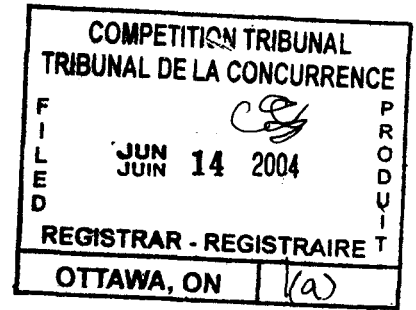


THE COMPETITION TRIBUNAL  
File No. CT-2004-006  
Registry Document No.: (a)



BETWEEN: 1177057 ONTARIO INC. c.o.b. as  
BROADVIEW PHARMACY

Applicant

AND: PFIZER CANADA INC.

Respondent

APPLICATION PURSUANT TO SECTION 103.1 OF THE *COMPETITION ACT*  
FOR LEAVE TO MAKE APPLICATION UNDER SECTION 75 OF THE *ACT*

TAKE NOTICE THAT:

1. The Applicant, 1177057 Ontario Limited, carrying on business as Broadview Pharmacy ("Broadview Pharmacy"), is applying to the Competition Tribunal pursuant to section 103.1 of the *Competition Act*, R.S. 1985, c. 19 (2<sup>nd</sup> supp.), as amended (the "Act"), seeking leave to bring an application for an Order under section 75 of the Act that the Respondent, Pfizer Canada Inc. ("Pfizer Canada") accept Broadview Pharmacy as customer on the "usual" trade terms, forthwith upon issuance of said Order.

AND TAKE NOTICE THAT:

2. Broadview Pharmacy will rely on the Statement of Grounds and Material Facts attached hereto and on the Affidavits of Herbert Cohen, duly sworn on June 8, 2004 and Harvey Organ, duly sworn on June 9, 2004.

3. The person against whom an Order is sought is the Respondent, Pfizer Canada. Its address is set out below.
4. The Applicant will seek directions from the Competition Tribunal for the expeditious hearing of this application.
5. The Applicant requests that this application proceed in English.
6. The Applicant requests that documents be filed in paper form.

DATED at Toronto, in the Province of Ontario, this 10<sup>th</sup> day of June, 2004.

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The Competition Tribunal  
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AND TO: Sheridan Scott  
Commissioner of Competition  
Competition Bureau  
50 Victoria Street  
Gatineau, Quebec  
K1A 0C9

AND TO: Pfizer Canada Inc.  
c/o Solicitors of Record  
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## **STATEMENT OF GROUNDS AND MATERIAL FACTS**

### **MATERIAL FACTS**

#### **The Parties**

1. The Applicant, 1177057 Ontario Inc., carrying on business as Broadview Pharmacy (“Broadview Pharmacy”), is a corporation, duly incorporated under the laws of the Province of Ontario and carries on business at 381 Broadview Avenue, Toronto.
2. The Respondent, Pfizer Canada Inc. (“Pfizer Canada”), is a corporation incorporated pursuant to the laws of Canada with its head office in Kirkland, in the Province of Quebec. Pfizer Canada carries on business as a pharmaceutical manufacturer across Canada, including Ontario.

#### **Nature of Applicant’s Business**

3. Broadview Pharmacy operates a retail pharmacy at its Toronto address. It has operated a pharmacy from that location since in or about 1960. From this location, Broadview Pharmacy offers its customers a wide selection of products and services, including prescription and over the counter medicines, health and beauty aides, cosmetics and fragrances, as is customary with a neighbourhood pharmacy.
4. There is significant competition among retail pharmacies in the Broadview and Gerrard area of Toronto. Six other retail pharmacies are located within a two block radius of Broadview Pharmacy’s location.
5. By their very nature, retail pharmacies are heavily dependent upon the supply of pharmaceutical medicines from the manufacturers of those products. In some cases, a generic version of a drug is available. Where no generic drug is available,

however, the drug manufacturers are the sole source of ongoing, longer-term supply for retail pharmacies such as Broadview Pharmacy.

### **Pfizer Canada Products Sold by Applicant**

6. Broadview Pharmacy has sold Pfizer Canada products for many years. Of Broadview Pharmacy's total annual sales of \$1.5 million in pharmaceutical drugs, approximately 20% (or \$300,000 a year) are from the sale of drugs manufactured by Pfizer Canada.
7. Among the important patented medicines available only through Pfizer Canada are the following:

<b>Drug</b>		<b>Indication</b>
Lipitor	-	high cholesterol
Accupril	-	high blood pressure
Norvasc	-	high blood pressure
Minestrin	-	birth control
Loestrin	-	birth control
Bextra	-	arthritis
Arthrotec	-	arthritis
Detrol	-	bladder incontinence
Neurontin	-	anti-convulsive
Celebrex	-	anti-arthritis
Dipentum	-	gastro intestinal
Chronovera	-	hypertension angina

