Date: 20090922

Dockets: T-3197-90
T-2624-91
T-2983-93

Citation: 2009 FC 949

2009 FC 949 (CanLII)

Toronto, Ontario, September 22, 2009

PRESENT: The Honourable Mr. Justice Hughes

Docket: T-3197-90

BETWEEN:

APOTEX INC. AND NOVOPHARM LTD.

Plaintiffs

and

THE WELLCOME FOUNDATION LIMITED

Defendant

Docket: T-2624-91

AND BETWEEN:

THE WELLCOME FOUNDATION LIMITED and GLAXO WELLCOME INC.

Plaintiffs

and

INTERPHARM INC. and APOTEX INC. and ALLEN BARRY SHECHTMAN

Defendants

Docket: T-2983-93

AND BETWEEN:

THE WELLCOME FOUNDATION LIMITED and GLAXO WELLCOME INC.

Plaintiffs

and

NOVOPHARM LTD.

Defendant

2009 FC 949 (CanLII)

REASONS FOR ORDER AND ORDER

[1] These reasons deal with an appeal from a decision of Prothonotary Lafrenière dated February 3, 2009, cited as 2009 FC 117 in which he granted leave to Wellcome Foundation Limited and Glaxo Wellcome Inc. (collectively GSK) to file a Further Fresh as Amended Statement of Issues in these three proceedings which have been consolidated and are to be heard together. Each of Apotex, Inc. and Novopharm Ltd. have appealed from the decision. For the reasons that follow I find that the appeal is dismissed except as to an amendment to the Order as to costs.

[2] The Prothonotary has in his reasons set out the background in these actions and the motion to amend particularly at paragraphs 4 to 17 of his reasons. In brief these actions were began in 1991 through 1993 in which it was alleged by GSK that Canadian Patent 1,238,277 (‘277 Patent) had been infringed by Apotex and Novopharm, which parties, in turn challenged the validity of that patent. There was an Order on consent for bifurcation as to damages or profits. The matter wound its way through the Courts and, ultimately, in 2002, the Supreme Court of Canada held that certain claims of the patent were valid and infringed.

2009 FC 949 (CanLII)

[3] A reference as to damages followed initiated by a pleading entitled “Statement of Issues” by GSK in 2003. An Amendment to the Statement of Issues was made, on consent, in 2005. There have been extensive discoveries. A trial date in March or May 2011, depending on the outcome of a proceeding, has been set.

[4] In December 2007, GSK filed a motion to further amend the Statement of Issues. That motion was supported by an affidavit of a law clerk, O’Connor, reviewing background information and documents, which affidavit is uncontroversial, and by an affidavit of Peter I. Dolton, Vice President of the UK Pharma Division of GlaxoSmithKline UK. That affidavit is controversial but brief, the important paragraphs are 4 through 7 which state:

> *a. Since the preparation of the Damages Schedules, GSK Canada has continued to investigate its damages claims, and in particular its determination of what pricing would have occurred “but for” the actions of, and infringement by, the Defendants.*
>
> *b. Based on these investigations, GSK Canada is of the view that the evidence supports a revised pricing as set out in proposed Further Fresh As Amended Statement of Issues.*
>
> *c. IN particular the Corporate Overview (GSK Production No. 2445), a Division Overview (GSK Production No. 2446), and RETROVIR® Marketing Plan (GSK Production No. 2447) and a RETROVIR® Sales Forecast Model (GSK Production No. 2402), provide information which impact on the “but for” pricing which would have occurred.*
>
> *d. In addition, shortly prior to the filing of the Damages Schedules certain pricing changes occurred which were not captured in the Damages Schedules, but which are relevant to GSK Canada’s claims.*

[5] Dolton was extensively cross-examined by counsel for each of Apotex and Novopharm.

[6] Novopharm filed an affidavit from Rosa Pedretti, a legal assistant to one of its outside counsel, providing non-controversial information and documents. Apotex filed an affidavit from a law clerk, Nicole Roth providing non-controversial information and documents and an affidavit of Stephen R. Cole, an outside business valuator, upon which there was extensive cross-examination by GSK's counsel.

