Federal Court  Cour fédérale

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Citation: 2016 FC 776

Ottawa, Ontario, July 8, 2016

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

APOTEX INC.

Applicant

and

MINISTER OF HEALTH AND ATTORNEY GENERAL OF CANADA AND THE INFORMATION COMMISIONER OF CANADA

ORDER AND REASONS

I. Overview

[1] Apotex appeals the Order of Prothonotary Martha Milczynski, made on April 4, 2016, in which she granted the motion of the Information Commissioner of Canada (the Commissioner) for leave to be added as a party, specifically a respondent, to Apotex's application for judicial review.

[2] The underlying application for judicial review relates to three separate but identical decisions of the Minister of Health (the Minister) to disclose information provided by Apotex to the Minister in response to an access to information request by a requester (or requesters).

[3] In the context of seeking the approval of the Minister for Apotex's pharmaceutical product, Apotex submitted an Abbreviated New Drug Submission to the Minister. In doing so, Apotex was required to provide all relevant information regarding its product, including its chemical composition. This information, if disclosed, could have a negative impact on Apotex's scientific, proprietary and other interests, including trade secrets of very high interest to competitors. Apotex notes that this information is confidential and is provided to the Minister on the basis that the Minister will not disclose and will safeguard the information.

[4] In March 2014, the Minister advised Apotex that three access to information requests had been received and requested Apotex's input on whether exemptions applied to permit the information to be withheld. In August 2015, the Minister notified Apotex of its decisions to disclose records in response to the three requests.

[5] By Order of Justice Luc Martineau dated October 14, 2015, this Court granted the parties' joint request that the three applications for judicial review be specially managed. Prothonotary Milczynski was subsequently appointed as the Case Management Judge and, in this capacity, has dealt with and will continue to deal with a range of procedural motions leading up to the determination of the three applications for judicial review.

II. The Prothonotary's Order

[6] On February 29, 2016, the Commissioner brought a motion in writing pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 (the Rules) seeking leave of the Court to be added as a respondent, as permitted by paragraph 42(1)(c) of the *Access to Information Act*, RSC, 1985, c A-1 (the Act).

[7] By order dated April 4, 2016 (the Order), the Prothonotary granted the motion and directed that the Commissioner be added as a respondent to the proceedings and that the style of cause be amended accordingly and, among other things: set out the applicable time frames for the exchange of documents; directed that the Commissioner be served with all further filings; directed that the Commissioner be permitted to file affidavit material and to complete cross-examination on affidavits within the time frames set out; and, directed that the Commissioner be permitted to make oral representations at the hearing of the application for judicial review.

III. The Issues

[8] Apotex appeals the Order, arguing that:

- The Prothonotary breached procedural fairness by failing to consider the submissions of Apotex, including failing to consider its request that an oral hearing be held;
- The Prothonotary erred in law by adding the Commissioner as a respondent; and,
- As a result of the errors, the Court should consider *de novo* whether the Commissioner should be added as a respondent.

IV. The Standard of Review

[9] The standard of review of a prothonotary's discretionary decision was established in *Canada v Aqua-Gem Investments Ltd*, [1993] 2 FC 425, 149 NR 273 (FCA) [*Aqua-Gem*].

[10] In *Merck & Co Inc v Apotex Inc*, 2003 FCA 488 at para 19, [2004] 2 FCR 459, leave to appeal to SCC refused, [2004] SCCA No 80 (QL) [*Merck*] , Justice Décary restated the *Aqua-Gem* test as follows: "Discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless: (a) the questions in the motion are vital to the final issue of the case, or (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of facts."

[11] There is no dispute that the addition of the Commissioner as a respondent is not vital to the final outcome of the application for judicial review. Only the second prong of the test is applicable.

[12] Apotex initially argued that the standard of review to be applied by the Court should be the appellate standard of review articulated in *Housen v Nikolaison*, 2002 SCC 33, [2002] 2 SCR 235 [*Housen*] of "palpable and overriding error." However, Apotex agrees that in the present case there would be no difference between assessing whether the "orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of facts" or assessing whether the Prothonotary made a palpable and overriding error.

Other principles from the jurisprudence

[13] The jurisprudence has established that the Court should only intervene in a prothonotary's decision "in the clearest case[s] of a misuse of judicial discretion" (*Sawridge Band v Canada*, 2001 FCA 338 at para 11, [2002] 2 FCR 346 [*Sawridge Band*], also referred to as *L'Hirondelle v Canada*; *Sawridge Band v Canada*, 2001 FCA 339 at para 4, 283 NR 112; *Montana Indian Band v Canada*, 2002 FCA 331 at para 7, [2002] FCJ No 1257 (QL) [*Montana Indian Band*]).

