Federal Court  Cour fédérale

Date: 20131213

Docket: T-1555-12

Citation: 2013 FC 1249

Ottawa, Ontario, this 13th day of December 2013

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

PFIZER CANADA INC.
and G.D. SEARLE & CO.

Applicants

And

APOTEX INC.
and THE MINISTER OF HEALTH

Respondents

REASONS FOR ORDER AND ORDER

[1] The applicants (collectively "Pfizer") appeal the order of Prothonotary Kevin R. Aalto of November 14, 2013 which denied, to a large extent, their request that they be allowed to file two affidavits in sur-reply.

[2] If these affidavits were allowed, they would constitute the fifth wave of affidavits in these proceedings that are meant to be summary in nature. In response to a Notice of Allegation by the respondent Apotex Inc. ("Apotex"), Pfizer issued its Notice of Application on August 16, 2012 in order to prohibit the Minister of Health from issuing a Notice of Compliance. The first four waves of affidavits occurred in the following way:

- 15 January 2013 Pfizer serves affidavits of Dr. Karen Seibert and Dr. Manuela Berger;
- 29 April 2013 Apotex serves the affidavits of Dr. Gurkirpal Singh, Dr. McCarthy and Dr. Curt Furberg (a fourth affidavit was served the same day);
- 6 August 2013 Pfizer serves the affidavits of Dr. Michael Brian Fennerty, Dr. Steven B. Abramson and Dr. Peter Tugwell (together with two other affidavits not relevant to the matter before this Court);
- 11 October 2013 in accordance with an order of this Court, Apotex is allowed to serve and file reply evidence in the form of affidavits of Dr. Singh and Dr. Furberg.

[3] The context in which this motion is to be considered has some importance. In a previous order, Prothonotary Aalto, as the Case Management Judge, was lamenting the fact that this case had been made more complicated than needed because the evidence is presented on a "partial reversal" basis. In that order of October 11, last, we can read:

> [3] This is particularly so in the context of a partial reversal of evidence which has led to the mischief in this case. The Applicants (Pfizer) delivered its fact evidence in support of the patent in suit first, followed by the Respondent's (Apotex) evidence on validity, followed by Pfizer's evidence on validity. The mischief which has arisen is that the Pfizer experts have now relied on an extensive number of clinical studies, monographs and other documents which Apotex argues are facts and should have been disclosed as part of the "fact" evidence.

[4] I believe it is fair to say that the Prothonotary took a rather dim view of the approach taken by Pfizer as it dealt with Apotex's attempt to strike substantial segments of the three Pfizer affidavits of August 6. The October 11, 2013 order was concerned with striking large portions of affidavits presented on behalf of Pfizer because they were seen as splitting the case. Pfizer on the other hand argued that the partial reversal was the reason for the confusion as it was unclear what the first wave of affidavits was to cover.

[5] Very sensibly in my view, the managing judge refused to strike most of the affidavits, but recognized that a solution had to be found to allow Apotex a response in view of the fact that most of Pfizer's case came in its second wave of affidavits. The solution chosen was to allow Apotex to serve reply affidavits in response to Pfizer's second wave.

[6] The Case Management Judge ordered costs on a substantial indemnity basis in favour of Apotex, as well as reasonable legal costs and disbursements in preparing and serving what became Apotex's second wave of affidavits, its reply affidavits.

[7] It is in sur-reply to these affidavits, the second wave of Apotex affidavits, that Pfizer wishes to serve and file two more affidavits, those of Dr. Fennerty and Dr. Abramson. It seems that Pfizer is content to leave the refusal of Prothonotary Aalto to allow an additional affidavit by Dr. Tugwell to stand as no appeal of that refusal was launched.

[8] Prothonotary Aalto's order denied leave to file Dr. Fennerty's sur-reply affidavit altogether and paragraphs 2 to 9 of Dr. Abramson's affidavit. That would leave only one paragraph standing, as paragraph one of Dr. Abramson's affidavit is merely introductory.

[9] Additional affidavits may be filed if leave is granted by the Court (Rule 312 of the *Federal Courts Rules*, SOR/98-106). The test applied in those circumstances, and used in this case, may not be particularly illuminating, but it serves as a framework in order to make those decisions on a case-by-case basis. I quote from *Atlantic Engraving Ltd. v Lapointe Rosenstein*, 2002 FCA 503, 23 CPR (4^{th}) 5:

> [8] . . . By exception, rule 312 allows a party, with leave of the Court, to file additional affidavits. Under that rule, the Court may allow the filing of additional affidavits if the following requirements are met:
>
> i) The evidence to be adduced will serve the interests of justice;
> ii) The evidence will assist the Court;
> iii) The evidence will not cause substantial or serious prejudice to the other side . . .
>
> [9] Further, an applicant, in seeking leave to file additional material, must show that the evidence sought to be adduced was not available prior to the cross-examination of the opponent's affidavits. Rule 312 is not there to allow a party to split its case and a party must put its best case forward at the first opportunity . . .
>
> (citations omitted)

It is now recognized that the test applies to matters like those in this case (*Pfizer Canada Inc. v Canada (Minister of Health)*, 2006 FC 984, [2007] 2 FCR 371).

