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ARTICLE

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Patent Decision

Dismissed motion for partial summary judgment upheld – Apotex unable to rely on section 73 of the *Patent Act*, as it existed in 1989, to void the patent at issue
Apotex Inc. v. Pfizer Inc., 2017 FCA 201

The Federal Court of Appeal ("FCA") dismissed the appeal of a Federal Court's ("FC") decision dismissing Apotex's motion for partial summary judgment. In the underlying decision, the FC did not agree with Apotex's contention that the Respondents' patent was invalid due to their failure to pay the proper application fee for the issuance of the '132 Patent.

The FCA stated that the main issue in this appeal was the interpretation of various provisions of the *Patent Act* as it existed in 1989 (the "1989 Act"), including section 73 of the 1989 Act. The FCA considered the legislative evolution of subsection 73(1) of the 1989 Act and found that that the object of this provision was to provide a tool for the Commissioner to collect fees. The FCA further noted that the words "may be restored and a patent granted" in subsection 73(2) suggest that the legislator did not envisage that section 73 would be relevant where a patent is already issued.

Apotex relied on the FCA's reasoning in *Dutch Industries Ltd. v. Canada (Commissioner of Patents)*, 2003 FCA 121 ("*Dutch*"), to suggest that the applicant's failure to pay the proper application fee in full "is a fact or default on which Apotex can rely as a defence against allegations of infringement within the meaning of section 59 of the 1989 Act because it renders the 132 Patent void". The FCA disagreed and concluded that the simple and literal approach advocated by Apotex to sections 27 and 59 would lead to an absurd result and disregards the scheme and object of the Act, and the purpose of provisions at issue. In distinguishing *Dutch*, the FCA also noted that in the present case, the applicant had made no untrue statements in its application for the '132 Patent.

The FCA also considered itself bound by the essential concept in *Fada Radio Ltd. v. Canadian General Electric Co. Ltd.*, [1927] S.C.R. 520, namely, that pre-patent issuance defects in the administrative process for applying for a patent cannot be relied upon by an alleged infringer to render a patent void. Notwithstanding that the *Patent Act* and practice of the Patent Office have evolved, the FCA acknowledged that this Court has since continued to agree with the essential holding in *Fada*.

Industry Updates

Health Canada released an Updated Notice: Interim Policy on Health Canada's Interpretation of Medicinal Ingredient and Assessment of Identical Medicinal Ingredient.

Health Canada released a Notice: Release of Draft (Step 2) International Council for Harmonisation Guidance: S5(R3): Revision of S5 Guideline on Detection of Toxicity to Reproduction for Human Pharmaceuticals.

Health Canada released a Notice: Release of Draft (Step 2) International Council for Harmonisation Guidance: E9(R1): Addendum: Statistical Principles for Clinical Trials.

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