Federal Court Cour fédérale

Date: 20161011

Docket: T-989-13

Citation: 2016 FC 1131

Ottawa, Ontario, October 11, 2016

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

TEVA CANADA LIMITED

Plaintiff

and

ELI LILLY CANADA INC. and ELI LILLY AND COMPANY

Defendants

ORDER AND REASONS

I. NATURE OF MATTER

[1] There are two motions before the Court. The first by Eli Lilly [Lilly] seeking an Order (a) requiring Teva Canada Limited [Teva] to produce a specific individual as a representative for continued examination for discovery; and (b) requiring answers to questions refused.

The second motion is by Teva seeking an Order requiring answers to questions refused.

[2] As a result of overlap and some general concerns about the way in which discoveries have been conducted to date, applicable to both parties, I am issuing a single set of Order and Reasons.

[3] These motions relate to an action in which Teva alleges that it suffered damages due to false or misleading statements made by Lilly (or related companies) with respect to Novopharm and/or Novo-olanzapine.

II. MOTION TO SUBSTITUTE WITNESS

[4] In the first round of examinations for discovery, Lilly put forward John Rudolph, General Counsel, and Teva's witness was Scott Sherwood, Associate Director Business Finance.

Lilly seeks to require the substitution of Ms. Terry Creighton for Sherwood because he was so ill informed/non-informed of matters relevant.

[5] This motion is made pursuant to Rule 237(3):

237 (3) The Court may, on the motion of a party entitled to examine a person selected under subsection (1) or (2), order that some other person be examined.	**237 (3)** La Cour peut, sur requête d'une partie ayant le droit d'interroger une personne désignée conformément aux paragraphes (1) ou (2), ordonner qu'une autre personne soit interrogée à sa place.

[6] A review of the transcript points to how ill informed/non-informed Sherwood was.

[7] In *Liebmann v Canada (Minister of National Defence)* (1996), 110 FTR 284 at para 31, 62 ACWS (3d) 1088 (FCTD) [*Liebmann*], the Court canvassed the considerations in determining substitution of the discovery witness and set out some of the considerations on this type of motion:

> 1. The party being examined must put forward a proper and knowledgable [*sic*] witness …;
>
> 2. The witness must be able to give broad discovery, including as to supplemental questions …;
>
> 3. The onus is on the party examining to demonstrate objectively the unsuitability of the witness in an application for a second discovery … and indeed the applicant must show that the first witness is either incapable of giving evidence of his own knowledge or by informing himself … or that the second witness is in a much better position to give evidence …;
>
> 4. Convenience may be a factor, for in some instances it is more desirable and practical to have the individual involved examined, rather than to have a witness inform herself or himself …;
>
> 5. The expense of a second witness is a factor …;
>
> 6. The circumstances of the case, including the responsiveness of the witness, the degree to which the witness has taken pains to inform herself or himself and the materiality of the evidence sought to be canvassed with the second witness are also factors … and indeed the discovery of a second or subsequent witness should be restricted where its purpose is predominantly that of a fishing expedition … .

[8] It is the examined party's right *prima facie* to put forward the representative it wishes. Lilly has not established that the chosen witness is "incapable of giving evidence of his own knowledge or by informing himself …" (*Liebmann* at para 31). Lilly has also not established that

anyone else (Creighton, for example) is in a better position to give evidence for the corporation on all the matters in this case, although she may be knowledgeable on specific aspects.

[9] Lilly has established that Sherwood did little or nothing to inform himself. Whether this was a tactic to avoid answering questions directly, to offer undertakings and then to craft responses later is an open issue as is the tactic of counsel answering over the objections of the examining party. For the next round of discoveries, Sherwood is to properly inform himself.

[10] Lilly's complaint about Teva's witness would be more sympathetic if its own representative had been properly prepared.

[11] Neither party has covered themselves in glory on this issue. The parties are reminded of their obligations under the Rules and counsels' obligation to assist in compliance.

[12] The tactic of putting up a "straw witness" must stop and must stop immediately. The Court will not permit such shenanigans. Failure to comply with both the spirit and the letter of the Rules will have consequences.