2009 FC 949 (CanLII)

[7] Some of the amendments sought to be made by GSK were not contested by Apotex/Novopharm. The amendments sought which are in controversy relate to the quantum of damages claimed and supporting rationale. Originally GSK claimed damages totalling $210,000,000 as set out in paragraph 5 of the Statement of Issues as follows:

> *5. The Plaintiffs claim damages from the Defendants on a joint and several basis in the total amount of $210,000,000. The Plaintiffs' damages claim, which defines the issues in this reference, is broken down as follows:*
>
> *(a) Losses on sales of zidovudine due to customer rebates (RETROVIR®, RETROVIR® 300, COMBIVIR®, TRIZIVIR®) $22,000,000*
>
> *(b) Lost revenue on sales of zidovudine at a reduced price (RETROVIR®, RETROVIR® 300, COMBIVIR®, TRIZIVIR®) $34,000,000*
>
> *(c) Lost revenue on sales of lamivudine at a reduced price (3TC®, HEPTOVIR®, COMBIVIR®, TRIZIVIR®) $58,000,000*
>
> *(d) Lost profits on the Defendants' sales of infringing products $30,000,000*
>
> *(e) Lost opportunity to re-invest profits/revenues in the usual and ordinary course of business (items a-d above) $66,000,000*
>
> *(f) Pre-judgment and post-judgment interest in an amount to be fixed by this Honourable Court*
>
> *(g) Costs in an amount to be fixed by this Honourable Court.*

[8] By amendments made on consent in 2005, the quantum of damages claimed by GSK rose from $220 to $300 million with the itemized figures revised as follows:

> *(a) Losses on sales of zidovudine due to customer rebates (RETROVIR®, RETROVIR® 300, COMBIVIR®, TRIZIVIR®) [Schedule 2] $17,608,599*
>
> *(b) Lost revenue on sales of zidovudine at a reduced price (RETROVIR®, RETROVIR® 300, COMBIVIR®, TRIZIVIR®) [Schedule 3] $38,959,636*
>
> *(c) Lost revenue on sales of lamivudine at a reduced price (3TC®, HEPTOVIR®, COMBIVIR®, TRIZIVIR®) [Schedule 3] $70,707,571*
>
> *(d) Lost profits on the Defendants' sales of infringing products [Schedule 4] $26,334,068*
>
> *(e) Lost opportunity to re-invest profits/revenues in the usual and ordinary course of business (items a-d above) [Schedule 5] $144,610,456*
>
> *(f) Pre-judgment and post-judgment interest in an amount to be fixed by this Honourable Court*
>
> *(g) Costs in an amount to be fixed by this Honourable Court.*

[9] The further amendments now sought would raise to total amount of damages claims by GSK to just under $675 million as set out in the proposed revised paragraph 5 set out below with further amendments to support these numbers set out in other paragraphs and appendixes to the proposed amended Statement of Issues:

> *(a) Losses on sales of zidovudine due to customer rebates (RETROVIR®, RETROVIR® 300, COMBIVIR®, TRIZIVIR®) [Schedule 2] $19,688,561*
>
> *(b) Lost revenue on sales of zidovudine at a reduced price (RETROVIR®, RETROVIR® 300, COMBIVIR®, TRIZIVIR®) [Schedule 3] $92,478,711*

2009 FC 949 (CanLII)

> *(c)* *Lost revenue on sales of lamivudine at a reduced price (3TC®, HEPTOVIR®, COMBIVIR®, TRIZIVIR®) [Schedule 3]* *$156,576,233*
>
> *(d)* *Lost profits on the Defendants' sales of infringing products [Schedule 4]* *$31,871,131*
>
> *(e)* *Lost opportunity to re-invest profits/revenues in the usual and ordinary course of business (items a-d above) [Schedule 5]* *$373,743,620*
>
> *(f)* *Pre-judgment and post-judgment interest in an amount to be fixed by this Honourable Court*
>
> *(g)* *Costs in an amount to be fixed by this Honourable Court.*

2009 FC 949 (CanLII)

[10] Prothonotary Lafrenière heard arguments and, on February 3, 2009, made the Order now under appeal, with Reasons, allowing the amendments with certain provisions as to costs. He concluded at paragraphs 52 to 55 of his Reasons, 2009 FC 117:

> *[52] Pleadings should reflect the real issues between the parties so that a matter can be decided on its merits and with all issues properly before the Court. In Canderel Ltd. v. Canada, [1994] 1 F.C. 3 (C.A.), Décary, J.A. stated the basic premise as follows . . . while it is impossible to enumerate all the factors that a judge must take into consideration in determining whether it is just, in a given case, to authorize an amendment, the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice.*
>
> *[53] I find that there will be no prejudice to the Respondents as a consequence of these amendments as they have been apprised of them before completion of the first round of examinations for discovery and further examinations for discovery are contemplated. In contrast, GSK would be prejudiced if these amendments are not allowed, since GSK will be prevented from asserting the proper quantification of damages which it would*

