Federal Court  Cour fédérale

Date: 20100430

Citation: 2010 FC 481

Ottawa, Ontario, April 30, 2010

PRESENT: Madam Prothonotary Mireille Tabib

Docket: T-644-09

BETWEEN:

APOTEX INC.

Plaintiff

- and -

SANOFI-AVENTIS

Defendant

Docket: T-933-09

BETWEEN:

SANOFI-AVENTIS AND
BRISTOL-MYERS SQUIBB SANOFI
PHARMACEUTICALS HOLDINGS PARTNERSHIP

Plaintiffs

- and -

APOTEX INC.
APOTEX PHARMACHEM INC. AND
SIGNA SA de CV

Defendants

REASONS FOR ORDER AND ORDER

[1] In accordance with the Notice to the Parties and the Profession dated May 1, 2009, relating to the streamlining of complex litigation, dates have been set aside, beginning on April 18, 2011, for a five-week trial of the consolidated actions herein. In order to ensure that those dates are met and that the trial proceeds within the time allowed, the Court has, at the occasion of earlier case management conferences, raised the issue of whether a date should be fixed after which service of supplementary affidavits of documents would require the consent of the opposing party or leave of the Court. The parties were formally required, by Order dated February 18, 2010, to be prepared to discuss that issue at a case management telephone conference held on March 5, 2010.

[2] Counsel for Sanofi agreed to this measure with alacrity. Apotex, however, argued that it was unnecessary as any issue as to the admissibility of evidence based on late disclosure could and should be determined at trial.

[3] I have, in earlier reasons issued in this matter (*Apotex Inc. v. Sanofi Aventis*, 2010 FC 77), discussed the need for the parties to comply not only with the letter of their obligations under the *Federal Courts Rules* to correct without delay inaccuracies or deficiencies in their affidavits of documents pursuant to Rule 226, but with their spirit and purpose, by reviewing on a continuing basis the completeness and accuracy of their disclosures.

> "[16] Finally, it should also be remembered that while the Rules provide that a party may correct any inaccuracy or deficiency in an affidavit of documents by serving a supplementary affidavit of

> documents, this must be done without delay. This is all the more important in actions subject to the streamlining initiative, as the tight schedules afford little "extra" time to re-open discoveries should new documents be disclosed. Where, on an informal request or a motion for production of further documents, a party's attention is drawn to a particular type or source of documents or to a particular factual issue which it had not considered for relevance, the party's duty to review its disclosure in order to correct any inaccuracy or deficiency in its affidavit of documents is triggered, and should result in such supplementary affidavit of documents as the review may require, without delay, and without the need for a specific order."

[4] The same reasoning equally applies to a party's continuing duty to correct or complete answers given to discovery questions, pursuant to Rule 245.

[5] The Rules provide that documents or information that have not been disclosed in affidavits of documents or have been withheld in answer to discovery questions cannot be adduced at trial unless certain conditions are met or leave of the Court is obtained. Rules 232(1) and 248 of the *Federal Courts Rules* provide:

"232. (1) Unless the Court orders otherwise or discovery of documents has been waived by the parties, no document shall be used in evidence unless it has been	« 232. (1) À moins que la Cour n'en ordonne autrement ou que les parties n'aient renoncé à leur droit d'obtenir communication des documents, un document ne peut être invoqué en preuve que dans l'un des cas suivant:
(a) disclosed on a party's affidavit of documents as a document for which no privilege has been claimed;	a) il est mentionné dans l'affidavit de documents de la partie et, selon celui-ci, aucun privilège de non-divulgation n'est revendiqué;
(b) produced for inspection by a party, or a	

person examined on behalf of one of the parties, on or subsequent to examinations for discovery; or	b) il a été produit par l'une des parties ou par une personne interrogée pour le compte de celle-ci pour examen, pendant ou après les interrogatoires préalables;
(c) produced by a witness who is not, in the opinion of the Court, under control of the party."	c) il a été produit par un témoin qui, de l'avis de la Cour, n'est pas sous le contrôle de la partie. »
"248. Where a party examined for discovery, or a person examined for discovery on behalf of a party, has refused, on the ground of privilege or for any other reason, to answer a proper question and has not subsequently answered the question, the party may not introduce the information sought by the question at trial without leave of the Court."	« 248. La partie soumise à un interrogatoire préalable, ou la personne interrogée pour son compte, qui a refusé de répondre à une question légitime au motif que les renseignements demandés sont protégés par un privilège de non-divulgation ou pour tout autre motif, et qui n'y a pas répondu par la suite, ne peut donner ces renseignements à l'instruction à moins d'obtenir l'autorisation de la Cour. »

[6] Clearly, these provisions aim to avoid a party being prejudiced by late disclosure of documents or information and to prohibit "trial by ambush". Yet a party could just as effectively ambush its opponent by serving a supplementary affidavit of document or supplemental answers to discovery a few days, weeks or even months before the trial, yet without sufficient time for the opposing party to adequately prepare to respond to the new documents or information.

