

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N :

APOTEX INC., and
APOTEX PHARMACHEM INC.

Appellants
(Respondents in the
Federal Court of Appeal)

- and -

SANOFI-AVENTIS, and
BRISTOL-MYERS SQUIBB SANOFI
PHARMACEUTICAL HOLDING PARTNERSHIP

Respondents
(Appellants in the
Federal Court of Appeal)

NOTICE OF MOTION

**(Respecting an application for leave to intervene by the AIPPI
pursuant to Rule 55 of the *Rules of the Supreme Court of Canada*)**

TAKE NOTICE that the Proposed Intervener, the Association Internationale pour la Protection de la Propriété Intellectuelle / International Association for the Protection of Intellectual Property (“AIPPI”), hereby applies to a Judge pursuant to Rule 55 of the *Rules of the Supreme Court of Canada* for an Order:

1. Granting AIPPI leave to intervene on this appeal, subject to the following terms and conditions:

- (a) That AIPPI be permitted to file a factum not exceeding 20 pages; and

- (b) That AIPPI be permitted oral argument at the hearing of this appeal, not exceeding 20 minutes; or

2. Such further and other Order as the said Judge may deem appropriate.

AND FURTHER TAKE NOTICE that the following documents will be referred to in support of the said motion:

- 1. The affidavit of Stephan Hubert Freischem, sworn June 17, 2014; and
- 2. Such further or other material as counsel may advise and may be permitted.

AND FURTHER TAKE NOTICE that the said motion shall be made on the following grounds:

1. AIPPI seeks leave to intervene in this appeal. AIPPI is an international organization founded in 1897 and dedicated to the development, improvement, legal protection, and international harmonization of intellectual property. Its membership includes intellectual property practitioners, owners, academics and others from over 100 countries, with approximately 9000 members, including those from Canada. The work of AIPPI has been relied upon by the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO), other government and non-governmental organizations, and the courts, including in Canada. AIPPI has also intervened before other courts and tribunals in respect of intellectual property issues, including the Supreme Court of the United States, the European Court of Justice, and the European Patent Office (Enlarged Board of Appeal).

2. As such, AIPPI is well positioned to assist this Court with respect to the issues of patent utility and disclosure which are raised by the within appeal. In particular, AIPPI will be able to provide the Court with a unique, international perspective, to permit this Court to understand

how Canadian law compares to, and in some cases now differs from, that of other national or regional jurisdictions, including for example the United States, various countries within Europe, and Japan.

3. AIPPI has an interest in this appeal:

- (a) First, as an organization whose objects include the harmonization of international patent laws, AIPPI has a direct interest in the development of the law of utility in Canada, including in respect of which the utility of an invention is required to be disclosed or discussed in the patent specification.
- (b) Second, AIPPI has previously conducted extensive international research on the topic of utility and industrial applicability in various national and regional jurisdictions. It has also passed a resolution pertaining to the international harmonization of the same. AIPPI has also further investigated the utility and/or industrial applicability requirements in various national jurisdictions in view of the specific issues arising on the present appeal. Therefore, AIPPI has information and a perspective relevant to development of the laws of utility in Canada as compared to that of other jurisdictions.
- (c) Third, members of AIPPI include intellectual property practitioners and intellectual property owners from around the world who file, or oversee the filing of, patents in Canada, and will be impacted to the extent that the law in Canada on utility develops in a manner which is different or inconsistent with that of other jurisdictions where corresponding patent protection is sought.

4. Having regard to its interest in the development of the law of utility in Canada, AIPPI wishes to address the following issues as raised in the Appellants' factum in this appeal:

- (a) The extent to which utility is required to be discussed or disclosed in the patent specification; and

- (b) What, if any, disclosure requirements are imposed on patentees when they are relying on the doctrine of sound prediction so as to satisfy the utility requirement for patentability.

5. In relation to these issues, if granted leave to intervene, AIPPI will make submissions on the utility or industrial applicability requirements for patentability in other jurisdictions, including the following:

- (a) Many national and regional jurisdictions have a requirement of “utility” or “industrial applicability” for patentability. The requirement of utility or industrial applicability is most often expressly established by statute;
- (b) For many jurisdictions, the utility or industrial applicability must be indicated in the specification if it is not otherwise obvious;
- (c) For many jurisdictions, there is no requirement that the proof or support for the utility or industrial applicability be provided in the patent specification;
- (d) In many jurisdictions, it is relatively rare that utility or industrial applicability is used as a basis to deny the grant of a patent. Similarly, it is relatively rare that utility or industrial applicability is used as a basis to invalidate a granted patent; and
- (e) By virtue of treaties and conventions to which Canada is a signatory, many patent applications filed in Canada have been drafted for filing in multiple foreign jurisdictions, and without having specific regard to Canadian laws, including the law of utility. Development of the law in Canada in a manner which is different or inconsistent with that of other major jurisdictions will lead to significant uncertainty and added costs for patentees who seek corresponding patent protection in Canada.

6. AIPPI's proposed submissions are useful and different from the parties to the appeal:

- (a) AIPPI presents the perspective of an international, politically neutral, non-profit organization dedicated to the development, improvement, protection, and international harmonization of intellectual property. Its perspective is therefore fundamentally different from that of generic and innovative pharmaceutical companies;
- (b) In addition, AIPPI can offer the perspective of an active participant in the international discourse that has taken place amongst intellectual property practitioners, owners, academics and other persons, including government representatives, in respect of matters relevant to the issues of the present appeal; and
- (c) Overall, in making its submissions, AIPPI will rely upon its recognized expertise in relation to the study and comparison of existing national and international laws and in proposing measures to achieve harmonization of those laws. AIPPI seeks to demonstrate to the Court that the development of the law on utility in Canada that is different or inconsistent with that of other major jurisdictions will lead to significant uncertainty and added costs for patentees who seek corresponding patent protection in Canada.

7. Rule 55 of the *Rules of the Supreme Court of Canada*.

8. Such further and other grounds as counsel may advise and this Honourable Court may permit.

Dated at Ottawa, Ontario, this 23rd day of June, 2014.

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NOTICE TO THE RESPONDENT TO A MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.