

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC.
and NOVAR INC.

Applicants

**SUPPLEMENTARY BOOK OF AUTHORITIES
OF SUN INDALEX FINANCE, LLC**

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TAB

1. *Apotex Inc. v. Merck & Co.*, [1999] F.C.J. No. 575

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Indexed as:
Apotex Inc. v. Merck & Co.

Between
Apotex Inc. and Signa S.A. de C.V., plaintiffs, and
Merck & Co., Inc., defendant

[1999] F.C.J. No. 575

[1999] A.C.F. no 575

167 F.T.R. 59

88 A.C.W.S. (3d) 198

Court File No. T-2869-96

Federal Court of Canada - Trial Division
Ottawa, Ontario

Muldoon J.

Heard: November 10, 1998

Judgment: April 28, 1999

(15 pp.)

Practice -- Pleadings -- Striking out pleadings -- Grounds, res judicata -- Grounds, abuse of process or delay.

Motion by the defendant, Merck, to strike out Apotex's statement of claim. The action arose in the context of patent impeachment litigation. Merck had previously obtained a permanent injunction to prevent Apotex from making or selling an invention for which Merck had the patent. Apotex issued a new statement of claim. Merck argued that Apotex was attempting to circumvent the permanent injunction and to improperly re-litigate issues that had been settled by a final determination of the court. Merck argue that it was an abuse of process to commence proceedings in the face of res judicata.

HELD: Motion allowed. The issue in this action had been decided in the previous proceeding, and the court in that case had refused to reopen or revisit the matter. For reasons of res judicata and is-

sue estoppel, the Apotex's statement of claim was struck out on the basis of abuse of process. Apotex was trying to re-litigate issues that had already been dealt with conclusively.

Statutes, Regulations and Rules Cited:

Federal Court Rules, 1998, Rules 221, 221(1)(a), 221(1)(c), 221(1)(d), 221(1)(e), 221(1)(f), 221(2), 337, 397, 419.

Patent Act, R.S.C. 1985, Chap. P-4, ss. 43, 56, 60(1).

Counsel:

Harry B. Radomski and Daniela Bassan, for the plaintiffs.

G. Alexander Macklin and Constance Too, for the defendant.

1 MULDOON J. (Reasons for Order):-- The applicant defendant, Merck & Co. Inc. ("Merck"), brought a motion pursuant to rule 221 of the Federal Court Rules, 1998 to strike out the respondent plaintiffs' statement of claim. The plaintiffs, Apotex Inc. and Signa S.A. de C.V. (collectively, "Apotex"), brought a cross-motion to strike out certain affidavits tendered by Merck in support of its motion. This action arises in the context of patent impeachment litigation regarding Patent No. 1,275,349 (the "349 patent"), for which Merck holds exclusive rights for making and selling the invention which is described in claims 1 through 17.

2 The hearing was held in Ottawa on November 10, 1998. Unfortunately, counsel were overly optimistic with their estimation that one day would suffice, and at the end of the day the Court had not heard oral argument from plaintiffs' counsel in respect of Merck's motion. Accordingly, the Court directed the parties to complete their arguments by way of written submissions, with the parties to work out an agreed upon schedule themselves. Although counsel assured the Court that the written submissions would be forthcoming before the end of 1998, again they were too optimistic. The plaintiffs' written responding submissions were filed with the Court on March 17, 1999, and the defendant's reply was received on April 9, 1999. Thus, some five months, and indeed a winter, have passed since the motion was heard and the parties completed their arguments.

Merck's Position

3 The applicants seek an order, pursuant to rule 221(1)(a), (c), (d), and (f), striking out Apotex' statement of claim and dismissing the action as disclosing no reasonable cause of action, being frivolous and vexatious, and constituting an abuse of process. In the alternative, Merck seeks an order striking out all or part of paragraphs 14, 15, 18, 20, 22, and 23 of the impugned statement of claim. In the further alternative, Merck seeks orders dismissing the action in regard to Apotex' participation, and for particulars of the plaintiffs' status as interested persons, as well as particulars of the material facts supporting the invalidity attack on claims 1, 8, and 11.

