

Federal Court



Cour fédérale

Date: 20101207

Docket: T-2221-07

Citation: 2010 FC 1236

Ottawa, Ontario, December 7, 2010

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

**PFIZER CANADA INC. AND PHARMACIA
ATKIEBOLAG**

Applicants

and

**THE MINISTER OF HEALTH AND
PHARMASCIENCE INC.**

Respondents

REASONS FOR ORDER AND ORDER

[1] Pfizer Canada Inc. and Pharmacia Atkiebolag, collectively “Pfizer”, successfully prosecuted an application for a prohibition order pursuant to section 6 of the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 (the “PMNOC Regulations”). On December 18, 2009, an Order was issued prohibiting the Minister of Health from issuing a Notice of Compliance to Pharmascience Inc. (“Pharmascience”) until the expiry of Canadian Patent No. 1,339,132. Pfizer was also awarded its costs on the application.

[2] By Notice of Motion filed pursuant to the *Federal Courts Rules*, SOR/98-106 (the “Rules”), Pfizer seeks directions concerning the assessment of its costs. Pharmascience filed a Responding Motion Record on May 28, 2010. By letter dated August 18, 2010, the Minister advised that he would not participate in this motion.

[3] Briefly, Pfizer seeks the assessment of its costs at an elevated tariff, that is midway of Column IV of Tariff B to the Rules, together with directions concerning the number of counsel for whom costs should be awarded and a 25% increase in costs as a penalty for Pharmascience’s alleged failure to pursue all grounds of invalidity alleged in its Notice of Allegation.

[4] For its part, Pharmascience first argued that Pfizer is not entitled to the benefit of Rule 403, that is directions in the matter of assessing costs, since it filed its motion in that regard beyond the time limit for doing so and has failed to satisfy the test for an extension of time. As well, Pharmascience argues that should the Court exercise its discretion to extend the time for Pfizer’s motion, higher costs as sought by Pfizer should not be authorized.

[5] I will first address the timeliness of Pfizer’s motion and its request for an extension of time.

[6] By requesting an extension of time in its written submissions filed as part of the Motion Record, Pfizer acknowledges that its motion for directions pursuant to Rule 403 is late. The extension of time is requested in the Notice of Motion. In the same written submissions, Pfizer purported to explain why the motion was filed beyond the time period specified in Rule 403 and

focused on the lack of prejudice resulting to Pharmascience as a result of the late filing of the Pfizer motion.

[7] Pharmascience points out that Pfizer provided no affidavit evidence as to the reason for the delay in filing the motion nor concerning its continuing intention to proceed with a motion pursuant to Rule 403. Pharmascience submits that arguments presented in written submissions are no substitute for the lack of evidence that is required in support of a request for the Court to exercise its discretion in extending the time set out in Rule 403.

[8] Rule 403 provides as follows:

<p>Motion for directions</p> <p>403. (1) A party may request that directions be given to the assessment officer respecting any matter referred to in rule 400,</p> <p>(a) by serving and filing a notice of motion within 30 days after judgment has been pronounced; or</p> <p>(b) in a motion for judgment under subsection 394(2).</p>	<p>Requête pour directives</p> <p>403. (1) Une partie peut demander que des directives soient données à l'officier taxateur au sujet des questions visées à la règle 400 :</p> <p>a) soit en signifiant et en déposant un avis de requête dans les 30 jours suivant le prononcé du jugement;</p> <p>b) soit par voie de requête au moment de la présentation de la requête pour jugement selon le paragraphe 394(2).</p>
<p>Motion after judgment</p> <p>(2) A motion may be brought under paragraph (1)(a) whether or not the judgment included an order concerning costs. Same judge or prothonotary</p>	<p>Précisions</p> <p>(2) La requête visée à l'alinéa (1)a) peut être présentée que le jugement comporte ou non une ordonnance sur les dépens. Présentation de la requête</p>

(3) A motion under paragraph (1)(a) shall be brought before the judge or prothonotary who signed the judgment.