> *otherwise be entitled to assert. The amendments will also assist the referee in deciding the matters in controversy.*
>
> *[54] The Respondents will be put to additional expense in defending the claim for damages, chiefly through duplication of effort in preparation for examination for discovery. The Respondents should accordingly be compensated for all reasonable costs incurred in re-examining GSK's representative for discovery with respect to the 2008 Price Amendments, such costs to be assessed at the middle of Column IV of Tariff B.*
>
> *[55] As a general rule, a party seeking an amendment should bear the costs, particularly when the amendments are required due to inadvertence. However, the Respondents resisted this motion for leave to amend on the merits, not just as to terms. Since GSK was successful in obtaining the relief it requested, I conclude that there should be no order of costs of this motion.*

2009 FC 949 (CanLII)

I. ISSUES

[11] Apotex/Nophovarm raise the following issues on this appeal:

1. What is the standard of review of the Prothonotary's Order in the circumstances of this particular case?
2. Did the Prothonotary misapprehend the evidence?
3. Did GSK provide an adequate explanation as to the need for amendment?
4. Do the amendments constitute a withdrawal of an admission?
5. Would Apotex/Novopharm suffer prejudice if the amendments were to be allowed?
6. Was the costs award inadequate?

II. GENERAL CONSIDERATIONS AS TO AMENDMENTS

[12] The general principles respecting amendments to pleadings have been stated many times in this and other common law Courts, an amendment should be permitted so as to put the real issues in controversy before the Court unless the opposing party will suffer prejudice not compensable in costs, and that the interests of justice will be served.

2009 FC 949 (CanLII)

[13] There are many authorities for this proposition, I cite *Canderel Ltd. v. Canada*, [1994] 1 F.C. 3 (CA) at paragraph 9 as a typical example:

> *[9] With respect to amendments, it may be stated as a result of the decisions of this Court in North-west Airporter Bus Service Ltd. v. The Queen and Minister of Transport; The Queen v. Special Risks Holdings Inc.; Meyer v. Canada; Glisic v. Canada and Francoeur v. Canada and of the decision of the House of Lords in Ketteman v. Hansel Properties Ltd which was referred to in Francoeur, that while it is impossible to enumerate all the factors that a judge must take into consideration in determining whether it is just, in a given case, to authorize an amendment, the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice.*

[14] Amendments that increase the quantum of an award sought by a plaintiff have been allowed, even at a late stage in the proceedings, in cases such as *Richardson International Ltd. v. Mys Chikhacheva (The)*, [2002] 4 F.C. 80. There the Trial Judge allowed such an amendment to be made just prior to closing arguments at trial. The Federal Court of Appeal did not set aside such amendments. Malone J.A. for the Court wrote at paragraphs 49 to 51:

> *[49] In this case, Richardson sought to amend its maritime lien claim at the last possible stage of the action, that is, just prior to its*

2009 FC 949 (CanLII)

> *closing argument. It argued that it was unaware that port expenses (the Korwell invoices) could be claimed as necessaries until its own American legal expert explained that such expenses were, in fact, properly the basis of a maritime lien. The Korwell invoices had been introduced in Court and proven at trial as an exhibit, and Bering's counsel cross-examined on the documents without protest. Dubé J. allowed the amendment under subsection 75(1) as Bering was unable to demonstrate prejudice.*
>
> *[50] Bering now argues that the Trial Judge erred in allowing Richardson to amend its claim to include the Korwell invoices at such a late stage in the trial. Bering alleges that it was unaware that the invoices were included in Richardson's claim until closing argument and further asserts that the amounts referred to in the invoices are not reflective of the heads of damage originally claimed in the statement of claim. As such, the amendment cannot be regarded as merely numerical, and, at the argument stage amounts to trial [page107] by ambush.*
>
> *[51] It is true that the application for leave to amend came at an extremely late stage in the trial, and it is unusual that Richardson would have learned of the Korwell invoices' relevance from its own expert witness. However, the key element in the Canderel test is, in my view, "the interests of justice." I note that counsel for Bering did not apply for an adjournment or to reopen Bering's case when the amendment was sought. Ms. Richardson was present and could have been recalled for further cross-examination, but that was not done. Accordingly, in light of Bering's failure to demonstrate any prejudice, I fail to see how Dubé J. erred in granting the amendment.*

[15] A similar situation was considered and such an amendment allowed by the Ontario Court of Appeal in *Haikola v. Arsenau* (1996), 27 O.R. (3d) 576.