[14] In *Montana Indian Band*, Justice Pelletier emphasized the principle of deference to decisions of a case management judge, at para 7:

> [7] We would like to emphasize once again the heavy burden upon litigants seeking to overturn an interlocutory order by a case management judge. This Court is loathe to interfere with interlocutory orders in any case due to the delay and expense which such appeals add to any proceeding. This is all the more so where an appeal is taken from an interlocutory decision of a case management judge who is intimately familiar with the history and details of a complex matter. Case management cannot be effective if this Court intervenes in any but the "clearest case of a misuse of judicial discretion" to echo the words of Mr. Justice Rothstein in *Sawridge Indian Band et al. v. Canada*, 2001 FCA 339, (2001) 283 N.R. 112.

[15] The wide discretion given to prothonotaries by virtue of their case management role was also highlighted by the Court of Appeal in *j2 Global Communications, Inc v Protus IP Solutions Inc*, 2009 FCA 41 at para 16, 387 NR 135. With respect to the second prong of the *Aqua-Gem* test, the orders of prothonotaries should not lightly be disturbed:

> [16] It has often been said in this Court that, because of their intimate knowledge of the litigation and its dynamics,

> prothonotaries and trial judges are to be afforded ample scope in the exercise of their discretion when managing cases: see also *Federal Courts Rules*, rules 75 and 385. Since this Court is far removed from the fray, it should only intervene in order to prevent undoubted injustices and to correct clear material errors. None have been demonstrated here. […]

V. The Relevant Provisions of the *Access to Information Act* and the *Federal Courts Rules*

[16] The Act provides,

42 (1) The Information Commissioner may	42 (1) Le Commissaire à l'information a qualité pour :
(a) apply to the Court, within the time limits prescribed by section 41, for a review of any refusal to disclose a record requested under this Act or a part thereof in respect of which an investigation has been carried out by the Information Commissioner, if the Commissioner has the consent of the person who requested access to the record;	a) exercer lui-même, à l'issue de son enquête et dans les délais prévus à l'article 41, le recours en révision pour refus de communication totale ou partielle d'un document, avec le consentement de la personne qui avait demandé le document;
(b) appear before the Court on behalf of any person who has applied for a review under section 41; or	b) comparaître devant la Cour au nom de la personne qui a exercé un recours devant la Cour en vertu de l'article 41;
(c) with leave of the Court, appear as a party to any review applied for under section 41 or 44.	c) comparaître, avec l'autorisation de la Cour, comme partie à une instance engagée en vertu des articles 41 ou 44.
(2) Where the Information Commissioner makes an application under paragraph (1)(a) for a review of a refusal to disclose a record requested under this Act or a part thereof,	(2) Dans le cas prévu à l'alinéa (1)a), la personne qui a demandé communication du document en cause peut comparaître comme partie à

the person who requested access to the record may appear as a party to the review.	l'instance.
[…]	[…]
44 (1) Any third party to whom the head of a government institution is required under paragraph 28(1)(b) or subsection 29(1) to give a notice of a decision to disclose a record or a part thereof under this Act may, within twenty days after the notice is given, apply to the Court for a review of the matter.	44 (1) Le tiers que le responsable d'une institution fédérale est tenu, en vertu de l'alinéa 28(1)b) ou du paragraphe 29(1), d'aviser de la communication totale ou partielle d'un document peut, dans les vingt jours suivant la transmission de l'avis, exercer un recours en révision devant la Cour.
(2) The head of a government institution who has given notice under paragraph 28(1)(b) or subsection 29(1) that a record requested under this Act or a part thereof will be disclosed shall forthwith on being given notice of an application made under subsection (1) in respect of the disclosure give written notice of the application to the person who requested access to the record.	(2) Le responsable d'une institution fédérale qui a donné avis de communication totale ou partielle d'un document en vertu de l'alinéa 28(1)b) ou du paragraphe 29(1) est tenu, sur réception d'un avis de recours en révision de cette décision, d'en aviser par écrit la personne qui avait demandé communication du document.
(3) Any person who has been given notice of an application for a review under subsection (2) may appear as a party to the review.	(3) La personne qui est avisée conformément au paragraphe (2) peut comparaître comme partie à l'instance.

(Sections 28 and 29 refer to decisions to disclose a record.)

[17] The Rules provide:

1.1 (1) These Rules apply to all proceedings in the Federal Court of Appeal and the Federal Court unless otherwise provided by or under an Act of Parliament.	1.1 (1) Sauf disposition contraire d'une loi fédérale ou de ses textes d'application, les présentes règles s'appliquent à toutes les instances devant la Cour d'appel fédérale et la Cour fédérale.
(2) In the event of any inconsistency between these Rules and an Act of Parliament or a regulation made under such an Act, that Act or regulation prevails to the extent of the inconsistency.	(2) Les dispositions de toute loi fédérale ou de ses textes d'application l'emportent sur les dispositions incompatibles des présentes règles.
[…]	[…]
104 (1) At any time, the Court may	104 (1) La Cour peut, à tout moment, ordonner :
(a) order that a person who is not a proper or necessary party shall cease to be a party; or	a) qu'une personne constituée erronément comme partie ou une partie dont la présence n'est pas nécessaire au règlement des questions en litige soit mise hors de cause;
(b) order that a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined be added as a party, but no person shall be added as a plaintiff or applicant without his or her consent, signified in writing or in such other manner as the Court may order.	b) que soit constituée comme partie à l'instance toute personne qui aurait dû l'être ou dont la présence devant la Cour est nécessaire pour assurer une instruction complète et le règlement des questions en litige dans l'instance; toutefois, nul ne peut être constitué codemandeur sans son consentement, lequel est notifié par écrit ou de telle autre manière que la Cour ordonne.
(2) An order made under	(2) L'ordonnance rendue en

