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- [English](#)

[Home](#) > [Canada \(Federal\)](#) > [Federal Court of Canada](#) > [2004 FC 190 \(CanLII\)](#)

## Apotex Inc. v. Pfizer Canada Inc., 2004 FC 190 (CanLII)

Date: 2004-02-04

Docket: T-1235-02

Parallel citations: 31 CPR (4th) 143; 246 FTR 290

URL: <http://canlii.ca/t/1gf80>

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Date: 20040204

Docket: T-1235-02

Citation: 2004 FC 190

Toronto, Ontario, February 4<sup>th</sup>, 2004

Present: Roger R. Lafrenière, Esquire

Prothonotary

BETWEEN:

**APOTEX INC.**

ntiff

Plai

and

PFIZER CANADA INC., PFIZER CORPORATION

and HER MAJESTY THE QUEEN

ants

Defend

## REASONS FOR ORDER AND ORDER

[1] The Defendants, Pfizer Canada Inc. and Pfizer Corporation ("Pfizer"), seek leave to amend their Statements of Defence to correct the place of incorporation of the Defendant, Pfizer Corporation, as well as to add a limitation period defence. The Plaintiff, Apotex Inc. ("Apotex") does not oppose the minor correction to the pleadings, but has refused to provide its consent to the more substantive amendment on the grounds that it raises no reasonable defence.

### Background facts

[2] This action was commenced by Statement of Claim dated August 1, 2002. Apotex seeks relief pursuant to [section 8](#) of the *Patented Medicines (Notice of Compliance) Regulations* (the "*Regulations*"), that provides for damages or profits in respect of the harm suffered by reason of any delay in the issuance of a Notice of Compliance caused by the commencement of an application for prohibition under the *Regulations*. More specifically, Apotex seeks compensation from Pfizer by reason of Pfizer's unsuccessful prosecution of a prohibition proceeding in Court File No. T-1714-95 (the "Prohibition Proceeding").

[3] The Prohibition Proceeding was commenced by Pfizer in response to a Notice of Allegation sent by Apotex on June 23, 1995, addressing Canadian Patent No. 1,181,076 (the "'076 Patent"). The claim covers the period commencing on August 11, 1995, the date upon which the Prohibition Proceeding was commenced, to January 30, 1998, the date upon which the Prohibition Proceeding was dismissed.

[4] Pfizer filed Statements of Defence on December 19, 2002 and Amended Statements of Defence on February 18, 2003.

[5] Apotex filed its Reply to each of the Amended Statements of Defence on March 27, 2003.

[6] The particular portion of each proposed Further Amended Statement of Defence at issue on this motion (paragraph 53 in the case of Pfizer Canada Inc. and paragraph 58 in the case of Pfizer Corporation) reads as follows:

"Pfizer Canada [Pfizer Corporation] admits that the proceeding was dismissed on January 30, 1998 and that more than two years have past before this action was commenced. As such, Pfizer Canada [Pfizer Corporation] relies on and specifically pleads [Section 39\(1\)](#) of the *Federal Court Act*, 1998 R.S.C. 1985, c.F-7, as amended and Section 45(1)(h) of the *Limitations Act*, R.S.O. 1990, Chap. L-15 to limit or bar all or part of Apotex' claim."

### Applicable legal principles

[7] The Court must take a generous approach to a request for an amendment. As a general rule, an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided that such amendment will not result in injustice to the other party, which cannot be compensated by an

award of costs: *Almecon Industries Ltd. v. Anchortek Ltd.* 1999 CanLII 7425 (FC), (1999), 85 C.P.R. (3d) 216 at 218 (F.C.T.D.).

[8] However, in determining whether an amendment to a pleading should be allowed, the Court should also consider whether the amendment, if it was already part of the proposed pleading, would be capable of being struck out under Rule 221. Proposed amendments to pleadings in circumstances where no cause of action is disclosed will be refused: *Visx Inc. v. Nidek Co.* 1996 CanLII 3941 (FCA), (1996), 72 C.P.R. (3rd) 19 at 24 (F.C.A.); *Chrysler Canada Ltd. v. The Queen*, [1978] 1 F.C. 137 at 138 (T.D.); *Johnson & Johnson Inc. v. Boston Scientific Ltd.* 2001 FCT 880 (CanLII), (2001), 14 C.P.R. (4th) 512 at 516 (F.C.T.D.).

[9] Moreover, a pleading which refers to a matter of statutory interpretation is capable of being struck out on a motion brought pursuant to Rule 221 of the *Federal Court Rules, 1998* if the legal proposition will necessarily fail. Such an approach was adopted by the Federal Court of Appeal in *Prior v. Canada* (1990), 101 N.R. 401 at 404:

When the success of an action is wholly dependant on a proposition of law that can easily be seen and precisely defined on the sole reading of the statement of claim, without any possibility of it being qualified by further pleadings, and there is no issue that could be better explored at a trial, a 419(1)(a) [now Rule 221] motion will permit the defendant to dispute the validity of such legal proposition and thereby show immediately that the action will necessarily fail since, even if the material facts alleged were all true, there is no way the Court may, in law, grant the reliefs sought.