[16] With respect to the interests of justice and timelyness of a motion to amend, these issues were also canvassed in *Canderel supra*. In brief the nearer to the end of a matter that an amendment is sought the more cautious a Court ought to be in granting the amendment. As well, there must be

a legitimate expectation that there will be an end to the litigation such that a seemingly endless series of amendments should be discouraged. Décary J.A. for the Court wrote at paragraphs 12 and 13:

> *[12] As regards interests of justice, it may be said that the courts and the parties have a legitimate expectation in the litigation coming to an end and delays and consequent strain and anxiety imposed on all concerned by a late amendment raising a new issue may well be seen as frustrating the course of justice. The principles were in our view best summarized by Lord Griffiths, speaking for the majority, in Ketteman v. Hansel Properties Ltd:*
>
> > *This was not a case in which an application had been made to amend during the final speeches and the court was not considering the special nature of a limitation defence. Furthermore, whatever may have been the rule of conduct a hundred years ago, today it is not the practice invariably to allow a defence which is wholly different from that pleaded to be raised by amendment at the end of the trial even on terms that an adjournment is granted and that the defendant pays all the costs thrown away. There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time.*
> >
> > *Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other.*

2009 FC 949 (CanLII)

> *Furthermore, to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.*
>
> *Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of the proceedings.*

and by Bowman T.C.J. in Continental Bank Leasing Corporation et al. v. The Queen:

> *. . . I prefer to put the matter on a broader basis: whether it is more consonant with the interests of justice that the withdrawal or amendment be permitted or that it be denied. The tests mentioned in cases in other courts are of course helpful but other factors should also be emphasized, including the timeliness of the motion to amend or withdraw, the extent to which the proposed amendments would delay the expeditious trial of the matter, the extent to which a position taken originally by one party has led another party to follow a course of action in the litigation which it would be difficult or impossible to alter and whether the amendments sought will facilitate the court's consideration of the true substance of the dispute on its merits. No single factor predominates nor is its presence or absence necessarily determinative. All must be assigned their proper weight in the context of the particular case. Ultimately it boils down to a consideration of simple fairness, common sense and the interest that the courts have that justice be done.*

2009 FC 949 (CanLII)

> *[13] While it is true that leave to amend may be sought at any stage of a trial, it is safe to say that the nearer the end of the trial a motion to amend is made, the more difficult it will be for the applicant to get through both the hurdles of injustice to the other party and interests of justice. We note that in all the tax cases referred to by counsel for the appellant, the motion to amend had been made before trial or was made at trial but was to be expected by the opposing counsel during trial.*

2009 FC 949 (CanLII)

[17] Regard should be given to the decision of the Federal Court of Appeal in *Merck & Co. v. Apotex Inc.*, [2004] 2 F.C.R. 459 where the Court dealt not only with the standard of review of a Prothonotary's decision which shall be discussssed shortly .

[18] Décary J.A., for the majority in *Merck supra* in dealing with amendments sought in that case by Apotex, said at paragraphs 32 and 33 that while generalized statements can be made, each amendment sought should be dealt with on a case by case basis:

> *[32] I fully agree with the proposition set out in paragraph 15, in Andersen, that:*
>
> > *We must ensure that the procedure to withdraw admissions is not made so complex and so stringent that virtually no admission will be made by the defendants.*
> >
> > *But I do not read these words to say that the procedure should be made so simple and so relaxed that virtually any withdrawal of admissions will be allowed. There is a burden to be met by the amending party and, while the factors to be considered are essentially the same for all amendments, the burden should be heavier when the amendments at issue purport to withdraw substantial admissions and would result in a radical change in the nature of the questions in controversy.*

2009 FC 949 (CanLII)

> *[33] The nature, timing and circumstances vary from one amendment to the other and from one type of amendment to the other, and one must be careful not to generalize judicial pronouncements made in a given context. The prothonotary or judge seized with the motion to amend has the duty to consider all relevant factors. There is, for example, as noted by Lord Griffiths in Ketteman, at page 62, "a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time". There is also a clear difference between allowing amendments at trial and allowing amendments before trial (see Glisic v. Canada, [1988] 1 F.C. 731 (C.A.), at page 740; Ketteman, supra). There is also a clear difference, I suggest, between allowing amendments that amount to the withdrawal of an admission and amendments that do not, and a clear difference between allowing amendments that amount to withdrawal of a substantial admission the result of which is to alter the cause of action and one that relates to a mere admission of fact.*

[19] In summary:

- In general an amendment should be granted provided that the opposite party is not prejudiced in a manner that cannot be compensated for in costs.
- Each amendment sought should be dealt with on a case by case basis.
- Amendments revising the quantum of damages sought upwardly are allowable, even at a late date.
- Endless amendments are to be discouraged.
- The later the amendment is sought, the more cautious a Court ought to be in granting it.

