Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

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T-793-96

BETWEEN:

GLAXO WELLCOME INC.

-and-

THE WELLCOME FOUNDATION LIMITED,

Applicants,

AND

THE MINISTER OF NATIONAL HEALTH AND WELFARE

-and-

APOTEX INC.,

Respondents.

REASONS FOR ORDER

RICHARD MORNEAU,
PROTHONOTARY:

INTRODUCTION

This motion by Glaxo Wellcome Inc. and The Wellcome Foundation Limited (the applicants) seeks a determination of whether, in the circumstances of the case at bar, this Court should, as the applicants request, order the striking out of certain documents and arguments included by the respondent Apotex Inc. in its application record (Rule 1607 of the *Federal Court Rules* (the Rules)), which was served on the applicants in connection with their application for judicial review.

FACTS

On April 4, 1996, pursuant to section 55.2 of the *Patent Act* and section 6 of the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 (the Regulations), the applicants filed an application for judicial review (the application) to prohibit the Minister of National Health and Welfare from issuing a notice of compliance to Apotex Inc. until after the expiration of four patents, namely 1,062,257; 1,096,863; 1,096,864 and 1,172,169. The application was filed in response to the sending by Apotex Inc. of a notice of allegation (paragraph 5(3)*(b)* of the Regulations) dated February 21, 1996, which stated the following:

> Patents 1096863 and 1096864 have no claim for the medicine (acyclovir) itself or the use of the medicine.

It should, however, be mentioned that the parties began proceedings substantially similar to the current proceedings at the beginning of 1996. On January 4, 1996, Apotex Inc. served a notice of allegation on the applicants concerning the medicine Acyclovir and involving patents 1,062,257; 1,096,863 and 1,096,864. In response, the applicants filed an application for judicial review on February 19, 1996, in file No. T-388-96 of this Court, seeking a prohibition similar to that requested in the application of April 4, 1996.

It seems that Apotex Inc. chose to send its second notice of allegation (that of February 21, 1996) to ensure that it could challenge patents 1,096,863 and 1,096,864, as it apparently believed that its challenge to those patents was weakened in file No. T-388-96 because of a change made by the applicants to the wording of their application for judicial review in that file and because of a lack of precision in the notice of allegation of January 4, 1996.

Since Apotex Inc. felt that developments in file No. T-388-96 were clearly relevant for the purposes of file No. T-793-96, it decided, in perfecting its application record under Rule 1607 (file No. T-793-96), to include the following, *inter alia*, in that record:

- the originating notice filed by the applicants on February 19, 1996 in file No. T-388-96;
- the amended originating notice filed by the applicants on February 20, 1996 in file No. T-388-96;
- an order made by Rouleau J. of this Court on June 11, 1996 in file No. T-388-96.

The inclusion of the said documents (the documents from file No. T-388-96) prompted the applicants to file the motion now under consideration in order to obtain an order by this Court striking from Apotex Inc.'s application record the documents from file No. T-388-96 and the passages of Apotex Inc.'s memorandum that referred to or were based on those documents.

ANALYSIS

It must first be asked what authority there might be for this Court to strike out the requested items.

It is well known that applications for prohibition under section 6 of the Regulations are considered applications for judicial review (see *Merck Frosst Canada Inc. et al. v. Minister of National Health and Welfare et al.* (1994), 58 C.P.R. (3d) 245, at p. 247 (*Merck Frosst*) and the cases referred to therein).

All applications for judicial review are governed by Rules 1600 *et seq.* As the Federal Court of Appeal has noted, Rules 1600 to 1620 intentionally do not contain

any provisions authorizing the striking out of applications for judicial review (*Bull (David) Laboratories (Canada) Inc. v. Pharmacia Inc. et al.* (1994), 176 N.R. 48, at pp. 52 *et seq.* (*Pharmacia*)).