4 With regard to the issue of status, Merck argues that the plaintiffs lack the status to bring the impeachment action because they have not pleaded any facts material to the issue of whether they are interested persons within the meaning of section 60(1) of the Patent Act, R.S.C. 1985, Chap. P-4. Merck submits that because Apotex is subject to a permanent injunction issued by Mr. Justice

MacKay on December 14, 1994 in action no. T-2408-91, which permanently enjoins Apotex from infringing claims 1 to 5 and 8 to 15 of the 349 patent, the plaintiffs have no current activities affected by the 349 patent's existence, and thus the plaintiffs are not interested persons. Merck also contends that the nature of the business relationship between Apotex and Signa is such that the latter corporation is bound by the (T-2408-91) permanent injunction.

5 Merck contends that Apotex is attempting to circumvent the permanent injunction and improperly to re-litigate issues which have been settled by a final determination of the Court. The applicant submits that the doctrine of res judicata operates so as to deprive this Court of jurisdiction to consider matters previously determined. Merck submits that it is an abuse of process to commence proceedings in the face of res judicata and, moreover, it is an abuse of process to plead a cause of action which is beyond the jurisdiction of the Court. Res judicata, the applicant (Merck) contends, operates so as to render futile the respondent's attack on the validity of claims 1, 8, and 11 of the 349 patent. The applicant (Merck) argues that insofar as res judicata relates to abuse of process, evidence may be adduced in support of this contention, and as well, this Court may consider and take notice of the judgment rendered in action T-2408-91 because it is a matter of record.

Apotex' Position

6 With regard to their cross-motion, the respondents submit that pursuant to rule 221(2), no evidence may be heard on a motion brought to strike a pleading or a portion thereof on the ground that it discloses no reasonable cause of action. The moving party must rely exclusively on the pleadings themselves, whose facts are presumed true as pleaded.

7 Turning to the substance of Merck's motion, the respondents (Apotex) address three issues: the reasonableness of the cause of action vis-à-vis the status of Apotex and Signa as interested persons under section 60(1) of the Patent Act; res judicata and abuse of process based on the decision of Mr. Justice MacKay in T-2408-91; and res judicata and abuse of process based on an alleged relationship of privity between Apotex and Signa.

8 With regard to the issue of reasonable cause of action, the respondents (Apotex) submit that paragraph 19 of the statement of claim, when read with paragraphs 1, 2, and 20-22, discloses sufficient material facts to establish that Apotex and Signa are interested parties. The respondents assert that they are interested persons for the following reasons:

- (a) both Apotex and Signa have a trading interest within the general field covered by the Merck Patent by virtue of the fact that Apotex and Signa wish to use compounds which may be asserted to fall within the scope of claim 1 of the Merck Patent;
- (b) the trading rights and interests of Apotex and Signa are prejudicially affected by claim 1 of the Merck Patent which they believe is void;
- (c) the plaintiffs' legal right to carry on their business, as it may relate to compounds within the scope of claim 1 of the Merck Patent, is also affected by the Merck Patent; and
- (d) irrespective of the location of Signa's offices, Signa's intended activities, namely to supply compounds in respect of the Merck Patent to Apotex and others in Canada, may render Signa liable for infringement.

(respondent's responding submissions, pp. 7-8)

9 Further to the issue of reasonable cause of action, the respondents contend that no radical defect has been established by the applicant. The respondents submit that their attack on validity is based on established principles of patent law, having to do with overly broad claims and non-utility.

10 With regard to the issue of res judicata and the earlier proceedings in action T-2408-91, the respondents submit that res judicata is a substantive defence and cannot be raised on a motion of this nature, but rather belongs in a motion for summary judgment or a trial of the action. The respondents contend that ultimately the validity of claims 1 to 5 was not contested by Apotex in T-2408-91, regardless of several draft amended statements of defence wherein claim 1 was attacked. Rather, their validity was deferred, one presumes for the purposes of future litigation. In any event, the respondents (Apotex) submit that a declaration of infringement is not a declaration of validity, and that this is still a live issue which has yet to be determined by the court. The respondents submit that the doctrine of res judicata should not apply because the issue they now raise was not fundamental to the earlier proceeding. The respondents argue that any admission as to the validity of claims 1 to 5 was for the purposes of that litigation only.

11 Finally, the respondents (Apotex) argue that the issue of the relationship between Apotex and Signa cannot be determined based on the speculative evidence filed by Merck in this preliminary motion. The applicant's allegations that Signa is a privy of Apotex is not supported by any evidence as to who controls or owns, either directly or indirectly, Signa, and that counsel for Merck conceded this point at the hearing (hearing transcript, p. 211).