subsection (1) shall contain directions as to amendment of the originating document and any other pleadings.	vertu du paragraphe (1) contient des directives quant aux modifications à apporter à l'acte introductif d'instance et aux autres actes de procédure.

VI. Did the Prothonotary Breach Procedural Fairness?

[18] Apotex submits that the Prothonotary did not consider its submissions in response to the motion of the Commissioner to be added as a party. Apotex points to the manner in which the Prothonotary identified the applicant and the respondent in her decision and to another decision of the Prothonotary, in another matter, in which she referred to the applicant, the respondent and the Commissioner in a different manner. Apotex also points to the failure to mention Apotex's request for an oral hearing.

[19] I do not agree. At the time of the Commissioner's motion to be added as a party, there were only two parties to the application for judicial review: the applicant, Apotex, and the respondent, the Minister of Health. The Order states: "And Upon reading the Applicant's Motion Record and a letter from counsel for the Respondent advising that the Respondent takes no position with regard to the motion". It is clear that the Prothonotary's reference to "the Applicant" refers only to Apotex. As the Commissioner notes, the Prothonotary consistently referred to the Commissioner as "the Information Commissioner of Canada" or "the Information Commissioner" and not as the "Applicant", although the Commissioner was the applicant on the particular motion.

[20] Apotex also argues that it did not provide a motion record, rather a response. I note, however, that the document filed by Apotex on the motion was titled "Responding Motion Record of the Applicant, Apotex". Given that Apotex described itself as the applicant on its own record, its argument cannot succeed. The Prothonotary was clearly referring to the material provided by Apotex.

[21] Similarly, Apotex's submission that the Prothonotary only referred to the submissions of two parties, when there were three positions to consider, does not change this finding. The Prothonotary reiterated the relief requested by the Commissioner in the Commissioner's motion at the outset of the Order, with references to the Rules and the statutory provisions which would permit the Court to grant leave to add the Commissioner as a party. The Prothonotary then referred to the submissions of the applicant, and the letter from the Minister.

[22] Apotex also points to another decision of Prothonotary Milczynski, also dated April 4, 2016, in *Porter Airlines v Canada (Attorney General)*, T-1296-15 [*Porter I*], which granted the Commissioner leave to be added as a party. In that order, Prothonotary Milczynski refers to the motion "on behalf of the Applicant, the Information Commissioner", although the applicant on the application for judicial review is Porter Airlines. The Prothonotary also notes that she had read "the Motion Record on behalf of the Information Commissioner", a letter from counsel for the respondent and a letter from counsel for the applicant. Apotex argues that in the present case, just as in *Porter I*, the motion was brought by the Commissioner as applicant and the Prothonotary's reference to "the Applicant" must mean the Commissioner and not Apotex.

Apotex adds that the specific reference in *Porter I* to "upon reading" the positions of all three parties can be contrasted with the lack of such a reference in the present case.

[23] I do not agree. First, this is not an exercise in statutory interpretation which calls for the comparison of like words in the same statutes to have the same meaning and different words to have different meaning. The orders are unrelated and each stands on its own. There is no requirement for prothonotaries and judges to use identical words or terms in their orders and judgments. Second, both orders clearly identify who is who. In *Porter I*, the Prothonotary identified "the Applicant, the Information Commissioner", which grammatically distinguishes the Commissioner as the applicant on the motion as opposed to the applicant on the judicial review. The recital indicating what the Prothonotary considered refers to all three positions and distinguishes counsel for the applicant (i.e. Porter) from the Commissioner. I also note that in *Porter I*, the applicant (Porter) and the respondent (Minister of Health) did not oppose the addition of the Commissioner as party.

[24] In the present case, the Prothonotary consistently referred to the "Information Commissioner" as such throughout the Order and never referred to the Commissioner as "the Applicant".

[25] The lack of a specific mention to Apotex's request for an oral hearing does not support Apotex's argument that its submissions were not considered. The Prothonotary was not obliged to hold an oral hearing or to provide reasons for not doing so.

[26] The Commissioner brought its motion in writing pursuant to Rule 369. In accordance with Rule 369, where a respondent to such a motion objects to its disposition in writing it must set out its reasons in its memorandum or written representations, following which the moving party may reply. The Court will then determine whether to dispose of the motion in writing or fix a time for an oral hearing.

