

CANADA / JUDGMENT

Pfizer Canada Inc. v. Rhoxalpharma Inc.

2004 FC 1580

COURT

Federal Court

DECIDED

28 October 2004

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Pfizer Canada Inc. v. Rhoxalpharma Inc. Court (s) Database Federal Court Decisions Date 2004-10-28 Neutral citation 2004 FC 1580 File numbers T-807-03 Decision Content Date: 20041028 Docket: T-807-03 Citation: 2004 FC 1580 Ottawa, Ontario, this 28th day of October, 2004 PRESENT: MADAM PROTHONOTARY ARONOVITCH BETWEEN: PFIZER CANADA INC. and PFIZER INC. Applicants

- and - RHOXALPHARMA INC. and THE MINISTER OF HEALTH Respondents REASONS FOR ORDER AND ORDER ARONOVITCH P.
- [1] Pfizer wishes to file supplementary evidence in the context of a section 6 application pursuant to the Patented Medicines (Notice of Compliance) Regulations, SOR/93-133.
- [2] In finding that Pfizer should have leave to file the supplementary affidavits of Doctor's Byrn and Munsen, I have considered and given weight the following factors.
- [3] The affidavits sought to be filed are in respect of issues that are centrally relevant to the issues for determination in this proceeding. Essentially, the matters for determination are whether the product contains "dihydrate" or will convert to "dihydrate" in the process of manufacture. As I understand it, conversion in the manufacturing process, in turn, involves the notion of "stability".
- [4] The affidavits in question, are focused and limited in their content. The subject matter also clearly calls for expert evidence.
- [5] I find moreover, that each of the issues that Pfizer wishes to reply to as arising from the cross-examination of Dr. Petrov, are new and could not have been anticipated, in the sense that they arise from inconsistencies with Dr. Petrov's affidavit or relate to the unanticipated definition of certain terms.
- [6] This is not the case of a document that Pfizer will have had in its possession, or an experiment that Pfizer has performed and seeks to introduce at this time in order to split its case (Salton Appliances (1985) Corp. v. Salton Inc. 4 C.P.R. (4th) 491 at page 497.

- [7] Nor is it acceptable to argue, as does Rhoxalpharma, that the evidence at issue could have been submitted previously. As noted in *Abbott Laboratories et al. v. The Minister of Health et al.* October 12, 2004, unreported, T-1847-02 (F.C.), an issue is not anticipated merely because it arises in the course of the proceeding. In that case, referring to the propriety of sur-reply evidence, I observed; "It is not a question of whether an issue, writ large, could have been anticipated, but rather whether the specific criticisms, or points raised in the reply, could or should have been anticipated."
- [8] In my view, the notion of what is known or can be anticipated does not place a positive burden on a party to conduct experiments to support its theories, or otherwise dictate what evidence the party will adduce. The fact that Pfizer has not conducted its own experiment does not preclude a right of reply to matters that genuinely could not have been anticipated arising from Rhoxalpharma's experiments. The right of reply would otherwise be meaningless.
- [9] In addition, I do not see this as a shoring-up or supplementing, by Pfizer, of its cross-examination. It is fair to limit a party to the answers it receives on cross-examination, provided a party can adequately prepare for it.
- [10] As to prejudice, Pfizer moved expeditiously following the cross-examination to bring the motion. The motion moreover, is not brought on the eve of the hearing. In this and other respects, this case is thus to be distinguished from *Astrazeneca AB v. Apotex Inc.* [2004] F.C.J. No. 54, on which Rhoxalpharma relies.
- [11] Indeed, I find that the balance of prejudice favours Pfizer who will otherwise be precluded from making fair reply, and adducing evidence on a vitally relevant issue. It is accordingly not in the interests of justice to deny the motion, as the interests of justice comprise the Court's interest in having the fullness of pertinent evidence available to it in determining the issues in the underlying proceeding (*Astrazeneca Inc. v. Apotex Inc. and the Minister of Health*, 2004 F.C. 761).
- [12] As to the respondent's submission that it be authorized to file sur-reply evidence, that determination can only be made on the basis of draft affidavits which are found to constitute proper sur-reply evidence in the circumstances.
- [13] That said, Rhoxalpharma is advised to first seek the consent of the applicants on the basis of draft affidavits that are similarly focused and limited. Parties are cautioned to make their best effort to obviate the need for a motion in that regard. If however, a motion proves necessary, on request, I will hear it on an expedited basis. THIS COURT ORDERS THAT:
1. The motion is granted as requested.
 2. Pfizer has leave to serve and file the affidavits of Stephen Byrn and Eric Munsen in the form proposed, by no later than five (5) days from the date of these Reasons for Order and Order.

3. If parties are unable to agree as to costs they may be separately spoken to. "Roza Aronovitch"
Prothonotary FEDERAL COURT NAMES OF COUNSEL AND SOLICITORS OF RECORD
DOCKET: T-807-03 STYLE OF CAUSE: PFIZER CANADA INC. ET AL. v. RHOXALPHARMA
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REASONS FOR ORDER AND ORDER : ARONOVITCH, P. DATED: OCTOBER 28, 2004
APPEARANCES: CHRISTOPHER VAN BARR FOR THE APPLICANTS MARC RICHARD
EDWARD HORE FOR THE RESPONDENT RON BOUCHARD RHOXALPHARMA INC.
SOLICITORS OF RECORD: GOWLING LAFLEUR HENDERSON LLP FOR THE APPLICANTS
OTTAWA, ON HAZZARD & HORE FOR THE RESPONDENT TORONTO, ON RHOXALPHARMA
INC. MORRIS ROSENBERG FOR THE RESPONDENT DEPUTY ATTORNEY GENERAL THE
MINISTER OF HEALTH OF CANADA

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