February 18, 2011

Thomas Jenkins
Chair, Expert Review Panel on Research and Development
1200-270 Albert Street
Ottawa, Ontario K1A 5G8

Submitted via email: consultations@rdreview-examenrd.ca

Dear Mr. Jenkins,

Please find enclosed the submission of the Canadian Generic Pharmaceutical Association (CGPA) to the Expert Review Panel on Research and Development.

The generic pharmaceutical industry is innovative and makes major investments in domestic R&D and manufacturing. The recommendations in our submission are focused on improvements to legal and regulatory frameworks and policies that would help to foster an internationally competitive environment that supports continued research, development and manufacturing by the generic pharmaceutical in Canada.

I would welcome the opportunity to review the recommendations in this submission with you and other members of the panel in greater detail.

Sincerely,

Jim Keon
President

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Submission to the

Government of Canada's

Expert Review Panel on Research and Development

Jim Keon, President
Canadian Generic Pharmaceutical Association

February 18, 2011

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Executive Summary

The Canadian Generic Pharmaceutical Association (CGPA) and its member companies welcome the opportunity to participate in the consultations conducted by the Expert R&D Review Panel. CGPA would welcome the opportunity to review the recommendations in this submission with members of the panel in greater detail.

Canada's generic pharmaceutical industry is innovative and a major investor in domestic research and development and manufacturing.

The following recommendations are focused on improvements to legal and regulatory frameworks and policies that would help to foster an internationally competitive environment that supports continued research, development and manufacturing by the generic pharmaceutical industry in Canada:

1. Industry Canada should undertake a comprehensive review of the intellectual property regime for pharmaceuticals, including the *Patented Medicine (Notice of Compliance) Regulations*, without delay.

2. The Government of Canada must reject the pharmaceutical intellectual property proposals of the European Union in the negotiations for a Comprehensive Economic and Trade Agreement (CETA).

3. Health Canada must develop and implement a concrete action plan to address the significant backlog in both Notifiable Change Submissions (NCs) and Abbreviated New Drug Submissions (ANDSs), and ensure the department is properly resourced to meet its own performance targets in these areas in the future.

CGPA Submission

Canada's generic pharmaceutical industry is innovative and a major investor in domestic research and development and manufacturing. RESEARCH Infosource Inc.'s annual list of Canada's Top 100 R&D Spenders shows that Toronto-based generic drug firm Apotex Inc. is the top R&D spending among all pharmaceutical/biotechnology companies in Canada. Apotex Inc. spent more than $188 million on R&D in 2009, or 15.9% of its domestic revenues. According to the same list, Montreal-based generic drugmaker Pharmascience spent more than $30 million on R&D in 2009. In addition to research and development of drug formulations, generic companies also develop innovative manufacturing processes to enhance the efficiency of production and keep costs down.

In contrast, the brand-name pharmaceutical industry invests just 7.5% of research as a percentage of domestic sales, as reported by the Patented Medicines Prices Review Board. Intellectual property protections for the brand-name pharmaceutical industry have been increased 8 times since 1987, yet brand domestic R&D investments as a percentage of sales continue to languish. The CGPA publication *The Real Story Behind R&D Spending by the Brand-Name Drug Companies in Canada* provides important background and also highlights the relative value of the brand R&D spending.[1]

The generic industry is export-oriented, with approximately 40% of domestic production exported to more than 115 countries around the globe. The United States forms the single largest and most important export market for Canadian-made generic pharmaceutical products.

There is no question that the generic pharmaceutical industry is a Canadian life sciences success story, and there is an internationally significant cluster of generic companies in Greater Toronto and Montreal Areas. The industry directly employs approximately 10,000 Canadians in highly skilled R&D and manufacturing positions.

Generic drug companies require an internationally competitive environment in order to compete effectively for R&D and manufacturing mandates. Canada's generic industry is currently under siege with low prices for our products and a complicated intellectual property regimen that permits a brand-name drug company two sue a generic company twice in regards to the same patents. As a result, generic companies are reassessing their investments in Canada.

In order to create a more competitive domestic environment to support continued generic pharmaceutical investments, CGPA recommends the following:

Recommendation #1: Industry Canada should undertake a comprehensive review of the intellectual property regime for pharmaceuticals, including the *Patented Medicine (Notice of Compliance) Regulations*, without delay.

Canada's intellectual property regime for pharmaceuticals has become unbalanced. It fails to recognize that generic manufacturers play a key role in challenging unwarranted patents in the public interest, thus helping to control prescription drug costs.

The *Patented Medicine (Notice of Compliance) Regulations* enable a brand-name drug

[1] http://www.canadiangenerics.ca/en/news/docs/RealStory_2010.pdf

company to bring an application raising patent concerns against a manufacturer seeking to bring a generic drug to market. Such an application triggers an automatic stay preventing the issuance of a notice of compliance (NOC) to the generic. The *Regulations* have been repeatedly described as "draconian" by the Supreme Court of Canada. They are an extraordinary measure that is not available to patentees in other sectors. Such "patent linkage" systems for pharmaceuticals are uncommon by international standards, and none have the serious flaws of Canadian regime.