Analysis

Legislative Framework

12 Rule 221 is the pertinent rule for striking out pleadings. It replaces former rule 419, but the two are essentially similar. Rule 221 reads as follows:

221(1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it,

- (a) discloses no reasonable cause of action or defence, as the case may be,
- (b) is immaterial or redundant,
- (c) is scandalous, frivolous or vexatious,
- (d) may prejudice or delay the fair trial of the action,
- (e) constitutes a departure from a previous pleading, or
- (f) is otherwise an abuse of the process of the Court,

and may order the action be dismissed or judgment entered accordingly.

- (2) No evidence shall be heard on a motion for an order under paragraph (1)(a).

Test to be Applied

13 The power to arrest an action by striking out a pleading is one that courts have consistently held should be exercised rarely and cautiously, reserved only for those cases where the action is an obvious abuse of legal procedure. In *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R 735, Mr. Justice Estey, on behalf of the Court, stated,

As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": *Ross v. Scottish Union and National Insurance Co.* [(1920), 47 O.L.R. 308 (C.A.)].

The test to be applied became known as the "plain and obvious" test: it must be plain and obvious that the plaintiff's statement of claim discloses no reasonable claim or cause of action before it can be struck out.

14 This formulation was affirmed by Madam Justice Wilson in *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441. In *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, Madam Justice Wilson, speaking for the majority of the Supreme Court of Canada, reviewed the origin and development of the rule permitting courts to strike pleadings. Early English decisions stressed the proposition that the rule derived from the court's power to ensure that it remained a forum in which genuine legal issues were addressed, and that it did not become an avenue for vexatious actions designed to harass another party through litigation.

History of the Proceedings

15 In *Weber v. Canada (Public Service Commission)* (T-2526-87 and T-2530-87, March 8, 1989), Mr. Justice Strayer, then of the Trial Division, held that a previous Federal Court of Appeal decision was determinative of the defendants' motion to strike on the grounds of no reasonable cause of action by reason of *res judicata*. The decision was a matter of record of which the Court could properly take judicial notice. In the case at bar, the decision in T-2408-91 is also a matter of record and, accordingly, can be considered by this Court in these proceedings, because it is conclusive of the 349 patent's validity.

16 In his decision, dated December 14, 1994, Mr. Justice MacKay found that Apotex had infringed claims 1 to 5 and 8 to 15 of Merck's 349 patent. He also concluded that claims 1 to 5 and 8 to 15 were valid, although as Merck did not seek a declaration of validity, none was granted. However, in *Computalog Ltd. v. Comtech Logging Ltd.*, (1990), 44 C.P.R. (3d) 77 (F.C.A.), the Court characterized such a declaration as "superfluous", stating that it would add nothing to the patentee's rights in light of the presumption of validity found in section 43 of the Patent Act.

17 On appeal, Mr. Justice MacKay's decision was reversed with regard to Apotex' section 56 defence. The Court of Appeal, however, affirmed the trial judgment with regard to the finding of infringement of claims 1 to 5, the validity of the patent claims, and the granting of the permanent injunction.

18 Apotex sought unsuccessfully to vary the Court of Appeal judgment by motion pursuant to former rule 337 (now rule 397). The judgment was varied, but only in regard to a clerical omission, and an amended judgment was issued.

19 On January 23, 1998, Mr. Justice MacKay dismissed Apotex' motion for an order to vary or stay the operation of the permanent injunction. Characterizing Apotex' action as one seeking "unusual relief", the Court dismissed the motion at paragraph 39:

In my opinion, the issues dealt with at trial as determined in this Court's judgment and as amended by the Court of Appeal mean that this Court is functus officio in relation to those matters within the issues raised by the pleadings of both parties. No ground is established to warrant reopening of the trial for determination within this proceeding of the issues Apotex now seeks to raise and there is no ground upon which the Court, even if it has discretion to do so, should now direct trial of those issues, or modify the terms of the judgment rendering an injunction as amended by the Court of Appeal, or stay the application of that injunction insofar as it relates to use by Apotex of compounds other than enalapril maleate or compounds within claims 2 to 5 of the Merck patent.

