Court File No. A-158-13

FEDERAL COURT OF APPEAL

B E T W E E N:

ATTORNEY GENERAL OF CANADA

Appellant

- and -

PICTOU LANDING BAND COUNCIL and MAURINA BEADLE

Respondents

REPLY SUBMISSIONS OF THE PROPOSED INTERVENER AMNESTY INTERNATIONAL

Motion for Leave to Intervene brought by Amnesty International

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Lawyers for the Proposed Intervener,
First Nations Child and Family Caring Society

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1. Amnesty International ("AI") should be granted leave to intervene on this appeal, as its participation will assist the Court in understanding the relevance of international law in determining the issues before it.

2. Contrary to the submissions of the appellant, the Attorney General of Canada ("AGC"), AI does not seek to raise new issues or introduce new evidence.[1] Rather, AI seeks to make submissions on how Canada's international obligations are relevant to, and should be considered in, interpreting the scope of *Jordan's Principle* and the right to equality in s. 15 of the *Charter* in the context of this appeal. Arguing these two issues – which are both squarely before this Court – from a different perspective (i.e. through the lens of international law) does not amount to raising a new issue and should not militate against granting leave to intervene.

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[1] See paras. 29-34 of the AGC's submissions

3. This Court routinely allows parties to intervene in order to address issues from a different perspective, even if that perspective was not before the court at first instance. For example, this Court granted leave to intervene in a case where certain non-parties offered insight into the impact of the proposed interpretation of the *Canada Transportation Act*, S.C. 1996, c. C-10, on the multi-modal transportation industry. In granting the request to intervene, this Court determined that "the ocean carriers will be bringing a different perspective to the issues which are before the Court."[2] This "different perspective" was not raised in the decision below.

4. Similarly, in a case dealing with patent infringement where elements of competition law were also engaged, this Court allowed the intervention of the Commissioner on Competition because, *inter alia*, the Commissioner's "knowledge of experience with the international development" of relevant instruments gave it a "unique perspective on their meaning" that would "assist the Court in resolving the legal issues raised by the appeal."[3]

5. The same conclusion should apply in this case. AI possesses knowledge of relevant international law, giving it a unique perspective that can assist the Court in resolving the legal issues already raised by the parties on this appeal – namely, the proper interpretation of *Jordan's Principle* and the right to equality in s. 15 of the *Charter* in the circumstances of this case.

6. The AGC's submissions on this motion for leave to intervention confuse the matter of bringing new perspective on an existing issue with raising an altogether new issue. The AGC has not cited any authority for the proposition that a party should be denied leave to intervene because it seeks to introduce a new perspective on an existing issue.[4] Indeed, if the AGC's submissions were

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[2] ***Canadian Pacific Railway Company v. Boutique Jacob Inc.***, 2006 FCA 426, Amnesty International Book of Authorities, Tab 2 at para. 28

[3] ***Apotex Inc. v. Eli Lilly and Co.***, 2005 FCA 203, Tab "A" to these submissions at para. 9

[4] Neither of the two cases cited by the AGC at para. 30 of its submissions have any application to the present appeal. In ***Canada (Minister of Indian & Northern Affairs) v. Corbiere***, [1996] F.C.J. No. 660 (Fed. C.A.), this Court held that leave to intervene on certain issues should be denied because the proposed intervener wanted to introduce "new issues

accepted, such that no intervener could raise a perspective on an existing issue unless that perspective was already put forward by a party, the role of interveners would be almost meaningless. They would be reduced to merely parroting what the parties have already said, addressing the same issues from the same perspective.

7. This cannot be the case. The essential role of interveners is to assist the Court by making submissions that add value and a different perspective to the issues the Court must decide, in a way that the parties are unwilling and/or unable to do as fully or effectively. AI seeks to do just that in this appeal by making submissions on the proper scope and interpretation of *Jordan's Principle*, and of s. 15 of the *Charter* (both issues already raised by the parties), from the perspective of international law (which the parties have not yet fully explored).

