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Apotex continues to contest ATI decisions on ANDS: Information Commissioner upheld as proper party to Apotex ATI challenge

Case:	*Apotex Inc. v Minister of Health et al.,* 2016 FC 776
Nature of case:	Appeal from Order granting leave to add party to judicial review application
Successful party:	Information Commissioner of Canada
Date of decision:	July 8, 2016

Summary

The Federal Court dismissed Apotex Inc.'s appeal from a prothonotary's order granting the Information Commissioner of Canada (**Commissioner**) leave to be added as a respondent to Apotex's applications for judicial review.

The underlying judicial review applications arise out of three separate but identical decisions of the Minister of Health (**Minister**) to disclose information from Apotex's Abbreviated New Drug Submission (**ANDS**) in response to an access to information request (**ATI**).

Background

On September 8, 2015, Apotex commenced the three applications for judicial review of the Minister's decision. Apotex alleged that the Minister erred in its decision to disclose this information as it contains:

(a) Apotex's trade secrets;

(b) financial, commercial, scientific or technical information that is confidential information supplied to the Minister and is treated as confidential by the Minister and by Apotex;

(c) information that, if disclosed, could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of Apotex; and

(d) information, that, if disclosed, could reasonably be expected to interfere with contractual or other negotiations of Apotex.

In its application, Apotex also alleged a lack of procedural fairness on the part of the Minister in reaching the decision to disclose the information.

On April 4, 2016, the prothonotary granted the Commissioner's motion requesting that the Commissioner be added as a respondent to the applications in accordance with paragraph 42(1)(c) of the *Access to Information Act*.

Apotex's appeal dismissed by the Federal Court

On appeal, the Federal Court found that the prothonotary made no error of law in failing to apply the stringent test of "necessity" for adding a party to a proceeding pursuant to Rule 104 of the *Federal Courts Rules* (**Rules**). The prothonotary correctly relied on paragraph 42(1)(c) of the *Access to Information Act* as the basis for adding the Commissioner as a respondent. The Federal Court found that there must be some interplay between the *Rules* and a statutory provision such as paragraph 42(1)(c) that permits a party to be added with leave of the Court.

Further, the Federal Court dismissed Apotex's allegation that the prothonotary breached procedural fairness by failing to consider Apotex's submissions and its request for an oral hearing on the motion. The Federal Court found that the prothonotary's reference to the "Applicant's Motion Record" referred to Apotex as the applicant in the proceeding, and not the Commissioner, even though the Commisioner was the applicant on the motion.

The lack of a specific reference to Apotex's request for an oral hearing also did not support Apotex's argument that its submissions were not considered. A prothonorary is not obliged to hold an oral hearing or to provide reasons for not doing so.

Standard of review

The Federal Court found that a discretionary decision of a prothonotary should only be interfered with where question on the motion is vital to the final issue in the case, or where the order was clearly wrong, proceeded on a wrong principle, or misapprehended the facts.

Apotex argued that the standard of review to be applied by the Court should be the appellate standard of review articulated by the Supreme Court in *Housen* v *Nikolaisen*, 2002 SCC 33 of palpable and overriding error. This is consistent with the Federal Court of Appeal's recent effort to homogenize the standard of review (reported on here and here).

Apotex has appealed the decision.

Links to the decision:

Federal Court Decision: *Apotex Inc. v Minister of Health et al.*, 2016 FC 776

Order of Prothonotary (unreported): Order dated April 4, 2016

Jillian Hyslop
Kristin Wall
Sara Zborovski

For more information, please contact your IP/Life sciences or healthcare practice professional at Norton Rose Fulbright Canada LLP.

For a complete list of our IP team, click here. For a complete list of our Life sciences and healthcare team, click here.