Federal Court | Cour fédérale

CANADA

Date: 20040331

Docket: T-1576-99

Citation: 2004 FC 489

Ottawa, Ontario, this 31st day of March, 2004

Present: THE HONOURABLE JUSTICE JAMES RUSSELL

BETWEEN:

HOESCHST MARION ROUSSEL CANADA

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

PATENTED MEDICINE PRICES REVIEW BOARD

Intervener

REASONS FOR ORDER AND ORDER

[1] This is an appeal pursuant to Rule 51 of the *Federal Court Rules*, 1998 by way of a motion by the Applicant, Hoescht Marion Roussel Canada, of the decision of Madam Prothonotary Aronovitch, dated November 14, 2003. In her decision, Prothonotary Aronovitch dismissed the Applicant's request for an order compelling the production of material sought pursuant to Rules 317 and 318 of the *Federal Court Rules*, 1998.

BACKGROUND

[2] The Applicant has an exclusive license to sell a product that inhibits smoking. It continuously delivers nicotine to the circulation system through the skin by way of a transdermal nicotine patch. The Patented Medicine Prices Review Board ("Board") alleges that the product is a medicine in relation to which the Applicant holds certain patents. It is further alleged that the Applicant has charged excessive prices for the product. A proceeding to determine whether the Applicant has engaged in excessive pricing has been instituted by Notice of Hearing, dated April 20, 1999.

[3] When Board staff believe there may be an instance of excessive pricing they conduct an investigation and report to the Chairperson of the Board.

[4] Until a matter is brought before the Board at a public hearing, no Board member is involved in, or aware of, the results of the staff investigation other than the Chairperson in his/her management capacity as Chief Executive Officer of the Board. In this case, no members of the Board saw the report produced by the staff ("Staff Report"), except for the Chairperson in his capacity as CEO of the Board.

[5] After the staff completed their investigation, the Applicant was invited to submit a Voluntary Compliance Undertaking ("VCU"). The Applicant did so. According to the Board's *Compendium of Guidelines Policies and Procedures* ("Compendium"), the Chairperson, in deciding whether to accept a VCU, should be guided by the policy of the Board that the price of the product should be adjusted to conform to the Guidelines. Also, if necessary, any excess revenues received by the patentee since the price first exceeded the Guidelines will be offset.

[6] The Compendium also states that, on receiving a report from the staff, the Chairperson should review the matter and may commence a hearing by issuing a Notice of Hearing when s/he "is of the view that the investigation has revealed that the price has exceeded the Guidelines or otherwise may be or has been excessive ...".

[7] In this case, following receipt and review of the Staff Report, the Applicant's VCU was rejected and a Notice of Hearing, dated April 20, 1999, was issued. The Chairperson also appointed himself to preside over the panel before whom the hearing was to be conducted.

[8] The Board asked the Applicant to file a response to the allegations of excessive pricing and, on being notified of the Applicant's objection to the issue of the Notice of Hearing on various grounds, the Board asked the Applicant to bring its objections before the Board panel by way of a motion.

[9] On May 25, 1999, the Applicant brought a motion ("Jurisdiction Motion") before a panel of the Board asking the Board to rescind the Notice of Hearing on the ground that it was issued in breach of the principles of procedural fairness. Other issues that were raised concerning the characterization of the nicotine patch as a medicine and the applicability of certain patents were dealt with by the Board separately and are part of a separate review application.

[10] In support of the Jurisdiction Motion, the Applicant argued as follows:

> i) the Patent Act permits an unacceptable overlap of responsibility for investigation, prosecution, and adjudication of alleged instances of excessive pricing, and as such results in a denial of a fair hearing contrary to s. 2(e) of the Canadian Bill of Rights;
>
> ii) alternatively, notwithstanding the degree of overlap permitted by the Patent Act, the Board has structured its operations so as to exceed any degree of overlap the Act may permit.

[11] The Applicant raised the following objections with respect to the procedures employed by the Board:

> a. the conclusive nature of the allegations of Board Staff following its investigation into the pricing of Nicoderm;
>
> b. the predetermination on key factual issues made by the Chairperson in rejecting the VCU;
>
> c. the Chairperson should not sit on the panel hearing the matter given that the Chairperson had reviewed the staff report and the VCU, and had decided to initiate a hearing; and
>
> d. the Chairperson did not afford the Applicant procedural fairness in considering the VCU.

