Date: 20091119

Docket: A-281-09

Citation: 2009 FCA 339

Present: **LAYDEN-STEVENSON J.A.**

BETWEEN:

PFIZER LIMITED

Appellant

and

RATIOPHARM INC.

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 19, 2009.

REASONS FOR ORDER BY: LAYDEN-STEVENSON J.A.

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REASONS FOR ORDER

LAYDEN-STEVENSON J.A.

[1] BIOTECanada is a not-for-profit, non-government association and represents more than 250 member companies encompassing a broad spectrum from the biotechnology sector including agriculture, aquaculture, bioinformatics, food, healthcare research, industrial biotechnology and renewable energy.

[2] Eli Lilly Canada Inc. is one of Canada's leading innovative research-based pharmaceutical companies. Eli Lilly and Company is one of the world's leading research-based pharmaceutical companies and is involved in developing pharmaceutical products for the world.

[3] BIOTECanada, Eli Lilly Canada Inc. and Eli Lilly and Company (the proposed interveners), by motion in writing, seek leave to intervene in this appeal and make joint written and oral submissions at the hearing. They do not seek to introduce any new evidence.

[5] The appellant, Pfizer Limited, in correspondence dated October 30 2009 indicates that it supports the motion because the "proposed intervention would assist in illuminating the issues on appeal." The respondent, ratiopharm inc., opposes the motion.

[6] Leave to intervene may be granted if each intervener has an interest in the outcome of the litigation, has rights that may be adversely affected by the outcome and will assist the court by bringing a perspective to the proceedings different from that of the parties: *Novopharm Limited v. Eli Lilly Canada Inc. et al*., 2009 FCA 24.

[7] The proposed interveners submit that in finding the '393 Patent invalid on the basis of utility and s. 53 of the *Patent Act*, R.S. 1985, c. P-4 (the Act), Hughes J. significantly changed established law relating to utility and s. 53 of the Act. They contend that the change in law in respect of these two grounds of invalidity significantly lowers the threshold needed to demonstrate invalidity on these grounds. Further, the proposed interveners claim to have specialized expertise in patent law and practises around the world which the parties themselves will not be able to fully canvas. Based upon this special expertise, the proposed interveners are in an optimal position to assist the court and "will be able to provide the court with (sic) how the decision of Hughes J. accords with international patent laws and practice."

[8] Aside from the issue of international patent law and practice, the nature of the proposed interveners' interest in the appeal is jurisprudential. They have not established that they are directly affected by the outcome of the appeal. To the contrary, they state that they have no interest in the particular facts of the case and no interest in the specific pharmaceutical product in dispute. A jurisprudential interest is not sufficient to grant intervener status: *Eli Lilly Canada Inc., v. Canada (Minister of Health)* (2001), 10 C.P.R. (4th) 310 (F.C.) aff'd. (2001), 11 C.P.R. (4th) 486 (F.C.A.).

[9] As for the issue of international patent law and practice, it is evident from the affidavits filed in support of the motion that this submission requires the interveners to demonstrate a difference between patentability requirements in Canada and foreign countries. Evidence on the state of foreign law would be necessary. Yet, the proposed interveners explicitly state that they do not seek to introduce evidence on the appeal. Therefore, the prospect of adding a new perspective to the dispute is seriously undermined.

[10] Finally, I am not satisfied that the proposed interveners will present the court with submissions that are useful and different from those that Pfizer will make. Both the issues of utility and section 53 of the Act constitute grounds of appeal and are addressed in Pfizer's memorandum of fact and law. The proposed interveners have not demonstrated that they will provide a relevant and useful point of view which Pfizer will not present. Nor do they contend that the court is unable to decide this appeal on its merits without their involvement. In short, although they do not disclose the specific contents of their proposed submissions, it appears that their arguments will simply bolster those made by Pfizer.

[11] For the foregoing reasons, the motion will be dismissed with costs to ratiopharm inc.

"Carolyn Layden-Stevenson"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-281-09
STYLE OF CAUSE:	Pfizer Limited v. Ratiopharm Inc.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	LAYDEN-STEVENSON J.A.
DATED:	November 19, 2009

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