(3) La requête visée à l'alinéa (1)a est présentée au juge ou au protonotaire qui a signé le jugement.

[9] Rule 8 governs applications for the extension of time. Rules 8(1) and 8(2) are relevant and provide as follows:

8. (1) On motion, the Court may extend or abridge a period provided by these Rules or fixed by an order.
When motion may be brought

8. (1) La Cour peut, sur requête, proroger ou abréger tout délai prévu par les présentes règles ou fixé par ordonnance.
Moment de la présentation de la requête

(2) A motion for an extension of time may be brought before or after the end of the period sought to be extended.

(2) La requête visant la prorogation d'un délai peut être présentée avant ou après l'expiration du délai.

[10] The decision in *Canada v. Hennelly* (1999), 244 N.R. 399 (C.A.) sets out four criteria that are to be considered upon an application for an extension of time. In order to obtain an extension of time, an applicant must show first, a continuing intention to pursue the application; second that the application has some merit; third that no prejudice arises from the delay; and fourth, that a reasonable explanation for the delay exists. The underlying consideration when weighing the four criteria is that justice must be done between the parties; see *Toronto Sun Wah Trading Inc. v. Canada (Attorney General)* (2008), 383 N.R. 340 (F.C.A.).

[11] As noted above, Rule 403 provides that a motion for directions is to be brought “by serving and filing a notice of motion within 30 days after judgment has been pronounced” (that is Rule 403(1)(a)). The purpose of providing a specific deadline in Rule 403 is to ensure that the matter is

sufficiently fresh in the mind of the Court; see *Smerchanski v. Minister of National Revenue*, [1979] 1 F.C. 801.

[12] The final Judgment in this matter was rendered on December 18, 2009. The Index of Recorded Entries indicates that this Judgment was entered in the Judgment and Order Book on that date. The period from December 21, 2009 to January 7, 2010 is the Christmas recess for the Court and the text of Rule 6(3) of the *Federal Courts Rules* clearly states that the Christmas recess is to be excluded from the calculation of time periods under the Rules. This means that the 30 day period from the date of final judgment, excluding the Christmas recess, expired on February 4, 2010. Yet, as noted above, Pfizer did not file its motion for directions until May 26, 2010, a delay of some 3 months and 3 weeks after the time limit.

[13] In asking the Court to exercise its discretion to extend the time for bringing this motion, Pfizer points simply to the lack of prejudice to Pharmascience. With justification, Pharmascience responds by saying that the lack of prejudice is but one of the elements to be considered and weighed by the Court in deciding to exercise its discretion.

[14] In reply written representations, Counsel for Pfizer submitted that Pfizer was awaiting the outcome of a related proceeding pursuant to the PMNOC Regulations, that is Cause T-124-08, involving Pfizer as the Applicant and the same patent and the same drug, that is Latanoprost. In oral argument, Pfizer submitted that it was reasonable to wait for the outcome of the related proceeding so that Pfizer could bring its motions for directions in the two cases at the same time, for the sake of economy of the parties' and the Court's time.

[15] The final Judgment in Cause T-124-08 was issued on April 26, 2010. A motion for directions pursuant to Rule 403 was filed by Pfizer on May 26, 2010.

[16] In support of its request for extraordinary relief, Pfizer attempts to distinguish this case from the decision in *Maytag Corp. v. Whirlpool Corp.* (2001), 14 C.P.R. (4th) 368 (F.C.A.). In *Maytag*, a matter had progressed from the Trial Division of the Federal Court of Canada, as it then was, to the Federal Court of Appeal and ultimately to the Supreme Court of Canada. *Maytag* was successful and was awarded costs at each stage of the litigation. After the Court of Appeal decision, *Maytag* failed to pursue directions for costs, deciding instead to wait for the Supreme Court of Canada to render its decision. As a result, *Maytag's* motion was filed more than two years after the expiry of the 30 day deadline.