[10] In order to succeed, Pfizer must satisfy the standard of review on appeal of discretionary decisions of prothonotaries. Appeals of those decisions are governed by Rule 51 and Pfizer will be

successful only if it satisfies the Court of one of two things: the question is vital to the final issue of the case or the order is "clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts" (per MacGuigan JA in *Canada v Aqua-Gem Investments Ltd.*, [1993] 2 FC 425, and slightly modified in *Merck & Co. v Apotex Inc.*, [2004] 2 FCR 459).

[11] It must also be noted that the order under appeal was made by the Case Management Judge who should be afforded "elbow room". After all, case management judges are much more familiar with the proceedings that they have been managing than a judge sitting on appeal (*Microfibres Inc. v Annabel Canada Inc.*, 2001 FCT 1336; 16 CPR (4^{th}) 12).

[12] Pfizer does not argue that the Prothonotary's order is vital to the final issue of the case. It follows that the applicant contends only that Prothonotary Aalto based his appreciation of the four requirements for additional affidavits on a wrong principle or upon a misapprehension of the facts such that the Prothonotary was clearly wrong. Pfizer's burden is not made any lighter given that if leave were to be granted, this would constitute its third wave of affidavits. A party must put its best case forward at the first opportunity.

[13] With great respect, I cannot find fault with the Prothonotary's assessment of the requirements of Rule 312. I have read the Apotex affidavits filed as its second wave, the same wave Pfizer seeks to "counter" in three specific areas with its third. I have also read the two affidavits Pfizer wishes to introduce. More importantly, I have read the order of the management judge, Prothonotary Aalto. I find his analysis persuasive and his reasons cogent.

[14] As I read the evidence, the second wave of affidavits submitted by Apotex were in reply to the five expert affidavits on behalf of Pfizer, together with 25 pieces of literature. The affiants addressed the large volume of evidence found in the five affidavits and pieces of literature. Generally speaking, we seem to have reached the stage where the experts want to argue among themselves and take issue with the weight to be given to studies and statistical methods, or whether a report has been endorsed by a regulatory agency. I cannot conclude that the Case Management Judge applied the wrong principle or misapprehended the facts. There has been written reply evidence by Apotex and if further elucidation, or contradiction, is deemed needed, cross-examination is the avenue to be pursued for the kinds of issues raised by Pfizer, as found by the Prothonotary. I was not persuaded that the evidence Pfizer purports to lead in its third wave of affidavits is needed to conduct an efficient cross-examination.

[15] In light of the four requirements in order for leave to be granted pursuant to Rule 312, I find that the proposed affidavits will not serve the interests of justice as adding affidavits to the multiplicity of affidavits does not serve any purpose at this stage, the evidence will not assist the Court as I believe, like the Case Management Judge, that cross-examinations would suffice, and it has not been shown that the evidence to be adduced was not available or could not have been anticipated. The appropriate factors were appropriately considered by Prothonotary Aalto and I cannot find any fault with his analysis.

[16] As a result, the appeal is dismissed. Costs in the cause.

ORDER

THIS COURT ADJUDGES that:

1. The applicants' appeal of the order of Prothonotary Kevin R. Aalto of November 14, 2013 which denied, to a large extent, their request that they be allowed to file two affidavits in sur-reply is dismissed.

2. Costs in the cause.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1555-12
STYLE OF CAUSE:	PFIZER CANADA INC. and G.D. SEARLE & CO. v APOTEX INC. and THE MINISTER OF HEALTH
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 11, 2013
REASONS FOR ORDER AND ORDER:	ROY J.
DATED:	DECEMBER 13, 2013

APPEARANCES:

Mr. Andrew Shaughnessy	FOR THE APPLICANTS
Mr. Jaro Mazzola Mr. Jordan Scopa	FOR THE RESPONDENT APOTEX INC.

SOLICITORS OF RECORD:

Torys LLP Toronto, Ontario	FOR THE APPLICANTS
Goodmans LLP Toronto, Ontario	FOR THE RESPONDENT APOTEX INC.