Case Name:

Apotex Inc. v. Eli Lilly and Co.

Apotex Inc.
v.
Eli Lilly and Company, and Eli Lilly Canada Inc.

[2015] S.C.C.A. No. 291

[2015] C.S.C.R. no 291

File No.: 36538

Supreme Court of Canada

Record created: August 4, 2015.
Record updated: January 14, 2016.

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Status:

Application for leave to appeal dismissed with costs (without reasons) January 14, 2016.

Catchwords:

Intellectual property -- Patents -- Medicines -- Civil procedure -- Pleadings -- Motion to strike -- Respondents seeking to strike portions of applicant's statement of claim pertaining to claims for unjust enrichment and disgorgement of respondents' profits as remedy for wrongful market exclusion -- Whether there is a single cause of action for unjust enrichment that encompasses "restitution for wrongs" line of cases, or is that cause of action confined to "subtraction" cases involving "transfer of wealth" from plaintiff to defendant -- Whether decision also raises issue of extent to which tripartite conceptualization of "unjust enrichment' should be applied to profit from wrongdoing cases, and if so how.

Case Summary:

The Respondents (collectively, "Eli Lilly") owned the '735 patent relating to the use of atomexetine hydrochloride in the treatment of Attention Deficit Hyperactivity Disorder. Eli Lilly received its Notice of Compliance ("NOC") in 2004 and entered the market as sole supplier of the medicine. In 2008 Apotex Inc. ("Apotex") developed its generic version of the drug and sought to obtain a NOC to also enter the market. It served Eli Lilly with a Notice of Allegation under the Patented Medicines (Notice of Compliance) Regulations, SOR/93-133 ("Regulations"), claiming that the '735 patent was invalid on the grounds of anticipation, obviousness and inutility. Eli Lilly commenced a proceeding under the Regulations, seeking an order to prohibit the issuance of a NOC to Apotex, triggering the statutory stay and effectively keeping Apotex from gaining market entry for a period of two years. Meanwhile, in another proceeding, the '735 patent was declared to be invalid for want of disclosure. As a result, Eli Lilly's prohibition application in the within action was dismissed. Apotex claimed damages against Eli Lilly under s. 8 of the Regulations for losses suffered as a result of its exclusion from the market during the prohibition period from October 10, 2008 to September 21, 2010. Apotex sought relief, inter alia, pursuant to unjust enrichment principles, for disgorgement of Eli Lilly's profits earned during the period of market exclusion.

Counsel:

Harry B. Radomski (Goodmans LLP), for the motion.

Patrick S. Smith (Gowling Lafleur Henderson LLP), contra.

Chronology:

1. Application for leave to appeal:

FILED: August 4, 2015.
SUBMITTED TO THE COURT: October 26, 2015.
DISMISSED WITH COSTS: January 14, 2016 (without reasons).
Before: Cromwell, Wagner and Côté JJ.

Procedural History:

Judgment at first instance: Respondents' motion to strike allowed in part; Apotex's claims pertaining to unjust enrichment and statutory damages allowed to proceed. Ontario Superior Court of Justice (Macdonald J.), July 25, 2012.
2012 ONSC 3808.

Judgment at first instance: Respondents' application for leave

to appeal order regarding claim for unjust enrichment granted.
Ontario Superior Court of Justice (Ducharme J.), Divisional Court, February 22, 2013.
2013 ONSC 1135.

Judgment at first instance: Respondents' appeal allowed; Apotex's claim for unjust enrichment struck from statement of claim.
Ontario Superior Court of Justice (Lax, Sachs and Grace JJ.), September 19, 2013.
2013 ONSC 5937.

Judgment on appeal: Apotex's appeal dismissed.
Court of Appeal for Ontario (Doherty, Feldman and Blair JJ.A.), May 5, 2015.
2015 ONCA 305; [2015] O.J. No. 2278.