[12] On the Jurisdiction Motion, the Applicant advanced four grounds in support of its position:

(a) Nicoderm is not a medicine within the meaning of the Patent Act;

(b) the Board is tainted by institutional bias;

(c) HMRC was not the patentee of the patents cited in the Notice of Hearing and in any event only one of the patents pertains to Nicoderm; and

(d) the Notice of Hearing was insufficiently detailed for HMRC to know the case it had to meet.

[13] Issues (b) and (d) were set out in paragraphs 6, 7 and 9 of the Notice of Motion filed with the Board in the Jurisdiction Motion. The Board heard the motion on issues (b) and (d) at a hearing on July 5, 1999, and issued a decision in Part I of the Jurisdiction Motion on August 3, 1999. The Board declined to terminate its proceedings and rescind the Notice of Hearing.

[14] On September 2, 1999, the Applicant filed its application for judicial review of the Part I Decision in Court File T-1576-99 ("Application"). In its Notice of Application, the Applicant requested the following documents:

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.

[15] The Board objected to the request for production of the documentation and informed the Applicant of its objection by letter dated September 21, 1999. The Board referred to the following grounds of objection:

> (a) with respect to paragraphs 1 and 2 of HMRC's request, the materials "are not relevant, given the law as it is stated in *Ciba-Geigy Canada Ltd. and the Patented Medicine Prices Review Board*";
>
> (b) with respect to paragraph 3 of HMRC's request, "there are no materials in this category"; and
>
> (c) none of the materials requested "were before the Board, or requested by HMRC to be before the Board, on the motion to the Board".

[16] The Applicant has also sought judicial review of the Part II Decision in Court File No. T-1671-00.

[17] In the motion before Prothonotary Aronovitch, the Applicant sought a wide range of documentation relating to the judicial review application in T-1576-99. However, at the hearing of the motion, the parties agreed that, for the purposes of the motion, the Applicant's request was limited to the production of the Staff Report only.

[18] The grounds of review of the Board's refusal to set aside the Notice of Hearing by application dated September 2, 1999 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 impermissible 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.

EVIDENCE ON THE MOTION BEFORE THE BOARD

[19] At the hearing of the Jurisdiction Motion before the Board, which led to the Part I Decision, the Applicant filed as evidence two letters written to the Applicant by the Director of the Board's Compliance and Enforcement Branch.

[20] Also part of the record was the Notice of Hearing and supporting documents.

[21] At no time before or during the hearing of Part I of the Jurisdiction Motion by the Board did the Applicant request that any further evidence or documentation - from the Board or otherwise - be added to the record for consideration on the motion. Accordingly, the materials sought by the Applicant in its motion before Prothonotary Aronovitch were not before, nor considered by, the Board panel on the hearing of the Jurisdiction Motion.

[22] As noted in the Part I Decision, the Applicant argued during Part I of the Jurisdiction Motion that the fact of the review of the Staff Report by the Chairperson only, prior to issuing the Notice of Hearing, made it inappropriate for him to sit on the hearing panel. However, the Applicant did not

request that the Staff Report and VCU - or any other documentation - be produced for consideration by the Board on this issue.

[23] Three of the four members of the Board panel that made the decision under judicial review have never seen or considered the Staff Report now sought by the Applicant, and the contents of the Staff Report formed no part of the record of the Jurisdiction Motion or the reasoning in the Part I Decision. Only the Chairperson of the Board has seen any documentation other than documentation that was part of the record on the motion, and he reviewed the Staff Report and the VCU for the limited purpose discussed in the Part I Decision, prior to the issuance of the Notice of Hearing.

DECISION UNDER REVIEW

[24] On June 25, 2003, the Applicant brought a motion before Prothonotary Aronovitch seeking the production of documents in the possession of the Board that are relevant to the application for judicial review.

[25] At the hearing of the motion, the parties agreed that, for the purpose of the motion, the Applicant was only seeking the production of the Staff Report concerning excessive pricing that was submitted to the Chairperson prior to the issuance of the Notice of Hearing.

[26] On November 14, 2003, Prothonotary Aronovitch issued an Order dismissing the Applicant's motion for the production of the documents. Prothonotary Aronovitch stated (at para. 21):

> ... 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, the Chairperson included, did not have reference to or rely on in its adjudication on the merits.

