

**Date: 20090901**

**Docket: T-775-09**

**Citation: 2009 FC 866**

**Toronto, Ontario, September 1, 2009**

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

**BETWEEN:**

**JANSSEN-ORTHO INC. and ALZA CORPORATION**

**Applicants**

**and**

**APOTEX and THE MINISTER OF HEALTH**

**Respondents**

**REASONS FOR ORDER AND ORDER**

[1] This is an appeal from two Orders of the Prothonotary dated August 11, 2009 which set the same schedule for this application and another application involving the same parties. The two schedules are exactly the same and provide that the hearings of the two applications will take place concurrently;

[2] Upon the Court finding that the applicants had sought a scheduling order with respect to application T-775-09. The Respondent Apotex responded by proposing that the schedule in this application coincide with the schedule set in Court Docket T-1983-08. The Prothonotary's Order

under appeal did schedule the steps in this application to coincide with the existing schedule for the steps in Court Docket T-1983-08 and did order that both applications be heard concurrently;

[3] And upon the applicants submitting that the Order under appeal is clearly wrong because there was no formal motion for consolidation of the two proceedings and the applicants did not have an adequate opportunity to oppose consolidation. However, the applicants did not request an adjournment before the Prothonotary to have an adequate opportunity to oppose. Rather, the applicants state in the notice of motion for this appeal that the “Prothonotary invited the parties to make submissions” and “the position of the applicants ... was asserted at the hearing”;

[4] And upon the Court finding that the scheduling order does effectively consolidate the two applications in that the two applications will be heard together;

[5] And upon the Court being satisfied that in order to consolidate two proceedings the separate causes of action need not have completely common questions of law or fact, but only some commonality [*Fibreco Pulp Inc. v. Star Shipping A/S* (1998), 145 F.T.R. 125 (Proth. Hargrave), paras. 42 and 46, aff'd (1998), 156 F.T.R. 127 (T.D.), aff'd (2000), 257 N.R. 291 (Fed. C.A.)].

[6] And upon the court being satisfied that consolidation of proceedings may be ordered upon the Court's own initiative [*John E. Canning Ltd. v. Tripap Inc.*, [1999] F.C.J. No. 715, (T.D.) (QL), Lemieux J. at paras. 26-27, *Montana Band v. Canada* (1999), 182 F.T.R. 161, MacKay J. at paras. 31-36].

[7] And upon the Court being satisfied that the Prothonotary has the same power and discretion under Rule 385(1) of the *Federal Courts Rules* to set this application to coincide with Court Docket T-1983-08 and to officially consolidate the two proceedings under Rule 105 of the *Federal Courts Rules* as a case management judge [*Remo Imports Ltd. V. Jaguar Cars Lts.* (2003), 24 C.P.R. (4th) 341, Gibson J. at para. 13, aff'd (2003), 24 C.P.R. (4th) 348 (Fed. C.A.); *Montana Band v. Canada* (November 8, 2000), Doc. A-700-99 to A-703-99, 2000 CarswellNat 2646 (fed. C.A.)].

[8] And upon the Court being satisfied that the Prothonotary's discretionary interlocutory decision is entitled to a high degree of deference and should not be interfered with unless the issues in dispute are clearly material to the just disposition of the litigation and the ruling is fundamentally flawed [*Lundbeck Canada Inc. v. Canada (Minister of Health)*, [2008] F.C.J. No.1275 (Fed. C.A.) (QL), Evans J.A. at para. 5].

[9] And upon the Court being satisfied that the applicants have not discharged their "heavy burden" to show that the Prothonotary's order is clearly wrong on either the material before the Prothonotary or the Court;

[10] And upon the Court advising the parties that the applicants can always ask the Prothonotary to reconsider the scheduling order that the two applications be heard concurrently on the ground that the applicants now state that they were taken by surprise at the hearing on July 27, 2009, and have relevant evidence and reasons to present the Prothonotary as to why the two applications should not

be heard concurrently. The Prothonotary has the discretion to review the scheduling order at any time for good and substantial reasons;

**ORDER**

**THIS COURT ORDERS AND ADJUDGES that:**

This appeal be dismissed with costs to Apotex in the cause.

“Michael A. Kelen”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-775-09

**STYLE OF CAUSE:** JANSSEN-ORTHO INC. and ALZA CORPORATION  
v. APOTEX and THE MINISTER OF HEALTH

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** August 31, 2009

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

**DATED:** September 1, 2009

**APPEARANCES:**

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FOR THE APPLICANTS

Mr. D. Cappe

FOR THE RESPONDENT (APOTEX INC.)

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