

Federal Court



Cour fédérale

Date: 20100622

Docket: T-1118-09

Citation: 2010 FC 684

Toronto, Ontario, June 22, 2010

PRESENT: Kevin R. Aalto, Esquire, Case Management Judge

BETWEEN:

PFIZER CANADA INC. AND EISAI CO., LTD.

Applicants

and

**GENPHARM ULC, MYLAN PHARMACEUTICALS ULC
AND THE MINISTER OF HEALTH**

Respondents

REASONS FOR ORDER AND ORDER

[1] When two corporations amalgamate, does an act taken by one of the pre-amalgamation corporations in its pre-amalgamation name result in the act being effectively a nullity? This is one of the issues raised in this application pursuant to the *Patented Medicines (Notice of Compliance) Regulations* (the “Regulations”). To put it another way, is a corporation which continues to carry

on business under its pre-amalgamation name without registering it, a “second person” within the meaning of the Regulations?

[2] This motion is brought by the Respondents, Genpharm ULC and Mylan Pharmaceuticals ULC (collectively “Genpharm”, individually “Genpharm ULC” and “Mylan”) pursuant to subsection 6 (5) (b) of the Regulations to strike one narrow allegation found in the notice of application. The specific allegation calls into question the corporate existence of Genpharm ULC. Pfizer pleads that the Notice of Allegation (“NOA”) that triggered this proceeding has no legal effect because Genpharm ULC, at the time it served the NOA did “not exist at law and/or was not a ‘second person’” under the Regulations. The issue for determination on this motion is whether or not these “corporate existence” allegations are baseless in law and doomed to fail.

[3] In simple terms, Pfizer argues that there is no legal entity called “Genpharm ULC” and it did not exist when it purported to serve Pfizer with a NOA. This is because over a month before it served the NOA it had become Mylan Pharmaceuticals ULC. Thus, in Pfizer’s view, Genpharm ULC was not a legal “person” and could not become a “second person” under the Regulations. An NOA sent by an entity that is not a second person has no legal affect. For that reason they argue that the allegation ought not to be struck and ought to be permitted to be reviewed by the hearings judge.

[4] Genpharm, for its part, argues that there is no merit to Pfizer's argument and that the hearing ought not to be encumbered with allegations that will not have any bearing on the outcome of the proceeding. Genpharm also point out that the name change is an internal matter to Genpharm and does not alter the scheme of the Regulations.

[5] In order to understand the issue better a brief chronology is helpful. The following sets out the chronology giving rise to the corporate issue which Pfizer has put in play:

December 21/07	Genpharm ULC is continued under the <i>Alberta Business Corporations Act</i> ("ABCA");
December 23/08	Genpharm ULC files its ANDS with the Minister;
January 1/09	Genpharm ULC amalgamates with Prempharm ULC under the ABCA and continues under the name Genpharm ULC;
April 24/09	Registered amendment of the name of Genpharm ULC to Mylan;
May 27/09	NOA is sent to Pfizer;
June 18/09	Proof of service of the NOA on Pfizer is sent to the Minister;
June 29/09	Pfizer conducts a corporate search of Genpharm ULC;
July 10/09	The Notice of Application is issued by Pfizer;
July 14/09	Pfizer serves Genpharm;
October 1/09	Genpharm officially adopts the Mylan name;
December/09	Mylan files information with the Minister to effect a name change from Genpharm ULC to Mylan Pharmaceuticals ULC

[6] Arising from these facts, Pfizer alleges in its Notice of Application:

6. Genpharm ULC purports to be a “second person” under the *Regulations*. However, on January 1, 2009, Genpharm ULC amalgamated with Prempharm Inc., and on April 24, 2009, the amalgamated entity changed its name to Mylan Pharmaceuticals ULC. Details of Genpharm ULC’s amalgamation and name change and details of who, as between Genpharm ULC and Mylan Pharmaceuticals ULC, is currently the sponsor of Genpharm’s abbreviated new drug submission with the Minister is not known to the Applicants but is known to the respondents.

10. The Applicants plead that Genpharm ULC, at the time it sent the NOA, was not a legal entity. The Applicants plead that a letter purporting to be an NOA written by an entity that does not, in law, exist is a nullity. In the alternative, the Applicants plead that Genpharm ULC is not capable of being a “second person” under the *Regulations* as Genpharm ULC does not exist at law. The Applicants further plead that the NOA therefore has no legal effect, and, in particular, does not comply with s. 5(1) of the *Regulations*, as it was sent by an entity that does not exist at law and/or is not a second person.

[7] Is this pleading bereft of any chance of success such that it should be struck at this stage of the proceeding? For the reasons that follow, in my view, it should.

