

Date: 20080110

**Dockets: A-253-07
A-129-07**

Citation: 2008 FCA 15

**CORAM: DESJARDINS J.A.
SEXTON J.A.
PELLETIER J.A.**

Docket: A-253-07

BETWEEN:

COBALT PHARMACEUTICALS INC.

Appellant

and

**PFIZER CANADA INC., PFIZER INC., PFIZER LIMITED
and THE MINISTER OF HEALTH**

Respondents

Docket: A-129-07

AND BETWEEN:

PHARMASCIENCE INC.

Appellant

and

**PFIZER CANADA INC., PFIZER INC., PFIZER LIMITED
and THE MINISTER OF HEALTH**

Respondents

Heard at Toronto, Ontario, on January 10, 2008.

Judgment delivered from the Bench at Toronto, Ontario, on January 10, 2008.

REASONS FOR JUDGMENT OF THE COURT BY:

DESJARDINS J.A.

Date: 20080110

**Dockets: A-253-07
A-129-07**

Citation: 2008 FCA 15

**CORAM: DESJARDINS J.A.
SEXTON J.A.
PELLETIER J.A.**

Docket: A-253-07

BETWEEN:

COBALT PHARMACEUTICALS INC.

Appellant

and

**PFIZER CANADA INC., PFIZER INC., PFIZER LIMITED
and THE MINISTER OF HEALTH**

Respondents

Docket: A-129-07

AND BETWEEN:

PHARMASCIENCE INC.

Appellant

and

**PFIZER CANADA INC., PFIZER INC., PFIZER LIMITED
and THE MINISTER OF HEALTH**

Respondents

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on January 10, 2008)

DESJARDINS J.A.

[1] Both appeals A-253-07 and A-129-07, relate to an interlocutory judgment rendered by a judge of the Federal Court (Hughes J.) who, in two sets of identical reasons, granted the motion of the respondents Pfizer Canada and Pfizer Inc. to add Pfizer Limited as a party to these proceedings.

[2] The appellants, Cobalt Pharmaceuticals Inc. in file no. A-253-07, and Pharmascience Inc. in file no. A-129-07, opposed the motion. They both brought a motion to strike these proceedings in respect of one of the patents at issue, the '393 patent, on the basis that since Pfizer Limited, the owner of the '393 patent, had not been included as one of the applicants, these proceedings were a nullity. The motions judge dismissed both appellants' motion.

[3] The facts and the reasons for judgment of the motions judge can be found at 2007 FC 169 for file A-253-07 and at 2007 FC 167 for file A-129-07.

[4] The motions judge found that it was not fatal to an application, under section 6(1) of the *NOC Regulations*, that the owner of the patent who is not a "first person" was not made initially a party to the proceedings, provided that the owner is joined at "an appropriate subsequent time" (reasons for judgment, paragraph 15). He found that subsection 6(1) of the *NOC Regulations* is a mandatory provision requiring that a "first person" commence an application within the 45-day time limit but that this time limit did not apply to the owner of the patent under subsection 6(4) of the *NOC Regulations*. He concluded that subsection 6(4) must be read separately, finding that while subsection 6(4) mandates the addition of the patentee as a party, the timing for doing so is governed not by subsection 6(1) but by the *Federal Courts Rules* (reasons for judgment, paragraph 14). He referred to Rule 303 requiring joinder of certain parties and Rules 103 and 104 which provide that a claim shall not be defeated by reasons of misjoinder or nonjoinder of a party and which allow the Court "[a]t any time" to order joinder subject to appropriate directions.

[5] In coming to this conclusion, the motions judge established a parallel between subsection 6(4) of the *NOC Regulations* and subsection 55(3) of the *Patent Act* (and analogous subsections in older versions of the Act) where the patentee must be made a party to any action for infringement of a patent (reasons for judgment, paragraph 10).

[6] We feel it was unnecessary for the motions judge to have recourse to subsection 55(3) of the *Patent Act*.

[7] Subsection 6(4) of the *NOC Regulations* while mandatory does not give any time limit for the patentee to be added as a party. The motions judge was correct in supplementing the provision with the assistance of the *Federal Courts Rules*.

