

Federal Court



Cour fédérale

Date: 20191101

Docket: T-351-18

Citation: 2019 FC 1379

Ottawa, Ontario, November 1, 2019

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**BRISTOL-MYERS SQUIBB CANADA CO.,
AND BRISTOL-MYERS SQUIBB HOLDINGS
IRELAND UNLIMITED COMPANY,
AND PFIZER INC.**

Plaintiffs

and

APOTEX INC.

Defendant

ORDER AND REASONS

[1] This is a motion brought by the Defendant seeking leave to serve and file a reply report of Dr. Alan Parr [the Reply Report]. The Reply Report addresses the report served and filed by the Plaintiffs' expert, Professor Martyn C. Davies, in response to the initial expert report of Dr. Parr.

[2] The Plaintiffs oppose the Defendant's motion and submit that if the Defendant is granted leave to file the Reply Report, then they ought to be granted leave to file a sur-reply report of Professor Davies [the Sur-Reply Report].

[3] The parties raised the filing of these reports as an issue the week before trial. Each has filed a Motion Record, and the Court heard oral submissions by teleconference on the afternoon of Thursday, October 31, 2019. The trial is to commence Monday, November 4, 2019. Given the short time available, only brief reasons will be provided.

[4] The principles governing the admissibility of reply evidence (and sur-reply evidence) has recently been examined by Justice Manson in *Janssen Inc v Teva Canada Limited*, 2019 FC 1309 at paras 16 and 17, citing Justice Pelletier in *Halford v Seed Hawk Inc*, 2003 FCT 141 at para 15:

1. Evidence which is simply confirmatory of evidence already before the court is not to be allowed.
2. Evidence which is directed to a matter raised for the first time in cross examination and which ought to have been part of the plaintiff's case in chief is not to be allowed. Any other new matter relevant to a matter in issue, and not simply for the purpose of contradicting a defence witness, may be allowed.
3. Evidence which is simply a rebuttal of evidence led as part of the defence case and which could have been led in chief is not to be admitted.
4. Evidence which is excluded because it should have been led as part of the plaintiff's case in chief will be examined to determine if it should be admitted in the exercise of trial judge's discretion.

[5] As Justice Manson observed at paragraph 17:

Mere disagreement with statements made by another witness is not proper subject matter for reply evidence. Disagreements between experts can be addressed by cross-examination.

[6] These motions arise in the context of a patent infringement action pursuant to subsection 6(1) of the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133. The Plaintiffs allege infringement of Canadian Patent No. 2,791,171 [the 171 Patent]. The Defendant denies infringement alleging that the patent is invalid for obviousness, overbreadth, and insufficiency.

[7] The reports of Dr. Parr and Professor Davies, filed in that order, address the common general knowledge of a person skilled in the art, and the state of the art at the relevant time. Professor Davies, in addressing Dr. Parr's report and opinion, raises 16 articles of prior art that were not raised by Dr. Parr in his report [the New Evidence].

[8] In the proposed Reply Report, Dr. Parr asserts that he could not have anticipated that Professor Davies would introduce the New Evidence nor draw the conclusions he has, many of which Dr. Parr asserts to be incorrect. Dr. Parr also says that he could not have anticipated that Professor Davies would state that the 171 Patent describes its invention to include the establishment of an IVIVC. In Dr. Parr's opinion, it only describes an IVIVR.

[9] Having read the records and considered the submissions of the parties, I find that the Defendant ought to be granted leave to file the Reply Report.

[10] The Reply Report does not address all 16 of the New Evidence raised by Professor Davies; it addresses only 6. It is a surgical 21-page response. The New Evidence addressed was

not previously before the Court. It was raised for the first time by Professor Davies in his initial report. I note however, that the Plaintiffs knew that Dr. Davies would be referencing these documents as early as February 28, 2018, when he provided his opinion to the Plaintiffs on the common general knowledge. The Plaintiffs never produced the New Evidence, or mentioned it on discovery. I accept that Dr. Parr and the Defendant would have been unaware of the New Evidence until disclosed by Professor Davies on October 11, 2019, when his report was served and filed. It is new evidence.

[11] The Plaintiffs submit that the New Evidence is part of the common general knowledge and thus Dr. Parr ought to have been aware of it and could have referenced it in his initial report. Even if so, Dr. Parr states that when he wrote his initial report he could not have anticipated the use of it or interpretation that Professor Davies places on that evidence. I accept that.

[12] It is in the interest of justice that the Reply Report be accepted for filing. I agree with the Defendant's submission that even if the content of the Reply Report could be obtained through examination-in-chief of Dr. Parr and cross-examination of Professor Davies, given the short time-frame for the trial of this action – 9 days - there is an obvious economy in having the Reply Report filed and entered as having been read, rather than take time to obtain those responses orally. Additionally, there remains a question whether there might be a sustained objection at trial to proceeding in that manner if the Reply Report is not filed.

[13] On the other hand, I find that the proposed Sur-Reply Report is not admissible because it simply does not address anything new to Professor Davies. It addresses the New Evidence raised

by Professor Davies and to which he as has already spoken. The Plaintiffs can put the Sur-Reply evidence addressing the views of Dr. Parr on the New Evidence to Professor Davies in chief.

[14] Moreover, the Sur-Reply is simply confirmatory in nature. Although the Plaintiffs point to specific paragraphs of the Sur-Reply in an attempt to show that the document is not merely confirmatory of Professor Davies' initial report, I remain unpersuaded. In each example given, I find on close examination that what the Plaintiffs claim to be a direct critique of Dr. Parr is really in the nature of Professor Davies saying that Dr. Parr is wrong in his interpretation of the New Evidence and I was correct in my initial report. That, at heart, is confirmatory evidence.

[15] Accordingly, the Defendant's motion for leave to serve and file a reply report is granted, and the Plaintiffs' motion to serve and file a sur-rely report is denied. The Defendant's are entitled to costs.

ORDER IN T-351-18

THIS COURT ORDERS that the Defendant's motion for leave to serve and file the reply report of Dr. Parr is granted, and the Plaintiffs' motion to serve and file a sur-rely report of Professor Davies is denied, and Apotex is awarded its costs in the middle of Column III of Tariff B.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-351-18

STYLE OF CAUSE: BRISTOL-MYERS SQUIBB CANADA CO, AND
BRISTOL-MYERS SQUIBB HOLDINGS IRELAND
UNLIMITED COMPANY, AND PFIZER INC v
APOTEX INC

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: OCTOBER 31, 2019

ORDER AND REASONS: ZINN J.

DATED: NOVEMBER 1, 2019

APPEARANCES:

David Tait FOR THE PLAINTIFFS
James Holtom

Harry Radomski FOR THE DEFENDANT
Richard Naiberg

SOLICITORS OF RECORD:

MCCARTHY TÉTRAULT LLP FOR THE PLAINTIFFS
Barristers & Solicitors
Toronto, Ontario

GOODMANS LLP FOR THE DEFENDANT
Barristers & Solicitors
Toronto, Ontario