

Federal Court of Appeal



Cour d'appel fédérale

**Date: 20130219**

**Docket: A-300-12**

**Citation: 2013 FCA 46**

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

**BETWEEN:**

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

**Appellants**

**and**

**H. LUNDBECK A/S**

**Respondent**

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**

Federal Court of Appeal



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**Appellants**

**and**

**H. LUNDBECK A/S**

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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) appeal from the order of Tremblay-Lamer J. (Docket T-1407-09, dated June 13, 2012) (the Judge) upholding the order of Prothonotary Tabib (Docket T-1407-09, dated June 1, 2012) who ordered each company individually to provide Lundbeck with 250g of escitalopram from at least three representative batches. The Prothonotary's order was made pursuant to Rule 249 of the *Federal Courts Rules*, SOR/98-106.

[2] The Judge applied the correct test to determine the appeal before her in respect of a motion that did not involve any question vital to the final issue of the case. She concluded that Apotex had failed to establish that the Prothonotary erred in law. She also found that this was not a clear case of misuse of judicial discretion by the case manager, especially considering that Rule 249 accords the decision-maker discretion to order the production of samples when it is expedient to do so for the purpose of obtaining information or evidence in full.

[3] Apotex disagrees with the Federal Court's interpretation of Rule 249 and argues that the Judge and Prothonotary below erred in law by not recognizing that the granting of an order under Rule 249 is an exceptional remedy and one of last resort. As a result, the Prothonotary should never have issued the impugned order.

[4] Although formulated differently, Apotex's arguments regarding the legal test applicable to Rule 249 are consistent with the submissions it made in four other appeals heard this day by the same panel. For reasons expressed in appeal file A-337-12 (consolidated with appeal files A-338-12 and A-339-12), Apotex's submissions are rejected. We are satisfied that the Federal Court adopted the proper test and applied it correctly to the facts.

[5] Although not pressed at the hearing of this appeal, Apotex also says that there was insufficient evidence to reach any conclusion other than H. Lundbeck A/S was on a fishing expedition. In the Appellants' view, both the Judge and the Prothonotary inverted the burden of proof and made palpable and overriding factual errors. We disagree.

[6] As a result, we have not been persuaded that either decision maker made any error that would justify our intervention.

[7] The appeal will be dismissed with costs.

“Pierre Blais”

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Chief Justice

“Johanne Gauthier”

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J.A.

“Johanne Trudel”

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-300-12

**STYLE OF CAUSE:** Apotex Inc. et al. v.  
H. Lundbeck A/S

**PLACE OF HEARING:** Montreal, Quebec

**DATE OF HEARING:** February 19, 2012

**REASONS FOR JUDGMENT OF THE COURT BY:** THE COURT

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

**APPEARANCES:**

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