

PATENTED MEDICINE PRICES REVIEW BOARD

**IN THE MATTER OF the *Patent Act*,
R.S.C., 1985, c. P-4, as amended**

**AND IN THE MATTER OF
Alexion Pharmaceuticals Inc. (“Respondent”)
and the medicine “Soliris”**

**NOTICE OF MOTION
AND WRITTEN REPRESENTATIONS OF THE RESPONDENT
Alexion Pharmaceuticals Inc.
(Motion in Writing for an Order Permitting Barry Katsof
to testify by Video Teleconference)**

RESPONDENT, ALEXION Pharmaceuticals Inc. (“Alexion”), makes this motion in writing pursuant to the direction of the Hearing Panel (the “Panel”) given in the Panel Order Regarding Motion for Particulars and Scheduling dated 4 January 2017.

THE MOTION IS FOR:

1. An Order permitting a witness, Barry Katsof, to testify on behalf of Alexion at the hearing of this matter by video conference from Spain.

THE GROUNDS AND WRITTEN REPRESENTATIONS FOR THE MOTION ARE:

Introduction

2. Mr. Katsof is a paroxysmal nocturnal hemoglobinuria (PNH) patient. He typically resides in Spain during the months of January through April and in Montreal the balance of the year.

3. Mr. Katsof is scheduled to testify at the hearing of this matter on 21 February and/or 22 February for approximately 1 day, including a half day for direct examination and a half-day for cross-examination.

Anticipated Evidence of Mr. Katsof

4. Mr. Katsof's anticipated evidence is outlined in the Witness Statement Alexion has filed with the Board (see Tab 1B). His evidence includes information about his personal experience and knowledge as a PNH patient. It also covers his experience as the founder and President of the Canadian Association of PNH Patients, an organization referred to by other witnesses, including Prof. Schwindt. His evidence is important for Alexion's case and will assist the Panel to understand the practicalities of living with PNH and the relative costs of Soliris (both societal and in comparison to similar types of medicines).

Mr. Katsof's Restrictions in Attending the Hearing in Person

5. As a result of his disease, Mr. Katsof is immunocompromised and consequently more susceptible, despite vaccinations, to a variety of infections, particularly meningococcal infections, and to various bacteria that commonly cause meningitis. Moreover, during the winter months in Canada, the increased incidence of respiratory tract infections, including influenza, is particularly dangerous for patients suffering from PNH.

6. At the recommendation of his doctor, Mr. Katsof reduces the risk of infections by spending the winter months in warm climates, like Spain, where he will be residing

between January and April of 2017. Warmer climates are significantly less conducive to the bacteria that cause respiratory infections.

6. Last year, Mr. Katsof returned to Montreal before the end of March, 2016. Upon his arrival home, he contracted influenza. He subsequently became extremely ill, was hospitalized for 8 days in Montreal, and was generally ill for an extended period following his hospitalization.

7. Mr. Katsof is unwilling to compromise his health by returning to Canada before April 2017. He is, however, fully prepared to testify by video conference.

Video Conferencing Facilities

8. Gowling WLG is able to arrange video conferencing facilities in Spain for Mr. Katsof and we have state-of-the art video capabilities at our offices in Ottawa. We can accommodate the Panel and all counsel involved at the hearing at our offices, at no cost to the Board, while Mr. Katsof testifies. Gowling WLG will ensure that Mr. Katsof is provided any documentation necessary for his testimony.

Relative Prejudice in Having Mr. Katsof Testify By Video

9. Alexion requests that the Panel exercise its powers under Rule 6(1)(a) and (e) of the *Patented Medicine Prices Review Board Rules of Practice and Procedure* to permit Mr. Katsof to testify by video conference. Mr. Katsof's testimony is important for Alexion's case and Alexion will be seriously prejudiced if Mr. Katsof is unable to testify.

10. The video capabilities will allow the Panel and counsel for Board Staff to see, hear, and fully evaluate Mr. Katsof's evidence and will in no way prejudice Board Staff or restrict the Panel's ability to assess Mr. Katsof's testimony.