[8] Counsel for Pfizer ably argues that the issue is neither bereft of any possibility of success nor clearly futile and should be left to the hearings judge for determination. However, while it would be easy to simply allow the matter to proceed and be dealt with by the hearings judge, it must be remembered that proceedings under the *Regulations* are paper intensive, complex and directed toward an understanding of patents and their claims and the respective positions of the patent holder and the generic. One does not need to add a further layer complexity to the hearing of an application under the *Regulations*, especially where the factual matrix for the determination of the

issue is complete and will not be any different at the hearing. It is even more important to deal with such issues by way of motion early in the proceeding as a determination of the issue may impact the hearing.

[9] What was the legal status of Genpharm ULC at the time it served its NOA on Pfizer on May 27, 2009? While it may not be of ultimate consequence, there is no compelling evidence that Pfizer was in any way confused when it received the NOA from Genpharm ULC. It undertook corporate searches which resulted in the impugned allegations being made. It responded to the NOA by issuing this Notice of Application in which it has named both Genpharm ULC and Mylan and served the originating notice at the correct head office address.

[10] Pfizer argues that Genpharm ULC was neither the actual name of the party delivering the NOA nor a business or trade name and therefore it cannot be a “second person” within the meaning of the Regulations. It argues that the use of the name Genpharm ULC was illegal and was an unregistered trade name or fictional name and no such entity as Genpharm ULC existed. Thus, Genpharm ULC could not be a “second person” under the Regulations. If it is not a “second person” then these proceedings are a nullity and should be recommenced in the correct legal name of Mylan.

[11] As support for these propositions, Pfizer argues that under s. 10 (9) of the ABCA, a corporation’s right to identify itself by a name other than its corporate name is limited by s. 10 (10) which provides that if a corporation “carries on business or identifies itself by a name other than its

corporate name, the name shall not contain a word referred to in subsection 3 or 15.4(2)". One of the words identified in s. 15.4 (2) is ULC. However, it is essential to consider this entire provision.

It reads:

(2) No person other than a body corporate that is an unlimited liability corporation shall carry on business within Alberta under any name or title that contains the words "Unlimited Liability Corporation" or "ULC".

[12] Notably, the section only refers to "within Alberta". The evidence before the Court is that Mylan and Genpharm ULC carry on business in Ontario. The NOC was sent to Pfizer in the name of Genpharm ULC from its business offices in Ontario to Pfizer's Ontario business offices. This section has no application in these circumstances. Even if it did have application and Genpharm ULC is offside by using ULC in a business name the remedy for doing so is not one that results in the corporation ceasing to exist. The remedy provided in the ABCA is a fine as it is a regulatory offence (see subsection 10(4)).

[13] However, similar provisions to the ABCA exist under the Ontario *Business Corporations Act*, ("OBCA") and the Ontario *Business Names Act* ("OBNA"). Pfizer also relies upon the OBNA in support of its position. For example, the OBNA provides in subsection 2 (1) that "No corporation shall carry on business or identify itself to the public under a name other than its corporate name unless the name is registered by that corporation". The OBNA also applies to extra-provincial corporations and provides in subsection 2.1 (2) that "No extra-provincial limited liability company shall carry on business in Ontario unless it has registered its company name" and in subsection 2.1(3) that "No extra-provincial limited liability company shall carry on business in Ontario under a

name other than its registered company name”. These sections deal with prohibitions on carrying on business not whether the entity exists. The penalty for breaching these provisions is found in subsection 10 (1) which reads as follows:

Every person who, without reasonable cause, contravenes section 2 or 2.1 or subsection 4 (4) or (6) or submits a statement in an application for a registration under this Act that is false or misleading with respect to any material fact is guilty of an offence and on conviction is liable to a fine of not more than \$2,000 or, if the person is a corporation, to a fine of not more than \$25,000.

[14] Notably, subsection 7 (3) provides that “No contract is void or voidable by reason only that it was entered into by a person who was in contravention of this Act or the regulations at the time the contract was made”. What is to be noted about this legislation is that it deals with regulatory matters and does not speak to the legal existence of companies or businesses. These sections apply to Genpharm as it carries on business in Ontario.

[15] Pfizer cites two Ontario decisions in support of its argument that Genpharm ULC is a non-existent legal entity. The first decision is that of a Justice of the Peace in *Toronto v. 1342736 Ontario Inc.* [2001] O.J. No. 4550 and the second is one of the Court of Appeal for Ontario, *Southside Property Management (London) Inc. v. Sibold Estate* [2004] O.J. No. 701 (Ont. C.A.). In the former case, the Justice of the Peace was dealing with a charge of operating a home renovation business without a licence. The corporate accused carried on business under various names including a name which did not appear to exist. The Crown failed to prove that the name under which the corporation carried on business was not legally incorporated. As there was a failure of

proof the charges were dismissed. The case does not assist in determining the issue before the Court.