[27] In the present case, the record reveals that Apotex requested an oral hearing asserting that the Commissioner's motion raises issues that would shape the underlying applications and that submissions should be made with the benefit of *viva voce* submissions. The Commissioner replied (in accordance with Rule 369(3)) noting that the written submissions addressed all the relevant issues and that Apotex had not provided any reasons to support that the motion could not be disposed of in writing.

[28] The Prothonotary obviously agreed with the Commissioner that the motion could be disposed of based on written submissions. The Prothonotary did not set a time for an oral hearing and issued her Order. The first recital in the Order refers to the "motion in writing … pursuant to Rule 369…".

[29] No breach of procedural fairness results from the determination of the motion in writing. Apotex was clearly aware of all the issues to address and did so in its written submissions.

[30] Nor does the failure to address Apotex's request for an oral hearing or provide reasons for not doing so support the view that the Prothonotary failed to consider Apotex's submissions more generally.

[31] As noted below, prothonotaries are not required to provide reasons for the many decisions and orders they make, given the high volume of motions they consider and the need to advance the underlying litigation, so long as it is apparent that the submissions have been considered.

[32] There is no reason to doubt that the Prothonotary considered the submissions of Apotex which opposed adding the Commissioner as a respondent.

VII. Did the Prothonotary err by exercising her discretion to grant leave to add the Commissioner as a respondent based on a wrong principle of law or a misapprehension of the facts?

Apotex's submissions

[33] Apotex argues that the Prothonotary based her decision on a wrong principle of law because she did not apply Rule 104 as it has been interpreted by the jurisprudence.

[34] Apotex submits that the jurisprudence has interpreted Rule 104 as setting a stringent test of necessity and that special or exceptional circumstances must exist to depart from the general rule that it is up to the applicant or plaintiff to identify the respondent (*Laboratoires Servier v Apotex Inc*, 2007 FC 1210 at paras 11, 16, 17, 63 CPR (4th) 21 [*Servier*]). Apotex argues that

Rule 104 alone governs whether the Commissioner may be granted leave to be added as a party pursuant to paragraph 42(1)(c) of the Act.

[35] Apotex notes that in *Canada (Fisheries and Oceans) v Shubenacadie Indian Band*, 2002 FCA 509, 299 NR 241 [*Shubenacadie*], Justice Evans clearly found that the meaning of "necessary party" set out in *Amon v Raphael Tuck & Sons Ltd*, [1956] 1 QB 357 at 380 [*Amon*] applies to the current Rules. A necessary party is, among other things, a party that is bound by the result.

[36] Apotex adds that in *Air Canada v Thibodeau*, 2012 FCA 14 at paras 10-11, 438 NR 321 [*Thibodeau*], the Court of Appeal highlighted that the requirement of necessity is the only test and that the only circumstance to justify adding a respondent is where that respondent would be bound by the result. Apotex adds that *Thibodeau* has been applied by this Court more recently in *Cami International Poultry v Canada (Attorney General)*, 2013 FC 583, [2013] FCJ No 790 (QL) [*Cami*].

[37] Apotex submits that on the motion, the Commissioner took the position that Rule 104 did not apply and did not argue that she was a necessary party. Rather, the Commissioner relied on the provisions of the Act.

[38] Apotex argues that there is no necessity for the Commissioner to be added as a respondent. The Commissioner would not be bound by the outcome of the judicial review. In

addition, if the Commissioner is added as a respondent, it would impact upon and could thwart the ability of Apotex to narrow the issues or settle the matter with the Minister.

[39] Apotex also argues that the Commissioner would not bring any expertise to the issues at stake in the application for judicial review that Apotex or the Minister lack. Apotex adds that one of the reasons advanced by the Commissioner in her motion for leave to be added as a respondent, which relates to Apotex's possible motion to request that the order of evidence be reversed on the application for judicial review, is premature since Apotex has not made such a motion. Regardless, the reversal of the order of evidence is not unusual and would not have any bearing on the burden of proof in the judicial review.

[40] Apotex submits that the interests of the Commissioner and the assistance she purports to provide could be met by way of an affidavit or by seeking intervenor status, noting that intervenors are not bound by the result.

[41] Despite the deference owed to the discretionary decisions of a prothonotary in their case management role, Apotex notes that such decisions are not immune from review (*Louis Bull Band v Canada*, 2003 FCT 732 at para 15, [2003] FCJ No 961 (QL) (FCTD) [*Louis Bull*]; *Merck* at paras 40-41). Apotex argues that the decision to grant leave to add a respondent is not within the customary case management role, does not rely on the Prothonotary's familiarity with the issues in the case or special knowledge, and, as in *Louis Bull*, is a new matter and not subject to the principle of deference (*Louis Bull* at paras 15-16).

[42] Apotex also argues that because the Prothonotary did not provide reasons, there is no basis for the Court to determine how she arrived at her decision and no basis for the Court to defer to the Prothonotary's exercise of discretion.

