Federal Court of Appeal | Cour d'appel fédérale

Date: 20150202

Dockets: A-452-14
A-453-14

Citation: 2015 FCA 33

Present: STRATAS J.A.

Docket: A-452-14

BETWEEN:

ViiV HEALTHCARE ULC,
ViiV HEALTHCARE UK LTD
and GLAXO GROUP LIMITED

Appellants

and

TEVA CANADA LIMITED
and THE MINISTER OF HEALTH

Respondents

Docket: A-453-14

AND BETWEEN:

ViiV HEALTHCARE ULC,
ViiV HEALTHCARE UK LTD
and GLAXO GROUP LIMITED

Appellants

and

APOTEX INC
and THE MINISTER OF HEALTH

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on February 2, 2015.

REASONS FOR ORDER BY: STRATAS J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20150202

Dockets: A-452-14
A-453-14

Citation: 2015 FCA 33

Present: STRATAS J.A.

Docket:A-452-14

BETWEEN:

ViiV HEALTHCARE ULC,
ViiV HEALTHCARE UK LTD
and GLAXO GROUP LIMITED

Appellants

and

TEVA CANADA LIMITED
and THE MINISTER OF HEALTH

Respondents

Docket:A-453-14

AND BETWEEN:

ViiV HEALTHCARE ULC,
ViiV HEALTHCARE UK LTD
and GLAXO GROUP LIMITED

Appellants

and

APOTEX INC
and THE MINISTER OF HEALTH

Respondents

REASONS FOR ORDER

STRATAS J.A.

[1] Canada's Research-Based Pharmaceutical Companies (the "Association") moves for leave to intervene in this appeal. The appeal is from the judgment of the Federal Court (*per* Justice Hughes): 2014 FC 328. The Federal Court found that the appellants' patent was not eligible for inclusion in the Patent Register under the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133.

[2] The Association says that the Federal Court's decision may affect the listing of 67 patents on the Patent Register. Several of these patents were listed by member companies of the Association. It says that if the Federal Court's judgment is not set aside, a patent claiming a single medicinal ingredient of a fixed-dose combination product will not be eligible to be listed under the Regulations, with detrimental effects caused to the innovative pharmaceutical industry, the future development of fixed-dose combinations, and the health of Canadians.

[3] The Association asks for leave to intervene and "provide the court with brief written and short oral submissions about the consequences that the decision under appeal will have on the broader innovative pharmaceutical industry." It also claims to have insights on the 2006 amendments to the Regulations and the Minister of Health's 2007 Guidance Document, both of which are relevant to the appeal.

[4] Under Rule 109(2) of the *Federal Courts Rules*, SOR/98-106, and such cases as *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21, 456 N.R. 365 at paragraph 11, a key consideration is whether the proposed intervener will advance different and valuable insights and perspectives that will actually further the Court's determination of the matter. If the proposed intervener's insights and perspectives are already reflected in the record before the Court or in the submissions that the parties have made or are likely to make in the appeal, the motion for leave to intervene should be dismissed.

[5] The Minister of Health is an active participant in this appeal as a respondent. She can speak to the issue of the 2006 amendments to the Regulations and the Minister's 2007 Guidance Document. The Association does not offer different and valuable insights and perspectives on those matters.

[6] As for the adverse consequences that the Federal Court's decision will have on the broader innovative pharmaceutical industry, evidence of that is already in the record. In the Federal Court, the appellant ViiV Healthcare filed an affidavit on this subject from the Association's Chief of Staff and Vice President. That affidavit appears in the Appeal Book filed on this appeal. The Association's insights and perspectives on this issue are already before this Court. Accordingly, I am not persuaded that granting the Association intervener status will introduce any different insights and perspectives into this appeal.

[7] In reply, the Association points out certain amendments to the Regulations being contemplated. It says that these are in response to the Federal Court's decision. In my view, the

existing parties to the appeal are able to draw these amendments to our attention and make submissions as to their relevance, if any.

[8] Even if I were persuaded that granting the Association intervener status would introduce different insights and perspectives, I would be concerned about the Association's delay in bringing this motion.

[9] Having had an affidavit of one of its senior officers filed in the Federal Court, the Association was well aware of this proceeding and the issues in it. The notice of appeal in this Court was filed on October 7, 2014. Soon after the filing of the notice of appeal, the parties sought to expedite the appeal. This Court agreed that the appeal should be expedited and issued an order expediting it. The Association filed its motion to intervene on January 13, 2015 after most of the memoranda of fact and law had been filed.

[10] One of the factors to consider on a motion such as this is its timeliness:

> Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"? For example, some motions to intervene will be too late and will disrupt the orderly progress of a matter. Others, even if not too late, by their nature may unduly complicate or protract the proceedings. Considerations such as these should now pervade the interpretation and application of procedural rules: *Hryniak v. Mauldin*, 2014 SCC 7 [[2014] 1 S.C.R. 87].

(*Pictou, supra* at paragraph 10.)

[11] Quite aside from those considerations, the timeliness of a motion to intervene can shed light on the other factors to be considered. Those really concerned about a proceeding, who have much

to say about it, and who are concerned that no one else will say it, proceed quickly. Here, that is not the case, and the Association has not explained its delay.

[12] The respondents, Teva Canada Limited and Apotex Inc. opposed this motion and seek their costs.

[13] Therefore, the Association's motion to intervene is dismissed with costs.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-452-14 AND A-453-14
DOCKET:	A-452-14
STYLE OF CAUSE:	ViiV HEALTHCARE ULC, ViiV HEALTHCARE UK LTD GLAXO GROUP LIMITED v. TEVA CANADA LIMITED and THE MINISTER OF HEALTH
AND DOCKET:	A-453-14
STYLE OF CAUSE:	ViiV HEALTHCARE ULC, ViiV HEALTHCARE UK LTDand GLAXO GROUP LIMITED v APOTEX INC and THE MINISTER OF HEALTH

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	FEBRUARY 2, 2015

WRITTEN REPRESENTATIONS BY:

David W. Aitken Marcus Klee Scott Beeser	FOR THE RESPONDENT, TEVA CANADA LIMITED
H.B. Radomski	FOR THE RESPONDENT, APOTEX INC.
Patrick Smith Scott E. Foster	FOR THE PROPOSED INTERVENER, CANADA'S RESEARCH-BASED PHARMACEUTICAL COMPANIES

SOLICITORS OF RECORD:

Norton Rose Fulbright Canada LLP Toronto, Ontario	FOR THE APPELLANTS, VIIV HEALTHCARE ULC, VIIV HEALTHCARE UK LIMITED AND GLAXO GROUP LIMITED
Aitken Klee LLP Ottawa, Ontario	FOR THE RESPONDENT, TEVA CANADA LIMITED
Goodmans LLP Toronto, Ontario	FOR THE RESPONDENT, APOTEX INC.
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT, THE MINISTER OF HEALTH
Gowling Lafleur Henderson LLP Ottawa, Ontario	FOR THE PROPOSED INTERVENER, CANADA'S RESEARCH-BASED PHARMACEUTICAL COMPANIES