

Federal Court



Cour fédérale

Date: 20091008

Docket: T-1636-08

Citation: 2009 FC 1020

Ottawa, Ontario, October 8, 2009

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

**ASTRAZENECA CANADA INC.,
ASTRAZENECA AB and
SHIONOGI SEIYAKU KABUSHIKI KAISHA**

Appellants

and

**NOVOPHARM LIMITED and
THE MINISTER OF HEALTH**

Respondents

REASONS FOR ORDER AND ORDER

[1] This is an appeal from the Order of Prothonotary Aalto dated September 11, 2009 granting Novopharm Limited leave to file three proposed reply affidavits in accordance with the Reasons for Order of Prothonotary Aalto.

[2] This appeal was brought by Notice of Motion for hearing in Toronto on September 28, 2009. The Respondent Minister of Health did not participate in the appeal.

[3] The appellants (hereinafter referred to as Astrazeneca) did not submit that the Prothonotary's Order was vital to the case so that this Court did not hear this appeal on a *de novo* basis. Accordingly, the standard of review was simply whether the Prothonotary was "clearly wrong".

[4] The Court heard counsel for Astrazeneca and decided that it did not need to hear from counsel for the Respondent Novopharm. Upon reviewing the Reasons for Order and Order of Prothonotary Aalto and the extensive motion records for the parties, the Court is of the view that Astrazeneca has not established that the Prothonotary's Order was clearly wrong. The Prothonotary applied the correct legal tests and legal principles to determine whether reply evidence ought be allowed, and did not misapprehend the facts.

[5] The Prothonotary's Reasons for Order carefully and thoroughly analyzed the facts and proposed reply evidence. The Prothonotary considered all the arguments and the relevant evidentiary matters; the correct legal principles with respect to reply evidence under the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133; the legal tests to be met by a party seeking to file reply evidence; the nature of expert evidence (including that an expert should not become an advocate for a position); the difficulty for a Court parsing the proposed reply affidavits to determine what parts of the affidavits repeat evidence in chief; the concern about substantial delays; the fact that responding to new unanticipated positions sometimes requires a modest amount of repetition in the reply evidence; and a careful review of the details in the proposed reply evidence from the three deponents.

[6] This Court is conscious of the repeated statements from the Federal Court of Appeal that case management Prothonotaries be given latitude and wide discretion to move cases forward and that this Court should only interfere in the clearest cases where the Prothonotary has misapplied or misused his or her judicial discretion, i.e. made a decision that was clearly wrong. In this case, the Prothonotary did not apply a wrong principle of law or misapprehend any of the facts.

[7] If Astrazeneca can demonstrate that the reply evidence will cause it a substantial prejudice, and that sur-reply evidence from Astrazeneca will serve the interests of justice, Astrazeneca can seek leave from the Prothonotary under Rule 312 of the *Federal Courts Rules* to file sur-reply affidavits. That is for the discretion of the case management Prothonotary, and if such leave was granted, the case management Prothonotary would undoubtedly limit the length of such affidavits and the timelines for filing and cross-examinations so as not to affect the anticipated March 2010 hearing date for this NOC application.

[8] With respect to costs, after hearing submissions from the parties, the Court decided to simply allow costs for this appeal to Novopharm in the cause.

ORDER

THIS COURT ORDERS that:

This appeal is dismissed with costs to Novopharm in the cause.

“Michael A. Kelen”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1636-08

STYLE OF CAUSE: ASTRAZENECA CANADA INC., ASTRAZENECA
AB and SHIONOGI SEIYAKU KABUSHIKI KAISHA
v. NOVOPHARM LIMITED and THE MINISTER OF
HEALTH

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 28, 2009

**REASONS FOR ORDER
AND ORDER:** KELEN J.

DATED: October 8, 2009

APPEARANCES:

Mr. Gunars Gaikis FOR THE APPELLANTS
Ms. Urszula Wojtyra

Mr. Jonathan Stainsby FOR THE RESPONDENT (NOVOPHARM)
Mr. Lesley Caswell
Mr. Andrew McIntyre

No one appearing FOR THE RESPONDENT (THE MINISTER
OF HEALTH)

SOLICITORS OF RECORD:

Smart & Biggar FOR THE APPELLANTS
Barristers & Solicitors

Heenan Blaikie LLP FOR THE RESPONDENT (NOVOPHARM)
Lawyers

John H. Sims, Q.C. FOR THE RESPONDENT (THE MINISTER
Deputy Attorney General of Canada OF HEALTH)