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. and the medicine "Soliris"

NOTICE OF MOTION AND WRITTEN REPRESENTATIONS OF BOARD STAFF

Board Staff makes this motion pursuant to Rule 24 of the *Rules of Practice and Procedure* for the issuance of subpoenas for the attendance of witnesses (Eric Lun and John Haslam) and for the production or inspection of documents.

THE GROUNDS FOR THE MOTION ARE:

1. The British Columbia Minister of Health is intervening in this proceeding and has indicated its intention of calling Mr. Eric Lun as a witness.

2. Alexion has indicated its intention of calling as a witness Mr. John Haslam who is the President and General Manager of Alexion Pharma Canada Corp. ("Alexion").

3. Paragraphs 32 to 37 of the Witness Statement of Mr. Haslam references negotiations between Alexion and the various provincial drug plans regarding Product Listing Agreements ("PLAs") that were negotiated as part of a process known as the "panCanadian Pricing Alliance" ("pCPA"). Mr. Haslam's Witness

Statement provides selective information with respect to the negotiation of the PLAs which were negotiated through the pCPA process.

4. Shortly before the hearing Board Staff received documentation from counsel for Alexion which they requested to be put into the Joint Book of Documents. Included in these documents were six emails (found at Tab 124 of the Joint Book of Documents marked as Exhibit 1) regarding the negotiation of a PLA agreement for Soliris for the treatment of PNH.

5. Both Alexion and the BC Minister of Health are relying upon evidence regarding the negotiation of PLAs.

6. It is manifestly obvious that there is considerably more documentation regarding the negotiation of the PLA agreements by Alexion with the various provincial drug plans. Obviously Alexion has only produced those documents which they rely on and which support their position.

7. Board Staff does not have copies of any of this documentation other than the select emails that have been provided by the BC Minister of Health and Alexion.

8. Alexion has alleged that the negotiation of the PLAs is relevant for the purpose of determining the average transaction price ("ATP") paid for Soliris.

9. Board Staff needs the opportunity to review these documents to determine whether the evidence that Mr. Lun and Mr. Haslam intend to provide contains the most relevant information.

The Patented Medicines Prices Review Board has subpoenaed relevant documents in past cases

10. Pursuant to Section 96(1) of the *Patent Act*, the Board has all the powers, rights and privileges as are vested in a superior court with respect to, among other things, the production and inspection of documents.

11. In *ratio-Salbutamol HFA*, the Panel issued a subpoena to GSK requiring the production of information to the Board in respect of all sales of ratio HFA to ratiopharm, including quantities and prices charged with respect to such sales.

12. The Panel agreed with Board Staff that the requested ex-factory prices were *relevant* to Board Staff's determination of whether ratiopharm sold HFA at an excessive price and ordered ratiopharm to produce the information.

13. In *Sandoz*, Board Staff examined a representative of Novartis Canada Inc., and obtained documents from Sandoz and Novartis Canada Inc., under the authority of a subpoena issued by the Board.

Relevant evidence is admissible

14. It is a principle of fairness that all relevant documents should be produced. Fairness requires that a party who will be affected by a decision must first be informed of the case to be met.

15. The following definition of "relevant" has been accepted by the Supreme Court of Canada in *R v. Cloutier*, [1979] 2 SCR 709:

> For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other. One fact is not relevant to another if it does not have real probative value with respect to the latter.

16. In *The Law of Evidence in Canada* the authors note at page 51 that whether a fact bears the required relationship to another fact is not usually determined by the application of a legal test, but it is an exercise in the application of experience and common sense.

17. In *Administrative Law in Canada* the authors note at pages 60-61 that relevance is determined by the purpose and subject matter of the proceedings and that evidence relevant to those matters is admissible.

18. Accordingly, relevant evidence typically concerns the key facts on which the decision will turn.

19. At page 76 of *Administrative Law in Canada*, the authors discuss the validity of subpoena powers and emphasize that a subpoena is enforceable so long as the tribunal proceeding has a valid regulatory purpose, and the purpose of the subpoena is to gather evidence related to the purpose.

20. Thus, relevant documents which are requested in a subpoena should be produced. This is particularly the case when there is no procedure for automatic disclosure in the relevant rules, such as there would be in civil litigation

Waiver by partial disclosure

21. It is well-settled that a litigant may not choose to disclose only select and self-serving excerpts of information to bolster his or her case while refusing to disclose the rest of the information relating to the same subject matter. Where a litigant discloses partial information, fairness will require that all of the information relating to that issue to be disclosed. Disclosure will be ordered despite the fact that the information would otherwise be considered to be protected by confidentiality, litigation privilege, or even the very strong protection afforded to solicitor client privilege.