#### Analysis

[10] As noted earlier, the first amendment is a minor housekeeping one and not contentious. The amendment will not prejudice Apotex, nor delay an expeditious trial. Consequently, leave to amend is granted to allow Pfizer Corporation to correct its place of incorporation.

[11] The second amendment seeks to add a limitation period defence that Pfizer claims was inadvertently left out of the original Statements of Defence. Simply put, Pfizer wishes to plead that Apotex's action is statute-barred because it was started more than two years after the proceeding under the *Regulations* was disposed of on January 30, 1998. The proposed amendment sets out the relevant statutory provisions that are relied upon by Pfizer to assert that a two (2) year limitation period applies to Apotex' claim. According to Pfizer, the other facts in support of this defence, such as when the limitation period commenced and when it is alleged to have been extinguished, are already part of the pleadings.

[12] It is Pfizer's position that a two year limitation period applies to Apotex' claim based on the provisions of subsection 39(1) of the *Federal Court Act*, 1998 R.S.C. 1985, c. F-7, as amended, and paragraph 45(1)(h) of the *Limitations Act*, R.S.O. 1990, Chap. L-15, which are reproduced below.

[Subsection 39\(1\) of the \*Federal Court Act\*](#)

39.(1) Prescription and limitation on proceedings in the Court - Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in any province between subject and subject apply to any proceedings in the Court in respect of any cause of action arising in that province .

Paragraph 45(1)(h) of The Limitations Act of Ontario

45.(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned,

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(h) an action for penalty, damages, or a sum of money given by any statute to the Crown or the party aggrieved, within two years after the cause of action arose;

[Subsection 39\(1\) of the \*Federal Court Act\*](#)

[13] Pfizer submits that [subsection 39\(1\) of the \*Federal Court Act\*](#) applies because Apotex has its head office in Toronto, Ontario, because the Prohibition Proceeding was formally issued in the Ottawa office of the Federal Court, and because the judgment of the Federal Court dismissing the Prohibition Proceeding was signed in the Toronto office of the Federal Court. By reason of these facts, Pfizer submits, the subject matter of the claim by Apotex against Pfizer arose in the province of Ontario.

[14] In order for [subsection 39\(1\) of the \*Federal Court Act\*](#) to apply, however, all of the elements of the "cause of action" must have arisen in the subject province. Both the damages suffered as well as the act that caused the damage must necessarily have arisen in the particular province: *Markevich v. Canada* 2003 SCC 9 ([CanLII](#)), (2003), 223 D.L.R. (4th) 17 at 35 and 36 (S.C.C.); *Kirkbi A.G. v. Ritvik Holdings Inc.* 2002 FCT 585 ([CanLII](#)), (2002), 20 C.P.R. (4th) 224 at 284 (F.C.T.D.); *Canada v. Maritime Group (Canada) Inc.* (1995), 185 N.R. 104 at 106 (F.C.A.); *Gingras v. Canada* 1994 [CanLII 3475 \(FCA\)](#), (1994), 113 D.L.R. (4th) 295 at 319 (F.C.A.).

[15] The cause of action that gives rise to the claim against Pfizer relates to a proceeding that was prosecuted federally, and not provincially. Moreover, the proceeding sought an order prohibiting the grant of a Notice of Compliance ("NOC"), which NOC is granted by the federal Ministry of Health and which NOC permits sales throughout Canada and not any particular province thereof. Further, the proceeding allegedly led to lost sales and the inappropriate continuation of a monopoly in Pfizer's favour throughout Canada, and not within any particular province.

[16] The location of the Registry office of the Federal Court that issued the application or the city where the judgment was signed by a judge have, in my view, no bearing on whether a cause of action arose in province. Nor does the fact that Apotex has its head office

in Toronto somehow confine the cause of action to a single province. Apotex's claim for compensation includes damages or profits in respect of harm it allegedly suffered outside of Ontario, in other provinces across Canada. Pfizer therefore has no basis to assert that the cause of action arose solely in Ontario.

[17] In any event, Pfizer does not plead sufficient material facts to support its conclusory allegation that a two year limitation period applies. Consequently, I conclude that [subsection 39\(1\)](#) of the *Federal Court Act* does not apply to the facts as pleaded.

[18] It follows, therefore, that the only limitation period that applies to Apotex's claim is the six year limitation period set out in [subsection 39\(2\)](#) of the *Federal Court Act* ("in respect of a cause of action arising otherwise than in a province"). There is no dispute that Apotex's action was brought well within this more generous limitation period.

