Federal Court | Cour fédérale

CANADA

Date: 20031114

Docket: T-1576-99

Citation: 2003 FC 1343

BETWEEN:

HOECHST MARION ROUSSEL CANADA

Applicant

-and-

ATTORNEY GENERAL OF CANADA

Respondent

-and-

PATENTED MEDICINE PRICES REVIEW BOARD

Intervener

REASONS FOR ORDER

ARONOVITCH P.

INTRODUCTION

[1] The applicant brings this motion in the context of the judicial review of a decision of the Patented Medicine Prices Review Board (the "Board") wherein the Board declined to set aside its notice of hearing to inquire into the pricing of nicotine patches marketed by Hoechst Marion Roussel Canada ("Hoechst"), under the brand name "Nicoderm".

[2] Hoechst's motion, made pursuant to Rule 318(4) of the *Federal Court Rules, 1998*, is for the production of documents in the possession of the Board that are said to be relevant to the underlying judicial review application. For the reasons that follow I will deny the motion.

BACKGROUND

[3] The motion is brought against the following background. On April 20, 1999, the Board issued a notice of hearing with a view to determining whether Hoechst was selling Nicoderm at an excessive price, as per sections 83 and 85 of the *Patent Act*, R.S. 1985, c. P-4, as amended (the "*Act*"). Hoechst challenged the notice of hearing on a variety of jurisdictional grounds. The objections were taken by way of a motion heard before the Board and disposed of in two tranches.

[4] The underlying application for judicial review is of the first of the Board's decisions, the "Decision on Jurisdiction - Part I". It principally disposed of Hoechst's objections to the Board's jurisdiction on the basis that the notice of hearing violated the rules of natural justice. More specifically, the Board in its reasons answered allegations of institutional bias by reason of the overlap of Board functions as investigator, prosecutor, and adjudicator, said by the applicant to create a reasonable apprehension of bias against it. The Board also dealt with the allegation that "the manner in which the Board proceeded by making determinations prior to the issuance of the notice of hearing", denied the applicant a reasonable opportunity to be heard, and equally gave rise to an apprehension of bias.

[5] Finally the Board addressed the applicant's complaint that its rights to procedural fairness had been violated in that the notice of hearing failed to provide grounds and material facts in sufficient detail to enable Hoechst to know the case it had to meet.

[6] A subsequent "Decision on Jurisdiction - Part II", dealt with, and dismissed, still other objections taken by the applicant to the Board's jurisdiction. That decision is the subject of a separate application for judicial review.

[7] In the contexts of this proceeding, the applicant's grounds of review essentially replicate those raised before the Board in objecting to its jurisdiction, and include the following:

> "The manner in which the Board has proceeded gives rise to a reasonable apprehension of bias on the part of the Board or, in the alternative, of its Chairperson, in that:
>
> a. the operations of the Board provide for an impermissable overlap of investigative and adjudicative functions on the part of Board personnel and its Chairperson,
>
> b. the Board, through its personnel and its Chairperson, reached conclusions prior to, and on, the issuance of the Notice of Hearing that give rise to a reasonable apprehension that a predetermination has been made on certain matters that are to be at issue at the hearing,
>
> c. the Chairperson, having reviewed material put forward by Board personnel, issued the Notice of Hearing, and appointed the Board members, including the Chairperson, to constitute the hearing panel."

[8] I have attached as an appendix, Rules 317 through 318 of the *Federal Court Rules, 1998*, pursuant to which the applicant seeks production. Rule 317 essentially entitles an applicant to request material relevant to an application that is in the possession of a tribunal whose order is at issue in the judicial review.

[9] On that basis, Hoechst has requested certified copy of the following material:

> 1. A copy of all memoranda, reports or other documents submitted to the Board, or its Chairperson, by the staff of the Board prior to the Board, or its Chairperson, making the decision to issue the Notice of Hearing dated April 20, 1999.
>
> 2. A copy of any other documents and materials that were before the Board, or its Chairperson, when the decision was made to issue the Notice of Hearing dated April 20, 1999.
>
> 3. A copy of any documents or materials which indicate the selection by the Board's Chairperson of the panel members to sit on the hearing, or hearings, instituted by the Notice of Hearing dated April 20, 1999."(emphasis added)

[10] The Board objects to the request, saying that the materials described in the above paragraphs 1 and 2, are not relevant given the law as stated in *Ciba-Geigy Canada Ltd. v. Canada (Patented Medicine Prices Review Board)*, [1994] 3 F.C. 425 (T.D.); affirmed (1994), 56 C.P.R. (3d) 377 (F.C.A.) ("*CIBA*"). The Board adds that there are no materials in the category described in paragraph 3, and articulates its position that the record on the judicial review application should be the same as the record on which the Board based its decision.