The Commissioner's submissions

[43] The Commissioner submits that paragraph 42(1)(c) of the Act clearly provides for the Commissioner to be added as a respondent in an application for judicial review with leave of the Court. The Commissioner accepts that Rule 104 has been interpreted in the jurisprudence as setting a stringent test, but notes that this jurisprudence does not address the application of the Rule in the context of a statutory provision that specifically provides for an Agent of Parliament to be added as a party.

[44] The Commissioner submits that if Rule 104 is interpreted without regard to the statutory provision, the Commissioner could not meet the stringent necessity test and, as a result, could not be granted leave to be added as a party despite the clear words of its governing legislation.

[45] The Commissioner notes that the Federal Court of Appeal has acknowledged that the Rules are subject to the provisions of Acts of Parliament and nothing has changed to displace this principle (*Canada (Human Rights Commission) v Canada (Attorney General)*, [1994] 2 FCR 447, 17 Admin LR (2d) 2 (FCA) [*Canada (HRC)*]).

[46] Rule 104 must be reconciled with the Act and its clear intent to permit the Commissioner to be added as a party. A specific legislative intent is an exception to the necessity test (*Servier* at para 17).

[47] The Commissioner also submits that *Thibodeau*, which denied the Commissioner of Official Languages (COL) leave to be added as a respondent, can be distinguished. The Commissioner also notes that the Supreme Court of Canada ultimately granted leave for the COL to intervene before that Court.

[48] The Commissioner notes that she is not in the same category as other individuals that may seek to be added as a party. The objectives of the Act and the specific duties and responsibilities of the Commissioner to ensure the proper administration of the Act and that the rights of requesters are considered in the application of the Act, among other interests, justify the Commissioner's party status.

[49] The Commissioner submits that this Court has established that the Commissioner may be granted leave to be added as a party where the Court is satisfied that her participation would assist the Court to determine a factual or legal issue in the proceeding (*Canon Canada Inc v Infrastructure Canada* (28 February 2014), T-1987-13, [*Canon*]. The Commissioner points to several orders of this Court granting leave to the Commissioner to be added as a respondent in various proceedings, as well as several judgments on applications for judicial review and other proceedings where the Commissioner had been granted status as a respondent. The recent decision of Justice Russell in *Porter Airlines v Canada (Attorney General)* (23 March 2016), T-

1491-15 [*Porter II*] noted that the Commissioner had been granted leave in many cases and would be "extremely helpful" to the Court.

[50] In the present case, the Commissioner set out the grounds to be granted leave in her written submissions on the motion, which were considered by the Prothonotary: the Commissioner's expertise and ability to provide assistance to the Court regarding the Act; the Commissioner's overall interest in the interpretation and administration of the Act; ensuring that the interests of requesters are considered; and, the intention by Apotex, which it has not yet resiled from, to bring a motion to reverse the order of evidence and the implications for the application for judicial review.

[51] The Commissioner adds that she would not thwart any possible settlement and could not deter the Court from approving of such a settlement.

VIII. The Prothonotary did not err by exercising her discretion based on a wrong principle of law or a misapprehension of the facts

Rule 104 and the statutory provision

[52] I agree with the Commissioner that a strict interpretation of Rule 104 without regard to the statutory provisions would undermine the intention of Parliament that the Commissioner may be granted leave to be added as a party.

[53] As noted by Prothonotary Tabib in *Canon* at page 2:

> The ICC is correct that section 42(1) of the ATIA contemplates the participation of the ICC as a party in any review applied under section 44, and that the very strict criteria of "necessity" set out in Rule 104 would, if applied on a motion under section 42(1) of the ATIA, render Parliament's intentions by enacting section 42(1) nugatory, as there will rarely, if ever, be a case where the ICC's presence in a judicial review would be "necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined".

[54] Rule 1.1 is instructive regarding the intent and application of the Rules. The Rules provide the mechanism or process, but do not trump the substantive law where there is inconsistency between the Rules and the substantive law. Although Rule 104 and paragraph 42(1)(c) may not be inconsistent on their face, the strict interpretation of Rule 104 would likely make it impossible in most circumstances to grant leave to the Commissioner. The Rule must be adapted accordingly.

[55] This same principle was acknowledged in *Canada (HRC)* where Justice Décary considered the predecessor to Rule 104 and other related rules, which at that time had been recently enacted to complement amendments to the *Federal Courts Act*, RSC 1985, c F-7, regarding judicial review applications. Justice Décary noted that the Rules sought to address the confusion between intervenor and party status. He stated:

> The Rules are subject, of course, to provisions in Acts of Parliament that may grant certain tribunals a distinct possibility of participating in judicial proceedings, either as a party or intervenor as of right, or as a party or intervenor with leave of the Court. Where such provisions exist, the Rules shall be adapted accordingly. For instance, where a tribunal which is given by statute the standing of party or intervenor, has not been named in the originating motion, any application by it under Rule 1602(3) or 1611, as the case may be, to be added as respondent or intervenor will be granted as a matter of course. For examples of statutory provisions giving a tribunal the possibility of participating in

> judicial proceedings, see: the *Official Languages Act*, R.S.C., 1985 (4th Supp), c. 31, s. 78(1)(a),(b) and (c) and 78(3); the *Access to Information Act*, R.S.C., 1985, c. A-1 , s. 42(1)(a),(b) and (c); the *National Telecommunications Powers and Procedures Act*, R.S.C., 1985, c. N-20 (as am. by R.S.C., 1985 (3rd Supp.), c. 28, s. 301), s. 65(4); and the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 , ss. 40(3), 50(1), 51 and 55.
>
> [Emphasis added.]