[16] In the *Southside* case, the Court of Appeal for Ontario held that as the business name used was not a legal entity it was not capable of maintaining a proceeding. This was an action for specific performance of a contract. Southside Group was not and never had been a legal entity but only a name used by an individual to enter into a contract. The Court of Appeal for Ontario found that the individual was in breach of the OBNA. As a result, the plaintiff, Southside Group, was not capable of maintaining an action to take the benefit of the contract. The essential part of the Court's conclusion was that there was no corporate entity in existence. Again, this case does not assist Pfizer.

[17] The answer to the position of Pfizer lies in the amalgamation. The amalgamation of Genpharm ULC and Mylan resulted in the continued existence of both of the corporations. As is noted by the Supreme Court of Canada in *R. v. Black and Decker Manufacturing Co.*, [1974] SCR 411, upon amalgamation, "no 'new' company is created and no 'old' company is extinguished" and that "amalgamating companies continue without subtraction in the amalgamated company, with all their strengths and their weaknesses . . ." (at p. 417 and 422). Thus, upon amalgamation, Genpharm ULC did not cease to exist nor did Mylan. The arguments of Pfizer are premised on the conclusion that Genpharm ULC did not exist at the time of the NOA was sent. However, applying the Supreme Court of Canada's conclusions in *Black & Decker* to Genpharm ULC that is not the case. Genpharm ULC did exist, and, in the words of the Supreme Court, continued "without

subtraction” following the amalgamation. Further, the parties having any interest in this proceeding are before the Court.

[18] Pfizer also argues that while this issue may be a novel issue in a proceeding under the Regulations it is all the more reason for it to be left to the hearings judge to deal with. However, because an issue is novel does not make it meritorious nor is there any compelling reason to clutter up the issues in dispute surrounding the patent in suit with this issue where the record is complete and will not be any different before the hearings judge. Further support for this approach may be found in *Pfizer Canada Inc. v. Canada (Minister of Health)* [2007] F.C.J. No. 273 wherein Justice Hughes opined as follows at par. 16:

Taking these matters into consideration I find that a section 6(5)(a) motion should be considered on the basis that if a determination can be made based on law and the application of uncontroverted relevant evidence or admissions or plain and obvious findings on the evidence, then the Court should proceed to make a determination. Section 6(5)(a) must have a purpose that is not trivial. However, if the Court finds itself determining the matter on disputed relevant evidence or having to weigh the merits of competing expert opinion, the matter should be left to the hearing at trial. It is difficult to sum this up as simply "plain and obvious", it goes beyond that, but where the law can be applied to admissions and relevant evidence that is quite reasonably found to be undisputed or "plain and obvious" then the Court has a duty to make a determination.

[19] In my view, this admonition of Justice Hughes applies equally to subsection 6 (5) (b).

Section 6 (5) (b) of the Regulations provides as follows:

Subject to subsection (5.1), in a proceeding in respect of an application under subsection (1), the court may, on the motion of a second person, dismiss the application in whole or in part (b) on the

ground that it is redundant, scandalous, frivolous or vexatious or is otherwise an abuse of process in respect of one or more patents.

[20] Finally, the Court has carefully considered the arguments of Pfizer regarding the heavy onus on a motion to strike and the high burden which must be met. However, for the above reasons Genpharm has met that burden and the motion is therefore granted.

[21] As no submissions were made with respect to the disposition of costs during argument, the parties are invited to resolve the issue of costs as between themselves. In the event the parties are unable to do so, the Court will fix the amount and disposition of the costs. Genpharm may make brief written representations (no more than 2 pages) within 15 days of the date of this Order and Pfizer may respond (no more than 2 pages) within a further 15 days.

ORDER

THIS COURT ORDERS that:

1. Paragraphs 6 and 10 of the Notice of Application herein are hereby struck without leave to amend.
2. Costs of the motion are reserved to be agreed upon by the parties or in accordance with these reasons.

"Kevin R. Aalto"
Case Management Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS: T-1118-09

STYLE OF CAUSE: PFIZER CANADA INC. AND EISAI CO., LTD.
v.
GENPHARM ULC, MYLAN
PHARMACEUTICLAS ULC AND THE
MINISTER OF HEALTH

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DATE OF HEARING: April 14, 2010

**REASONS FOR ORDER
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