Court overturns C$125 million damages award based on extent of inadmissible hearsay evidence relied on by judge

March 28 2017 | Contributed by Dentons

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Introduction

In May 2016 the Federal Court of Appeal overturned a judgment for C$125 million in damages following a 15-day trial between two pharmaceutical drug companies and sent the case back to the trial judge for redetermination. The court concluded that the trial judge, in reaching his decision, may have relied on inadmissible hearsay evidence tendered at trial on behalf of the plaintiff. In his reasons, Justice Stratas – who wrote the unanimous decision on behalf of the court's three-member panel – reviewed the general principles underlying the grave danger in admitting hearsay evidence at trial, particularly in high-stakes litigation between pharmaceutical drug companies.(1)

Facts

Pfizer Canada Inc, the defendant, was the corporate successor to the original defendants Wyeth and Wyeth Canada (collectively, 'Wyeth'), which, as innovator, held a patent on the antidepressant venlafaxine. Teva Canada Limited, the plaintiff, was the corporate successor to the original plaintiff Ratiopharm Inc, which intended to introduce a generic brand of venlafaxine into the Canadian pharmaceutical drug market.

Regulatory scheme

The applicable regulatory scheme set out a mechanism for a proposed generic entrant into the market to recover damages in the event that the patent holder improperly excluded it from doing so. Any damages award, if liability could be established, would relate to the period in which the generic drug company was excluded from selling its generic drug based on the patent holder's actions. Establishing liability depended on proof that, had it not been for the patent holder's actions, the generic drug company could and would have introduced the generic drug to the market and was not, by market forces or otherwise, unable to sell its generic drug during the relevant period.

Witness through whom hearsay evidence was introduced over Pfizer's objections

In support of its claim that it could and would have introduced a generic version of venlafaxine to the market, Teva called – as one of its seven fact witnesses – Kent Major, who, at the relevant time, had been vice president for development management and regulatory affairs at Teva. During the course of his testimony at trial, Major was presented with a significant number of emails between Teva and Alembic Pharmaceuticals, Teva's supplier of venlafaxine, to which Major had not been privy. Teva intended to rely on these emails and buttress them with Major's testimony in support of its argument that it could and would have been able to introduce a generic version of venlafaxine to the market.

During the course of Major's testimony, counsel for Pfizer repeatedly objected to the introduction of this evidence on the basis that it was hearsay. Instead of rejecting the evidence outright, the trial judge admitted the evidence, advising that he would consider the weight, if any, to be given to the evidence in view of Pfizer's objections. The court ultimately found in favour of Teva. The damages award, including pre-judgment interest, was C$125 million. Pfizer subsequently appealed to the Federal Court of Appeal on several issues.

Appeal and analysis

Stratas began with the following fundamental observation:

> "*When considering evidentiary issues in complicated, high-stakes cases, certain high-level principles are best kept front of mind starting with a fundamental general principle that facts must be proven by admissible evidence.*(2) *Put another way, a court can act only on the basis of facts proven by admissible evidence or evidence whose admissibility has not been contested.*"(3)

The court noted that there are rare exceptions to this:

> "*These include circumstances where facts are subject to judicial notice,*(4) *facts are deemed or presumed by legislation to exist, facts have been found in previous proceedings in circumstances where they bind the court,*(5) *and facts have been stipulated or agreed to.*
>
> *In a civil case, absent one of those exceptions, admissibility must be the court's first inquiry where an objection has been made. If the evidence is not admissible, it is not before the court in any way and, thus, the court cannot deal with it in any way. Appellate courts may interfere with admissibility decisions vitiated by errors of law.*(6) *Any factual findings that affect the application of a law of evidence are entitled to deference.*"(7)

The court elaborated:

> "*Recently, some rules of evidence have been liberalized, allowing for more flexibility. Seduced by this trend towards flexibility, some judges in various jurisdictions have been tempted to rule all relevant evidence as admissible, subject to their later assessment of weight. But according to our Supreme Court, this is heresy. The trend towards flexibility has not undermined the need for judges to take a rigorous approach to admissibility, separating that analytical step from others, such as determining the weight to be given to evidence.*"(8)

Going back to basic evidentiary principles, the court went on to explain:

> "*The status of a particular piece of evidence as hearsay depends on its use. Hearsay is an oral or written statement that was made by someone other than the person testifying at the proceeding, out of court, that the witness repeats or produces in court in an effort to prove that what was said or written is true.*(9) *This is to be distinguished from a non-hearsay use, where a witness repeats or produces a statement to prove merely that it was made. The court noted the classic expression of this distinction is as follows:*
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> *Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement but the fact that it was made.*"(10)