[56] As the Commissioner notes, Apotex has not acknowledged this jurisprudence, nor has any jurisprudence been cited which changes or contradicts this authority.

[57] The jurisprudence relied on by Apotex, with the exception of *Thibodeau*, to argue that the Prothonotary erred in law by not applying the stringent necessity test of Rule 104 does not involve the application of Rule 104 in the context of a statutory provision which provides for a party to be added with leave.

[58] In *Servier*, Justice Snider noted, at paras 11-13, that Rule 104 allows the addition of a party only in exceptional or special circumstances where one of the two tests in Rule 104 is met. Justice Snider noted that the Court of Appeal had endorsed the meaning of "necessary party" from *Amon* with approval in *Shubenacadie*.

[59] However, Justice Snider noted that other principles also apply when determining whether a person is a necessary defendant (at para 17), including that:

> - Absent a specific legislative provision (as in, for example, *Nissho-Iwai Canada Ltd. v. Minister of National Revenue for Customs & Excise*, [1981] 2 F.C. 721 (T.D.)), when the plaintiff's statement of claim seeks no relief against a person and makes no allegations against them the person will not be

> considered a necessary party (*Shubenacadie*, above at para. 6; *Hall v. Dakota Tipi Indian Band*, [2000] F.C.J. No. 207 at paras. 5, 8 (T.D.) (QL); *Stevens v. Canada (Commissioner, Commission of Inquiry)*, [1998] 4 F.C. 125 at para. 21 (C.A)).
>
> [Emphasis added.]

[60] *Servier* did not address the interplay between a statute that permits a party to be added and the Rules. Moreover, Justice Snider acknowledged the principle that a party should not be added where the claim seeks no relief against the added party (i.e., where they would not be bound), absent a specific legislative provision. Clearly the jurisprudence has recognized, as in *Canada (HRC)*, that the provisions of a statute must be respected.

[61] In *Thibodeau*, the Court of Appeal denied the motion of the COL to be added as a respondent, even though the *Official Languages Act*, RSC, 1985, c 31 (4th Supp) provides that the COL may be granted leave to be added as a party, similar to subsection 42(1) of the *Access to Information Act*. Justice Blais found that there is only one test governing the exercise of the judge's discretion pursuant to Rule 104, that of necessity (at para 11).

[62] Justice Blais cited *Stevens v Canada (Commissioner of Inquiry)*, [1998] 4 FC 125, [1998] FCJ No 793 (QL) (FCA), which endorsed the following passage from *Amon* on the meaning of "necessary":

> The person to be joined must be someone whose presence is necessary as a party. What makes a person a necessary party? It is not, of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately. That would mean that on the

> construction of a clause in a common form contract many parties would claim to be heard, and if there were power to admit any, there is no principle of discretion by which some could be admitted and others refused. The court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it is necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party.

[63] Justice Blais then considered, at para 12, whether it was necessary "to grant the Commissioner status as a party to completely adjudicate and settle the issues raised in these proceedings" and found it was not.

[64] The issue in the present case is not what "necessary" means or whether the Commissioner is a necessary party, but whether necessity is the only test for adding a party, as found in *Thibodeau*. In my view, *Thibodeau* can be distinguished and, with respect, should not be relied on for the proposition that necessity is the only test, regardless of an applicable statutory provision. First, it appears that Justice Blais accepted that Rule 104 applied in the context of the statutory provision, but did not address the implications or whether the Rules could override the statutory provision to the extent that the statutory intent was impaired. Second, it appears that Rule 1.1 was not raised, which provides that the statutory provision prevails to the extent of any inconsistency with the Rules. Third, it appears that the earlier jurisprudence of *Canada (HRC)*, which specifically states that the Rules should be adapted where the statute grants tribunals the possibility of participating and specifically mentions the *Access to Information Act*, was not raised to the Court of Appeal's attention in *Thibodeau*.

[65] In addition, the conclusion in *Thibodeau*, denying leave, can also be distinguished on its facts. Justice Blais noted, among other factors, that the COL had sought and been granted full intervenor status in the Federal Court, had made written and oral submissions, had taken part in cross-examinations, but had not sought to be added as a party. Therefore, the choice had been made and it was too late for the COL to reverse his position. Justice Blais found that intervenor status, which was agreed to by Air Canada, was sufficient.

