

**Date: 20080702**

**Docket: T-2078-00**

**Citation: 2008 FC 824**

**Ottawa, Ontario, July 2, 2008**

**PRESENT: The Honourable Mr. Justice Hugessen**

**BETWEEN:**

**BRISTOL-MYERS SQUIBB COMPANY and  
BRISTOL-MYERS SQUIBB CANADA INC.**

**Plaintiffs**

**and**

**APOTEX INC.**

**Defendant**

**REASONS FOR ORDER AND ORDER**

[1] Notwithstanding Mr. Lederman's able submissions I am simply not persuaded that either of the points which he takes issue with, in the Prothonotary's pre-trial Order, demonstrate an error of law and since the Order was clearly discretionary he must show that the Prothonotary committed an error of law. Indeed I think the cases go further, and that to succeed he must show that she was clearly wrong in giving the Order.

[2] The two aspects of the Order with which Mr. Lederman takes issue are first the Prothonotary's decision that the venue of the trial which was thought by all the parties at that time, to be of a projected duration of almost 100 days, should depend upon the availability of Court

resources. What the Prothonotary said was that the Chief Justice's office would fix the trial in either Montreal or Toronto depending upon availability. In my view that was clearly not an error. In fact, I think she was clearly right.

[3] For a trial of that projected length, I think that the interests of justice do dictate that the trial should be held as soon as possible. As for the other matters that go into the so-called balance of convenience test with respect to venue, there is very little difference between Montreal and Toronto. The two cities are in constant connection by hourly airplane flights, daily train and an excellent road system and the Court has available, if necessary, videoconference facilities. Availability of where a trial should be held, where the trial is of such exceptional length such as this one, is simply not a matter that can be seriously debated.

[4] The other issue which was dealt with by the Prothonotary had to do with the production of expert reports.

[5] In my view, there is not as Mr. Lederman urges, an absolute right to produce rebuttal reports. What the Prothonotary's Order foresaw was that each party would produce reports dealing with those issues (in the plaintiffs' case infringement, and in the defendant cross-plaintiffs' case, invalidity) upon which the party had the burden of proof. Then each party was given the right to produce expert reports to the contrary in the plaintiffs' case, of course with respect to the points that had been taken by the defendant's experts, and the defendant's case with respect to the points that

had been taken by the plaintiffs' experts. Then the Prothonotary went on to permit the production of rebuttal reports subject to leave of the Court.

[6] Even if the right to produce rebuttal reports is a right and it is not, in my view, an absolute right, to subject it to leave of the Court was a simple prudent measure to ensure that at this stage, because we are talking about reports which would be produced a mere 30 days before the opening of the trial, it was a prudent move to make the production of such reports subject to the Court's leave so as to make sure that there was no abuse by either counsel who in the defendant's counsels' own words are "crafty".

[7] The motion, in my view, cannot succeed and must fail.

[8] Having heard counsel on the issue of costs it is my view that the defendant should pay costs to the plaintiffs which costs are hereby fixed and assessed in the total amount of \$3,500 all in payable forthwith and in any event of the cause.

**ORDER**

**THIS COURT ORDERS that**

The motion is dismissed; defendant shall pay plaintiffs' costs which are hereby fixed and assessed in the sum of \$3,500 all in forthwith and in any event of the cause.

“James K. Hugessen”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-2078-00

**STYLE OF CAUSE:** BRISTOL-MYERS SQUIBB COMPANY et al  
v.  
APOTEX INC.

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** JUNE 27, 2008

**REASONS FOR ORDER  
AND ORDER:** HUGESSEN J.

**DATED:** JULY 2, 2008

**APPEARANCES:**

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Marc Richard

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