[11] At the hearing before me, the parties agreed that for the purposes of this motion Hoechst's request is to be limited to production of the report of the staff of Board concerning excessive pricing, (the "staff report").

[12] To understand the argument of the parties, it is useful to begin with the genesis and nature of the staff report. It is succinctly described in the judgement of McKeown J. in *CIBA*, *supra*, of which more will be said later:

> .....
>
> The confidential relationships which Board staff entertain with third parties are very important to their ability to discharge their statutory responsibilities. The Board staff will communicate to the patentee the substance of the evidence upon which any excessive pricing determination is made. If the investigation suggests that the price exceeds the guidelines, the patentee is provided with the basis for the Board staff's conclusion and is requested to enter into a Voluntary Compliance Undertaking (VCU) to adjust its price. Regardless of the patentee's response to the Board staff's request, upon completing its investigation, board staff prepares a confidential report which is forwarded to the chairperson of the Board. It is upon review of this report that the chairperson decides whether or not there is sufficient evidence to issue a notice of hearing. The notice of hearing sets out the grounds upon which the chairperson believes a remedial order may be issued; i.e. that a *prima facie* case exists, and the material facts which led the chairman to this conclusion. (at page 486) (emphasis added)

[13] The following, from the decision of the Board provides further context for the discussion. Here, the Board explains aspects of its operations, starting at page 3 of its reasons with the aftermath of a patentee's voluntary agreement to adjust its price:

> Operation
>
> .....
>
> If the matter is not resolved through this process, Board Staff may recommend to the Chairperson that it be brought before a panel of the Board for determination in a public hearing.
>
> Until the matter is brought before them at the public hearing, no Board member is involved in or aware of the results of Board Staff's investigation into an instance of alleged excessive pricing, other than the Chairperson in his management capacity as Chief Executive Officer of the Board, as discussed below. The members first learn of Board Staff's case when the Notice of Hearing is issued, and they hear the evidence adduced by Board Staff when it is put before a panel of Board members in the form of evidence adduced at a public hearing.
>
> When Board Staff report to the Chairperson that there has been an instance of excessive pricing, the Chairperson, as Chief Executive Officer of the Board, will

> review the matter with the sole purpose of determining whether it is in the public interest that there be a public hearing concerning the matter. In making this determination, the Chairperson determines, among other things, whether the allegations made by Board Staff, if proven true, would establish a prima facie case of excessive pricing by a patentee under the Board's jurisdiction. The Chairperson's role in this context is as the senior management official of the Board directing its operations and ensuring that public hearings are held (and only held) in appropriate cases; it is not in any sense adjudicative and the Chairperson undertakes no analysis of whether the facts alleged by Board Staff are, or will be, proven.
>
> If the Chairperson determines that it is in the public interest that a hearing be held, the Board issues a Notice of Hearing and the Chairperson appoints a panel of members to preside at the hearing. At the hearing Board Staff will advocate its position that there has been excessive pricing of a medicine under the Board's jurisdiction, the patentee will present its case to the contrary, and the panel of the Board will hear the evidence and issue a decision in the matter. The panel of the Board is represented by its own separate counsel throughout the hearing process.

ISSUES AND ANALYSIS

[14] The first matter for consideration is whether in the circumstances, the staff report may be said to the "material relevant to the application and in the possession of the tribunal" within the meaning of Rule 317. The second, is as to whether Hoechst is right in arguing that even if the report was not before the Board when it rendered its decision, it is nevertheless entitled to it, in order to make out its case of apprehended bias.

[15] What documents are considered relevant for our purposes? In *Pathak v. Canadian Human Rights Commission* (1995), 180 N.R. 152, at para. 1 (F.C.A.), the Court stated that a document is relevant to a judicial review application if it "may affect the decision that the Court will make on the application". Whether a document was considered or relied upon by a tribunal is not the appropriate consideration for that purpose says the applicant. Relying principally on *Friends of the West Country Assoc. v. Minister of Fisheries and Oceans* (1997), 130 F.T.R. 206, at para. 28

(F.C.T.D.) ("*Friends of the West*"), Hoechst argues that documents are relevant that relate to the grounds advanced in the originating process.