> ***Browne (Litigation Guardian of) v. Lavery,*** 2002 CanLII 49411 (ON SC) [Browne]
> ***S.C.L. v. Ontario,*** 2004 CanLII 14107 (ON SC)
> ***K.F. Evans Ltd. v. Canada (Minister of Foreign Affairs),*** [1996] F.C.J. No. 30 (FC TD) [Evans]
> ***Canadian Memorial Services v. Personal Alternative Funeral Services Ltd.,*** 1999 CanLII 8502 (FC) [Canadian Memorial]

22. In *Browne* the defendant produced an expert report which referred to a report prepared by another expert. The defendant permitted plaintiff's counsel to interview the other expert. The defendant claimed litigation privilege over the other expert's report and undertook not call the expert at trial. The court held that where a litigant makes partial disclosure of a matter, fairness may require all related information to be disclosed, citing from previous authorities and case law at paragraph 22 as follows:

> This approach has been coined by some writers as the "fairness test". As discussed by Wigmore, (Wigmore on Evidence, vol. 8 (McNaughton rev.,

1961)) note 28, at para. 2327, at pp. 635-36, cited in Hunter v. Rogers (1981), 1981 CanLII 710 (BC SC), 34 B.C.L.R. 206, [1982] 2 W.W.R. 189 (S.C.):

> There is always also the objective consideration when [a privileged person's] conduct touches a certain point of disclosure, fairness requires that his[/her] privilege shall cease whether [s/]he intended that result or not. [S/]He cannot be allowed, after disclosing as much as [s]he pleases, to withhold the remainder. [S/]He may elect to withhold or to disclose, but after a certain point his[/her] election must remain final.

23. S.C.L. took a similar approach in the context of a claim for solicitor client privilege. The plaintiff had referred to a number of communications between himself and his solicitor in his book of documents, but refused to answer questions relating to the communications in examination for discovery. The Court considered case law and authorities on the issue of waiver by partial disclosure and held at paragraph 68:

> Once the otherwise privileged document is disclosed the privilege that would apply to other communications between the solicitor and client as to the same subject matter is waived, as is set out above. Otherwise a party could engage in selective and self-serving disclosure in respect of a particular topic, disclosing only those privileged documents that support the position of the party and not disclosing those communications that do not.

24. In *Evans* an affidavit by the respondent disclosed three memorandum which were redacted on the basis that confidentiality was protected by either solicitor client privilege or the *Canada Evidence Act*. The Federal Court reviewed case law addressing waiver by implication demonstrating that waiver of part of a communication will be held to be waiver of the entire communication where fairness so required. The Court held at paragraphs 23 and 24:

> In the information not disclosed on account of solicitor-client privilege, there is also commentary pertaining to these issues. (For example, page 13, deletion 19.) The inconsistency of disclosing some solicitor-client advice and maintaining confidentiality over other advice both pertaining to the

> issues raised by the applicant causes me concern. In the circumstances of this case, to ensure that the Court and the applicant are not mislead, and in the interest of consistency, the respondent must be considered to have waived all rights to solicitor-client privilege.
>
> I am satisfied that there has been a waiver of privilege of some solicitor-client communication, and that in the circumstances of this case fairness and consistency must result in an entire waiver of the privilege. This is a case in which, as Wigmore says, the conduct of the respondent touches a certain point of disclosure at which fairness requires that privilege shall cease whether that is the intended result or not.

25. In *Canadian Memorial* the plaintiff referred to certain settlement agreements that had been entered into with others. The settlement agreements were produced with sections blacked out. A Prothonotary had refused to require the plaintiff to produce unredacted versions of the settlement agreements. The Federal Court noted that the Prothonotary had overlooked the jurisprudence relating to waiver by partial disclosure. The Court held at paragraph 4:

> The plaintiff waived whatever confidential status the agreements might have had when it relied upon them and produced them to support its response to the defendant"s position. The plaintiff cannot selectively choose to disclose parts of those documents but not others unless the parts are severable, relating to a different subject, or irrelevant. The parts that have not been disclosed are closely related to those that have been disclosed. They are relevant to the scope of the protection of the trade-mark that the plaintiff asserted in the context of this other litigation. The weight to be given to them is, of course, a matter for the judge hearing the claim on its merits.

26. The reasoning of the cases mentioned above clearly require that all communications relating to the PLAs be disclosed. The Respondent is not entitled to selectively choose to disclose parts of the communication that bolsters

its case and not disclose the remaining materials. Fairness requires that all communications relating to the PLA be provided to Board Staff.

THE FOLLOWING DOCUMENTARY EVIDENCE is being relied upon:

a) The pleadings and proceedings herein;

b) The Joint Book of Documents and Tab 124 of the Joint Book of Documents; and

c) The Witness Statement of John Haslam.

DATED January 20, 2017

Original signature redacted

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