8. Contrary to the AGC's submissions, and as set out in AI's original submissions on this motion,[5] AI is not seeking to add to the record or introduce new evidence.[6] Rather, AI will accept the record before this Court and will rely on international instruments, jurisprudence and other secondary sources related to the interpretation and application of international human rights law as it relates to the issues raised on this appeal.

9. Lastly, the AGC is seeking its costs of this motion to intervene. AI submits that such a request should not be granted by this Court given the public interest nature of this case and AI's public interest mandate. AI intends to advance an important public interest perspective: ensuring that the interpretation of Canadian law is consistent with Canada's international obligations. AI is a non-profit organization financed by subscriptions and donations from its worldwide membership,

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which require the introduction of fresh evidence" and had waited more than two years to intervene, with the result being that granting intervention would cause "serious prejudice and delay": see AGC BOA, Tab 3 at paras. 2-3. In ***Mikisew Cree First Nation v. Canada***, 2004 FCA 66, this Court simply affirmed the proposition, from *Corbiere,* that an intervenor "cannot, to the prejudice of the parties, argue new issues which require the introduction of fresh evidence": see AGC BOA, Tab 4 at para. 4. AI is <u>not</u> seeking to introduce any fresh evidence on this appeal.

[5] See AI submissions at para. 52

[6] See AGC's submissions at paras. 30 and 34

and receives no government funding.[7] Its mandate is to advance and promote international human rights at both the international and national levels, which includes making submissions in Canadian judicial proceedings as to the application of international human rights in Canada.[8] Consequently, AI is not seeking costs, and submits that this is not a situation in which costs should be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

January 21, 2014

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[7] **Affidavit of Alex Neve sworn December 17, 2013 ("Neve Affidavit")**, Amnesty International Motion Record ("AI MR"), Tab 2 at paras. 2-3

[8] **Neve Affidavit**, AI MR, Tab 2 at paras. 16-17

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Lawyers for the Proposed Intervener,
First Nations Child and Family Caring Society

TAB A

Case Name:

Eli Lily and Co. v. Apotex Inc.

Between
Apotex Inc., appellant (plaintiff by counterclaim), and Eli Lilly and Company and Eli Lilly Canada Inc., respondents (defendants by counterclaim), and Shionogi & Co. Ltd., respondent (defendant by counterclaim)

[2005] F.C.J. No. 964

[2005] A.C.F. no 964

2005 FCA 203

2005 CAF 203

40 C.P.R. (4th) 289

139 A.C.W.S. (3d) 970

Docket A-579-04

Federal Court of Appeal

Evans J.A.

Heard: In writing.
Judgment: May 27, 2005.

(18 paras.)

Civil procedure -- Appeals -- Application by Commissioner for Competition for intervenor status allowed.

Civil procedure -- Parties -- Intervenors.

Intellectual property -- Patents -- Ownership -- Assignment.

Commercial law -- Trade regulation -- Competition -- Regulatory framework.

Motion by the Commissioner of Competition for intervenor status in the appeal by the defendant and plaintiff by counterclaim, Apotex. The plaintiff, Eli Lilly, successfully applied for summary judgment that struck the defence and counterclaim by Apotex in its action for patent infringement. Apotex's pleadings alleged that Eli Lilly engaged in a criminal conspiracy to restrict competition by arranging the assignment in its favour of other similar patents. The judge found that although the arrangement lessened competition, it was expressly permitted under s. 50(1) of the Patent Act, and was permitted under the Intellectual Property Enforcement Guidelines issued by the Commissioner. The Commissioner sought leave to intervene on the issue of whether the judge's conclusion was compatible with the Guidelines, and whether the judge erred in holding that s. 50 of the Patent Act excluded assignments of patents from ss. 45 and 36 of the Competition Act. The Commissioner also sought to introduce an affidavit into evidence that discussed the development of the Guidelines.

