Federal Court  Cour fédérale

Date: 20170602

Dockets: T-389-11
T-1668-10

Citation: 2017 FC 545

Ottawa, Ontario, June 2, 2017

PRESENT: The Honourable Mr. Justice Locke

Docket: T-389-11

BETWEEN:

APOTEX INC.

Plaintiff

and

ASTRAZENECA CANADA INC.

Defendant

Docket: T-1668-10

AND BETWEEN:

ASTRAZENECA AKTIEBOLAG,
ASTRAZENECA CANADA INC. and
ASTRAZENECA UK LIMITED

Plaintiffs/
Defendants by Counterclaim

and

APOTEX INC. and
APOTEX PHARMACHEM INC.

Defendants/
Plaintiffs by Counterclaim

ORDER AND REASONS

[1] This order concerns disputes between the parties (referred to herein as Apotex and AstraZeneca) arising from the reading in at trial of passages from examinations for discovery as contemplated in Rule 288 of the *Federal Courts Rules*, SOR/98-106 [the *Rules*]. These disputes, which were argued during the trial, fall into two categories:

1. With regard to certain of Apotex's proposed read-ins, AstraZeneca seeks to add qualifying answers under Rule 289;
2. With regard to certain of AstraZeneca's proposed read-ins, Apotex objects to their inclusion.

[2] I address each of these categories in turn.

I. AstraZeneca's Proposed Qualifying Answers

[3] The parties do not appear to disagree on the applicable law. Rule 288 permits a party to introduce as its own evidence at trial any part of its examination for discovery of a person examined on behalf of an adverse party. Rule 289 provides that the Court may order a party who introduces evidence under Rule 288 to also introduce into evidence "any other part of the examination for discovery that the Court considers is so related that it ought not to be omitted."

The applicable jurisprudence (which I canvassed in my decision in *MediaTube Corp v Bell Canada*, 2016 FC 1066) leads to the conclusion that I should permit qualifying read-ins only:

(i) where the witness misunderstood something in the question put to him;

(ii) where the passage read-in under Rule 288 misrepresents what the witness was saying; or

(iii) where the passage read-in under Rule 288 lacks necessary context or subject matter.

[4] When considering whether to order that qualifying answers be read in, it is important to bear in mind that what AstraZeneca seeks here is an order requiring Apotex to include certain evidence as part of its case. I am not considering whether AstraZeneca could have included similar information as part of its case.

[5] Having now heard from the parties and reviewed the passages in question (which were submitted to the Court in a book having six tabs), I have concluded that none of the proposed qualifying answers should be ordered to be introduced. I am not convinced that any of the criteria for permitting qualifying answers is met for any of the passages proposed by AstraZeneca. The table below provides additional details:

Tab	**Passages**	**Content of Apotex's Read-In**	**Additional Content of AstraZeneca's Qualifying Answers**	**Comments**
1	108:22-112:5 (Collis)	AstraZeneca's level of promotion of its Nexium product around the time of loss of exclusivity	Specific products that had higher amounts of promotion than Nexium	The passage AstraZeneca seeks to add concerns different information – it is not enough that the start of Apotex's passage refers to the previous passage that AstraZeneca seeks to add

2	206:20-209:15 (Collis)	AstraZeneca had no typical response of introducing a discount card program around the time of a loss of exclusivity	AstraZeneca's introduction of a card program for Nexium around the time of a loss of exclusivity	The passage AstraZeneca seeks to add concerns different information
3	Responses 77-79 (Collis)	Product Listing Agreements entered into between AstraZeneca and BC Health after Apotex obtained its NOC for Apo-Esomeprazole	AstraZeneca's contemplation of entering into such agreements before Apotex obtained that NOC	The response AstraZeneca seeks to add concerns different information
4	161:6-163:3 (Findlay)	Whether the formulary listing for Nexium would be different in the but-for world	AstraZeneca's product listing agreements in the real world	The passage AstraZeneca seeks to add concerns different information
5	352:3-355:22 (Findlay)	Nexium as the first product for which AstraZeneca introduced a card program	Additional information concerning AstraZeneca's card program such as (i) key reasons for the timing of its introduction for Nexium, and (ii) other products for which it was introduced	The additional information is not necessary to understand Apotex's passage, nor does it clarify the passage
6	380:5-383:7 (Findlay)	Approaches to AstraZeneca by companies in July 2010 about a card program were unrelated to Nexium	Other AstraZeneca products that these companies' approaches were related to	The additional information is not necessary to understand Apotex's passage, nor does it clarify the passage

II. Apotex's Objections to AstraZeneca's Proposed Read-Ins

[6] Apotex's objections concern two passages from the examination for discovery of AstraZeneca's representative, Gordon Fahner: page 1120, line 24 to page 1122, line 18 and page

1127, lines 4 to 16. Apotex objects because the information sought and provided in these passages concerns hypothetical situations, whereas AstraZeneca has consistently objected to questions about hypothetical situations when sought from fact witnesses during trial. The parties have agreed that those objections will be addressed in closing argument and in my decision on the merits. Apotex also notes that Mr. Fahner was a witness at trial and that the answers he gave during discovery could have been put to him in Court. Of course, we can be confident that such questions would have been objected to if they had been put to Mr. Fahner by Apotex. Apotex submits that AstraZeneca should not be allowed to approbate and reprobate.

[7] AstraZeneca argues that, since the admissibility of hypothetical questions put to fact witnesses has not yet been decided in this case, it should not be prevented from putting in this evidence subject, as with the other evidence in this issue, to my eventual determination of the admissibility issue. AstraZeneca essentially turns the tables on Apotex's approbate/reprobate argument: AstraZeneca should not receive an unjust benefit that would result from the exclusion of these read-ins in the event that I should decide that such hypothetical questions put to fact witnesses are admissible.

[8] In reply, Apotex argues that AstraZeneca seeks to make contingent read-ins, which is not contemplated in the *Rules*.

[9] I prefer AstraZeneca's position. In my view, it is fairer if the read-ins in question are admitted now subject to my decision later on admissibility, than to exclude them now and risk the exclusion of information that is later determined to be admissible. I see no unfairness or other problem in allowing read-ins subject to a contingency and I see no prohibition in the *Rules* against such a course of action. Also, I see no reason that Mr. Fahner's availability to answer

questions at trial should prevent AstraZeneca from relying on his statements during examination for discovery as contemplated in Rule 288.

III. Conclusion

[10] For the reasons set out above, I will not interfere in any way with the proposed read-ins. I will not order Apotex to include any qualifying answers in its read-ins. Also, I will not order any of AstraZeneca's read-ins to be excluded.

ORDER in T-389-11 and T-1668-10

THIS COURT ORDERS that the parties' respective requests to order qualifying read-ins and to exclude read-ins are refused.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-389-11 AND T-1668-10
DOCKET:	T-389-11
STYLE OF CAUSE:	APOTEX INC. v ASTRAZENECA CANADA INC.
AND DOCKET:	T-1668-10
STYLE OF CAUSE:	ASTRAZENECA AKTIEBOLAG, ASTRAZENECA CANADA INC. AND ASTRAZENECA UK LIMITED v APOTEX INC. AND APOTEX PHARMACHEM INC.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 31, 2017
ORDER AND REASONS:	LOCKE J.
DATED:	JUNE 2, 2017

APPEARANCES:

Jerry Topolski	FOR THE PLAINTIFF IN T-389-11 AND FOR THE DEFENDANTS in T-1668-10
Kevin Siu	FOR THE DEFENDANT IN T-389-11 AND FOR THE PLAINTIFFS IN T-1668-10

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