[16] *Friends of the West*, however does not represent the predominant view, and is given narrow application. (*Hiebert v. Canada (Correctional Service)*, [1999] F.C.J. No. 1957 (QL)) ("*Hiebert*"). Indeed, Justice Pelletier observes in *Hiebert* that the bulk of case authority dealing with production of documents in judicial review applications suggests that only documents that were before the decision-maker are subject to production and goes on to conclude:

> The position taken by Nadon J. was approved by the Federal Court of Appeal in 1185740 v. Canada (Minister of National Revenue) (1998), 150 F.T.R. 60. I therefore find that documents are not subject to production unless they were before the decision-maker at the time the decision was made. (at page 10).

[17] The Board points out that 3 of the 4 members of the panel that heard and decided Hoechst's motion, being the members other than the Chairperson, had not seen the staff report when the Board rendered its decision on jurisdiction, nor was the report part of the record or evidence before the Board in that adjudication.

[18] Even so, says the applicant, the staff report can be said to have been "before" the tribunal by virtue of the Board being constituted of members that included the Chairperson who had seen the staff report prior to the issuance of the notice of hearing, and thereafter sat as a member of the panel that rendered the impugned decision.

[19] As I understand Hoechst's argument, it is made both in respect of the issuance of the notice of hearing, and the panel's adjudication of the jurisdiction motion. As is already apparent, while it is at the call of the Chairperson, the notice of hearing issues from the Board. Hoechst argues that by virtue of the Chairperson's knowledge of the report the Board may be said to have had the report under consideration in issuing the notice of hearing, and by the same token, notwithstanding that the report did not form part of the record before the Board, the report may equally be said to have been before the panel when it adjudicated the objections to its jurisdiction.

[20] I do not accept the applicant's suggestion as what constitutes the tribunal record in this case. The enabling legislation clearly contemplates that the Chairperson and the Board have differing and separate functions. In addition, the *Act* expresaly permits the Chairperson to sit as a hearing member of a panel of the Board, notwithstanding his role in the issuance of the notice of hearing. The report itself was not relied upon or evidence before the panel of the Board.

[21] As to the decision that is being challenged in the underlying judicial review, it is the Board's determination as to its jurisdiction. More precisely, whether it was without jurisdiction to inquire into the pricing of Nicoderm by virtue of alleged violations of the rules of natural justice, including those already visited. In the circumstances, I see no basis to expand the clear meaning of "before the decision-maker at the time the decision was made" - to artificially enlarge the tribunal record to include a document that the deliberating panel, Chairperson included, did not have reference to or rely upon in its adjudication on the merits.

[22] Indeed, I agree fully with the Board's contention that, *CIBA* remains directly on point and to the same effect. The Court, in that case, was seized of the judicial review of an order of the Board dismissing Ciba-Geigy's request for disclosure and production of all documents relating to matters in issue in an upcoming hearing to be held by the Board, as to whether Ciba-Geigy's drug "Habitrol" was excessively priced in Canada.

[23] The staff report was very much at issue in the case. The Court in *CIBA* was called upon to consider whether Ciba-Geigy, the patentee in that case, was entitled to more than the documents that the Board intended to rely on at the hearing, and in particular "to all the fruits of the investigation of Board staff".

[24] Admittedly, the perspective and argument in *CIBA* were somewhat different from the case at bar. In *CIBA*, the Board had refused the documents for the purposes of an upcoming hearing whereas in the present case, the request for documents is made after the fact, and pursuant to Rule 317. In addition, the patentee in *CIBA* relied on the decision of Sopinka J. in *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326, to the effect that in a criminal case, the Crown has a legal duty to make total disclosure to the defence. The patentee's argument was that disclosure that fell short of that would impair its ability to make full defence before the Board.

[25] Having considered the argument, Justice McKeown found that some leeway had to be given to an administrative tribunal with economic regulatory functions and that the disclosure of confidential information gathered while fulfilling its regulatory obligations would unduly impede

the tribunal's administrative work. Justice McKeown agreed with the Board that in light of the extensive disclosure already made, the need for candid communication, and the limited purpose of the Chairperson's review of the staff report, its production was not appropriate. In particular the Court found there was no prejudice to the patentee in that the staff report would not be evidence before the Board:

> "CIBA sought in particular to have the Board's report disclosed. This report was prepared for the chairperson and was only used to decide if a notice of hearing should issue. It is no different than any other document put before the Board. The documents only become relevant if the Board is going to rely on them."

