

**Date: 20060905**

**Docket: A-126-06  
A-308-06**

**Citation: 2006 FCA 294**

**CORAM: NOËL J.A.  
SEXTON J.A.  
EVANS J.A.**

**BETWEEN:**

**A-126-06**

**APOTEX INC.**

**Appellant**

**and**

**ABBOTT LABORATORIES, ABBOTT LABORATORIES, LIMITED AND**

**THE MINISTER OF HEALTH**

**Respondents**

**A-308-06**

**APOTEX INC.**

**Appellant**

**and**

**ABBOTT LABORATORIES, ABBOTT LABORATORIES, LIMITED AND**

**THE MINISTER OF HEALTH**

**Respondents**

Heard at Ottawa, Ontario, on September 5, 2006.

Judgment delivered from the Bench at Ottawa, Ontario, on September 5, 2006.

REASONS FOR JUDGMENT OF THE COURT BY:

NOËL J.A.

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**REASONS FOR JUDGMENT**

**(Delivered from the Bench at Ottawa, Ontario, on September 5, 2006)**

[1] These are appeals by Apotex Inc. (“Apotex”) against two decisions of the Federal Court rendered on March 15 and June 28, 2006, respectively. In the first decision (Appeal A-126-06) O’Keefe J. granted Abbot Laboratories Limited’s (“Abbott”) motion to disqualify the expert testimony of Dr. Dunitz and to strike his evidence from the record. In the second decision (A-308-06), Mactavish J. upheld an earlier decision of Prothonotary Lafrenière who denied Apotex’ motion for leave to replace the affidavit of Dr. Dunitz with that of another expert.

[2] By order dated August 3, 2006, the appeal from the decision of Mactavish J. was set to be heard today immediately following the hearing of the appeal from the decision of O’Keefe J. Having heard Apotex’ arguments with respect to both appeals, we see no basis for intervention.

[3] With respect to the first, O’Keefe J. held that Dr. Dunitz’s proposed testimony on behalf of Apotex gave rise to a risk of prejudice to Abbott since Dr. Dunitz had been previously hired by Abbott and Abbot’s legal strategy had been disclosed to him. In support of its appeal, Apotex alleges that O’Keefe J. erred in failing to find that Abbott had retained Dr. Dunitz for an improper purpose, that is to eliminate Dr. Dunitz from the pool of experts available to Apotex. According to Apotex, this is “the only conclusion” that can be drawn from the record, and O’Keefe J. made a palpable and overriding error in failing to draw that inference.

[4] With respect, we are unable to agree. The allegation made by Apotex is a serious one that should not be made in the absence of clear and compelling evidence. No such evidence was adduced, and it was open to O’Keefe J. to hold on the record before him that Apotex’ allegation had not been made out.

[5] In the second decision under appeal, Mactavish J. upheld the decision of Prothonotary Lafrenière denying Apotex leave to file additional evidence in replacement of Dr. Dunitz’s evidence. Prothonotary Lafrenière denied this relief because the same relief had been sought by Apotex in the proceeding before O’Keefe J. Indeed the Notice of Appeal filed against that decision, which was part of the record before Prothonotary Lafrenière, alleged *inter alia* that O’Keefe J. erred in failing to make an order that Apotex be permitted to file the affidavit of another expert.

[6] This is what prompted the Prothonotary Lafrenière to hold that Apotex was making an “end run” around the appeal process by attempting to obtain from him the very relief which it was seeking in the other proceeding.

[7] There is no doubt that in these circumstances, Prothonotary Lafrenière was entitled to exercise his discretion as he did, and that Mactavish J. committed no reviewable error in declining to interfere with his decision.

[8] Apotex has conceded for purposes of the appeal that it did not seek to obtain leave to file the affidavit of another expert before O’Keefe J. (Apotex’ Memorandum, para. 22). It may well be that

Prothonotary Lafrenière would have exercised his discretion differently, had that concession been made when the matter came before him. However, it was not. Based on the record as it stood before him, Prothonotary Lafrenière cannot be faulted for denying Apotex' motion to file additional evidence on the basis that he did.

[9] For these reasons, which will be filed in both file A-126-06 and file A-308-06, the appeals are dismissed with costs to Abbott in any event of the cause in each instance.

“Marc Noël”

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-126-06 & A-308-06

**APPEALS FROM THE ORDERS OF THE FEDERAL COURT DATED MARCH 15, 2006  
AND JUNE 28, 2006 RESPECTIVELY, NO. T-1847-03**

**STYLE OF CAUSE:** Apotex Inc v. Abbott Laboratories et  
al

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** September 5, 2006

**REASONS FOR JUDGMENT OF THE COURT:** Noël, Sexton, Evans, JJ.A.

**RENDERED FROM THE BENCH BY:** Noël, J.A.

**APPEARANCES:**

|                      |  |
|----------------------|--|
| Mr. Edward J. Babin  | FOR THE APPELLANT                          |
| Mr. Steven G. Mason  | FOR THE RESPONDENT                         |
| Mr. Andrew Mandlsohn |  |
| No-one appearing     | FOR THE RESPONDENT<br>(Minister of Health) |

**SOLICITORS OF RECORD:**

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| Davies Ward Phillips & Vineberg LLP<br>Toronto, Ontario                  | FOR THE APPELLANT                          |
| McCarthy Tétrault LLP<br>Toronto, Ontario                                | FOR THE RESPONDENT                         |
| Mr. John H. Sims<br>Deputy Attorney General of Canada<br>Ottawa, Ontario | FOR THE RESPONDENT<br>(Minister of Health) |