

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20140527**

**Docket: A-93-14**

**Citation: 2014 FCA 138**

**CORAM: SHARLOW J.A.  
GAUTHIER J.A.  
MAINVILLE J.A.**

**BETWEEN:**

**TEVA CANADA LIMITED**

**Appellant**

**and**

**PFIZER CANADA INC., PFIZER INC., AND  
PFIZER IRELAND PHARMACEUTICALS**

**Respondents**

Heard at Toronto, Ontario, on May 26, 2014.

Judgment delivered at Toronto, Ontario, on May 27, 2014.

**REASONS FOR JUDGMENT BY:**

**MAINVILLE J.A.**

**CONCURRED IN BY:**

**SHARLOW J.A.  
GAUTHIER J.A.**

**Federal Court of Appeal**



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**REASONS FOR JUDGMENT**

**MAINVILLE J.A.**

[1] This is an appeal from an order of Justice de Montigny of the Federal Court dated January 22, 2014, bearing citation number 2014 FC 69, which dismissed an appeal from an order of Prothonotary Aronovitch dated August 20, 2013. The Prothonotary had struck those portions of the appellant's Statement of Claim seeking punitive and exemplary damages pursuant to an

action under section 8 of the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 (the *NOC Regulations*).

[2] This is a case relating to the drug Viagra, which has been the object of much litigation. It is not necessary to summarize the long history of proceedings with respect to this drug. The relevant background for the purposes of this appeal may be adequately described as follows.

[3] On December 21, 2012, the appellant Teva Canada Limited (Teva) commenced this action in the Federal Court under section 8 of the *NOC Regulations* seeking compensation for losses suffered during the period beginning on April 25, 2008 - the date it alleges that the competent Minister would have issued to it a notice of compliance for its generic version of Viagra - and ending November 8, 2012 - the date the Supreme Court of Canada reversed the order granting the prohibition application brought by Pfizer Canada Inc. and Pfizer Ireland Pharmaceutical (collectively referred to herein as Pfizer).

[4] In addition to compensatory damages, Teva seeks punitive and exemplary damages. Teva also seeks a quantification of Pfizer's profits since, in its view, the governing rule for establishing the quantum of punitive damages is proportionality. Teva submits that subsection 8(4) of the *NOC Regulations* allows it to make these claims. That subsection provides that "the court may, in respect of any losses referred in [subsection (1)], make any order for relief by way of damages that the circumstances warrant."

[5] Pfizer brought a motion to strike those portions of Teva's Statement of Claim relating to punitive and exemplary damages and the quantification of profits. The Prothonotary agreed with Pfizer, and as noted above, her decision was upheld by Justice de Montigny.

[6] The issue in this appeal is thus whether a claim for punitive and exemplary damages may be sustained under section 8 of the *NOC Regulations*. I am of the view that such a claim cannot be sustained, substantially for the reasons expressed by Justice de Montigny at paragraphs 28 to 37 of his order, which I adopt. I however add the following brief comments.

[7] Punitive damages may be awarded in exceptional cases of high-handed, malicious, arbitrary or highly reprehensible misconduct that represents a marked departure from ordinary standards of decent behaviour: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 196 (*Hill*); *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 ("*Whiten*") at para. 36.

[8] I recognize that punitive damages are not limited to certain categories of claims: *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085 at pp. 1104-1105; *Whiten* at para. 67. I also recognize that punitive damages have been found to be available in all types of cases, notably in patent infringement cases: *Bell Helicopter Textron Canada v. Eurocopter*, 2013 FCA 219, 449 N.R. 111 at paras. 180 to 184; *Lubrizol Corp. v. Imperial Oil Ltd.*, [1996] 3 F.C. 40, 67 C.P.R. (3d) 1 at p. 20 of the C.P.R. ed.; *Whiten* at para. 44.

[9] That being said, however, punitive and exemplary damages cannot be available where the statutory regime underlying the claim explicitly or implicitly precludes them. This is the case under the *NOC Regulations*, which set out a comprehensive scheme with respect to compensation resulting from the operation of the statutory stay it provides for.

[10] Subsection 8 of the *NOC Regulations* specifically provides that “the first person [the innovator drug manufacturer] is liable to the second person [the generic drug manufacturer] for any loss suffered during the period...” (emphasis added). Our Court has held that this wording allows compensation for losses actually incurred by a second person by reason of the operation of the statutory stay contemplated by the *NOC Regulations*, but it does not allow for other types of relief, such as disgorgement of profits or punitive damages: *Apotex Inc. v. Merck & Co.*, 2009 FCA 187, [2010] 2 F.C.R. 389 at paras. 89 to 91 and 101-102, leave to appeal refused [2009] S.C.C.A. No. 347 (QL); *Apotex Inc. v. Eli Lilly Canada Inc.*, 2011 FCA 358; 98 C.P.R. (4<sup>th</sup>) 323 at paras. 22 and 23; *Apotex Inc. v. Sanofi-Aventis Canada Inc.*, 2014 FCA 68 at para. 109 (dissenting opinion supported on this point by the majority); *Teva Canada Limited. v. Sanofi-Aventis Canada Inc.*, 2014 FCA 67, at para. 91 (dissenting opinion supported on this point by the majority).

[11] At the hearing of this appeal, Teva further raised the application of paragraph 8(5) of the *NOC Regulations* as a new justification for seeking punitive damages. That paragraph provides that in “assessing the amount of compensation the court shall take into account all matters that it considers relevant to the assessment of the amount, including any conduct of the first or second person which contributed to the disposition of the application under subsection 6(1)” (emphasis

added). That paragraph relates to the assessment of the losses suffered by the generic drug manufacturer as a result of the stay. It allows the court to adjust the damages taking into account the conduct of the parties with respect to the prosecution of the prohibition application initiated under the *NOC Regulations*, such as when a generic drug manufacturer would have improperly contributed to the delay in the disposition of the application, thus unduly increasing the losses it suffered.

[12] However, by its terms, paragraph 8(5) cannot sustain a claim for punitive damages since, by their very nature, punitive damages are not “compensation”: *Hill* at para. 196; *Whitten* at paras. 36 and 68.

[13] The appeal should therefore be dismissed, with costs.

"Robert M. Mainville"

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J.A.

"I agree

K. Sharlow J.A."

"I agree

Johanne Gauthier J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:**

A-93-14

**APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE DE MONTIGNY OF THE FEDERAL COURT OF CANADA, DATED JANUARY 22, 2014, DOCKET NUMBER T-2280-12**

**STYLE OF CAUSE:**

TEVA CANADA LIMITED v.  
PFIZER CANADA INC., PFIZER  
INC., AND PFIZER IRELAND  
PHARMACEUTICALS

**PLACE OF HEARING:**

TORONTO, ONTARIO

**DATE OF HEARING:**

MAY 26, 2014

**REASONS FOR JUDGMENT BY:**

MAINVILLE J.A.

**CONCURRED IN BY:**

SHARLOW J.A.  
GAUTHIER J.A.

**DATED:**

MAY 27, 2014

**APPEARANCES:**

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