In well over two-thirds of cases brought under the *Regulations*, the brand's patent concerns ultimately prove to be without foundation: the courts find the patents to be invalid or not infringed by the generic product. The generic product is often wrongfully kept off the market for years in this way.

There are two problems with the *Regulations* that must be urgently addressed.

a) A court decision under the Regulations does not resolve the patent dispute.
No other country forces generic manufacturers to engage in litigation which does not resolve the patent issue, as Canada does.

Even if a generic manufacturer litigates for years and is successful in an NOC proceeding in Canada, it can be sued again on the same patent under the *Patent Act* by the same brand company as soon as it enters the market. This has been common since regulatory amendments in October 2006 closed some of the "patent evergreening" loopholes in the *Regulations* that had been vigorously exploited by brand-name companies. The outcome of the patent action may be different from the result under the *Regulations*. The generic manufacturer therefore enters the market at risk that it could be found liable for all the brand-name company's lost profits, an amount many times larger than any profit it could possibly earn from its generic product.

For example, Apotex won litigation under the *Regulations* on two patents relating to raloxifene, an osteoporosis drug (Federal Court cases T-361-06 and T-1364-05), but Eli Lilly is nevertheless now suing Apotex for infringement of the same patents (T-512-10 and T-516-10). Many other generic manufacturers have been involved in similar dual litigation on many other products as well.

Under the current regime, the generic manufacturer cannot earn a return if it is right on the patent issues, and faces catastrophe if it is wrong. If litigation under the *Regulations* does not resolve the patent dispute, and the generic manufacturer loses when the patent is litigated a second time under the *Patent Act*, its liability could be so large that bankruptcy is conceivable in the case of a major drug. It is obviously difficult for a rational business to justify investing in patent challenges in these circumstances. The system also incentivizes brand companies to litigate against and delay all generic drugs, even if they know their patents are invalid or not infringed.

These factors are particularly damaging to generic manufacturers because provincial reimbursement prices for generic drugs have recently dropped dramatically. In 2010, Ontario dropped its reimbursement price for generic drugs from 50% of the drug benefit price of the equivalent brand product, to 25%. Ontario's reimbursement prices tend to drive prices in other provinces, and across the market as a whole. As a result, generic drugs now bring even greater savings to the provincial formularies and the public, but the resulting drop in generic manufacturers' revenues makes it harder to undertake the investment and risk involved in challenging invalid or non-infringed patents, given the problems set out above.

b) The lack of an adequate damages provision in the Regulations.

As a result of court decisions, it has become clear that if a generic NOC is wrongfully delayed under the *Regulations*, the manufacturer either cannot obtain damages from the brand company at all under section 8, or may at best be entitled to recover only a fraction of its actual business loss. For example, a generic manufacturer bizarrely cannot obtain section 8 damages if the patent is declared invalid in a final decision at trial, rather than in preliminary litigation under the *Regulations*.

The courts have also held that section 8 allows the generic manufacturer compensation only for damages incurred during the period of the delay, but not for its all-important loss of expected future market share had it got to market ahead its generic competitors. This makes it difficult or impossible for the first generic manufacturer to earn a return if it successfully challenges the patent in court, because the brand typically lets all generic competitors on the market at the same time, whereupon intense price competition drives generic net prices to levels at which returns are negligible. Yet the generic manufacturer's investment in challenging the patent successfully in court saves the public and the provincial drug plans tens or hundreds of millions of dollars for a significant drug. Third-party payers are also unable to recoup their lost savings when weak or frivolous litigation extends the length of time they must pay monopoly prices.

Recommendation #2: The Government of Canada must reject the pharmaceutical intellectual property proposals of the European Union in the negotiations for a Comprehensive Economic and Trade Agreement (CETA).

The European Union has tabled a series of proposals aimed at increasing intellectual property protections for pharmaceuticals in the CETA negotiations.[2] These include a right of appeal under the *Patented Medicine (Notice of Compliance) Regulations*, which would further exacerbate existing issues with the regime as outlined in Recommendation #1. Also proposed are increased scope and length of data protection and patent term extensions – both of which are unnecessary given the robustness of the existing Canadian regime.

Canada intellectual property regime for pharmaceuticals exceeds our existing trade obligations under both NAFTA and TRIPS. It offers similar effective protective periods to the United States and the EU, although all three jurisdictions have different mechanisms in place to achieve these similar results.

There is a significant profit motivation for brand-name drug companies behind these proposals. Many brand companies are headquartered in the EU and pharmaceuticals comprise 15.6% of the EU's exports to Canada, worth CDN$5.3 billion annually. CGPA commissioned an economic impact assessment of the proposals by Aidan Hollis of the University of Calgary and Paul Grootendorst of the University of Toronto.[3] The economists found that generic market entry would be delayed by an average of 3.46 years if the proposals were implemented, at a cost to Canadians of $2.8 billion annually.