20 The Court accepted that Apotex had become aware after the trial of compounds other than enalapril maleate which were believed to be within the scope of claim 1. The Court, however, did not accept that there was any sort of agreement between Merck and Apotex to defer contesting the validity of claim 1 for another day. Moreover, Apotex acknowledged at the hearing of the motion that it had considered contesting claim 1 in pre-trial preparations, but had ultimately proceeded without doing so. Furthermore, counsel for Apotex made concessions of validity of claims 1 to 5 at trial. Mr. Justice MacKay then stated at paragraphs 21 to 23,

Implicitly, the validity of that claim [claim 1], supported by the [Patent] Act and not questioned by Apotex, underlies the finding of infringement and the injunction order so far as those relate to claim 1. * * *

In my opinion, whatever authority this Court may have to vary a judgment, that does not extend to reopening trial of issues disposed of expressly or implicitly in reaching the judgment now sought to be varied. Thus the relief sought by Apotex to vary the terms of the injunction and direct trial of issues now raised is simply not within this Court's jurisdiction. There would be no end of litigation if a party were free to reopen trial of issues once disposed of because a circumstance not contemplated at the time of trial has now come to its attention. The general principle is that there be an end to litigation between parties. Aside from exceptional circumstances a trial is a once and for all time event, settling the issues raised, as between the parties, for all time, subject only to variation on appeal, or within the narrow circumstances within the Court's Rules for change by the trial judge.

That principle precludes this Court from reopening the trial for consideration of issues that might have been raised and were not, for whatever reason, and that now have been implicitly determined by the judgment following trial. That trial judgment has been amended on appeal and further appeal to the Supreme Court of Canada has been refused. Thus, in my opinion, that principle precludes the exercise of any discretion the Court might have to reopen the trial, to direct the trial of new issues or to vary the terms of the injunction as amended for that purpose.

21 To this day, the permanent injunction stands and is in effect, although the litigation surrounding the 349 patent continues to wend its way through the Federal Court with no end in sight.

Res Judicata

22 A statement of the general principle of res judicata, adopted from *Re Ontario Sugar Co.* (1910), 22 O.L.R. 621 (Ont. H.C.J.), affirmed 24 O.L.R. 332, is found in *Sopinka & Lederman on The Law of Evidence in Canada* (1992 at p. 989):

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

23 In *Singh v. Canada* (1996), 123 F.T.R. 241, this Court made the following comments:

There is a plethora of jurisprudence which supports the defendant's complaint herein to the effect that: if a party to litigation could have raised an issue before a competent tribunal, that party fails to raise the issue at the peril of being estopped on the basis of res judicata when purporting to raise that same issue in subsequent litigation in which the same adversary is engaged. The above mentioned party's practice was roundly condemned by the Alberta Court of Appeal in *Re Abacus Cities Ltd.*, [1988] 1 W.W.R. 78 at p. 85 when it held that "* * * no litigant can be permitted to litigate issues by instalment."

That Court of Appeal made reference to the judgment of the Supreme Court of Canada in *Maynard v. Maynard*, [1951] S.C.R. 346 at pp. 358/9, [1951] 1 D.L.R. 241, where the Supreme Court adopted a passage from *Green v. Weatherill*, [1929] 2 Ch. 213 at pp. 221/22, as follows:

* * * the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

So also, in the *Maynard* judgment the Supreme Court adopted the following passage from *Hoystead v. Commission of Taxation*, [1926] A.C. 155 at p. 170, [1926] 1 W.W.R. 286:

Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal

result either of the construction of the documents or the weight of certain circumstances.

If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle.

The principle which the defendant invokes, in this motion for summary judgment, is of venerable vintage and although judge-made, it is so old as to have been born in Latin: *nemo debet bis vexari * * * pro una et eadem causa*. No one ought to be twice vexed * * * for one and the same cause. An applicant or plaintiff asserting a claim must claim all of his or her relief in regard to such cause or claim and any second attempt to elicit the Court's aid in or for the same cause or claim must be prevented. So it is virtually asserted in *Sopinka & Lederman, Butterworths*, Toronto, 1974 at p. 369. This is what the Alberta Court of Appeal meant (above) in denouncing "litigation by instalment."

The above statement of the law in regard to *res judicata* and estoppel is confirmed in the following jurisprudence, at least, *Wahl v. Nugent*, [1924] 2 W.W.R. 1138 (Sask. C/A); *420093 B.C. Ltd. v. Bank of Montréal* (1995), 128 D.L.R. (4th) 488 (Alta. C/A) at p. 493-94; [also abuse of process and fragmentation of litigation] *Sunshine Village v. Dupuy et al.* A-416-95 (June 5, 1996) (F.C.A.), [1996] F.C.J. No. 800.