[27] The Prothonotary's decision was based on her finding that the Staff Report was not before the Board at the time the Board decision was made. Further, Prothonotary Aronovitch was of the view that, since bias was raised from the outset in this case, the Applicant was not entitled to the production of the Staff Report to make out its case of apprehended bias, and that the Applicant ought to have attempted to compel the production of the Staff Report for the purposes of the hearing before the panel of the Board that considered the Jurisdiction Motion. She stated (at para. 39):

> ... 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 and arising out of "the manner in which the Board proceeded by making a 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 these 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 ...

PERTINENT LEGISLATION

[28] The Board has a statutory mandate which, pursuant to s. 83 of the *Patent Act*, includes the authority to determine whether a patentee of an invention pertaining to a medicine is selling the medicine in Canada at a price that, in the Board's opinion, is excessive and to require the patentee

to reduce the price to a level the Board considers not to be excessive. (*Patent Act*, R.S.C. 1985, c. P-4, s. 83)

ISSUES

The Applicant suggests that the following issues arise on this motion for an order setting aside the decision of Prothonotary Aronovitch, dated, November 14, 2003 and ordering the production of documents:

a. **What is the appropriate standard of review of an order of a prothonotary?**

b. **Did Prothonotary Aronovitch err in defining the material that is relevant to the application and in the possession of the tribunal within the meaning of Rule 317?**

c. **Did Prothonotary Aronovitch err in concluding that the Staff Report was not before the Board when it made its decision on August 3, 1999?**

d. **Did Prothonotary Aronovitch err in concluding that the Applicant was required to seek disclosure of the Staff Report at the hearing before the panel of the Board?**

e. **Did Prothonotary Aronovitch err in deciding that the Applicant was not entitled to the production of the Staff Report in order to evidence the bias of the Board in issuing the Notice of Hearing on the application for judicial review?**

ANALYSIS

A. What is the appropriate standard of review of an order of a prothonotary?

[29] Pursuant to Rule 51(1) of *Federal Court Rules, 1998*, an order of a prothonotary can be appealed by motion to this Honourable Court.

[30] An order of a prothonotary of the kind in issue in this case is subject to review by a judge of the Federal Court if it is clearly wrong in the sense that it is based upon a wrong principle of law or a misapprehension of the facts. If a prothonotary has fallen into an error of law that prevents the proper exercise of discretionary powers, a Motions Judge is justified in exercising the discretion *de novo* (*Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (F.C.A.) at 463).

B. The Ambit of Rule 317

[31] The Applicant argues that Prothonotary Aronovitch was "clearly wrong" within the meaning of *Aqua-Gem, supra*, in various ways.

[32] First of all, the Applicant says that Prothonotary Aronovitch erred because she held that the Staff Report did not come within the ambit of Rule 317 because it was not relied upon by the Board in its decision of August 3, 1999.

[33] The Applicant says that the Staff Report is relevant to the underlying judicial review application because that application seeks prohibition of the proceedings commenced by the Notice of Hearing on the grounds that there was a reasonable apprehension of bias on the part of the Board, or its Chairperson, in that 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 was made on certain matters that are to be in issue at the hearing.

[34] The Applicant argues that the jurisprudence recognizes that relevance in the case of an application for judicial review may extend beyond documents that were relied upon or otherwise before the tribunal in question, particularly in a situation of overlapping investigatory and decision-making functions of the tribunal. In this regard, the Applicant relies upon the following cases:

> *1185740 Ontario Ltd. v. Canada (Minister of National Revenue)* (1999), 247 N.R. 287 (F.C.T.D.) at 289.
>
> *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)* (1997), 130 F.T.R. 206 (F.C.).
>
> *Hiebert v. Canada (Correctional Service)* (1999), 182 F.T.R. 18 (T.D.)
>
> *Pauktuutit, Inuit Women's Assn. v. Canada* (2003), 229 F.T.R. 25 (T.D.)
>
> *Canadian Arctic Resources Committee Inc. v. Diavik Diamond Mines Inc.* (2000), 183 F.T.R. 267 (T.D.)

[35] Prothonotary Aronovitch handles this issue in the following manner in her decision:

> 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. 80. 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).

[36] The Applicant says that Prothonotary Aronovitch was clearly wrong to take this approach and to reject the position taken by the Applicant on relevance. The alleged mistake is that Prothonotary Aronovitch failed to understand what was being reviewed under the judicial review application and, in particular, she failed to address the prohibition aspects of that application. This mistake is manifest, according to the Applicant, in paras. 21 and 38 of her decision:

> 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.
>
> ...