Consequently, neither Rule 419--which deals with striking out in the context of an action--nor any rule of procedure under provincial law can be relied upon through Rule 5 in seeking to have an application for judicial view struck out or, *a fortiori*, in seeking to have application records or parts of application records filed by the parties under Rule 1606 or 1607 struck out.

Does this Court nevertheless have jurisdiction to grant a motion to strike in the context of an application for judicial review?

The door seems somewhat open to this in exceptional cases in which it is warranted. In *Pharmacia*, Strayer J.A. stated the following at the end of his analysis (at pp. 54-55):

> This is not to say that there is no jurisdiction in this court either inherent or through rule 5 by analogy to other rules, to dismiss in summary manner a notice of motion which is so clearly improper as to be bereft of any possibility of success. (See e.g. *Cyanamid Agricultural de Puerto Rico Inc. v. Commissioner of Patents* (1983), 74 C P.R. (2d) 133 (F.C.T.D.); and the discussion in *Vancouver Island Peace Society et al. v. Canada (Minister of National Defence) et al.*, [1994] 1 F.C. 102; 64 F.T.R. 127, at 120-121 F.C. (T.D.)). Such cases must be very exceptional and cannot include cases such as the present where there is simply a debatable issue as to the adequacy of the allegation in the notice of motion.
>
> (emphasis added)

This same reasoning was applied by Nadon J. of this Court in a recent decision rendered on August 13, 1996 (*Tom Pac Inc. v. Kem-A-Trix (Lubricants) Inc.*, file No. T-1238-96, at p. 5).

When counsel for the applicants was asked to specify the rule or authority pursuant to which she was seeking to have the items in question struck out, she referred both to Rule 1607, which sets out what the respondent's application record can contain in any given case, and to what Richard J. of this Court held in *Merck Frosst*, *supra*.

With respect to Rule 1607, it was properly noted in *Merck Frosst* that Rule 1606--like Rule 1607, of course--does not provide an exhaustive list of what the applicant's application record can contain. I do not think that Rule 1606 or 1607 can be relied upon in order to have a document or any part thereof struck out.

With respect to *Merck Frosst*, I do not feel that Richard J. intended in that case to depart from or extend the test established by Strayer J.A. in *Pharmacia*, as referred to above.

In *Merck Frosst*, Richard J. began his analysis by noting forcefully that all applications for judicial review must follow a summary procedure and be heard expeditiously (*Merck Frosst*, *supra*, at p. 248). He also noted that the making of interlocutory motions--like the one under consideration here--is inconsistent with the objectives of the rules governing applications for judicial review.

Richard J. even referred to *Pharmacia* in support of his comments on this point.

It must therefore be inferred that he was well aware that in exceptional cases, the Federal Court of Appeal does permit reliance on the Court's inherent jurisdiction in order to strike out a motion.

Based on my analysis of Richard J.'s reasons, it must be concluded that in *Merck Frosst*, he felt that he was dealing with an exceptional case and that in the circumstances certain items should be struck from the applicants' application record.

In this regard, it should be noted that *Merck Frosst* primarily concerned two pharmaceutical companies in the context of an application for judicial review governed by the same legislative and regulatory provisions as the case at bar.

In that case, after more than fifteen (15) interlocutory motions were brought, the applicants included all the documents supporting those motions in their application record. One of the respondents brought a motion to strike and Richard J. held, *inter alia*, that the interlocutory orders and the notices of motion relating to the fifteen (15) motions could remain in the applicants' application record, but ordered that the affidavits supporting those motions be struck out since the issue addressed by the affidavits had been disposed of by the orders made subsequently. Moreover, I infer from Richard J.'s reasons that at least one such affidavit contained, as an exhibit, an affidavit that the Court had refused to allow to be filed.

In my view, Richard J. decided to intervene because of the length of the applicants' application record and particularly the inclusion of documents already refused by the Court.

The factors that prompted Richard J. to interyene in *Merck Frosst* are not present here.

Moreover, I do not feel that the applicants here are in a situation that is so exceptional (which is to say unacceptable) that the Court must intervene and strike out the documents from file No. T-388-96 and the other related items.