III. ISSUE #1

[20] What is the standard of review of the Prothonotary's Order in the circumstances of this case?

2009 FC 949 (CanLII)

[21] The standard of review to be applied by the Court in an appeal from a decision of a Prothonoary has been well established in this Court and the Court of Appeal. It is the standard as set out by the Federal Court of Appeal in *Merck & Co. v. Apotex Inc*., *supra* where Décary J.A. for the majority wrote at paragraph 19:

> *[19] To avoid the confusion which we have seen from time to time arising from the wording used by MacGuigan J.A., I think it is appropriate to slightly reformulate the test for the standard of review. I will use the occasion to reverse the sequence of the propositions as originally set out, for the practical reason that a judge should logically determine first whether the questions are vital to the final issue: it is only when they are not that the judge effectively needs to engage in the process of determining whether the orders are clearly wrong. The test would now read: "Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless: (a) the questions raised in the motion are vital to the final issue of the case, or (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts."*

[22] Apotex/Novopharm argue on the present appeal that I should approach the matter *de novo* since an amendment of a request for damages which only for $675 million when earlier $300 million was sought is so substantial as to go directly to the heart of the matter. GSK replies in stating that while the numbers are greater, the basis for those numbers remains the same although the factual information going to quantum such as price levels increase, it is the same methodology and circumstances for calculation.

[23] I am satisfied that, in the present situation, GSK is not seeking amendments that would add a substantial new issue nor dispose of an issue. The effect of the amendments would be to increase the value of the claim substantially, but not the claim itself or the basis for the claim.

2009 FC 949 (CanLII)

[24] The main consideration that Prothonotary Lafrenière had to deal with is whether there was sufficient basis for the amendment made out by GSK or sufficient basis for refusing it made out by *Apotex* or whether *Apotex/Novopharm* had demonstrated irreparable harm or other basis in the interests of justice to refuse the amendment. In my opinion I should not approach the matter *de novo* rather I should examine the matter to determine if an error of law was made or whether there was a material misapprehension of the relevant facts. I should add however that even if I were to approach the matter *de novo* my conclusions on the evidence and the law would be the same as those of the Prothonotary.

IV. ISSUE #2

[25] Did the Prothonotary misapprehend the evidence?

[26] The evidence offered by GSK for the amendment is, I agree, scanty. It amounts to little more than one of the instructing minds on the GSK litigation team saying that they have thought about the matter more and that, based on some the documents that came to light, they believe that a larger claim is in order. However, that person has been extensively cross-examined, Apotex has put in evidence of its own expert giving the view that the documents do not substantiate such a claim. It is the totality of this evidence that is now before me.

[27] I am satisfied that the Prothonotary turned his mind to this evidence and considered the relevant materials. There are two points to make. First, GSK does not have to prove its case conclusively or even on the balance of the evidence at this stage, only that it has an arguable case to make. Second,there is ample time for further discovery and for Apotex/Novopharm to prepare its rebuttal. No prejudice not compensable in costs has been shown. The Prothonotary was right in his determination at paragraphs 41 and 42 of his Reasons that these issues raised by the amendments are best left for consideration at trial.

2009 FC 949 (CanLII)

V. ISSUE #3

[28] Did GSK provide an adequate explanation as to the need for amendment?

[29] This issue is closely related to Issue #2 above and the result is the same.

VI. ISSUE #4

[30] Do the amendments constitute a withdrawal of an admission?

[31] Apotex/Novopharm made two arguments in this respect. One is to say that by stipulating an amount claimed in the Statement of Issues GSK has, by implication, stated that such an amount, in this case $300 million as set out in the 2005 amendments, is the maximum recovery that it can seek. I do not agree with such an argument. The pleading is a statement of position of GSK, and as I have already set out, the Courts have allowed such statements to be revised. The situation is not similar to *Merck supra* where Apotex was seeking to raise an entirely new defence of non-infringement at a

late stage in the proceedings. In *Merck*, Apotex had stated that it had only one basis for asserting non-infringement, it was precluded from raising a second quite different basis late in the proceedings.