[26] The Federal Court of Appeal confirmed the judgment, per MacGuigan J.A. at page 380:

> "We are all agreed that the Motions Judge has correctly stated and applied the law.
>
> 6. Indeed, in emphasizing that its case is one of *audi alteram partem* and not of bias, counsel for the appellant expressly agreed with the law as stated by the respondent that "the concept of procedural fairness is eminently variable, and its content is to be decided in the specific context of each case."

[27] This bring us to Hoechst's argument in the alternative, that the original record before the tribunal may be supplemented on judicial review where bias, or the apprehension of bias, are alleged. Hoechst refers to three cases which it submits supports its position that the order under Rule 318 should be granted.

[28] In *Lindo v. Royal Bank of Canada* (1999), 162 F.T.R. ("*Lindo*"), Gibson J. rejected the applicant's motion for production, under Rule 317 relying on *Pathak, supra*, which stated that the investigative and decision-making phases of the Human Rights Commission are separate and that

documents relevant to the investigation phase are not subject to production in relation to a challenge to the decision-making phase. However, Gibson J. stated at para. 14, in *obiter*:

> If, in her application for judicial review, the applicant had alleged bias on the part of the investigators who conducted the investigation leading to presentation to the Commission of an allegedly biased report, that ground might very well have provided a basis to go behind the report of the investigators, but no such allegation is made.

[29] The applicant also refers to *Persons Seeking to Use the Pseudonyms of John Witness and Jane Dependant v. The Commissioner of the Royal Canadian Mounted Police*, [1998] 2 F.C. 252 ("*John Witness*"). The applicant, in that case, sought judicial review of the decision of the Commissioner of the RCMP not to provide police protection under the witness protection program.

[30] Among the allegations in *John Witness*, was that counsel who was also defending the RCMP in a civil suit taken by the applicant, had written the Commissioner's reasons. Having considered the Commissioner's claim of privilege for the documents at issue, the Court found that the applicant was entitled to know th extent of counsel's involvement in the formation and writing of the decision on the merits. Reed J. accordingly ordered that any document or part of it, other than legal opinion, be produced that dealt with the decision, and was "relevant to Mr. Leising's involvement in the decision making process..." (*John Witness, supra*, at para 24).

[31] Finally, Hoechst points to the following observation of the Federal Court of Appeal in *Beno v. Canada (Commission of Inquiry into the Deployment of Canadian Forces in Somalia - Létourneau Commission)*, [1996] F.C.J. No. 1129 (QL), [1996] F.C.J. No. 1493 (QL) (F.C.A.) ("*Beno*") at Note 1.

> [O]n an application for judicial review and prohibition based on a reasonable apprehension of bias on the part of a member of a tribunal, the applicant is always entitled to adduce in support of his application any evidence tending to show the alleged bias.

[32] As the Board points out, this case may be distinguished from those cited, as in this instance the issue of bias was raised by Hoechst from the outset. The grounds of the judicial review that relate to an apprehension of bias are not substantially different from those argued before the Board on the question of its jurisdiction. That being the case, had the applicant required the staff report to makes out its case of apprehended bias, it ought to have attempted to compel its production for the purposes of the hearing before the panel that considered those very allegations.

[33] The point is made as follows, by Gibson J., in *Canada Post Corp. v. Public Service Alliance of Canada*, [1999] F.C.J. 356 (T.D.) ("*Canada Post*"), at para. 11:

> That being said, I am satisfied that the grounds for this application for judicial review, fundamental as they may be, do not of themselves, make additional materials not before the Tribunal, appropriate subject-matter of a request under Rule 317, particularly where, as here, an opportunity existed to ensure that those materials were before the Tribunal, and the applicant simply failed to avail itself of that opportunity. The time to secure inclusion of those materials in the Tribunal Record on this application for judicial review has now gone by.

[34] In my view, the same implication may be taken from the observations of the Court of Appeal in *CIBA, supra*, cited at paragraph 26.

