

You Can't Plead Contributory Patent Infringement in Canada

Jul 12, 2012

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***Nycomed Canada Inc. et al v. Teva Canada Limited* 2012 FCA 195 (F.C.A. per Noël J.A., Evans and Sharlow JJ. A., concurring)**

In *Nycomed v. Teva*, the Federal Court of Appeal confirmed that there is no cause of action in Canada for “contributory infringement” of a patent and, accordingly, approved a decision that struck out parts of a Statement of Defence and Counterclaim that pleaded it.

The Court confirmed that the Supreme Court of Canada, in the *Monsanto Canada Inc. v. Schmeiser* decision (2004 SCC 34), did not indicate an intention to depart from the existing precedents to recognize “contributory infringement” as a cause of action under Canadian law. The Court affirmed the decision of Simpson J. in the Federal Court (2011 FC 1441) and agreed with her reasoning on the point at issue.

Simpson J. had reviewed the law of inducing and procuring patent infringement. Her decision did not alter the Canadian law on inducing and procuring infringement that requires three components: (a) completion of the act of infringement by the direct infringer; (b) the act(s) of infringement must have been influenced by the alleged inducer to the point that, without the influence, the direct infringement would not take place (a “but-for” test); and (c) the inducer must know that this influence will result in the completion of the act of infringement.

Simpson J. noted that Nycomed had only alleged that Novopharm and Apotex had contributed to physicians prescribing, pharmacists dispensing, and patients using a medication in combination with an anti-microbial agent for treatment of ulcers. Novopharm and Apotex were alleged not to be the sole cause, but had contributed to the infringing activities through their product monographs, websites, and marketing strategies to physicians and pharmacists.

Simpson held (and the Federal Court of Appeal expressly agreed with her) that when the Supreme Court held in the *Monsanto* case, that what was prohibited was “any act that interferes with the full enjoyment of the monopoly granted to the patentee”, “in whole or in part, directly or indirectly”, it was dealing only with a case of direct infringement and neither inducement nor contributory infringement. The language “indirectly” is consistent with the Inducement test but does not support a fundamental departure from it.

The decision stresses the importance of drafting pleadings in such a way that they comply within the current state of Canadian law and the rules of pleading of our courts. Motions attacking the pleadings are becoming more prevalent so care and, sometimes, creativity are important.