**Pfizer Canada Correspondence with Broadview Pharmacy**

8. By letter dated April 23, 2004, Pfizer Canada demanded a written explanation of Broadview Pharmacy's monthly purchase variations of major Pfizer Canada pharmaceutical products for the twelve month period ending March 31, 2004.
9. By undated letter sent by telefax on April 30, 2004, Broadview Pharmacy advised Pfizer Canada that in the past, because it considered it to be its right to do so, Broadview Pharmacy had supplied some internet pharmacies with some pharmaceutical products, but that Broadview Pharmacy would no longer be doing so.
10. By letter dated May 21, 2004, Pfizer Canada advised Broadview Pharmacy that it required an Affidavit or Statutory Declaration by June 1, 2004 regarding the matters set out below, failing which Broadview Pharmacy's "approved purchaser status" would be terminated and Broadview Pharmacy would no longer be able to purchase Pfizer Canada products. The letter required an affidavit or statutory declaration which confirmed that:
  - (a) Broadview Pharmacy place a notice prominently in any website linked to it advising that Pfizer pharmaceutical products are not available for sale outside of Canada;
  - (b) that Broadview Pharmacy would not sell Pfizer Canada pharmaceutical products outside Canada or to any one exporting products out of Canada;
  - (c) that none of Broadview Pharmacy's owners, directors or officers, either owns, controls or has an interest, in any pharmacy in Canada which is an unapproved purchaser of Pfizer Canada pharmaceutical products or which Broadview Pharmacy knows, or has reason to know, sells or intends to sell

Pfizer Canada pharmaceutical products for export from Canada (the “cross-ownership undertaking”); and

- (d) that Broadview Pharmacy acknowledges that Pfizer Canada will only consider continuing supply of its products on this occasion only and that further breaches of Pfizer Canada’s terms of sale will result in immediate termination of supply.

In addition, Pfizer Canada, in its letter of May 21, 2004, required that Broadview Pharmacy, among other things, permit a maximum of four audits annually to confirm whether Broadview Pharmacy has complied with Pfizer Canada’s terms and conditions of sale throughout the audit period. The letter also required a twelve-month projection of expected Pfizer Canada pharmaceutical product purchases, on a product by product basis.

11. Broadview Pharmacy’s counsel responded to Pfizer Canada by letter dated May 26, 2004. That letter reconfirmed that Broadview Pharmacy was fully prepared to give an undertaking not to sell Pfizer Canada pharmaceutical products outside of Canada, or to any person or pharmacy in Canada that it knows or has reason to know will either directly or indirectly export Pfizer Canada pharmaceutical products.
12. The May 26, 2004 letter took issue with the cross-ownership undertaking, and expressed the view that it was simple overreaching and that the undertaking not to sell to exporters should suffice. The May 26, 2004 letter also raised concerns about the maintenance of patient confidentiality in the context of Pfizer Canada’s requirement of a maximum of four audits per year and asked for a full review of the proposed audit process.

### **Settlement Discussions**

13. Following the May 26, 2004 letter from Broadview Pharmacy's counsel to Pfizer Canada, counsel for Broadview Pharmacy and counsel for Pfizer Canada engaged in a series of off-the-record and without prejudice discussions with respect to the undertaking set forth in Pfizer Canada's May 21, 2004 letter to Broadview Pharmacy. As a result of those off-the-record discussions, it appeared clear that the parties would be able to reach an agreement with respect to most of the undertakings sought by Pfizer Canada, including the manner in which Pfizer Canada pharmaceutical product would be advertised on any website used by Broadview Pharmacy, and the form of undertaking to be given by Broadview Pharmacy not to export any Pfizer Canada products out of Canada. As well, it appeared clear that suitable assurances would be given by Pfizer Canada to ensure the confidentiality of patient information in respect of the proposed audits referred to in Pfizer Canada's May 21, 2004 letter.

### **Pfizer Canada's "No Cross-Ownership" Demand**

14. However, Broadview Pharmacy and Pfizer Canada were unable to agree on the "cross-ownership" undertaking found in the May 21, 2004 letter. In fact, one of the co-owners of Broadview Pharmacy also has an interest in another and separate pharmacy which sells Pfizer Canada products outside of Canada. Broadview Pharmacy has advised Pfizer Canada, on the record that it is not prepared to adhere to the "cross-ownership" demand of Pfizer Canada. Broadview Pharmacy cannot be expected to change its ownership structure. It has taken the position that the "no export" undertaking which it is fully prepared to give, namely, that it not export Pfizer Canada pharmaceutical products out of Canada, or supply those who do so, together with the agreed to audits to be conducted by Pfizer Canada, are entirely sufficient for Pfizer Canada's purposes. Pfizer Canada's requirement of the no "cross-ownership" undertaking is unnecessary, unreasonable and overreaching.



**Pfizer Canada's Termination of Supply and its Arbitrary Imposition of No-Cross Ownership Demand**

15. Notwithstanding, Pfizer Canada has now taken the step of terminating Broadview Pharmacy's approved purchaser status, effective June 2, 2004. Broadview Pharmacy is no longer able to purchase Pfizer Canada products.
  