[8] In *Pfizer Canada Inc. v. Canada (Minister of Health)*, 2007 FC 205; aff'd 207 FCA 244, the Federal Court (Phelan J.) explained at para. 17, 18 and 19 that the *Federal Courts Rules* apply to proceedings initiated under the Regulations to the extent that the Rules do not conflict with the Regulations themselves. He wrote:

[17] The Regulations are not a complete code. There are numerous aspects of *NOC* proceedings which are governed either by the *Federal Courts Act* or its Rules. The Regulations enjoy supremacy only in respect of matters which conflict with the more general provisions found in the Act or the Rules.

[18] The fundamental requirement under the Regulations is that an application to the Court must be commenced within 45 days of the notice of allegation. The Court has no jurisdiction to extend the 45 days because the general rule

on extensions would be in direct conflict with Regulation s. 6(1). (*Merck Frosst Canada Inc. v. Canada (Minister of National Health and Welfare)* (1997), 72 C.P.R. (3d) 453 (F.C.T.D.))

- [19] However, once the matter is commenced within the statutory time limits, the *Federal Courts Rules*, SOR/98-106, apply except where there is a conflict. The Act and Rules apply to a number of matters not specifically addressed in the Regulations including the right to appeal. (*Bayer AG v. Canada (Minister of National Health and Welfare)* (1993), 51 C.P.R. (3d) 329 (F.C.A.) at 336).

[9] Rule 104(1) gives discretion to the Court to add the patentee “[a]t any time”, and to set appropriate directions. This includes ensuring that the addition be made so as to maintain the normal course of the proceedings. In the case at bar, the motions judge ordered that Pfizer Limited be represented by the same solicitors as the respondents and that it not be entitled to adduce any evidence or conduct cross-examinations on its own behalf beyond that already adduced or to be adduced and conducted or to be conducted by the respondents.

[10] There was therefore no inconsistency between the NOC Regulations and the *Rules*. The motions judge was well within his discretion to allow Pfizer Limited to be named as a party to the application as permitted by the *Federal Courts Rules*. He considered the possibility of prejudice and concluded there were none. In exercising his discretion in this manner, he committed no reviewable error.

[11] These appeals will be dismissed with costs.

[12] Copies of these reasons for judgment will be filed in each file.

"Alice Desjardins"

J.A.

FEDERAL COURT OF APPEAL
NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS: A-253-07 & A-129-07

**APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE HUGHES
DATED FEBRUARY 14, 2007 IN DOCKET NO. T-768-06 FOR A-253-07**

**APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE HUGHES
DATED FEBRUARY 14, 2007 IN DOCKET NO. T-899-06 FOR A-129-07**

**STYLE OF CAUSE: COBALT PHARMACEUTICALS INC. v. PFIZER CANADA
INC., PFIZER INC., PFIZER LIMITED and THE MINISTER
OF HEALTH
AND BETWEEN:
PHARMASCIENCE INC. v. PFIZER CANADA INC.,
PFIZER INC., PFIZER LIMITED and THE MINISTER OF
HEALTH**

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 10, 2008

REASONS FOR JUDGMENT OF THE COURT BY: (DESJARDINS, SEXTON &
PELLETIER JJ.A.)

DELIVERED FROM THE BENCH BY: DESJARDINS J.A.

APPEARANCES:

Ms. Heather Watts

FOR THE APPELLANT (Cobalt
Pharmaceuticals Inc.)

Ms. Carol Hitchman
Ms. Olga Kalinina

FOR THE APPELLANT
(Pharmascience Inc.)

Mr. John B. Laskin
Ms. Amanda Kemshaw

FOR THE RESPONDENT
Pfizer Canada Inc.

No one appearing

FOR THE RESPONDENT
The Minister of Health

SOLICITORS OF RECORD:

Deeth Williams Wall LLP

FOR THE APPELLANT (Cobalt

Toronto, Ontario

Hitchman & Sprigings
Toronto, Ontario

Torys LLP
Toronto

John S. Sims, Q.C.
Deputy Attorney General of Canada

Pharmaceuticals Inc.)

FOR THE APPELLANT
(Pharmascience Inc.)

FOR THE RESPONDENT
Pfizer Canada Inc.

FOR THE RESPONDENT
The Minister of Health