

Federal Court



Cour fédérale

**Date: 20230124**

**Docket: T-2543-22**

**Citation: 2023 FC 115**

**Ottawa, Ontario, January 24, 2023**

**PRESENT: The Honourable Mr. Justice Manson**

**Docket: T-2543-22**

**BETWEEN:**

**ALEXION PHARMACEUTICALS, INC.**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

I. Introduction

[1] This is an application brought pursuant to section 52 of the *Patent Act*, RSC 1985, c P-4 [the “Act”]. The Applicant, Alexion Pharmaceuticals, Inc. [“Alexion”], seeks to add Mark J. Evans [“Dr. Evans”] as an inventor to the records of Canadian Patent No. 2,645,810 [the “810 Patent”] and Canadian Patent No. 3,022,097 [the “097 Patent”].

[2] The Respondent, the Attorney General of Canada, does not oppose this application.

## II. Background

[3] Alexion is the sole registered owner of the 810 Patent and the 097 Patent.

[4] The two current named inventors are Leonard Bell [“Dr. Bell”] and Russell P. Rother [“Dr. Rother”]. Dr. Bell and Dr. Rother do not receive remuneration or royalties relating to the 810 Patent and the 097 Patent. Dr. Evans, Dr. Bell and Dr. Rother are not current employees of Alexion.

[5] The 810 Patent, titled “Treatment of Paroxysmal Nocturnal Hemoglobinuria Patients by an Inhibitor of Complement”, was issued on December 11, 2018 and contains 16 claims. The 810 Patent was issued from Patent Cooperation Treaty Application No. US2007/006606 [the “PCT Application”].

[6] The 097 Patent is a divisional of the 810 Patent and is similarly titled “Treatment of Paroxysmal Nocturnal Hemoglobinuria Patients by an Inhibitor of Complement”. The 097 Patent was issued on October 27, 2020 and contains eight claims.

[7] Dr. Evans was not included in the list of named inventors in the PCT Application. Correspondingly, he was excluded from the current named inventors of the 810 Patent and the 097 Patent.

[8] Alexion submits that it became aware of Dr. Evans's contribution to the claimed subject matter and inadvertent omission from the PCT Application in 2016. Subsequently, three United States patents that were also applied for from the PCT Application were amended to add Dr. Evans as an inventor.

[9] In support of this application, Alexion has included affidavits from each of Dr. Evans, Dr. Bell and Dr. Rother. As well as an affidavit from Tara Rahemba, Head of Intellectual Property at Alexion.

[10] Dr. Bell and Dr. Rother consent to the naming of Dr. Evans as a co-inventor.

[11] The 810 Patent claims, *inter alia*, "[a]n antibody that binds C5 comprising a heavy chain consisting of SEQ ID NO: 2 and a light chain consisting of SEQ ID NO: 4", as those sequences are defined in the 810 Patent.

[12] The 097 Patent claims, *inter alia*, "[a] use of a compound which inhibits complement or inhibits formation of C5b-9 to improve at least one aspect of the quality of life of a patient suffering from paroxysmal nocturnal hemoglobinuria (PNH), wherein said compound is an antibody comprising a heavy chain consisting of SEQ ID NO: 2 and a light chain consisting of SEQ ID NO: 4", as those sequences are defined in the 097 Patent.

[13] The evidence indicates that Dr. Evans made the following contributions to the 810 Patent and the 097 Patent:

- A. Dr. Evans worked on an antibody that binds C5.
  
- B. Dr. Evans was involved in conceiving that the antibody include a heavy chain consisting of SEQ ID NO: 2 and a light chain consisting of SEQ ID NO: 4 (as those sequences are defined in the 810 Patent and the 097 Patent).
  
- C. Dr. Evans was responsible for the sequencing of the antibody having SEQ ID NO: 2 and SEQ NO: 4 (as those sequences are defined in the 810 Patent and the 097 Patent).

[14] The addition of Dr. Evans as an inventor will not affect the ownership of the 810 Patent or the 097 Patent. Dr. Evans has confirmed that all of his rights in the 810 Patent and the 097 Patent are owned by Alexion.

### III. Issue

[15] Should the 810 Patent and the 097 Patent be varied to add Dr. Evans as an inventor?

### IV. Analysis

[16] Section 52 of the Act grants this Court the power to vary an entry in the records of the Patent Office:

**52** The Federal Court has jurisdiction, on the application of the

**52** La Cour fédérale est compétente, sur la demande du commissaire ou de toute

Commissioner or of any person interested, to order that any entry in the records of the Patent Office relating to the title to a patent be varied or expunged.

personne intéressée, pour ordonner que toute inscription dans les registres du Bureau des brevets concernant le titre à un brevet soit modifiée ou radiée.

[17] The power to vary “title” has been interpreted broadly to include matters such as inventorship (*Micromass UK Limited v Canada (Commissioner of Patents)*, 2006 FC 117 at paras 12-13; *Qualcomm Incorporated v Canada (Commissioner of Patents)*, 2016 FC 1092 at para 10).

[18] The Act does not specify a test for applications to vary inventorship pursuant to section 52. In determining whether to grant the relief requested, the Court has applied the principles from subsection 31(4) of the Act, which governs the joining of applicants in pending patent applications. Namely the Court must be satisfied of the following:

- A. the proposed individual(s) should be joined as an inventor; and
- B. the omission of the inventor was due to inadvertence or mistake and not for the purpose of delay.

(*Pharma Inc v Canada (Commissioner of Patents)*, 2019 FC 208 at para 5; *Segatoys Co, Ltd v Canada (Attorney General)*, 2013 FC 98 at paras 19-24)

[19] I am satisfied that Dr. Evans should be joined as an inventor. Alexion has provided sufficient evidence showing Dr. Evans's contribution to specific claims of the 810 Patent and the 097 Patent.

[20] I am also satisfied that the omission was due to inadvertence and not done for the purposes of delay. The omission of Dr. Evans as an inventor on the PCT Application appears to have led to his exclusion from all patents derived therefrom, including the 810 Patent and the 097 Patent.

[21] Alexion has confirmed that Dr. Evans's omission from the PCT Application was due to inadvertence that was uncovered during a review of pending US patent applications that were also issued from the PCT Application. It did not occur to Alexion to correct its Canadian applications until retaining Canadian counsel in September 2022.

[22] Alexion has satisfied both requirements to vary inventorship under section 52 of the Act. The 810 Patent and the 097 Patent are hereby varied to add Dr. Evans as an inventor.

V. Conclusion

[23] The application is granted.

**JUDGMENT in T-2543-22**

**THIS COURT'S JUDGMENT is that** the application is allowed and Mark J. Evans is hereby added as an inventor to Canadian Patent No. 2,645,810 and Canadian Patent No. 3,022,097.

"Michael D. Manson"

---

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-2543-22

**STYLE OF CAUSE:** ALEXION PHARMACEUTICALS, INC. v ATTORNEY  
GENERAL OF CANADA

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO  
RULE 369 OF THE *FEDERAL COURTS RULES***

**JUDGMENT AND REASONS:** MANSON J.

**DATED:** JANUARY 24, 2023

**WRITTEN REPRESENTATIONS BY:**

Peter Wilcox  
Marian Wolanski

FOR THE APPLICANT

Abigail Browne

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Belmore Neidrauer LLP  
Barristers and Solicitors  
Toronto, Ontario

FOR THE APPLICANT

Attorney General of Canada  
Toronto, Ontario

FOR THE RESPONDENT