This report also found that such increases in pharmaceutical intellectual property would be unlikely to result in increases in R&D spending by brand-name drug companies in Canada. In

[2] http://www.canadiangenerics.ca/en/advocacy/canadaEU.asp

[3] http://www.canadiangenerics.ca/en/news/docs/02.07.11CETAEconomicImpactAssessment-FinalEnglish11.pdf

terms of the generic industry, extensions in intellectual property protection would be likely to delay generic entry in Canada in comparison to the United States. Due to the export restrictions of the *Patent Act*, this would mean that Canadian generic manufacturers would not be able to access U.S. markets for new generics in a timely manner. In a global R&D and manufacturing context, such mandates would likely be moved to U.S. or other jurisdictions without this barrier to trade.

Both the generic industry and the brand industry agree that the pharmaceutical IP regime in Canada should be reviewed, however, improvements that are in the best interests of Canadians cannot be achieved by cherry-picking certain brand/EU proposals in the context of trade negotiations. Canada must reject the EU proposals and instead initiate a comprehensive review of the domestic intellectual property regime for pharmaceuticals.

Recommendation #3: Health Canada must develop and implement a concrete action plan to address the significant backlog in both Notifiable Change Submissions (NCs) and Abbreviated New Drug Submissions (ANDSs), and ensure the department is properly resourced to meet its own performance targets in these areas in the future.

Notifiable Changes
The review of Notifiable Change submissions made by generic companies is in severe backlog and can only be described as abysmal. Just 10% of NCs were reviewed by Health Canada within the 90-day performance standard at the end of Q3-2010.

Such submissions are required when a company wants to make a change to a manufacturing process or product input, such as a change in a supplier of an active pharmaceutical ingredient (API). Missed performance targets have a significant impact on company efforts to maintain normal business practices, including their need to implement changes in process in a timely manner.

In September 2009, there was a significant change in Health Canada's Notifiable Change policy. Previously, if a company did not receive any written comments from Health Canada within 90 days with respect to a Notifiable Change submission it could implement the proposed change by default. Under the new policy, a company is unable to implement the proposed change until receiving the approval in a "No Objection" letter.

The Therapeutic Products Directorate of Health Canada does not resource this area of review adequately and, as a result, NC review times continue to grow significantly. While Health Canada has allowed NCs to be expedited in the case of proven drug shortages, there is currently no concrete plan to address this significant concern of all manufacturers of therapeutic products.

Possible solutions to address this concern include reinstating the 90-day default implementation policy, narrowing the range of NC submissions requiring review, and/or increasing the number of review staff dedicated to the review of these submissions. NCs were excluded from Health Canada's Health Products and Food Branch (HPFB) cost recover initiative as published in Canada Gazette Part I in November 2010. The inclusion of NCs in this initiative, with clear associated performance standards, could also help to address the insufficiency of resources for NC reviews.

Abbreviated New Drug Submissions
Health Canada regulatory programs serve as the gatekeepers to commercializing the products that Canadians demand. These programs can either discourage commercialization, or they can

facilitate and encourage it.

There is a significant resource and capacity gap for generic drug submissions, resulting in significant increases in backlog. The number of annual ANDSs has increased by more than 200% over the past 10 years. While the number of ANDSs has increased steadily, there have been no increases in dedicated resources to address the volume of submissions.

The number of Abbreviated New Drug Submissions (ANDSs) in backlog (i.e. beyond Health Canada's performance standard) increased from 5% in Q4-2008 to 48% in Q3-2010. A total of 97 of the 204 ANDS submissions being reviewed by TPD by the end of Q3-2010 were in backlog. These performance targets are missed even though submissions have been subject to cost recovery since 1993. The HPFB cost recovery proposal published in Canada Gazette Part I in November 2010 proposes a new fee structure for submissions.

It is not yet clear to CGPA that the new fee structure will lead to improved performance for generic drug submissions. CGPA is extremely concerned about the specific exclusion from performance targets under the proposed initiative for certain ANDSs. This exclusion is NOT acceptable to CGPA. Health Canada must meet all performance standards for ANDSs. The stated benefits to consumers, patients, insurers, taxpayers and the generic industry are derived from meeting the performance targets for all ANDSs. It is entirely misleading to presume these benefits while explicitly allowing this exclusion. Health Canada must meet all ANDS performance standards.

Other regulatory authorities, such as the Food and Drug Administration (FDA) in the United States, are facing similar challenges with a growing number of generic drug submissions. In the case of the FDA, additional resources were recently allocated in an effort to ensure timely review of generic drug submissions with the intent that personnel increases will eliminate the generic drug application backlog by 2012. Canada too needs to place a high priority on the timely review of generic drug submissions.

APPENDIX 1: CGPA MEMBERS

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