

Federal Court of Appeal



Cour d'appel fédérale

Date: 20130219

Docket: A-370-12

Citation: 2013 FCA 47

**CORAM: BLAIS C.J.
GAUTHIER J.A.
TRUDEL J.A.**

BETWEEN:

**APOTEX INC. and
APOTEX PHARMACHEM INC.**

Appellants

and

**ASTRAZENECA CANADA INC.,
ASTRAZENECA AKTIEBOLAG
and ASTRAZENECA UK LIMITED**

Respondents

Heard at Montreal, Quebec, on February 19, 2013.

Judgment delivered from the Bench at Montreal, Quebec, on February 19, 2013.

REASONS FOR JUDGMENT BY:

THE COURT

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REASONS FOR JUDGMENT BY THE COURT
(Delivered from the Bench at Montreal, Quebec, on February 19, 2013)

[1] Apotex Inc. and Apotex Pharmachem Inc. (collectively Apotex) are the defendants to an infringement action brought by the AstraZeneca group of companies. In the course of that proceeding, AstraZeneca, pursuant to Rule 249, has successfully moved for the production of samples of Apotex esomeprazole magnesium bulk, blends, tablet cores, finished tablets and other related materials for destructive testing.

[2] Apotex appeals from the order made by Mosley J. of the Federal Court (2012 FC 991) who upheld the previous order dated June 5, 2012 by Prothonotary Aronovitch (T-1668-10) who found that “the proposed sampling is necessary and expedient in order to allow AstraZeneca to adduce its own independent evidence to support and make its case on infringement” (Prothonotary’s endorsement at page 2).

[3] Apotex argues that the Federal Court misconstrued, in several ways, the applicable test for the production of samples under Rule 249 of the *Federal Courts Rules*, SOR/98-106. It submits that the Federal Court read down the statutory language of the Rule and failed to apply the single “necessary and expedient” standard to all of its aspects.

[4] Moreover, Apotex also alleges that the Prothonotary committed errors by failing to recognize AstraZeneca’s lack of evidence establishing that the samples would likely assist the innovator in making its case, which is supported by a patent construction “without any air of reality” especially considering that Dr. Byrn’s affidavit was not filed as evidence in this case. As well, the Prothonotary should have considered two additional factors: first that AstraZeneca led no evidence that the order sought would not prejudice Apotex; and second that AstraZeneca had another course of action available. It could have emulated Apotex’s manufacturing process or accessed marketed tablets for testing.

[5] Finally, Apotex also appeals the order as to costs. Costs were ordered to be paid forthwith. At the hearing of this appeal, Apotex indicated that it no longer wishes to pursue this issue.

[6] For reasons issued this day in appeal file A-337-12, we dismiss all of Apotex's arguments regarding the alleged errors of law committed by the Federal Court in identifying the requirements of Rule 249. We are satisfied that the Federal Court committed no error in applying Rule 249 to the facts of this case.

[7] Having carefully reviewed the order and endorsement of Prothonotary Aronovitch and the extensive reasons of the Judge, we have not been persuaded that they committed errors of principle or any other errors.

[8] As a result, this appeal will be dismissed with costs.

« Pierre Blais »
Chief Justice

« Johanne Gauthier »
J.A.

“Johanne Trudel”
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-370-12

STYLE OF CAUSE: Apotex Inc. et al v.
Astrazeneca Canada Inc. et al

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: February 19, 2013

REASONS FOR JUDGMENT OF THE COURT BY: THE COURT

DELIVERED FROM THE BENCH BY: TRUDEL J.A.

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