[13] On this issue of tactical discoveries, the record is replete with examples of counsel answering questions despite the objection of examining counsel. This is contrary to Rule 246(1). Counsel answering over objection is not an answer to the question posed (Rule 246(2)).

[14] The party examining is entitled to the witness' answer not the answer counsel for the examined party wishes his/her witness would give.

[15] Like the matter of the ill-informed witness – and perhaps because of being ill informed counsel answered – that conduct must cease. There will be consequences for violation of this Rule which may be meted out to counsel personally.

III. MOTIONS TO COMPEL ANSWERS

[16] The following paragraphs dispose of the questions to be answered, organized by topics, and reflects the state of disclosure as of the date of the argument on the motions.

A. *Lilly Category 1: Questions regarding Teva's Claim*

[17] This category addresses questions regarding Teva's claim and Lilly's ability to know the case that it has to meet. Certain questions (e.g., questions 168, 276, 404, 2053-2054, and 2055) have already been answered, or counsel has undertaken to provide answers and nothing need be ordered yet.

[18] Lilly seeks information from Teva regarding any legal opinions of the validity of Canadian Patent No. 2,041,113 and the probability of success in that litigation. This information is *prima facie* privileged. However, as held in *Lapointe v Canada (Minister of Fisheries and Oceans)*, [1987] 1 FC 445 (TD), parties may waive privilege through their pleadings, and this is what Teva has done by claiming that the statements made by Lilly were baseless. The existence

and content of any legal opinions are relevant to whether the allegations made by Lilly were indeed "baseless"; therefore, questions 195 and 196 must be answered.

[19] Lilly also seeks information regarding Teva's understanding of whether a product can be removed from the Canadian market by way of an injunction, as well as Teva's understanding of what use Lilly made of the "Novopharm" trademark as contemplated by the *Trade-marks Act*, RSC 1985, c T-13. These are legal questions that do not seek to elicit facts, and are therefore improper questions for discovery. Questions 212, 430-432, and 1722-1724 should not be answered.

B. *Lilly Category 2: Questions regarding Novo-levofloxacin*

[20] This category addresses questions with respect to Novo-levofloxacin, a Teva product that was put onto the market and subsequently removed. Lilly seeks a broad range of information including dates, notifications sent to provincial formularies, steps taken to remove the product from the market, responses from provincial formularies, formulary listings, and feedback from provincial formularies and customers.

[21] The inquiries in this area are irrelevant to the issues pleaded. Therefore, the questions in this category should not be answered.

C. *Lilly Category 3: Questions regarding Teva's Dealings with Formularies*

[22] This category addresses Teva's interactions with provincial formularies and Lilly's requests for unredacted copies of documents. Responsive answers have already been provided to certain questions (e.g., questions 576-577 and 1700-1702), and it is not open to Lilly to seek broader disclosure.

[23] Teva's interactions with the provincial formularies concerning Lilly or Lilly products are not relevant to the issues pleaded, nor are any alleged uses that Teva has made of the Lilly trademark; therefore, questions 462, 463-468, and 1729-1731 should not be answered.

[24] However, the existence of any emails sent to BC similar to those at productions 246 and 252 are relevant to issues raised in the pleadings (such as resulting damage); therefore, questions 1972-1974 must be answered.

[25] With respect to the redactions in Teva documents, it is not the case that a party receiving relevant documents is always entitled to the entire, unredacted documents. In *Eli Lilly Canada Inc v Sandoz Canada Incorporated*, 2009 FC 345 at para 14, the Court indicated that certain principles should be considered when determining whether redactions of portions of text in a disclosed document should be allowed: "The redacted portion should be clearly irrelevant to the issues in dispute and would clearly not assist in properly understanding those parts of the documents which are relevant. Redactions should also only be resorted to where important confidentiality concerns exist."

[26] In the present case, the redactions cover unrelated litigation and an unrelated branded product. Teva has already agreed to provide the redacted information on dates. The remaining redactions cover irrelevant information; therefore, questions 541 and 542 need not be answered.

[27] Any legal opinions provided by Teva to BC would be relevant to determining the reason that the listing for Novo-olanzapine was delayed. Therefore, questions 1696-1698 must be answered.