16. The no cross-ownership undertaking demands of Pfizer Canada are arbitrary and hypocritical. Pfizer Canada has purported to add to its list of "unapproved purchasers" seven of over 200 Medicine Shoppe pharmacies, a western-Canada chain of pharmacies. The entire chain of Medicine Shoppe pharmacies is owned by one group of principals. By selecting of the seven of the over 200 Medicine Shoppe stores as "unapproved purchases", Pfizer Canada shows that it is not at all concerned about cross-ownership issues as far as Medicine Shoppe is concerned. The seven Medicine Shoppe locations listed by Pfizer Canada as "unapproved purchasers" are known, or suspected by Pfizer Canada to be exporting Pfizer Canada pharmaceutical products from Canada, or supplying to other who do so. Yet Pfizer Canada continues to supply its products to the 200 plus remaining Medicine Shoppe locations without regard to cross-ownership concerns. This inconsistency is quite glaring, and demonstrates that Pfizer Canada has chosen to discriminate against smaller pharmacies such as Broadview Pharmacy, while allowing the larger drug store chains, and those distributors who supply them, to continue to carry on business as usual.

**Effect of Pfizer Canada's Refusal to Deal**

17. Many customers of Broadview Pharmacy have regular multiple prescriptions and come to Broadview Pharmacy to fill all of their prescription needs in one visit. If Broadview Pharmacy is not able to serve such patients' needs, because it is out of Pfizer Canada product, such customers will very likely choose to fill their

prescriptions at other pharmacies which can serve all of their needs. As Pfizer Canada products are now no longer available to Broadview Pharmacy, many of its patients will go elsewhere for their pharmaceutical needs, and Broadview Pharmacy will likely lose such customers for good. Pfizer Canada's actions thus seriously threaten the financial viability of Broadview Pharmacy.

18. Pfizer Canada occupies a dominant position in the marketplace with respect to its patented pharmaceutical products. Pfizer Canada's products are otherwise in ample supply in the Toronto area, including Broadview Pharmacy's neighbourhood competitors.
19. Within the last two weeks, the largest distributor of pharmaceutical products in Canada, McKesson Canada, has commenced the practice of restricting access to its catalogue of products to any "unapproved purchasers", that is, any pharmacy that has been cut-off of supply by any of the large pharmaceutical manufacturers, including Pfizer Canada. This step means that pharmacists are no longer able to access important information about drug quantities, characteristics and pricing through the McKesson website or from McKesson sales staff who answer telephone inquiries from pharmacies such as Broadview Pharmacy. Broadview Pharmacy's patients' interests have been adversely affected accordingly.

#### **Pfizer Canada's Refusal to Deal with Other Smaller Pharmacies**

20. Notwithstanding Pfizer Canada's inconsistent dealings with the Medicine Shoppe stores, as described above, it appears that dozen of smaller pharmacies throughout Canada, neighbourhood pharmacies like Broadview Pharmacy, have now been cut off of all supply of pharmaceutical products by Pfizer Canada. This will have a devastating impact on the availability of import medicines to patients across Canada.

## GROUNDS FOR APPLICATION UNDER SECTION 103.1

21. In this application, Broadview Pharmacy seeks leave to bring an application for an order pursuant to section 75 of the Act, which provides:

“75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

- (a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,
- (b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,
- (c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,
- (d) the product is in ample supply, and
- (e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.”

22. Subsection 103.1(7) of the Act sets out the test for granting leave under section 103.1, as follows:

“The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the application is directed and substantially affected in the Applicant’s business by any practice referred to in one of those sections that could be subject to an order under that section.”

23. The Competition Tribunal has held that “the appropriate standard under subsection 103.1(7) is whether the leave application is supported by sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have

been directly and substantially affected in the applicant's business by a reviewable practice, and that the practice in question could be subject to an order."

**Ref:** *National Capital News Canada v. Milliken*, (2002) 23 C.P.R. (4<sup>th</sup>) 77

24. In *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 Comp. Trib. 1, the Competition Tribunal held:

"What the Tribunal must have reason to believe is that Barcode is directly and substantially affected in its business by Symbol's refusal to sell. The Tribunal is not required to have reason to believe that Symbol's refusal to deal has or is likely to have an adverse effect on competition in a market at this stage."

25. The foregoing test is clearly met in this application, as the materials in support of the application establish unequivocally the following:
- (a) Pfizer Canada is engaged in activity which constitutes a refusal to deal under section 75 of the Act; and
  - (b) Broadview Pharmacy's business is directly and substantially affected by Pfizer Canada's refusal to deal, and refusal to allow others to deal, with it.
26. In support of the foregoing, the Applicant refers to the affidavits of Herbert Cohen sworn June 8, 2004 and Harvey Organ sworn June 9, 2004.
27. The actions of Pfizer Canada in refusing to deal with Broadview Pharmacy and in refusing to allow its distributors to deal with Broadview Pharmacy clearly fall

within the scope of activity prescribed by section 75 of the Act, and clearly amount to a practice which could be subject to an order under that section.

DATED at Toronto, in the Province of Ontario, this 10<sup>th</sup> day of June, 2004.

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