[19] By reason of the foregoing, the allegations made by Pfizer, as they pertain to [subsection 39\(1\)](#) of the *Federal Court Act*, are so clearly futile as to have no possible chance of success and should not be permitted.

### **Paragraph 45(1)(h) of the Limitations Act of Ontario**

[20] Even if Pfizer were correct in its allegation that [subsection 39\(1\)](#) of the *Federal Court Act* applies because the cause of action arose in Ontario, it plain and obvious that Pfizer's defence based on paragraph 45(1)(h) of the *Limitations Act* of Ontario cannot possibly succeed.

[21] In *Johnson Controls Inc. v. Varta Batteries Limited* (1984), 53 N.R. 6 (F.C.A), the Federal Court of Appeal found that paragraph 45(1)(h) of the *Limitations Act* of Ontario relates exclusively to actions of a penal nature. The Court held that paragraph 45(1)(h) applies to "penal actions not actions the object of which is to compensate an aggrieved party for losses occasioned by the acts of another". The Court of Appeal for Ontario reached the same conclusion in *Westend Construction Ltd. et al. v. Ontario Human Rights Commission et al.* [reflex](#), (1989), 70 O.R. (2d) 133. The Court held that the limitation period set out in paragraph 45(1)(h) was restricted to enactments where punishment was the objective rather than statutory damages that had a compensatory element.

[22] The Federal Court of Appeal also found in *Varta* that paragraph 45(1)(h) does not apply to actions brought pursuant to the *Patent Act* for compensation in respect of alleged patent infringement. Rather, the Court concluded that an action for patent infringement brought pursuant to the *Patent Act* is an action "upon the case" for which paragraph 45(1)(g) (and its accompanying six year limitation period) is the applicable provision.

[23] Although the *Varta* case dealt with an action under the *Patent Act* for infringement, as oppose to a claim under [section 8](#) of the *Regulations*, I see no basis upon which it can be distinguished. The reasoning of the Federal Court of Appeal in *Varta*, with which I concur, applies equally to the facts of this case. In my view, there is no contentious legal issue of statutory interpretation to be resolved.

[24] Apotex's claim is clearly not an action of a penal nature for which Apotex can seek punishment, but rather is an action of a compensatory nature for which Apotex is seeking to be made whole. In the circumstances, I conclude that the proposed amendment in add a limitation defence based [paragraph 45\(1\)\(h\)](#) of the *Limitation Act* cannot possibly succeed and should not be allowed.

[25] In light of my conclusions above, I need not address an additional argument advanced by Apotex that paragraph 45(1)(h) of the *Limitations Act* is applicable only to an action "given by any statute", and not by regulations. Suffice it to say that an argument can certainly be made that the reference to a "statute" in the *Limitations Act* would apply not only to statutes, but also to regulations passed pursuant to that statute and deemed to be part of the statute.

### **ORDER**

**THIS COURT ORDERS** that

1. The Defendants, Pfizer Canada Inc. and Pfizer Corporation ("Pfizer"), are granted leave to amend their Statements of Defence to correct the place of incorporation of the Defendant, Pfizer Corporation.
2. The motion is otherwise dismissed.
3. Costs of the motion shall be paid by the Defendants, Pfizer Canada Inc. and Pfizer Corporation, to the Plaintiff, Apotex Inc., in any event of the cause.

\_\_\_\_\_  
"Roger R. Lafrenière"

Prothonotary

### **FEDERAL COURT**

#### **NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** T-1235-02

**STYLE OF CAUSE:** APOTEX INC.

Plaintiff

and

PFIZER CANADA INC., PFIZER CORPORATION

And HER MAJESTY THE QUEEN

Defendants

MOTION HEARD ORALLY ON NOVEMBER 17, 2003 AND ADJOURNED FOR FURTHER WRITTEN SUBMISSIONS FROM THE PARTIES

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** NOVEMBER 17, 2003

REASONS FOR ORDER

**AND ORDER BY:** LAFRENIÈRE P.

**DATED:** FEBRUARY 4, 2004

**APPEARANCES:**

Mr. Andrew R. Brodtkin  
Mr. Patrick S. Smith

FOR THE PLAINTIFF  
FOR THE DEFENDANTS,

Pfizer Canada Inc. and Pfizer  
Corporation

**SOLICITORS OF RECORD:**

GOODMANS LLP

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FOR THE DEFENDANTS,

Ottawa, Ontario

Pfizer Canada Inc. and Pfizer  
Corporation

**FEDERAL COURT**

Date: 20040204

Docket: T-1235-02

BETWEEN:

APOTEX INC.

Plaintiff

and

PFIZER CANADA INC., PFIZER CORPORATION and HER MAJESTY THE QUEEN

## Defendants

### REASONS FOR ORDER AND ORDER

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