[17] The Federal Court of Appeal held that waiting for the decision of the Supreme Court of Canada was not a valid reason to delay filing the motion for directions. Pfizer argues that the lengthy two year delay in that case makes it exceptional. In my opinion, this argument cannot succeed. Waiting to file a motion for directions because of an impending decision in a similar, unrelated case is much less compelling than waiting for a Supreme Court of Canada appeal decision on the same case.

[18] Counsel for Pharmascience cited a recent decision of Justice Pinard in *Collins v. Canada (Attorney General)*, 2010 FC 949. In that decision, Justice Pinard refused an extension of time for the filing of an application record and said the following:

The requested extension of time is denied on the main ground that the applicant has failed to satisfy the Court that a reasonable explanation for the delay exists.

[19] Counsel for Pfizer submits that a distinction can be drawn between those cases where an extension of time is refused in applications for judicial review and the present case. Pfizer argues that applications for judicial review can involve substantive rights whereas the extension of time in this case is sought simply for the purpose of allowing the Court to deal with a procedural matter, that is the manner in which costs will be assessed, the award of costs already having been made.

[20] I am not persuaded by this argument. The Rules clearly specify that a motion for directions is to be filed within 30 days of a final judgment. Pfizer waited 3 ½ months before filing its motion for directions. Pfizer did not present an evidentiary basis to justify the exercise of discretion to extend the time pursuant to Rule 403. Pfizer has failed to demonstrate, by acceptable evidence, a continuing intention to seek an extension of time. Pfizer has failed to show why this Court should detour from the jurisprudence which has set out a framework within which the discretion to extend time should be exercised.

[21] I agree with the submissions of Pharmascience that Pfizer has failed to establish the evidentiary basis upon which it seeks the positive exercise of discretion for the extension of time. I agree with the arguments of Pharmascience that Pfizer has failed to offer an adequate explanation for the delay and has failed to demonstrate, as a consequence of the lack of evidence, a continuing intention to bring a motion for directions.

[22] As noted by the Court in the decision in *Hennelly*, four factors are to be considered and in my opinion, this means that an applicant, such as Pfizer, must address each of those four factors. In the present case, Pfizer has not adequately addressed the reason for the delay.

[23] In the result, Pfizer's motion for directions is dismissed. Pfizer is entitled to its costs of the application as per the Order of December 18, 2009, to be assessed by an assessment officer in the absence of directions. Pharmascience shall have its costs of this motion.

[24] If the parties cannot agree on costs, then brief submissions can be made, not exceeding two (2) pages, such submissions to be served and filed by Pharmascience by December 14, 2010 and by Pfizer by December 20, 2010.

ORDER

THIS COURT ORDERS that the motion for directions is dismissed with costs to Pharmascience in accordance with paragraph 24 above.

“E. Heneghan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2221-07

STYLE OF CAUSE: PFIZER CANADA INC. AND PHARMACIA
ATKIEBOLAG v. THE MINISTER OF HEALTH AND
PHARMASCIENCE INC.

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: October 25, 2010

**REASONS FOR ORDER
AND ORDER:** HENEGHAN J.

DATED: December 7, 2010

APPEARANCES:

Brian Daley
Kavita Ramamoorthy

FOR THE APPLICANTS

Carol Hitchman

FOR THE RESPONDENT
PHARMASCIENCE INC.

SOLICITORS OF RECORD:

Ogilvy, Renault LLP
Barristers and Solicitors
Montreal, QC

FOR THE APPLICANTS

Gardiner Roberts LLP
Barristers and Solicitors
Toronto, ON

FOR THE RESPONDENT
PHARMASCIENCE INC.

Myles J. Kirvan
Deputy Attorney General of Canada
Toronto, ON

FOR THE RESPONDENT
THE MINISTER OF HEALTH