD:

Osler, Hoskin & Harcourt LLP FOR THE APPELLANT
Barristers and Solicitors
Ottawa, Ontario

Norton Rose Canada LLP FOR THE RESPONDENTS
Barristers and Solicitors
Toronto, Ontario