The court further observed that when faced with hearsay objections, courts must not only appreciate the terms of the hearsay rule, but should also keep in mind the rationales underlying it (ie, the need for trials to be effective in discovering the truth while ensuring procedural fairness to all parties). The court elaborated as follows:

> "*On this, the right of parties in a civil action to confront evidence presented against their positions is paramount. Their main instrument is cross-examination—what Wigmore has*

called "beyond any doubt the greatest legal engine ever invented for the discovery of truth" and what the Supreme Court has called "a vital element of the adversarial system applied and followed in our legal system...since the earliest times," of "essential importance in determining whether a witness is credible".(11) *For this reason, counsel are given the greatest latitude in cross-examination and restrictions are rare.*(12) *To be effective, cross-examination must be able to test many aspects of witnesses' testimony—their observation, perception, memory and narration of events or facts, their accuracy in recounting or perceiving them, and their sincerity and honesty as witnesses.*"

The court noted that all of these vital objectives are lost when witnesses testify second-hand about an event. When this happens, only their sincerity and honesty about what they were told can be tested. The person who actually knows first-hand about the event or fact is out of court, shielded from any testing of their observation, memory, accuracy, sincerity or honesty.

The court referenced what the Supreme Court of Canada expressed in relation to this concern:

> "*Our adversary system puts a premium on the calling of witnesses, who testify under oath or solemn affirmation, whose demeanour can be observed by the trier of fact, and whose testimony can be tested by cross-examination. We regard this process as the optimal way of testing testimonial evidence. Because hearsay evidence comes in a different form, it raises particular concerns. The general exclusionary rule is a recognition of the difficulty for a trier of fact to assess what weight, if any, is to be given to a statement made by a person who has not been seen or heard, and who has not been subject to the test of cross-examination. The fear is that untested hearsay evidence may be afforded more weight than it deserves.*"(13)

More recently, the Supreme Court of Canada confirmed that those who try to test hearsay evidence face "difficulties inherent in testing the reliability of the declarant's assertion".(14) An out-of-court declarant may have supplied inaccurate information, but unless he or she is in court as a witness, that possibility can never be tested because:

- the declarant may have misperceived the facts to which the hearsay statement related;
- even if correctly perceived, the wrong facts may be incorrectly remembered;
- the declarant may have narrated the relevant facts in an unintentionally misleading manner; and
- the declarant may have knowingly made a false assertion.

Accordingly, as the court observed, "the opportunity to fully probe these potential sources of error arises only if the declarant is present in court and subject to cross-examination".

Exceptions to hearsay rule

The court observed that the Supreme Court of Canada developed a general principled exception to the exclusionary hearsay rule. Under that broader exception, courts can admit hearsay evidence if it is necessary and reliable.(15) The court observed that Teva had not provided evidence or submissions to the effect that the hearsay evidence was nonetheless admissible because it was reliable or necessary:

> "Necessity. *Many of the emails Mr. Major testified about disclose the names of many Alembic employees who might have been able to give direct testimony on Alembic's ability to supply during the relevant time. Those emails also disclose the names of personnel at Teva who also could have been called. Teva offered no evidence or submissions as to why these individuals or others could not be called to testify. Instead, Teva called Mr. Major, who had no direct, first-hand knowledge of Alembic or its operations at the relevant time.*
>
> Reliability. *The hearsay evidence tendered by Mr. Major did not possess circumstantial guarantees of trustworthiness. Quite the contrary. Teva was Alembic's client and one may presume that Alembic had an incentive to say whatever needed to be said to keep its customer pleased and give it the impression that it could satisfy its customer's needs at any time it asked.*"

The court observed that "all of the mischief associated with admitting hearsay evidence was present" in *Pfizer*. As the court put it:

> "*Confronted with the hearsay evidence, all that Pfizer could do was test Mr. Major's sincerity and honesty about what he was reading from documents he did not author, what he had heard from Alembic personnel, and what colleagues were saying Alembic personnel were saying.*"

The court reasoned that in a high-stakes case, this was hardly a meaningful or fair test. The court framed the problem as follows:

> "*Those who actually knew first-hand about whether Alembic could supply the desired quantities of venlafaxine at the relevant times in the hypothetical world—personnel at Alembic—were out of court, shielded from any testing of their observation, memory, accuracy, sincerity or honesty, but their say-so on that issue—recounted or recorded by others—was admitted into these proceedings.*"

The court determined that "this worked great unfairness to Pfizer" and granted the appeal, sending the case back to the trial judge for redetermination based on a record that excluded the inadmissible hearsay evidence.