D. *Lilly Category 4: Questions regarding Teva's Ability to Supply*

[28] This category addresses questions concerning Teva's ability to supply the market. This topic is directly relevant to the issues pleaded. However, Teva has already provided answers to some of the questions asked (e.g., questions 484, 560-561, 1009-1010, and 1672-1674). Furthermore, some of the information sought by Lilly has already been provided. Teva has already supplied the information relevant under questions 1021-1022 (that is, the volume of Novo-olanzapine from the exhibit batches available for sale), and the exhibit batches themselves are not relevant. Teva has also already supplied the relevant information under questions 1599-1605 (proposed delivery dates).

[29] Lilly requests that Teva inquire with its supplier Dr. Reddy's as to the supply of active pharmaceutical ingredient [API] that Dr. Reddy's had available at the relevant time period. Dr. Reddy's is a third party, and as such the appropriate method of obtaining disclosure would be to pursue a motion under Rules 233 and/or 238. Therefore, questions 483 and 515-517 need not be answered.

[30] Whether there were any supply shortages would be relevant to an assessment of damages. Therefore, question 600 should be answered.

[31] In addition, any concerns by healthcare providers regarding future unavailability of Novo-olanzapine would be relevant to the issues pleaded. As Teva is alleging that Lilly attempted to raise these concerns through allegedly false and misleading statements, then the proof that such concerns were indeed raised would be germane. As such, question 608 must be answered.

[32] Indications of changes in API purchasing around the relevant time would be part of a train of inquiry leading to further relevant information, and as such questions 1612-1615 must be answered.

[33] Some of the information sought by Lilly in this category is irrelevant, including information on the amount of API available prior to the time period in issue, the dates of manufacture of batches of Novo-olanzapine tablets, and batch records. Therefore, questions 1647-1648, 1655-1664, and 1665 need not be answered. Lilly already has the relevant information in its possession, such as the amount of Novo-olanzapine tablets manufactured in the relevant time period and Teva's manufacturing capacity.

E. *Lilly Category 5: Questions regarding Teva's Use of Lilly Trademarks*

[34] This category addresses questions concerning Teva's use of Lilly trademarks. Any alleged Teva use of the Lilly trademark is irrelevant to the issues in this case, which concern

Lilly's use of the Teva trademark. Furthermore, some of the questions in this category seek to elicit legal interpretations. Therefore, the questions in this category should not be answered.

F. *Lilly Category 6: Questions regarding Trade Spend*

[35] This category addresses questions concerning trade spend. Teva has indicated that it is not pursuing claims with respect to lost sales of other products or increased trade spend for customers, and therefore questions 861 and 1439-1441 do not need to be answered.

[36] In addition, Teva has already provided responsive answers to certain questions (e.g., questions 1223-1230, 1237, and 1548-1549), and it is not open to Lilly to attempt to broaden the scope of the information originally sought in the question.

[37] With respect to Lilly's stated need for the algorithm used to reconcile indirect and direct sales in order to remove duplicate records, Teva has advised that the algorithm it uses has already removed the duplicate records. Therefore, Lilly already has the relevant information with respect to sales, and it is not necessary to answer questions 1260-1262.

[38] It is inappropriate to request speculative answers (that is, what Teva could have done) rather than facts in an examination for discovery. Therefore, question 687 should not be answered.

[39] Teva's answer with respect to whether there is anyone still at Teva today who was in the group responsible for profitability analysis in 2007 is not responsive to the question asked. Teva must answer questions 815-817.

[40] Lilly requests that Teva produce the trade spend sales data for one year past the relevant time period. This is an onerous and overly burdensome task, and the data has minimal relevance to the issues pleaded. Therefore, it would not be consistent with the principles in Rule 3 to require the production of this data, and questions 1270-1276 should not be answered.

[41] However, if Teva does claim any losses past 2008, then the relevance of this data will outweigh the burden caused by its production and it will have to be produced.

[42] Lilly seeks information with respect to the identities of authors of documents and the sources of data. As noted in Category 7 below, these documents were created in the usual and ordinary course of business with data drawn from systems such as Oracle and Data Analyzer. Therefore, questions 1334-1337 and 1394-1395 should not be answered.