2009 FC 949 (CanLII)

[32] The second argument raised is that one of the principal factors used in calculating the claim was the proposed selling price of the drug. Apotex/Novopharm say that the GSK representative on discovery said that such a price was $1.95. The new claim is made on the basis that such a price would have to be at or about $2.20. A review of other portions of the discovery transcript indicates that no binding admission as to the $1.95 price level was made by GSK and that Apotex/Novopharm was well aware that a level approaching $2.20 may be asserted.

VII. ISSUE #5

[33] Would Apotex/Novopharm suffer prejudice if the amendments were to be allowed?

[34] This issue is also closely related to if not identical to Issues 2 and 3 above. As to irreparable prejudice the onus rests on Apotex/Novopharm to show prejudice to them not compensable in costs. Those parties have put no evidence forward to show that they would be prejudiced in any way not compensable in costs. The evidence of the Apotex expert Cole is directed to an attempt to show that GSK has no reasonable foundation for the increased damages sought, it does not show irreparable prejudice to Apotex or Novopharm. There is no evidence by any representative of either of those parties as to what if any irreparable harm will be suffered by them.

VIII. ISSUE #6

[35] Was the costs award inadequate?

2009 FC 949 (CanLII)

[36] On this issue I differ with the Prothonotary only in the fixing of costs at the middle of Column IV or at any level at present. I agree that any costs respecting additional discovery and preparation should be paid by GSK regardless as to the outcome of the case. Given, however, that the strength or weakness of the basis for the amendments cannot be determined at this time, it would be proper to leave the quantification of the costs, whether it be full indemnification, Column IV, or otherwise, to the Trial Judge.

IX. CONCLUSION

[37] The appeal is dismissed except that paragraph 2 of the Prothonotary's Order is amended so as to leave the quantum of the assessment of costs to the Trial Judge.

[38] Given the results of this appeal GSK shall have its costs in the cause.

ORDER

THIS COURT ORDERS that:

1. The Order of Prothonotary Lafrenière dated February 3, 2009 is varied only in that the words “to be assessed at the middle of Column IV of Tariff B” are replaced with the words “to be assessed at a level fixed by the Trial Judge following the trial.”

2. The appeal is otherwise dismissed.

3. *The Wellcome Foundation Limited* and *Glaxo Wellcome Inc.* are awarded costs of this appeal in the cause.

“Roger T. Hughes”
Judge

2009 FC 949 (CanLII)

FEDERAL COURT

SOLICITORS OF RECORD

2009 FC 949 (CanLII)

DOCKETS:	T-3197-90, T-2624-91, T-2983-93
STYLE OF CAUSE:	BETWEEN: APOTEX INC. AND NOVOPHARM LTD. v. THE WELLCOME FOUNDATION LIMITED AND BETWEEN: THE WELLCOME FOUNDATION LIMITED and GLAXO WELLCOME INC. v. INTERPHARM INC. and APOTEX INC. and ALLEN BARRY SHECHTMAN AND BETWEEN: THE WELLCOME FOUNDATION LIMITED and GLAXO WELLCOME INC. v. NOVOPHARM LTD.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 21, 2009
REASONS FOR ORDER AND ORDER:	HUGHES J.
DATED:	SEPTEMBER 22, 2009

APPEARANCES:

ANDREW BRODKIN JULIE ROSENTHAL	FOR THE PLAINTIFF (APOTEX INC.)
MARY PATTERSON	FOR THE PLAINTIFF (NOVOPHARM LTD.)

PATRICK KIERANS JANE CASKEY AMY E.GRENON	FOR THE DEFENDANT (WELLCOME FOUNDATION LIMITED)

SOLICITORS OF RECORD:

GOODMANS LLP Barristers & Solicitors Toronto, Ontario	FOR THE PLAINTIFF (APOTEX INC.)
OSLER HOSKIN & HARCOURT LLP Barristers & Solicitors Toronto, Ontario	FOR THE PLAINTIFF (NOVOPHARM LTD.)
OGILVY RENAULT LLP Barristers & Solicitors Toronto, Ontario	FOR THE DEFENDANT (WELLCOME FOUNDATION LIMITED)

2009 FC 949 (CanLII)