[66] In *Cami*, noted by Apotex as a recent application of the necessity test and *Thibodeau*, Chief Justice Crampton found that the Chicken Farmers of Canada (CFC) should not be added as a respondent, relying on *Thibodeau* and *Shubenacadie* in support of the stringent test of necessity. Again, *Cami* did not involve a statute which provided for the proposed respondent to be added; it dealt only with Rule 104. There was no statutory provision to permit the CFC to be added as a party.

[67] Rule 104 must be adapted to permit the Court to consider whether to exercise the discretion to grant leave to the Commissioner to be added as a party. As the Commissioner noted, this Court has granted leave in several cases and has articulated an approach to do so.

[68] Recently, in *Porter II*, Justice Russell granted leave to the Commissioner to be added as a party pursuant to paragraph 42(1)(c), noting among other conclusions and findings, at para 5:

> 5. All in all, I cannot accept the reasons for the Applicant's resistance and it seems to me that, on balance, as in so many cases where the Commissioner has been granted status under s 42(1) (c) of the Act, that the Commissioner's knowledge and background of the statute, its jurisprudence and the legal issue in this case will be extremely helpful to the Court in dealing with this dispute.

[69] Although the Commissioner's knowledge and perspective could be beneficial to the parties and to the Court, whether the Commissioner should be added as a party is a case-by-case determination. That determination cannot be based on the stringent criteria established in the jurisprudence with respect to Rule 104 alone.

If Rule 104 is not applicable, what criteria should guide the exercise of discretion?

[70] As noted by the Commissioner, many other orders have been made by prothonotaries and judges to add the Commissioner as a respondent which do not reflect the approach of *Thibodeau*, rather the application of other criteria.

[71] Prothonotary Tabib's recent articulation of the basis for adding the Commissioner, in *Canon*, appears to capture the rationale reflected in other orders. Prothonotary Tabib considered what criteria should guide the exercise of discretion, having found that the necessity test was not appropriate in the context of an application to be added as a party pursuant to paragraph 42(1)(c). She noted that there was no jurisprudence that had addressed the criteria, but found that analogous jurisprudence suggested that the criteria should be "akin to those considered on a motion for leave to intervene pursuant to Rule 109. The Court should be satisfied that the participation of the ICC would assist the Court to determine a factual or legal issue in the proceedings" (at pages 2-3).

[72] This approach reflects the need to reconcile Rule 104 with the Act to respect both the intention of the Act and the requirement that leave be sought to be added as a party.

[73] As noted by Prothonotary Tabib, the Commissioner will not be automatically added as a party pursuant to paragraph 42(1)(c). The Court must consider whether and how the addition of the Commissioner would assist the Court, based on the submissions of the parties, and then determine whether leave should be granted.

[74] For example, in *Canon*, Prothonotary Tabib noted that the Commissioner's expertise on its own was not a sufficient reason to grant leave. However, she found that the Commissioner's participation would be useful to the Court in the context of the applicant's motion for confidentiality order.

No reason to displace the principle of deference

[75] Apotex argues that no deference should be given to the Prothonotary's discretionary decision because she exceeded her role as a case management judge and dealt with a new matter, not dependent on her familiarity with the issues in the judicial review. I do not agree.

[76] In *Merck*, the Court of Appeal addressed the rule or principle stated in *Sawridge Band* and *Montana Indian Band*, where the Court of Appeal noted that the Court should only interfere in decisions made by case management prothonotaries or judges "in the clearest case of misuse of judicial discretion". The Court of Appeal clarified at para 41:

> [41] This rule, of course, only applies where deference is owed; it does not apply where the discretion has to be exercised *de novo*, for example, where, as here, the question is vital to the final issue of the case or where the case management prothonotary or judge has made an error of principle (see *Apotex*, *supra*, para. 41). Indeed, in *Apotex*, Strayer J.A. refused to dilute the legal right a party has to have relevant questions answered on examination for

> discovery for the sake of enhancing the case management system and of expediting the whole process. Furthermore, as noted by Snider J. in *Louis Bull Band, supra*, it is not all orders made by a case management judge or prothonotary which are made "as a result of an ongoing management function" (para. 16): where an order deals with "a new matter in respect of which [the case management prothonotary] had no special knowledge", the *Sawridge* rule does not apply. Indeed, case management prothonotaries and judges are often asked to decide motions which far exceed the case management expertise they have gained in a given case.

[77] In *Louis Bull*, also relied on by Apotex, Justice Snider noted the principle that discretionary decisions made by prothonotaries in the context of case management should not lightly be disturbed, given the Prothonotary's familiarity with the issues and expertise more generally, but found that such decisions are not immune from review. Justice Snider found, on the facts of that case, that the motion to add a cause of action raised an entirely new issue and that deference was not appropriate.