HELD: Motion allowed in part. The power to intervene in judicial proceedings was implicit in the Commissioner's broad duty to enforce and administer the Competition Act. The Commissioner was directly affected by the appeal because her statutory jurisdiction in respect of the assignment of patents was at issue. The relationship between the relevant sections of the Patent Act and the Competition Act, and the interpretation of the Guidelines, involved questions of statutory interpretation that were plainly justiciable and of public interest. In addition, the Commissioner was in a position to assist the court in the resolution of the legal issues raised by the appeal because of her experience with the interpretation and development of the relevant instruments. The Commissioner's request to file an affidavit was denied. There was no basis to depart from the rule that intervenors must accept the record as found.

Statutes, Regulations and Rules Cited:

Competition Act, R.S.C. 1985, c. C-34, ss. 7(1)(a), 36, 45, 125, 126

Federal Court Rules, Rules 109, 369

Patent Act, R.S.C. 1985, c. P-4, ss. 50, 50(1)

Counsel:

Written representations by:

William Miller, Randall Hofley and Belinda Peres, for the proposed intervener.

Harry Radomski, David Scrimger and Miles Hastie, for the appellant.

Patrick Smith and John Norman, for the respondent (Eli Lilly and Company and Eli Lilly Canada Inc.).

David Morrow and Colin B. Ingram, for the respondent (Shionogi & Co. Ltd.).

REASONS FOR ORDER

1 **EVANS J.A.**:-- The Commissioner of Competition has brought a motion under rule 369 of the Federal Courts Rules for leave to intervene pursuant to rule 109 in the appeal by Apotex Inc. against an order of Hugessen J. of the Federal Court, dated October 20, 2004. The decision is reported as Eli Lilly and Co. v. Apotex Inc., [2004] F.C.J. No. 1753, 2004 FC 1445.

2 On a motion for summary judgement Hugessen J. struck out a counterclaim and defence by Apotex to an action by Elli Lilly and Company and Eli Lilly Canada Inc. ("Lilly") for infringing its eight patents for processing cefaclor, an antibiotic drug. Four of these patents had been assigned to Lilly by Shionogi & Co. Ltd.

3 Apotex alleged in its defence and counterclaim (to which it added Shionogi) that, since Lilly already owned four other relevant patents, the assignment of Shionogi's four patents lessened competition unduly because it enabled Lilly to control all the commercially viable processes for producing cefaclor. The agreement to assign, Apotex alleged, thereby constituted a criminal conspiracy contrary to section 45 of the Competition Act, R.S.C. 1985, c. C-34, and gave rise to an action in damages under section 36.

4 Hugessen J. rejected this argument. He held (at para. 22) that, while the assignment lessened competition, it did not do so "unduly", because subsection 50(1) of the Patent Act, R.S.C. 1985, c. P-4, expressly authorises the assignment of patents. He found (at para. 23) that his conclusion was compatible with the Intellectual Property Enforcement Guidelines ("IPEGs") issued by the Commissioner.

5 The Commissioner seeks leave to intervene in the appeal from Hugessen J. on two issues: whether the Judge erred in holding that section 50 of the Patent Act excludes assignments of patents from sections 45 and 36 of the Competition Act, and that his conclusion that it did was compatible with the IPEGs. The Commissioner's motion to intervene is opposed by Lilly and Shionogi, and supported by Apotex.

6 The Commissioner's motion to intervene will be granted on the basis of the factors identified in Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd. [2000] F.C.J. No. 220 (F.C.A.) to guide the Court's exercise of discretion under rule 109.

7 The Commissioner is directly affected by the appeal. In addition to her many and diverse specific functions, she has a general statutory responsibility for the "administration and

enforcement" of the Competition Act: paragraph 7(1)(a). Her ability to administer the Act in respect of patent rights may be affected by the outcome of Apotex' appeal because it could completely remove the assignment of patents from her jurisdiction under section 45. The Commissioner may also be affected by the interpretation of the IPEGs, which Hugessen J. found to be consistent with his decision. In view of her broad statutory functions, her interest in the appeal is not merely "jurisprudential".

