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Public Disclosure vs. Confidentiality Protection: The FCA Finds the Proper Balance

In *FibroGen, Inc v Akebia Therapeutics, Inc*, the Federal Court of Appeal set aside an order requiring a party to make certain fact witness statements from a discontinued action public, restoring the proper balance and safeguarding the confidentiality of documents that had been designated as confidential or highly confidential information.

Background

Akebia Therapeutics, Inc. and Otsuka Canada Pharmaceutical Inc. (“Akebia”) brought an action to impeach several Canadian patents owned by FibroGen, Inc. (“FibroGen”) in Federal Court File No. T-1004-18. The parties were engaged in related patent disputes in other jurisdictions, including the United States.

Certain procedural facts set the backdrop for this appeal.

A pre-trial schedule was approved by the Court requiring the exchange of fact witness statements two weeks prior to trial. Two weeks prior to trial, FibroGen served two fact witness statements attaching thousands of pages of documents designated as confidential or highly confidential under the parties’ confidentiality agreement.

On the eve of trial, the action was discontinued on consent.

Months later, Akebia filed a motion to challenge the confidentiality designations in FibroGen’s fact witness statements and the accompanying documents.

Two key concepts were at play in this appeal:

- confidentiality agreements, and
- the implied undertaking rule.

Both concepts are integral in protecting a party’s confidential information while also facilitating litigation.

Confidentiality Agreements

Protective orders and confidentiality agreements are vital to efficient litigation and have the same force and effect in the Federal Court. The Federal Court encourages parties to enter into such agreements or obtain an order on consent. In certain

cases, the parties cannot reach agreement and an order may be issued following a motion.

In this case, the parties entered into a confidentiality agreement. The confidentiality agreement addressed four categories of information ranging from public information to highly confidential information.

Implied Undertaking Rule

In Canada, the implied undertaking rule provides that documents and information obtained through the discovery process of a legal proceeding cannot be used for any purpose other than the resolution of the issues in that proceeding. This is an obligation to the Court.

The confidentiality agreement expressly stated that the confidentiality agreement did not affect any implied undertaking with respect to the use of documents. Moreover, the confidentiality agreement specifically stated that designated information shall be used “solely for the purpose of the within proceeding and may not be used for any other purpose…”.

Decision on the Motion

Following the discontinuance on consent of the action, Akebia filed a motion to challenge the confidentiality designations in FibroGen’s fact witness statements and the accompanying documents.

Akebia sought an order declaring the statements and the attachments were neither confidential nor highly confidential. Akebia filed the fact witness statements and the attachments in its motion record under seal, and as part of its claim for relief sought an order directing that the seal be lifted. FibroGen objected to the motion on the basis that (1) the motion was moot because the action was discontinued, and (2) all of the information contained in the witness statements was subject to the implied undertaking rule and that Akebia could not use that information for any purpose.

The Federal Court judge held that:

- The motion was not moot because Akebia might use the evidence in the parallel proceedings between the parties in US litigation, and the potential use of the statements to impeach the fact witnesses was a live issue that could not be left unresolved.
- Akebia did not breach the implied undertaking rule by filing the witness statements under seal on the motion because for Akebia to challenge the confidentiality

designation, the Federal Court would have to review the productions in their entirety.

- FibroGen's objection based on the implied undertaking rule was premature because Akebia had not yet used the productions in the US litigation.

The Federal Court ordered that the material remain under seal pending the filing of a redacted or public version of the motion materials, failing which the entirety of the motion record would be made public. This order was stayed by the Federal Court of Appeal until the disposition of the appeal.

FCA Restores Balance, and Safeguards Confidential Information and the Implied Undertaking Rule

Issues on Appeal Not Moot

As a preliminary matter, the Federal Court of Appeal first determined the issues on appeal were not moot even in the face of the underlying action being discontinued. The Court will, if necessary, intervene and impose orders as required as part of its implied jurisdiction to supervise proceedings before it and after the litigation ends.

Potential Use of Witness Statements in Cross Examination Was Speculative

After the Court issued its order on the motion, but before the appeal was heard, the related patent action in the US was also discontinued. The related patent action in the US was the primary rationale for the motion judge finding that the motion was not moot. Regardless, the Federal Court of Appeal went on to find that the Federal Court's determination that the matter was not moot on this basis was an error. The Federal Court of Appeal found that the potential use of the witness statements in cross-examination was speculative. This reasoning had none of the rationale – immediacy, certainty, and precision—to constitute an exception to the general rule that moot issues should not be heard.

Rights Not Preserved after Discontinuance

The confidentiality designations were made during the course of the action and remained valid at the time the action ended—Akebia failed to preserve its rights to contest the designations having consented to the discontinuance of the action. In the alternative, Akebia should have made a reservation to this effect prior to the discontinuance. The Federal Court of Appeal stated (emphasis added):

> A party cannot challenge an outstanding objection to disclose based on solicitor-client privilege or an objection

> to produce on the basis of relevance following the filing of a discontinuance. I see no reason why the result would be any different in this case. The question whether the documents were properly classified died with the termination of the action. Curiosity is not valid reason for a court to hear a spent issue.

The Implied Undertaking Rule Was Binding

The Federal Court of Appeal found that Akebia was attempting to evade its obligations under the implied undertaking rule which required it to not use information or documents produced in the course of civil litigation for any use other than the underlying proceeding.

The motion judge incorrectly rejected FibroGen's assertion of the implied undertaking rule on the basis that it was premature. The burden was on Akebia to demonstrate to the Court why it should be relieved of the consequences of the implied undertaking rule.

The Federal Court of Appeal held Akebia was bound by the implied undertaking rule, and the rule survived the discontinuance of the action. An applicant seeking to be relieved from the implied undertaking must demonstrate, on a balance of probabilities, a public interest of greater weight than the values that the implied undertaking protects privacy, candor and the efficient conduct of the litigation. The Federal Court did not apply this test, nor did Akebia argue that the balance was in its favour.

To File or Not to File

The Federal Court of Appeal held that in many cases, including this one, a party seeking to be relieved from the implied undertaking rule does not need to file the documents in questions. A generic description of the situation that does not disclose confidential information is usually sufficient to allow a court to determine if the party should be relieved of its obligations under the implied undertaking rule.

Conclusion

Serious obligations arise from confidentiality agreements, protective orders, and the implied undertaking rule. These are important safeguards embedded in our legal system. While the interest of public disclosure is strong, ensuring the proper balance is maintained falls to the courts as well as litigants.

Further, the discontinuance of an action terminates the proceeding and closes the court file. If there are any outstanding rights that must be preserved, parties are encouraged to consider making a reservation to that effect. Failing which, the

case ends when it ends.

Prior to joining Lenczner Slaght, Jordana Sanft was counsel of record on the Federal Court action and not the appeal motion being discussed. The views expressed in this blog are those of the authors only.