

Pharma in brief - Canada

Federal Court dismisses motion to strike allegation of anti-competitive “product hopping”

Case:	<i>Alcon Canada Inc. v Actavis Pharma Company</i> , 2015 FC 1323
Drug:	PATADAY [®] (olopatadine)
Nature of case:	Appeal from decision to dismiss motion to strike
Successful party:	Actavis Pharma Company
Date of decision:	November 27, 2015

Summary

The Federal Court upheld a Prothonotary’s decision to dismiss Alcon Canada Inc.’s (**Alcon**) motion to strike portions of Actavis Pharma Company’s (**Actavis**) Statement of Defence and Counterclaim alleging anti-competitive behaviour.

Background

Following the dismissal of Alcon’s Application for a prohibition order under the *PM(NOC) Regulations* relating to PATADAY[®], a 0.2% olopatadine product (reported [here](#)), Alcon brought an infringement action against Actavis. Alcon alleged infringement of Canadian Patent No. 2,447,924 (**’924 Patent**), which covers stable topically administrable solutions containing approximately 0.17% to 0.62% (w/v) olopatadine.

In its Statement of Defense and Counterclaim, Actavis alleged that Alcon engaged in anti-competitive behaviour, including conduct contrary to the common law rules against restraint of trade and various sections of the *Competition Act*, and that such behaviour ought to reduce or eliminate infringement damages. The basis of the anti-competitive behaviour is Alcon’s alleged transitioning of the market to PATADAY[®] after losing a prohibition proceeding with respect to PATANOL[®], a 0.1% olopatadine product .

The Competition Bureau investigated Alcon’s actions (reported [here](#)). After the Bureau’s inquiry was started, Alcon resumed supplying PATANOL[®] and generic versions of PATANOL[®] entered the market. For these reasons, the Commissioner ended the inquiry as “the competitive dynamic appears to have been restored”.

The motion to strike before the Prothonotary

Alcon brought a motion before Prothonotary Milczynski to strike Actavis’ allegations of anti-competitive behaviour, which it argued do not relate to Alcon’s rights in or Actavis’ infringement of the ’924 Patent. Prothonotary Milczynski held that Actavis may have a “steep hill to climb” but should not be denied the opportunity to advance the defence and that such a defence was not plainly and obviously doomed to fail.

Appeal to the Federal Court

Justice Locke upheld the decision of Prothonotary Milczynski. He found that that her decision was not “vital to the final issue” in the case, as removal of these paragraphs from the pleading would not exclude an entire claim or cause of action. Further, her decision was not clearly wrong, as she did not base her decision upon a wrong principle or misunderstand the facts.

Links:

[Alcon Canada Inc v Actavis Pharma Company, 2015 FC 1323](#)

[Prothonotary's decision](#)

[Pharma in brief - Federal Court dismisses application for a prohibition order in respect of PATADAY eye drop solution](#)

[Pharma in brief - Competition Bureau discontinues “product hopping” investigation](#)

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