8 The relationship between section 50 of the Patent Act and section 45 of the Competition Act involves a question of statutory interpretation that is plainly justiciable and of public interest. The interpretation of the IPEGs is also justiciable, and it is important to both the Commissioner and those to whom they apply that the meaning of their provisions is clear. This appeal provides an appropriate occasion for the Commissioner to be heard on these questions.

9 The parties to the appeal are sophisticated litigants whose counsel will no doubt represent them most ably. However, as a result of her understanding of competition law and policy, the Commissioner is better placed to put before the Court the possible consequences and implications for the administration of the Competition Act resulting from the interpretation of the statutory provisions in question in this appeal. In addition, as the author of the IPEGs, and possessing knowledge of experience with the international development of comparable instruments, the Commissioner has a unique perspective on their meaning. In my view, the Commissioner is able to assist the Court in resolving the legal issues raised by the appeal.

10 Although this appeal has been expedited, the Commissioner's intervention will not cause significant further delay. Even if leave to intervene were refused, the appeal would not have been heard until the Fall. The intervention should not preclude its being heard before the end of December. Any increased costs that the parties may incur as a result of the Commissioner's proposed intervention are likely to represent but a small proportion of the overall costs.

11 Lilly also argues that the Commissioner cannot be given leave because she has no statutory power to intervene in proceedings before the Court. Counsel notes that sections 125 and 126 of the Competition Act authorise the Commissioner to intervene in proceedings before federal and provincial administrative tribunals, and that there are no similar provisions authorising interventions before courts.

12 Counsel relies on Canada (Director of Investigation and Research under the Combines Investigation Act) v. Newfoundland Telephone Co., [1987] 2 S.C.R. 466, where the Court held that the Director (the Commissioner's predecessor) had no power to intervene in proceedings before the Newfoundland Board of Commissioners of Public Utilities and that, consequently, the Board could not grant leave to the Director to intervene before it. In my view, this case is distinguishable.

13 First, the Director had no statutory mandate analogous to the responsibility of the Commissioner under paragraph 7(1)(a). The power to intervene in judicial proceedings when the court believes that the Commissioner will assist it in interpreting the Competition Act is implicit in

the Commissioner's broad duty to enforce and administer the Act.

14 Second, Newfoundland Telephone is not directly on point because it concerned interventions in proceedings before an administrative tribunal, not a superior court.

15 Third, the Court in Newfoundland Telephone was influenced by the fact that the statute then in force empowered the Director to intervene before federal administrative tribunals, but was silent with respect to provincial tribunals. The Court inferred from this that the omission of provincial tribunals was deliberate and signalled a legislative intention to withhold from the Director the power to intervene before them.

16 The statute was subsequently amended so as to expressly authorise the Commissioner to intervene before tribunals at both the federal and provincial levels. Because of the different functions of courts and tribunals it cannot be inferred from this provision, and from the omission of a power to intervene before courts, that Parliament did not intend impliedly confer on the Commissioner the power to intervene in court proceedings, with leave of the court. It is not as if the Act provides that the Commissioner may intervene in proceedings before superior courts established under provincial law and makes no reference to courts established by Parliament.

17 For these reasons, leave to intervene will be granted on the terms set out in the order of the Court. However, the Commissioner's request to file the affidavit of Gwyllim Allen on the development of the IPEGs is denied. Interveners must normally accept the record as they find it. I am not persuaded that this affidavit warrants a departure from the normal rule.

18 Accordingly, the Commissioner's motion will be allowed in part. There will be no order as to costs.

EVANS J.A.

cp/e/qlspg/qlhcs

Court File No. A-158-13

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