

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20141028**

**Docket: A-395-13**

**Citation: 2014 FCA 244**

**CORAM: TRUDEL J.A.  
STRATAS J.A.  
NEAR J.A.**

**BETWEEN:**

**PFIZER CANADA INC. AND PFIZER INC.**

**Appellants**

**and**

**TEVA CANADA LIMITED**

**Respondent**

Heard at Toronto, Ontario, on October 28, 2014.  
Judgment delivered from the Bench at Toronto, Ontario, on October 28, 2014.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**NEAR J.A.**

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20141028**

**Docket: A-395-13**

**Citation: 2014 FCA 244**

**CORAM: TRUDEL J.A.  
STRATAS J.A.  
NEAR J.A.**

**BETWEEN:**

**PFIZER CANADA INC. AND PFIZER INC.**

**Appellants**

**and**

**TEVA CANADA LIMITED**

**Respondent**

**REASONS FOR JUDGMENT OF THE COURT**  
**(Delivered from the Bench at Toronto, Ontario, on October 28, 2014).**

**NEAR J.A.**

[1] Pfizer Canada Inc. and Pfizer Inc. (Pfizer or the appellants) appeal from the October 23, 2013 decision of the Federal Court (2013 FC 1066) in which Justice Campbell dismissed their appeal of the decision of Prothonotary Milczynski (the Prothonotary) dated April 5, 2013.

[2] The Prothonotary dismissed the appellants' motion to strike the Statement of Claim of Teva Canada Ltd. (Teva or the respondent) seeking damages under section 8 of the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 (PMNOC Regulations). The appellants sought to strike the Statement of Claim on the basis that it disclosed no reasonable cause of action or constituted an abuse of process (under Rules 221(1)(a) and 221(1)(f) of the *Federal Courts Rules*, SOR/98-106, respectively).

[3] The appellants raise two issues in relation to this appeal. The appellants submit that the judge erred in not undertaking a *de novo* review of the Prothonotary's decision and pointed to ongoing differences in the Federal Court as to the application of the test set out in *Aqua Gem* and subsequent cases. The appellants invite us to resolve any uncertainty with respect to the application of the test set out in *Aqua Gem*. The question as to the continued appropriateness of the test set out in *Aqua Gem* is one that is of some interest to the Court. For example, see *Apotex Inc. v. Bristol Myers Squibb Company*, 2011 FCA 34 at paragraphs 6-9. However, in our view this is not an appropriate case for resolving this question given the facts of this case.

[4] The appellants also argue that it is plain and obvious that Teva's claim is doomed to fail because it is grounded on a decision of the Federal Court that was overturned by our Court. We do not agree. In our view, the facts of this case illustrate that, as the Prothonotary observed, proceedings related to section 8 of the regulations, are still evolving and not fully settled. For that reason, on the facts of this case, the appeal will be dismissed with costs.

"D.G.Near"

---

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-395-13

**STYLE OF CAUSE:** PFIZER CANADA INC. AND  
PFIZER INC. v. TEVA CANADA  
LIMITED

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** OCTOBER 28, 2014

**REASONS FOR JUDGMENT OF THE COURT BY:** TRUDEL J.A.  
STRATAS J.A.  
NEAR J.A.

**DELIVERED FROM THE BENCH BY:** NEAR J.A.

**APPEARANCES:**

Matthew P. Gottlieb FOR THE APPELLANTS  
Paul Fruitman

Marcus Klee FOR THE RESPONDENT  
Devin Doyle

**SOLICITORS OF RECORD:**

Lax O'Sullivan Scott Lisus LLP FOR THE APPELLANTS  
Barristers and Solicitors  
Toronto, Ontario

Aitken Klee LLP FOR THE RESPONDENT  
Barristers and Solicitors  
Toronto, Ontario