

Federal Court



Cour fédérale

Date: 20140224

Docket: T-1555-12

Citation: 2014 FC 173

Ottawa, Ontario, February 24, 2014

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

**PFIZER CANADA INC.
AND G.C. SEARLE & CO.**

Applicants

and

**APOTEX INC.
AND THE MINISTER OF HEALTH**

Respondents

ORDER AND REASONS

I. Overview

[1] Pfizer appeals an order of Prothonotary Aalto in which, on Apotex's motion, he struck certain paragraphs from expert evidence filed by Pfizer, permitted Apotex to file expert evidence in reply, and ordered Pfizer to compensate, Apotex in part, for its costs. The order arose in the context of Pfizer's application for a prohibition order under the *Patented Medicines (Notice of Compliance)*

Regulations. Pfizer's appeal relates solely to the portion of the order in which Prothonotary Aalto ordered Pfizer to pay the costs of Apotex's motion on a "substantial indemnity basis".

[2] Pfizer argues that the Prothonotary should not have imposed costs on an elevated level without giving it a chance to make submissions (Apotex had sought costs on its motion but not solicitor and client costs). Further, Pfizer submits that no such cost award can be imposed without an explicit finding of exceptional circumstances, which the Prothonotary did not make. Finally, Pfizer contends that Prothonotary Aalto erred by not making reference to the factors relevant to cost awards set out in s 400 of the *Federal Courts Rules*, 1998 SOR/98-106.

[3] I cannot agree with Pfizer's submissions. Prothonotary Aalto dealt with the circumstances before him by creating a suitable and fair remedy that gave both parties some relief. Pfizer was able to preserve almost all its expert evidence. Apotex was given a chance to meet that evidence with its own and received some compensation for the additional costs it would incur. I cannot see any unfairness to Pfizer in these circumstances, or anything unreasonable about Prothonotary Aalto's decision.

II. Apotex's Motion and the Prothonotary's Order

[4] On its prohibition application, Pfizer wished to reverse the evidence – that is, to require Apotex to file its evidence first. Apotex opposed that request, but acquiesced to a partial reversal of evidence in which Pfizer would tender its fact evidence first, Apotex would then file its expert evidence on inutility, and then Pfizer would tender its responding expert evidence.

[5] Pfizer filed some fact evidence, to which Apotex responded with its expert evidence. Pfizer then filed its expert evidence, which included a good deal of evidence Apotex regarded as fact evidence, mainly studies supporting Pfizer's position on utility.

[6] Apotex then moved to strike a substantial amount of Pfizer's evidence on the basis that it was out of keeping with the partial reversal order and, accordingly, that Apotex had been prejudiced in having to produce its expert evidence without disclosure of the documentation on which Pfizer intended to rely to support its utility arguments. Pfizer opposed the motion but conceded that Apotex should have a right of reply to the expert evidence.

[7] Prothonotary Aalto clearly believed that reversal orders in general and partial reversal orders in particular should be discouraged. However, he acknowledged that the striking of portions of affidavits is an exceptional remedy. The judge hearing the prohibition proceeding should have the benefit of a full record, and to strike large portions of its evidence would prejudice Pfizer. On the other hand, Pfizer would clearly have been aware of the existence of the fact evidence on which its experts were going to rely, based on parallel proceedings with another party, yet it did not disclose that evidence to Apotex. The issue was the remedy that should be granted in the circumstances.

[8] Prothonotary Aalto sought a middle ground in which the prejudice to Apotex could be remedied, in part, by allowing it to file reply evidence. In addition, he concluded that the portions of Pfizer's expert opinions that were critical of Apotex's experts for their failure to consider studies of which they were unaware should be struck. Finally, he held that Apotex should receive substantial

indemnity costs for having to bring its motion to strike, and should be compensated for the costs of preparing reply evidence, although not the experts' fees themselves.

III. Did the Prothonotary treat Pfizer unfairly or render an unreasonable decision?

[9] Pfizer argues that the Prothonotary could not impose solicitor and client costs without giving it a chance to make submissions on that issue. Further, the Prothonotary could not impose solicitor and client costs without making a finding that special circumstances justified them. Finally, Pfizer contends that the Prothonotary had to consider the factors in s 400 of the *Federal Courts Rules* in his cost award.

[10] A short answer to Pfizer's position is that the Prothonotary did not impose solicitor and client costs. He imposed costs on a substantial indemnity basis and encouraged the parties to come to an agreement on quantum. This is not the same thing as imposing solicitor client costs. Further, the Prothonotary's reasons as a whole disclose why he imposed an elevated cost award. He refers to mischief, misbehaviour, and prejudice. Finally, the Prothonotary had no obligation to refer specifically to the factors in Rule 400.

[11] In addition, however, in my view, these circumstances differ from an ordinary cost award. Here Prothonotary Aalto used costs as a means of fashioning an appropriate and balanced remedy in a complex and unique situation.

[12] Further, since costs can be used as a tool for achieving justice between parties, a judicial officer, particularly a case management judge, must have the freedom to determine how heavy a tool to use by setting the appropriate quantum. That must include setting costs at an elevated level.

[13] Here, Prothonotary Aalto arrived at a creative remedy that sought to allow Pfizer to preserve almost all of its evidence, give Apotex a chance to respond to that evidence, and compensate Apotex for some of the additional costs it would incur in doing so. In his discretion, Prothonotary Aalto imposed elevated costs as a means of achieving a just resolution of the predicament brought about by the reversal order, and allowing the parties to continue to advance to a hearing on the real issues between them. Short of an obvious error or injustice, I would be loathing to meddle with the Prothonotary's well-informed balancing of the respective parties' positions or his efforts to move the case along.

[14] Therefore, I would dismiss this motion with costs.

ORDER

THIS COURT ORDERS that the motion is dismissed with costs.

“James W. O’Reilly”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1555-12

STYLE OF CAUSE: PFIZER CANADA INC. AND G.C. SEARLE & CO. v
APOTEX INC. AND THE MINISTER OF HEALTH

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 18, 2014

ORDER AND REASONS:
O'REILLY J.

DATED: FEBRUARY 24, 2014

APPEARANCES:

Steve Mason FOR THE RESPONDENTS

Andrew Brodkin FOR THE APPLICANTS
Jaro Mazzola

SOLICITORS OF RECORD:

Torys LLP FOR THE RESPONDENTS
Toronto, Ontario

Goodmans LLP FOR THE APPLICANTS
Barristers and Solicitors
Toronto, Ontario