[78] As noted by the Commissioner, motions to add a party as respondent or intervenor are not complex, unique or beyond the range of motions dealt with by prothonotaries in their case management role. This is demonstrated by the several orders cited by the Commissioner where this Court has made such orders, including on consent.

[79] In the present case, the Prothonotary had been appointed as case manager in this proceeding in October 2015 and was familiar with the issues raised in the underlying applications and, more generally, with the range of motions that may arise in the context of such applications. In addition, the Prothonotary had considered motions to add the Commissioner as a respondent in other proceedings, (for example, in *Porter I*, as noted by Apotex). It cannot be said

that this motion raised a new issue that did not draw on the Prothonotary's expertise and familiarity with the issues or that went beyond her case management function.

[80] There is nothing on the facts of the present case to displace the principle of deference.

There is no requirement for detailed reasons

[81] The lack of reasons in the Prothonotary's Order does not invite the Court to ignore the principle of deference.

[82] As noted by Justice Mosley in *Apotex v Merck*, 2007 FC 250 at para 13, [2007] FCJ No 322 (QL):

> [13] The lack of reasons alone will not automatically give rise to a hearing *de novo* on an appeal from a prothonotary's decision before a judge of this Court. This was the conclusion Justice François Lemieux reached in *Anchor Brewing Co. v. Sleeman Brewing & Malting Co.*, 2001 FCT 1066, 15 C.P.R. (4th) 63 at para. 31 having reviewed the existing precedents. Justice Lemieux noted further at paragraph 32 of his reasons that:
>
> > *De novo* intervention is not justified when, examining all of the circumstances, including the nature of the order made, the evidence before the prothonotary, whether the exercise of discretion involves essentially a consideration of legal principles, **reasonably demonstrate the manner in which the prothonotary exercised his/her discretion.**
>
> [Emphasis in the original]

[83] In *Savanna Energy Services Corp v Technicoil Corp*, 2005 FC 842, 272 FTR 159 [*Savanna*], Justice Harrington found that the Prothonotary's reference to the material that had been considered was sufficient, noting at para 19:

> [19] Having come to the conclusion that the joinder is not a vital issue to the outcome of the cause, is it appropriate that I exercise discretion *de novo* on the grounds that the prothonotary did not give reasons? The reference to "motion records of the parties" and "hearing submissions of counsel", in my opinion, is sufficient to preclude me from exercising discretion *de novo*. (*Anchor Brewing Co. v. Sleeman Brewing & Malting Co.* (2001), 15 C.P.R. (4th) 63 (F.C.T.D.); *Pharmaceutical Partners of Canada v. Faulding (Canada) Inc.*, 2002 FCT 1010, [2002] F.C.J. 1305 (QL) (at para.9); *General Electric Co. v. Wind Power Inc.*, 2003 FCT 537, [2003] F.C.J. No. 692.) The prothonotaries deal with an extraordinary volume of procedural issues. It would be intolerable, and the wheels of justice would grind most slowly indeed, if each discretionary order had to be accompanied by a full set of motivated reasons in order to discourage the unsuccessful party from appealing and inviting the Court to exercise its discretion anew. In any event, I would have exercised my discretion as the Prothonotary did.

[84] As in *Savanna*, I find that the Prothonotary's reference in the Order indicating that she had read the Applicant's Motion Record (meaning that of Apotex, as found above), the letter from the Minister and the submissions of the Commissioner, documents which are reflected in her reiteration of the relief requested, demonstrates that she considered all the submissions and exercised her discretion to grant leave. The lack of detailed reasons does not detract from the deference owed.

[85] In conclusion, there is no basis to disturb the Order of the Prothonotary. The Commissioner did not purport to be a necessary party but provided grounds that the Prothonotary found sufficient to grant leave to be added as a party in accordance with the statutory provision.

Apotex's opposition to those grounds need not be addressed given that the Court will not consider *de novo* whether the Commissioner should be added.

No delay

[86] With respect to the Commissioner's submissions that Apotex's appeal was out of time, I agree with Apotex that the motion to appeal was filed, albeit with some deficiencies, in time and that the deficiencies were shortly rectified after determining, in consultation with the Commissioner, the appropriate date for the motion to be heard. The Commissioner was clearly aware of the appeal and of Apotex's intention to pursue it.

Costs in the cause

[87] With respect to the Commissioner's submission that the appeal should have been dealt with on the basis of written material and that an oral hearing unnecessarily added to the costs of the parties, I find that the oral hearing of the appeal was appropriate and beneficial to ensure that both Apotex and the Commissioner could fully advance their arguments.

[88] As agreed to by Apotex and the Commissioner, costs will be determined in the cause.

ORDER

THIS COURT ORDERS that the motion to set aside the Prothonotary's Order of April 4, 2016 is dismissed.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1511-15, T-1782-15, T-1783-15
STYLE OF CAUSE:	APOTEX INC v MINISTER OF HEALTH ET AL
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 31, 2016
ORDER AND REASONS:	KANE J.
DATED:	JULY 8, 2016

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