[7] To leave the receiving party with the choice of making a motion to rule on the admissibility of evidence (which if brought pursuant to Rule 220(1)(b)) is an unwieldy two-stage process), or to

deal with the matter as an objection to evidence at trial is simply inefficient. Further, to the extent justice between the parties requires that the evidence be allowed to be adduced at trial subject to further discoveries or additional export reports, it is clear that leaving the determination to the Trial Judge leads straight to an adjournment of the trial, whereas early determination of these issues by the case management Judge could potentially provide a timely remedy and avoid an adjournment.

[8] There is, in my view, a need for a procedural mechanism by which potential disputes as to the parties' compliance can be determined or remedied before trial on an adequate record and in a timely manner. I am therefore satisfied that a date should be set after which supplementary affidavits of documents or production of documents or information in answer to discoveries would require either consent of the opposing party or leave of the Court in order to be effective for the purposes of Rules 232 and 248. This will ensure that, if the parties do not meet their obligations to review their disclosure on an ongoing basis, there is a date by which a comprehensive review should be made, after which parties will have to provide justification for late disclosure and any prejudice caused to the other party can be addressed or remedied if possible. It will further promote the early identification and disposition of issues of admissibility related to late disclosure, freeing up trial and time and possibly avoiding adjournments.

[9] In the circumstances, that date should roughly coincide with the date on which the last of the rebuttal expert reports are to be served and filed. Indeed, by then, documents on which litigation privilege may have been claimed but which have been relied upon by experts expected to be called at trial should be subject to waiver and accordingly moved from Schedule II of the Affidavit of

Document to its Schedule I. Also, the parties will then have as complete an understanding as they are likely to get before the actual start of the trial as to the issues in dispute and their opponent's position thereon. Combined with the theory of the case and the trial strategy which they ought to have been refining and developing throughout the discovery stages, the parties should then be in a position to know with great precision on what documents and information they might wish to rely at trial and to fully appreciate the consequence of any incomplete and inaccurate disclosures they might have made. As such, it is expected that there should be few or no new disclosures after that date. Imposing on the parties a mechanism by which they can justify why or on what conditions disclosures made after that date should be admissible at trial is neither unfair nor overly burdensome.

ORDER

THIS COURT ORDERS that:

1. No supplementary affidavit of documents served after December 15, 2010, and no corrected or completed information in answer to a discovery question provided after January 15, 2010 shall be deemed effective for the purposes of Rules 232(1) or 248 unless:

   (a) The other party has consented; or

   (b) Leave has been granted on motion made, without delay, before the case management Judge.

2. The trial of this matter shall begin at 9:30 a.m. on April 18, 2011, for a duration of 25 days, in French and in English, at a place to be determined either on motion or at the pre-trial conference.

"Mireille Tabib"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-644-09
STYLE OF CAUSE:	APOTEX INC. v. SANOFI-AVENTIS
DOCKET :	T-933-09
STYLE OF CAUSE :	SANOFI-AVENTIS and BRISTOL-MYERS SQUIBB SANOFI PHARMACEUTICALS HOLDINGS PARTNERSHIP v. APOTEX INC., APOTEX PHARMACHEM INC. and SIGNA SA de CV
PLACE OF HEARING: (Teleconference)	Ottawa, Ontario
DATE OF HEARING: (Teleconference)	March 5, 2010
REASONS FOR ORDER:	TABIB P.
DATED:	April 30, 2010

APPEARANCES:

Mr. Nando De Luca Mr. Sandon Shogilev	FOR APOTEX INC.
Mr. Anthony Creber Ms. Cristin Wagner	SANOFI-AVENTIS .

SOLICITORS OF RECORD:

GOODMANS LLP TORONTO, ONTARIO	FOR APOTEX INC.
GOWLING LAFLEUR HENDERSON LLP OTTAWA, ONTARIO	SANOFI-AVENTIS .