In their originating notice, the applicants themselves referred to the existence of file No. T-388-96 and argued that Apotex Inc. should not be entitled to issue a second notice of allegation. In paragraph 14 of that notice, they even stated the following:

> These proceedings are instituted *ex abundanti cautela* and without prejudice to the Applicants' right to maintain that Apotex's "further" notice of allegation is irregular and should never have been served.

Can Apotex Inc. now be criticized for seeking to include the documents from file No. T-388-96 in its application record in this file? I do not think so. On the off chance that Apotex Inc. has done something inappropriate or unacceptable--which I have difficulty seeing at this time--it is certainly not such as to engage this Court's inherent jurisdiction within the meaning of *Pharmacia*.

Of course, my point of view is not binding on the judge who will hear the merits of this case.

The applicants also argued in their notice of motion to strike that the inclusion of the documents from file No. T-388-96 was prejudicial to them. However, this was stated merely as an allegation in their motion and was not elaborated upon or supported by affidavit evidence. I therefore cannot consider it any further.

Finally, counsel for the applicants argued that, at the very least, the documents from file No. T-388-96 had to be introduced by Apotex Inc. via an affidavit. I am not convinced that this had to be the case, especially as regards Rouleau J.'s order. As for the other documents, they are copies of certified copies of documents in a public file of the Court. Even if there is a requirement that they be introduced by way of affidavit, the resulting irregularity cannot be such as to justify their being struck out at this stage.

In my view, the problems identified by the applicants with respect to the contents of Apotex Inc.'s application record are factors that they must address, if they wish, in their supplementary application record to be filed under Rule 1608 in accordance with the schedule established by Rouleau J. in his order of July 9, 1996, and not in an interlocutory motion that necessarily delays the advancement of the case. As Strayer J.A. noted in *Pharmacia*, at p. 53:

> This all reinforces the view that the focus in judicial review is on moving the application along to the hearing stage as quickly as possible. This ensures that objections to the originating notice can be dealt with promptly in the context of consideration of the merits of the case.

For these reasons, the applicants' motion to strike will be dismissed and their supplementary application record must be filed in accordance with the schedule established by Rouleau J. in his order of July 9, 1996.

Costs in the cause.

Richard Morneau

Prothonotary

Montréal, Quebec
September 6, 1996

Certified true translation

A. Poirier

Federal Court of Canada

Court No. T-793-96

BETWEEN

GLAXO WELLCOME INC.
-and-
THE WELLCOME FOUNDATION LIMITED

Applicants

— and —

THE MINISTER OF NATIONAL HEALTH AND WELFARE
-and-
APOTEX INC.

Respondents

REASONS FOR ORDER

FEDERAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT NO.:	T-793-96
STYLE OF CAUSE:	GLAXO WELLCOME INC. -and- THE WELLCOME FOUNDATION LIMITED, Applicants, AND THE MINISTER OF NATIONAL HEALTH AND WELFARE -and- APOTEX INC., Respondents.
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	August 20, 1996
REASONS FOR ORDER BY:	Richard Morneau, Esq., Prothonotary
DATE OF REASONS FOR ORDER:	September 6, 1996

APPEARANCES:

Judith Robinson	for the Applicants
Harry B. Radomski	for the Respondents

SOLICITORS OF RECORD:

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Harry B. Radomski Goodman Phillips & Vineberg Toronto, Ontario	for the Respondents

THE FEDERAL COURT OF CANADA

LA COUR FÉDÉRALE DU CANADA

Court No.: T-793-96

No. de la cause:

Let the attached certified translation of the following document in this cause be utilized to comply with Section 20 of the **Official Languages Act.**

Je requiers que la traduction ci-annexée du document suivant telle que certifiée par le traducteur soit utilisée pour satisfaire aux exigences de l'article 20 de la **Loi sur les langues officielles.**

Reasons for Order

September 6, 1996

DATE

Richard Morneau

Prothonotary Protonotaire

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