[35] The applicant responds that the apprehended bias which it seeks to establish by means of the staff report, arises from the very substance of the Board's reasons, and in particular from the Board's statement in its reasons, that a notice of hearing will issue if the Chairperson determines that the

"public interest" requires it. The applicant cites for example the below passage from the Board's reasons, at page 6:

> 2. The "predetermination on key factual issues" made by the Chairperson in rejecting the VCU
>
> .....
>
> The complaint here is based on a misapprehension of the policies and procedures of the Board, and in particular the reasons for which the Chairperson might decide to initiate a public hearing despite having received a VCU.
>
> As noted in the *Compendium*, in considering a VCU the Chairperson will be guided by whether or not the VCU will result in compliance with the Board's excessive pricing Guidelines, and could initiate a public hearing if it does not. However, the Chairperson may initiate a public hearing when it is in the public interest to do so, and this could be for a number of reasons, one of which is that the matter appears open to debate and the Chairperson believes that there should be a public hearing at which Board Staff, the patentee and interested parties can present evidence regarding the allegations of excessive pricing. As noted in the next section, the Chairperson's consideration at this stage is simply whether the allegations of Board Staff, if proven true, would constitute a *prima facie* case of excessive pricing. The evidence at the hearing might, or might not, bear out the allegations." (emphasis added)

[36] Hoechst points out that Section 8.1 of the Compendium of Guidelines, Policies and Procedures of the Patented Medicine Prices Review Board (the "Compendium"), states that the Chairperson may commence a hearing by issuing a notice of hearing when he or she "is of the view that the investigation has revealed that the price has exceeded the Guidelines or otherwise may be or has been excessive". No mention is made of public interest grounds. Without the report, says the applicant, how is Hoechst to know whether the Chairperson took extraneous matters into account that are not within his authority to consider, and which may have unduly swayed or biassed him in calling for a hearing?

[37] The argument is not persuasive as it fails to establish the report's relevance to an alleged bias of the decision-maker at issue. The production of documents to enlarge the record that was before a tribunal is contemplated in the jurisprudence, in order to allow a party to make full evidence of the bias of a decision-maker in respect of the decision that is sought to be set aside on judicial review. Reed J. in *John Witness* makes reference to documents relevant to "the decision" and "the decision making process". Desjardins J.A. in *Beno*, speaks of the right to adduce evidence in support of an allegation of bias "on the part of a member of the tribunal".

[38] The apprehended bias the applicant seeks to demonstrate as arising from the Board's reasons, is in respect of the Chairperson's decision to call a hearing which then results in the issuance of a notice of hearing. It is not the Chairperson's "view" or opinion leading to the issuance of the notice of hearing that is under review in the underlying application. The decision-maker at issue is the panel adjudicating the jurisdiction motion of which the Chairperson was admittedly a member. The impugned decision is the resulting determination of that panel on the merits.

CONCLUSION

[39] For the foregoing reasons, I conclude that the staff report need not be produced. I note again the fact that Hoechst, having raised the argument of apprehended bias to challenge the jurisdiction of the Board, including as arising out of "the manner in which the Board proceeded by making determination prior to the issuance of the notice of hearing", did not find it necessary to compel the

disclosure of the staff report in the proceeding before the panel that adjudicated those allegations. The Board's reasons do not, in my view, give rise to what Hoechst essentially presents as a fresh ground of bias. More importantly, the alleged bias is not that of a member of the tribunal whose decision is sought to be set aside in the underlying judicial review. An order will go accordingly.

"Roza Aronovitch"

Prothonotary

Signed this 14th day
of November 2003

APPENDIX I TO REASONS FOR ORDER DATED NOVEMBER 14, 2003

DOCKET NO. T-1576-99

Rule 317 provides as follows:

A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.	Une partie peut demander que des documents ou éléments matériels pertinents à la demande qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande lui soient transmis en signifiant à l'office fédéral et en déposant une demande de transmission de documents qui indique de façon précise les documents ou éléments matériels demandés.
(emphasis added)	(mes soulignés)

Rule 318(2) provides:

Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.	Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent par écrit toutes les parties et l'administrateur des motifs de leur opposition.

Rule 318(4) underlies the applicant's request in the present motion, and provides:

The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.	La Cour peut, après avoir entendu les observations sur l'opposition, ordonner qu'une copie certifiée conforme ou l'original des documents ou que les éléments matériels soient transmis, en totalité ou en partie, au greffe.

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1576-99

STYLE OF CAUSE:

HOECHST MARION ROUSSEL CANADA

Applicant

-and-

ATTORNEY GENERAL OF CANADA

Respondent

-and-

PATENTED MEDICINE PRICES REVIEW BOARD

Intervener

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: JUNE 25, 2003

REASONS FOR ORDER OF MADAM PROTHONOTARY ARONOVITCH

DATED: NOVEMBER 14, 2003

APPEARANCES:

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