[43] Regarding documents produced by Teva that describe projections for sales in 2007, the source of this information is directly relevant to the events at issue (and, in particular, to the damages allegedly suffered by Teva). Lilly is entitled to know the basis of such projections, and questions 1397-1403 must therefore be answered.

[44] With respect to the documents that were produced and subsequently withdrawn, Lilly requests that Teva provide information as to how these documents were determined to be unreliable. This may assist Lilly in determining the trade spend specific to Novo-olanzapine. This is essentially a narrative question, seeking an explanation for the unreliability of previously produced documents, and it has not been answered responsively on the record. Therefore, questions 1541-1544 must be answered.

G. *Lilly Category 7: Questions regarding Authors of Documents*

[45] This category of questions addresses inquiries as to the authors of documents produced by Teva. Many of these documents were created in the usual and ordinary course of business; therefore, as indicated in *Canada (Minister of Citizenship and Immigration) v Skomatchuk*, 2006 FC 730 at para 13, they are exceptions to the hearsay rule and admissible under s. 30(1) of the *Canada Evidence Act*, RSC 1985, c C-5. As such, and considering that Teva has already produced or will be producing the names of the departments that authored these documents or that the data was simply drawn from programs such as Oracle or Data Analyzer, it would be unduly onerous and burdensome to require Teva to identify the individual authors of these documents. Therefore, questions 974-975, 1035-1040, 1054-1055, 1072, 1128-1130, 1133-1134, 1236, 1277-1279, 1285-1286, 1328-1329, 1353-1354, 1380-1386, and 1448-1452 need not be answered.

[46] However, it is unclear that the document at production 101 (being a summary of the "Open Capacity" for olanzapine tablets) was created in the usual and ordinary course of

business, and the information is directly relevant to the issues pleaded. Therefore, Teva should make best efforts to respond to questions 994-995.

H. *Lilly Category 8: Miscellaneous Questions*

[47] This category concerns the balance of Lilly's questions. Firstly, Lilly seeks unredacted versions of financial statements from 2007 to 2011. As noted above, it is not the case that a party is always entitled to the entire, unredacted version of a relevant document. In the current circumstances, it is not at all clear that financial information with respect to unrelated legal proceedings is relevant to the issues pleaded. Therefore, questions 941-945 need not be answered.

[48] Lilly also seeks a legible copy of a bill of lading produced by Teva. The relevant information has already been produced in the purchase order and invoice, and the bill of lading has a very low degree of relevance. Therefore, questions 1124-1125 need not be answered.

[49] Furthermore, Lilly seeks to know whether Terry Creighton is a registered lobbyist and whether her job duties require her to lobby provincial governments. This is not a legal question, and it may be relevant to assessing Teva's efforts to list Novo-olanzapine with the provincial formularies. Therefore, questions 1691-1695 must be answered.

[50] Finally, Lilly seeks information as to the source of data for the public market versus the private market for olanzapine in Ontario. The source of this information may be relevant to assessing Teva's damages; therefore, questions 1821-1823 must be answered.

I. *Teva Category 1: Further Relevant Documents*

[51] This category deals with questions relevant for determining the existence of further relevant documents. The items remaining in this category consist of a request for Lilly to advise whether it sent out a litigation hold letter with respect to the present litigation, and a request for Lilly to inquire and advise whether Messrs. Ricks, McCool, and/or Stovall have further documents regarding the negotiations preceding the August 2007 Product Listing Agreement [PLA] with BC.

[52] These inquiries are relevant to the issues in the proceeding. In particular, any documents concerning negotiations leading up to the execution of the PLA are relevant to assessing the circumstances surrounding any allegedly false and misleading statements. Furthermore, in *Control Data Canada, Ltd v Senstar Corp* (1987), 10 FTR 153, 13 CPR (3d) 546 (FCTD), the Court indicated that the representative of a company being examined for discovery is not excused from attempting to obtain information from former employees simply because they no longer work for the company. As such, the remaining questions in this category must be answered.

J. *Teva Category 2: Discussions with the BC Formulary*

[53] This category addresses discussions that Lilly had with the BC formulary. Several of the questions under this category have been answered (e.g., questions 70-72 and 82-83), and it is not open to Teva to substitute broader or alternative questions.