> 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.

[37] The Applicant says that the prohibition aspects of its judicial review application are not dependent on the August 3, 1999, decision of the Board concerning jurisdiction. In other words, the reasonable apprehension of bias allegations against the Chairperson do not relate to the decision made by the Board, and Prothonotary Aronovitch took far too narrow an approach towards the underlying judicial review application and this caused her to err over the matter of relevance.

[38] The distinctions which the Applicant seeks to make concerning the scope of the application for judicial review don't appear to me to be in accordance with its own application. The Application for Judicial Review of September 2, 1999, says "THIS IS AN APPLICATION FOR JUDICIAL REVIEW IN RESPECT OF the decision of the Patented Medicine Prices Review Board ("Board") dated August 3, 1999 ...."

[39] So Prothonotary Aronovitch can hardly be faulted for following the Applicant's own documentation to conclude that 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." This was the decision of August 3, 1999.

[40] But the Applicant seeks to broaden the scope of its application for judicial review in order to say that Prothonotary Aronovitch failed to take account of the prohibition aspects of that Application.

[41] Prothonotary Aronovitch refers to the following in her 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.

[42] Prothonotary Aronovitch makes it quite clear that she understands that 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." And to answer this she says "[i]t 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."

[43] Of course, the Applicant says it is not attacking the Chairperson's decision to call a hearing. This is a separate decision and it is not referred to in the underlying Application for Judicial Review which only references the Board's decision of August 3, 1999.

[44] This is why, in my opinion, the Applicant is now reduced to arguing that Prothonotary Aronovitch failed to take into account the prohibition aspects of its application for judicial review and the fact that the prohibition remedy does not require a decision.

[45] In my opinion, this is an untenable argument forced upon the Applicant by the strategic approach it has taken on this matter and it is one that is not born out by the record.

[46] To begin with, the Application for Judicial Review is quite clear that it is in relation to the Board's decision of August 3, 1999. The principal relief requested in that Application is as follows:

> THE APPLICANT MAKES APPLICATION FOR:
>
> 1. An order, pursuant to section 18.2 of the *Federal Court Act*, R.S.C. 1985, c-F-7, as amended, staying the proceedings commenced by the Board's issuance of the notice of Hearing until a final disposition of the within application;
>
> 2. An order, pursuant to section 18.1 of the *Federal Court Act*, R.S.C. 1985, c-F-7, as amended, setting aside the decision of the Board dated August 3, 1999;
>
> 3. An order, pursuant to section 18.1 of the *Federal Court Act*, R.S.C. 1985, c-F-7, as amended, prohibiting the Board from proceeding with the hearing instituted by the Board's Notice of Hearing dated April 20, 1999; or, in the alternative, setting aside any decision made by the Board as a consequence of such hearing;

[47] The whole focus of the judicial review application is the Board's decision of August 3, 1999 and, in particular, its failure to accede to the Applicant's request to set aside the Notice of Hearing. The bias issue is dealt with by the Board as part of its decision on the Jurisdiction Motion:

> 3. The Chairperson having reviewed Board Staff's report and the VCU and having decided to initiate a public hearing should not sit on the panel hearing the matter

> As noted above, in reviewing the record of Board Staff, the Chairperson is undertaking a limited assessment: that of whether it is in the public interest that the matter proceed to a public hearing. In the course of that assessment the Chairperson will consider 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. However, the Chairperson undertakes no analysis of whether the facts are or will be proven. Similarly, when the Chairperson initiates a public hearing despite having received a VCU, it does not entail the conclusion that any predetermination on the matter has been made.
>
> Given the role of the Chairperson as Chief Executive Officer of the Board, the structure and operation of the Board and its mandate as an expert tribunal developing and applying relevant policies, the Board considers it to be useful and appropriate for the Chairperson of the Board to be available to sit on panels of the Board at its public review of the report of Board Staff and the VCU, there will be no reasonable apprehension of bias resulting from the Chairperson's inclusion on the panel of the Board at the public hearing.

[48] The request for prohibition contained in para. 3 of the application for judicial review is clearly related back to, and dependent upon, the request to set aside the decision of the Board and the principal complaint that the Board "declined to set aside a Notice of Hearing dated April 20, 1999 ... ."

