

**Date: 20081210**

**Docket: A-576-08**

**Citation: 2008 FCA 394**

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

**BETWEEN:**

**APOTEX INC.**

**Appellant  
(Defendant)**

**and**

**SANOFI-AVENTIS CANADA INC. and  
SANOFI-AVENTIS GmbH SCHERING CORPORATION**

**Respondent  
(Plaintiffs)**

**AND BETWEEN:**

**APOTEX INC.**

**Appellant  
(Plaintiff by Counterclaim)**

**and**

**SANOFI-AVENTIS CANADA INC.,  
SCHERING CORPORATION,  
SANOFI-AVENTIS DEUTSCHLAND GmbH  
And RATIOPHARM INC.**

**Respondents  
(Defendants by Counterclaim)**

Heard at Toronto, Ontario, on December 10, 2008.

Judgment delivered from the Bench at Toronto, Ontario, on December 10, 2008.

REASONS FOR JUDGMENT OF THE COURT BY:

EVANS J.A.

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## REASONS FOR JUDGMENT

### EVANS J.A.

[1] We are not persuaded that Justice Snider made any error warranting the intervention of this Court when, on November 15, 2008, she denied a motion by Apotex Inc. requesting that she recuse herself from presiding at the trial of Court File No. T-161-07. This is an action by the respondents to this motion for the infringement of Canadian Letters Patent No. 1,341,206 (“206 Patent”) by Apotex, which is defending the action on the ground that the patent is invalid for several reasons, including obviousness.

[2] In particular, we find no inappropriate predisposition on the part of Justice Snider with respect to the issues in dispute in T-161-07 on the basis of the fact that she was the Judge in Court File Nos. T-482-03 and T-1548-06, even though the issues involved in these three cases may overlap to a degree.

[3] Court File No. T-482-03 arose under the *Patented Medicines (Notice of Compliance) Regulations* (“PMNOC Regulations”). In that proceeding, Justice Snider held that a Notice of Allegation alleging that the ’206 Patent, which is at issue in T-161-07, was invalid was not justified: *Aventis Pharma Inc. v. Pharmascience Inc.* (2005), 38 C.P.R. (4th) 441 (F.C.), affirmed 53 C.P.R. (4th) 453 (F.C.A.), leave to appeal to the Supreme Court of Canada denied, [2006] S.C.C.A. No. 362. However, because of their summary nature, PMNOC proceedings are decided on an inevitably more limited evidential base than a trial.

[4] Court File No. T-1548-06 was an infringement action in which Apotex was found to have infringed Canadian Letters Patent No. 1,341,196: *Laboratoires Servier v. Apotex Inc.* (2008), 67 C.P.R. (4th) 241 (F.C.) (“*Servier*”). The validity of the ’206 Patent was only tangential to the issues in that case.

[5] However, in argument before us Apotex relied heavily on a sentence in paragraph 260 of Justice Snider’s reasons in *Servier* (which total 519 paragraphs in all) as evidence of an improper predisposition, where she said of a witness, Dr Elizabeth Smith, that her “inventiveness and ingenuity is unquestioned”. However, this comment is not a finding of credibility of Dr Smith, who is likely to be a witness at the T-161-07 trial. Nor is it so sufficiently clear and definitive as to give rise to a reasonable apprehension that Justice Snider would not fairly judge whether the ’206 Patent is invalid on the ground of obviousness on the basis of whatever evidence may be led at the T-161-07 trial. Indeed, counsel for Apotex conceded that the inventiveness and ingenuity of Dr Smith were indeed not questioned in T-1548-06.

[6] There is a strong presumption of judicial impartiality: *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at para. 59 (“*Wewaykum*”). This is particularly difficult to rebut when an allegation of a reasonable apprehension of bias is based on a judge’s previous encounter with a party, a witness or an issue in his or her judicial capacity. We are not satisfied that Apotex has provided the “serious” or “substantial” grounds (*Wewaykum* at para. 76) necessary to rebut the presumption here.

[7] For these reasons, the appeal will be dismissed with costs.

“John M. Evans”

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-576-08

**(APPEAL FROM A DECISION OF SNIDER, J. DATED 13-NOV-08, DOCKET NO. (T-161-08))**

**STYLE OF CAUSE:** *APOTEX INC. v. SANOFI-AVENTIS CANADA INC. and SANOFI-AVENTIS GmbH SCHERING CORPORATION AND BETWEEN: APOTEX INC. v. SANOFI-AVENTIS CANADA INC., SCHERING CORPORATION, SANOFI-AVENTIS DEUTSCHLAND GmbH and RATIOPHARM INC.*

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** DECEMBER 10, 2008

**REASONS FOR JUDGMENT OF THE COURT BY:** (SEXTON, EVANS, RYER JJ.A.)

**DELIVERED FROM THE BENCH BY:** EVANS J.A.

**APPEARANCES:**

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