

Date: 20091119

Docket: A-281-09

Citation: 2009 FCA 338

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] The appellant, Pfizer Limited (Pfizer) appealed from the order of Hughes J. dated July 8 2009 in Court File No. T-1712-07. Hughes J. found Canadian Patent Number 1,321,393 (the '393 Patent) relating to amlodipine besylate (marketed by Pfizer under the name NORVASC) to be invalid on several grounds including a breach of s. 53(1) of the *Patent Act*, R.S. 1985, c. P-4 (the Act).

[2] Pfizer filed its notice of appeal on July 9th. On August 10th, it filed an agreement as to the contents of the appeal book and on October 9th, it filed its memorandum of fact and law.

[3] The respondent, ratiopharm inc. (ratiopharm) filed a motion in Court File No. A-75-06 on August 12 2009 requesting that this Court set aside the prohibition order it granted under the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 (the NOC Regulations) in relation to the '393 Patent. Relying upon Hughes J.'s finding of invalidity pursuant to s. 53(1) of the Act, ratiopharm submitted that the prohibition order should be set aside because it was obtained by fraud.

[4] By motion in writing, Pfizer now requests an order:

- (1) varying the contents of the appeal book to include ratiopharm's August 12th motion;
- (2) granting Pfizer leave to serve and file an amended notice of appeal;
- (3) granting Pfizer leave to serve and file an amended memorandum of fact and law "to address ratiopharm's notice of motion and/or the additional grounds raised in the amended notice of appeal" (if the relief in (1) and (2) above is granted) within five days of the date of this Court's order disposing of the motion;
- (4) extending the time for ratiopharm to serve and file its memorandum of fact and law to 30 days after Pfizer serves its amended memorandum of fact and law (if the Court grants some or all of the requested relief).

[5] Dealing first with Pfizer's request to amend the contents of the appeal book, the purported justification for the request is alleged to be the fact that ratiopharm is relying on the trial judge's finding relating to s. 53(1) as a basis to set aside this Court's order. Pfizer submits that the inclusion of ratiopharm's motion in the appeal book "is material to the Court's understanding of why it is

necessary to address Pfizer's appeal in respect of s. 53(1) regardless of how it decides Pfizer's other grounds of appeal." In other words, it is essential that the Court understand that the trial judge's finding in respect of s. 53(1) is a "live issue" that should be addressed.

[6] Beyond this bare assertion, there is no specificity as to what Pfizer intends to establish by the inclusion of this document. Pfizer's notice of appeal explicitly alleges error on the part of the trial judge in his application or misapplication of s. 53(1) of the Act. The arguments in relation to s. 53(1) can be made in the context of its appeal. There is no suggestion otherwise. The ratiopharm motion addresses an order pursuant to the NOC Regulations, a separate proceeding under a separate regime. Pfizer has not established its relevance to this appeal.

[7] Moreover, Rule 343(2) governs the inclusion of documents in an appeal book. As a general rule, an appellate court will not consider evidence that was not before the court from which the appeal is taken. New evidence may be adduced on appeal only pursuant to an order under Rule 351: *Montana Band v. Canada*, 2001 FCA 176. No such motion has been made. Pfizer's contention that new evidence can be admitted where it is in the interests of justice to do so fails because, as noted above, although Pfizer indicates that the inclusion would be in the interests of justice, it has neither indicated nor established why.

[8] As for the request to amend its notice of appeal, Pfizer claims that it will help clarify the grounds of appeal and ensure that the issues raised by the judgment below will be fully argued and determined. In fact, the proposed amendment does nothing more than track the language of s. 53(1)

of the Act. The pertinent sections of the Act are a matter of which the Court must take judicial notice. No justification has been offered to establish why the amendment is required or what Pfizer intends to argue as a result of it. Its memorandum of fact and law addresses the issue of “omissions” and “additions” wilfully made “for the purpose of misleading.” I acknowledge that generally, amendments can be permitted at any stage of a proceeding. Nonetheless, Pfizer must at least indicate that the amendment is necessary and will serve the interests of justice. This it has failed to do.

[9] The remaining requests are contingent upon the relief requested in paragraphs (1) and (2) being granted. Since I am not inclined to grant the first two requests, there is no need to address the requests in paragraphs (3) and (4).

[10] The motion will be dismissed with costs. The ratiopharm memorandum of fact and law shall be served and filed within 30 days from the date of this order.

“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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