Comment

The *Pfizer* decision demonstrates the danger of proceeding to trial in a case where voluminous documents are sought to be tendered as evidence without ensuring:

- that the authenticity of such documents will not be challenged; and
- more importantly, that witnesses called at trial can attest first-hand to the matters addressed in the documents.

In general, the pre-trial use of requests to admit will enable a party to know well before trial which evidence, if any, will be subject to challenge based on either the authenticity of the documents referenced or the facts set out in the request to admit.

Trial judges are typically not interested in petty challenges regarding the authenticity of documents unless there is good reason to challenge the authenticity of any particular document. The real battle is with respect to the facts intended to be established by the adverse party.

The rule against admitting hearsay evidence at trial is intended to prevent a party from attempting to establish facts without affording the adverse party the opportunity to challenge such facts through the cross-examination of the proper parties who are best able to attest to such facts.

If a party seeks to insulate a witness from cross-examination by not calling the witness, the other party is left without recourse to the most powerful legal tool available to challenge such evidence. *Pfizer* will serve as a valuable precedent, as the court went to great lengths to cite in full the general principles of evidence which are too often relaxed.

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Endnotes

(1) The action was commenced in October 2007. The Federal Court Trial Division released its reasons in June 2014. The Federal Court of Appeal heard the appeal in December 2015 and released its reasons in May 2016.

(2) See *R v Schwartz*, 1988 CanLII 11 (SCC), [1988] 2 SCR 443 at pp476-77, 55 DLR (4th) 1; *Canadian Copyright Licensing Agency (Access Copyright) v Alberta*, 2015 FCA 268 (CanLII), 392 DLR (4th)

563 at para 20; and *Canada v Kabul Farms Inc*, 2016 FCA 143 (CanLII) at para 38.

(3) *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 (CanLII), [2015] 2 SCR 548 at paras 26-27.

(4) *R v Spence*, 2005 SCC 71 (CanLII), [2005] 3 SCR 458.

(5) *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 (CanLII), [2001] 2 SCR 460.

(6) See *R v Fanjoy*, 1985 CanLII 53 (SCC), [1985] 2 SCR 233 at p238, 21 DLR (4th) 321; *R v Evans*, 1993 CanLII 86 (SCC), [1993] 3 SCR 653 at p664, 108 DLR (4th) 32; and *Housen v Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 SCR 235. In the case of hearsay evidence, see *R v Saddleback*, 2014 ABCA 166 (CanLII), 575 AR 203 at para 8.

(7) *R v Youvarajah*, 2013 SCC 41 (CanLII), [2013] 2 SCR 720 at para 31.

(8) *R v Khelawon*, 2006 SCC 57 (CanLII), [2006] 2 SCR 787 at para 59.

(9) *Khelawon*, above at paras 35-36; *R v Smith*, 1992 CanLII 79 (SCC), [1992] 2 SCR 915 at pp924-925, 94 DLR (4th) 590 and *R v Starr*, 2000 SCC 40 (CanLII), [2000] 2 SCR 144 at para 162.

(10) *Subramanian v Public Prosecutor*, [1956] 1 WLR 965 at p969 (PC).

(11) *Wigmore on Evidence* (Chadbourne rev 1974) Vol 5, p32, para 1367; *Innisfil Township v Vespra Township*, 1981 CanLII 59 (SCC), [1981] 2 SCR 145 at p167, 123 DLR (3d) 530 and *R v Osolin*, 1993 CanLII 54 (SCC), [1993] 4 SCR 595 at p663, 109 DLR (4th) 478.

(12) *CHD v CRH*, 2007 NSCA 1 (CanLII), 250 NSR (2d) 138 at para 41.

(13) *Khelawon*, above, at para 35.

(14) *R v Baldree*, 2013 SCC 35 (CanLII), [2013] 2 SCR 520 at para 31.

(15) *R v Khan*, 1990 CanLII 77 (SCC), [1990] 2 SCR 531, 59 CCC (3d) 92; *Smith*, above; *R v B* (KG), 1993 CanLII 116 (SCC), [1993] 1 SCR 740, 79 CCC (3d) 257; *R v U* (FJ), 1995 CanLII 74 (SCC), [1995] 3 SCR 764, 128 DLR (4th) 121; and *R v Blackman*, 2008 SCC 37 (CanLII), [2008] 2 SCR 298.

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