24 In *Borley v. Canada (Fraser River Harbour Commission)* (1995), 92 F.T.R. 275, the Court struck out a statement of claim on the basis that the issues had already been dealt with, and to the extent that they were not brought forward, they ought to have been.

25 From this, it is apparent that the application of the doctrine of *res judicata* does not depend on whether the parties actually raised the issue or issues in previous proceedings, but rather whether the parties could have done so. Should a party choose to drop certain issues for reasons of tactics, strategies, or otherwise, the party seals its fate with regard to those decisions. Parties must bring forward their whole case, and will not be permitted to litigate by instalments in piecemeal fashion. It is a principle of law and also of policy that there be finality to court decisions: see also *Grandview v. Doering*, [1976] 2 S.C.R. 621 at 634 and 636. Parties to litigation must be able to rely on the finality of final judgments so that they can adjust their affairs, if necessary, and conduct themselves accordingly.

26 In *Canada v. Chung*, [1993] 2 F.C. 42 at 57 the Federal Court of Appeal noted that *res judicata* has two forms: *action estoppel* and *issue estoppel*. The test for *issue estoppel* was set out in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853, and this formulation was approved by the Supreme Court of Canada in *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248. *Issue estoppel* has three requirements: the same question, or issue, has been decided, the judicial decision said to create the estoppel is final, and the parties to the judicial decision or their privies are the same parties to the proceedings in which the issue of estoppel is raised. In *Angle*, Mr. Justice Dickson elaborated on the first requirement:

It will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceedings

27 In the instant case, with the exception of Signa, the parties are the same. The previous proceedings which form the basis of Merck's claim to res judicata are final and the Court in that case has refused to reopen or revisit the matter. The issue, as well, has also been decided in the previous proceeding, when the Court found that the claims now attacked were valid and infringed. Accordingly, Merck's argument as to res judicata must succeed.

Interested Person

28 Pursuant to section 60(1) of the Patent Act, "a patent or any claim in a patent may be declared invalid or void by the Federal Court ... at the instance of any interested person." In *Wakefield Properties Corp. v. Teknion Furniture Systems Inc.* (1992), 44 C.P.R. (3d) 474 (F.C.T.D.) it was held that a party is sufficiently interested to pursue an action if it is able to show that it is engaged in dealing with the same kind of thing as the patentee and is presently and actively engaged in competition with it. This case was cited with approval by Mr. Justice Denault in *ACIC (Canada) Inc. v. Merck & Co.* (1995), 62 C.P.R. (3d) 362 (F.C.T.D.) where the Court held that, inter alia, to the extent that the plaintiff revealed no material facts as to its status as an interested person, the action was frivolous and vexatious. The statement of claim was struck in its entirety with leave to the plaintiff to serve and file a new action.

29 Although Merck alleged that the relationship between Signa and Apotex is one that renders the former company a privy of the latter, no evidence was presented to support this claim. However, the respondent Signa does not disclose any material facts that show whether it is engaged in competition with Merck, or that it is engaged in dealing with the same kind of thing as the patentees.

Conclusion

30 No evidence has been or will be considered by this Court on the issue of no reasonable cause of action. This has no effect on the disposition of Merck's motion. The Court, without breaching rule 221(2) needs to hear no "evidence" in order to take notice of its own previous, relevant proceedings.

31 In his decision in T-2408-91, Mr. Justice MacKay held that claims 1 to 5 and 8 to 17 of the 349 patent were valid, and Apotex was duly enjoined from infringing them by way of permanent injunction. Apotex considered challenging claims 1 through 17, but ultimately chose to attack only claims 8 to 17, which it did unsuccessfully, and deliberately abandoned the wider challenge. Apotex is now attempting to revisit issues which have already been dealt with conclusively.

32 For reasons of res judicata and issue estoppel, this Court hereby exercises its discretion in favour of Merck and, accordingly, the respondent's statement of claim is struck out on the basis of abuse of process. Should Signa wish to pursue this action any further, it may serve and file a new statement of claim in which it fully sets out particulars as to its status as an interested person under the Patent Act and in a manner mindful of the reasons set out in *Wakefield Properties*, referred to earlier. Costs to the applicant.

MULDOON J.

cp/d/scl

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Proceeding commenced at Toronto

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