

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160610

**Dockets: A-499-14
A-33-15**

Citation: 2016 FCA 176

**CORAM: DAWSON J.A.
STRATAS J.A.
DE MONTIGNY J.A.**

BETWEEN:

TEVA CANADA LIMITED

Appellant

and

GILEAD SCIENCES INC.

Respondent

Heard at Toronto, Ontario, on October 29, 2015.

Judgment delivered at Ottawa, Ontario, on June 10, 2016.

REASONS FOR JUDGMENT BY:

STRATAS J.A.

CONCURRED IN BY:

**DAWSON J.A.
DE MONTIGNY J.A.**

FEDERAL COURT OF APPEAL

BETWEEN:

RADU HOCIUNG

Appellant

and

**MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Respondent

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1.

Teva Canada Limited v. Gilead Sciences Inc. 2016 FCA 176

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] In the Federal Court, Teva Canada Limited brought two consecutive motions for leave to amend its statement of claim. By orders dated November 3, 2014 and January 19, 2015, the Federal Court (both *per* Barnes J.) dismissed the motions. Teva now appeals both.

[2] These are the reasons for judgment on both appeals. A copy of these reasons shall be placed in each appeal file.

[3] In my view, the Federal Court committed no reviewable error in making the orders. Therefore, I would dismiss the appeals with costs.

A. The impeachment action

[4] In the summer of 2012, Teva issued a statement of claim in the Federal Court impeaching claims 1 to 32 of Canadian patent number 2,261,619 and claims 1 to 14 of Canadian patent number 2,298,059.

[5] In that statement of claim, Teva alleges that the claims in the '619 Patent are invalid for obviousness, anticipation, lack of utility and insufficient disclosure. It alleges that the claims in the '059 Patent are invalid for obviousness, double patenting, overbreadth, lack of utility and ambiguity. The allegations against the '059 Patent have been discontinued.

[6] The '619 and '059 Patents have been the subject of proceedings under the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133. In those proceedings, Teva's notice of allegation alleged that the inventors of the '619 Patent had not soundly predicted utility. In its statement of claim, Teva decided not to advance this ground.

[7] The respondent, Gilead Sciences Inc., has defended against the claim, denying all grounds of invalidity. Discoveries have followed and are complete. Teva has had the opportunity to examine Gilead's discovery representative on two separate occasions, five of the six inventors of the '619 Patent, and the three inventors of the '059 Patent.

B. Teva's first motion for leave to amend the statement of claim

[8] Roughly two years after the statement of claim was issued, Teva moved for leave to amend its statement of claim. Some amendments were of a minor, housekeeping nature; others were much more contentious. The contentious amendments alleged that the '619 Patent was fraudulently obtained by misleading the Patent Office and, thus, the '619 Patent is invalid and void for material misrepresentation contrary to subsection 53(1) of the *Patent Act*, R.S.C. 1985, c. P-4.

C. The Prothonotary's ruling on the motion

[9] The first motion came before the Prothonotary. She granted the minor, housekeeping amendments.

[10] As for the contentious amendments, she dismissed the motion on the ground that the proposed amendments lacked particularity. However she allowed Teva to renew its motion on further and better particulars.