11. There is a strong and longstanding body of case law that supports permitting Mr. Katsof to testify via video conference. In *Hryniak v Mauldin*,¹ the Supreme Court of Canada recently signalled the need to move away from traditional processes of adjudication in favour of modern, proportionate, timely and affordable procedures that meet the needs of any particular case.²

12. The Supreme Court of Canada's direction in *Hryniak* was recently applied in two Ontario Superior Court decisions where the court positively endorsed the use of video conference technology to transmit witness testimony. In *Chandra v Canadian Broadcasting Corp.*,³ Justice Mew, referring to *Hryniak* and modern advances in technology, allowed testimony to be tendered by video concluding that "[t]he use of video or similar technologies does not now represent a significant deviation from the general principle favouring oral evidence in court."⁴ His Honour also found that "[a]rbitrations and other private forms of dispute resolution already routinely use video conferencing and, indeed, video testimony can be and is often used in criminal cases in Canadian courts, even where credibility is a central issue and mistakes are high."⁵

¹ 2014 SCC 7 [*Hryniak*].

² *Ibid* at para 2.

³ 2015 ONSC 5385 [*Chandra*].

⁴ *Ibid* at para 20.

⁵ *Ibid* at para 22.

13. Echoing Justice Mew's finding, the court in *Davies v Clarington (Municipality)*⁶ also expressly followed the Supreme Court of Canada's call for a positive culture shift and noted that there was a growing trend, both in Canada and internationally, "towards the use of video technology for the administration of justice".⁷ Notably, the court in *Davies* referred to the longstanding case of *Pack All Manufacturing Inc. v Triad Plastics Inc.*⁸, decided 16 years ago, which strongly approved the merits of video conferencing technology (even as it stood at that time) noting it allows the decision-maker to see "the witness full face on, in colour and live in a conference facility".⁹

14. The fair and expeditious conduct of these proceedings requires an order permitting Mr. Katsof to testify by video conference. There is no prejudice to Board Staff if Mr. Katsof is permitted to testify in this manner and refusing to allow it is highly prejudicial to Alexion as Mr. Katsof has important evidence for Alexion that will only be available if he can testify by video.

THE FOLLOWING DOCUMENTARY EVIDENCE is being relied upon by Alexion for the purpose of this motion:

1. Letter of Dr. Stuart Glaser dated 9 January 2017;
2. Witness Statement of Barry Katsof; and
3. Such further or other material as counsel may adduce and the Panel admit.

⁶ 2015 ONSC 7353 [*Davies*].

⁷ *Ibid* at para 29.

⁸ [2001] OJ No 5882 (Ont SCJ) [*Pack All*].

⁹ *Ibid* at para 6.

Dated: 10 January 2017

Original signature redacted

Malcolm Ruby
GOWLING WLG (CANADA) LLP
1 First Canadian Place
100 King Street West
Suite 1600
Toronto, ON M5X 1G5

Malcolm N. Ruby
Tel: 416-862-4314
Fax: 416-862-7661
malcolm.ruby@gowlings.com

Alan West
Tel: 416-862-4308
Fax: 416-862-7661
alan.west@gowlings.com

Lawyers for the Respondent

TO: PATENTED MEDICINE PRICES REVIEW BOARD
Legal Services Branch
Standard Life Centre
333 Laurier Avenue West, Suite 1400
Ottawa, ON K1P 1C1
Tel: (613) 952-7623
Fax: (613) 952-7626

Guillaume Couillard (*Secretary of the Board*)
guillaume.couillard@pmprb-cepmb.gc.ca

AND TO: PERLEY-ROBERTSON HILL & MCDUGAL LLP
340 Albert Street, Suite 1400
Ottawa, ON K1R 7Y6
Tel: (613) 566-2833
Fax: (613) 238-8775

David Migicovsky
dmigicovsky@perlaw.ca

Christopher Morris
cmorris@perlaw.ca

Lawyers for Board Staff

AND TO: MINISTRY OF JUSTICE
Legal Services Branch
PO Box 9280 STN PROV GOVT
1001 Douglas Street
Victoria, B.C. V8W 9J7
Tel: (250) 356-893
Fax: (250) 356-8992

Ms. Sharna Kraitberg

Sharna.Kraitberg@gov.B.C..ca

Lawyer for Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Minister of Health
Representative for the Interveners, the Provinces of Manitoba, Ontario, and Newfoundland and Labrador

AND TO: CANADIAN LIFE AND HEALTH INSURANCE ASSOCIATION
79 Wellington St. West, Suite 2300
P.O. Box 99, TD South Tower
Toronto, ON M5K 1G8
Tel: (416) 777-2221
Fax: (416) 777-1895

Craig Anderson

CAnderson@clhia.ca

Lawyer for Canadian Life and Health Insurance Association

AND TO: BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street
Suite 1300
Ottawa, ON K1P 1J9

Jamie Mills

jmills@blg.com

Beverley Moore

bmoore@blg.com

Lawyers for BIOTECCanada