[54] With respect to questions regarding Lilly's understanding of the litigation referred to in Article 5 of the PLA, this question is not directed to a legal opinion. Rather, the question is directed to "Lilly's understanding" of the meaning of that term. In *Kun Shoulder Rest Inc v Joseph Kun Violin & Bow Maker Inc*, [1997] FCJ No 1386, 76 CPR (3d) 488 at 494 (FCTD), the Court indicated that while it is improper to ask a witness to speculate or interpret a document, it is appropriate to ask "what the company understands is meant by certain wording". The company may or may not have such an understanding. If the company in question does not have such an understanding, it would be inappropriate to provide a speculative answer.

[55] Questions with respect to Lilly's discussions with the BC formulary are relevant to understanding the context of any allegedly false or misleading statements. As noted in *E Mishan & Sons, Inc v Supertek Canada Inc*, 2016 FC 986 at para 11 [*Mishan*], the Court must inquire into the nature and circumstances of allegedly false and misleading statements, as well as any subsequent conduct by the party making such statements. Requests made by the province for indemnification, and requests by Lilly that the PLA be exclusive, are therefore relevant for assessing the context surrounding any allegedly false or misleading statements.

[56] The answer provided by Lilly with respect to Lilly's understanding of why Mr. Malikail was writing to BC in the period of time represented by the September 27 letter is not responsive to the question asked. Lilly states that provincial formularies are generally interested in such information, but this does not reflect whether this was Lilly's understanding in these particular circumstances. It may be that this was Lilly's understanding, but Teva is entitled to a more responsive answer.

[57] Therefore, questions 66-68, 88, 89-90, and 122-125 must be answered.

K. *Teva Category 3: Requests by Regulators*

[58] This category addresses requests made to Lilly by provincial regulators regarding the status of litigation. This is directly relevant to issues raised in Lilly's Statement of Defence, wherein Lilly claims that any statements made to provincial regulators were made in response to the requests of regulators. This question is not overbroad or unduly onerous, because it is explicitly limited to those requests referred to in Lilly's Statement of Defence and would therefore be limited to those requests relating to the relevant litigation in the relevant time period. Therefore, question 128 must be answered.

L. *Teva Category 4: Lilly's Strategy*

[59] The issue dealt with in this category is Lilly's strategy for coping with the loss of exclusivity for its olanzapine products, which is relevant to what Lilly planned to say to customers of Teva. As previously noted, *Mishan* at para 11 indicates that the Court should inquire into the relevant circumstances surrounding allegedly false and misleading statements. Therefore, questions 152 and 153 must be answered.

M. *Teva Category 5: Prior Drafts of the Agreement*

[60] This category addresses prior drafts of an agreement produced by Lilly. Such drafts may speak to the circumstances surrounding any allegedly false and misleading statements; in other

words, while prior drafts may not have been executed, they may indicate what was occurring in the discussions between Lilly and the province. Therefore, question 168 must be answered.

N. *Teva Category 6: Discussions between Lilly and the Provinces*

[61] The issues addressed in this category are whether Lilly and BC engaged in discussions between Lilly's submission of its response to the Request for Proposal and the execution of the PLA and whether there were discussions between Lilly and the provinces of Manitoba and Saskatchewan that included reference to Novopharm. Such discussions are directly relevant to the issues pleaded.

[62] With respect to the discussions between Lilly and Manitoba and Saskatchewan, it is not a sufficient answer to say that the discussions "would have been" about a topic other than Novopharm (namely, Zyprexa). This response is purely speculative. Lilly must respond to the question asked by making inquiries of the relevant individuals as to their recollection of these discussions.

[63] Therefore, questions 177-180, 227-228, and 244 must be answered.

ORDER

THIS COURT ORDERS that:

1. The motion to substitute a witness is dismissed without prejudice to bringing another such motion where appropriate;

2. Each of the respective parties is to provide their answers to the questions in accordance with the Reasons; and

3. Costs will be in the cause.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-989-13
STYLE OF CAUSE:	TEVA CANADA LIMITED v ELI LILLY CANADA INC. and ELI LILLY AND COMPANY
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 9, 2016
ORDER AND REASONS:	PHELAN J.
DATED:	OCTOBER 11, 2016

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