[49] There is no suggestion at all in her decision that Prothonotary Aronovitch failed to take into account the prohibition aspects of the underlying judicial review application. The apprehension of bias allegations are clearly addressed in the Board's decision of August 3, 1999 and will, no doubt, be addressed by this Court when that application is heard.

[50] The reasonable apprehension of bias allegation was very much a part of the Applicant's notice of motion before the Board when it sought rescission of the Notice of Hearing:

> 6. The Board is without jurisdiction to inquire into the Respondent's pricing of Nicoderm as an overlap of Board functions as investigator, prosecutor and adjudicator

> creates a reasonable apprehension of bias against the Respondent which is not excused at law and is contrary to the principles of fundamental justice and the *Canadian Bill of Rights;*
>
> 7. The Board is without jurisdiction as the Notice of Hearing was issued in this case in breach of the principles of natural justice and procedural fairness. The manner in which the Board proceeded by making determinations prior to the issuance of the Notice of Hearing denied the Respondent a reasonable opportunity to be heard and gives rise to a reasonable apprehension of bias;

[51] The whole manner of proceeding, which the Applicant says was not considered by Prothonotary Aronovitch, was a significant aspect of the Jurisdiction Motion and the jurisdiction decision by the Board.

[52] In order to address these matters before the Board, the Applicant did not seek to place the Staff Report on the record. The Applicant now says that its application to review the August 3, 1999 Board decision requires the Staff Report to be placed upon the record.

[53] To allow this would be to allow the Applicants to argue a different case on review to the one that was argued before the Board in a situation where no new issues of bias have arisen that were not before the Board.

[54] This is why, in the present case, Prothonotary Aronovitch declined to apply *Friends of the West Country Assoc. v. Minister of Fisheries and Oceans* (1997), 130 F.T.R. 206 and considered the guidance of Pelletier J. in *Hiebert v. Canada (Correctional Services)*, [1999] F.C.J. No. 1957 (T.D.) to be the more apt approach. To have done otherwise would, on the facts of the case at bar, have

allowed the Applicant to argue the same issues at the review stage as were argued at the tribunal stage, but on the basis of a different record.

[55] In my opinion, Prothonotary Aronovitch was fully alive to the arguments raised by the Applicant, including the prohibition aspect of the underlying application, and applied the law correctly. The Staff Report was not "material relevant to an application" within the meaning of Rule 317.

C. Was the Staff Report before the Board when it made its decision on August 3, 1999?

[56] The Applicant says that Prothonotary Aronovitch was clearly wrong because she concluded that the Staff Report was not before the Board when it made its August 3, 1999, decision. The basic argument here is that material before the Board for the purposes of Rule 317 does not need to be material that was part of the formal record, and the Staff Report was before the Chairperson, so it must be considered to have been before the Board because the Chairperson presided over the process before the Board.

[57] Once again, in my opinion, this argument lacks credibility. If the Applicant had really felt that the Staff Record was before the Board and that its contents were important for the Applicants' case, it seems odd that the Applicant did not ask to see it for purposes of arguing its case before the Board.

[58] As to whether the Staff Report was before the Board because the Chairperson had knowledge of it, Prothonotary Aronovitch examined the relative functions and roles of the Chairperson, the Board and the staff in the enabling legislation and concluded that the "report itself was not relied upon or evidence before the panel of the Board." The implication in her decision is clearly that just because the Chairperson had knowledge of the Staff Report in his role as Chairperson did not, because of the respective roles played by the Chairperson, the staff and the Board, place the Staff Report before the Board when a panel of the Board sat to consider the Applicant's Jurisdiction Motion. Knowledge of the existence of the Staff Report by the Chairperson is not evidence that the Staff Report or its contents were before the Board panel when it entertained and considered the Jurisdiction Motion. In fact, the Board's August 3, 1999, decision, in what it says about the respective roles played by the parties suggests entirely otherwise.

[59] The Notice of Hearing was before the Board panel and it sets out the allegations of Board staff concerning the patents and the historical pricing of Nicoderm. The following indications from the Boards's decision of August 3, 1999, explain the situation:

> Though not required by the Act to do so the Board has introduced procedures that separate its adjudicative functions from its monitoring and investigative functions.
> ...
>
> ...
>
> 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.

...

<u>The "conclusive" nature of the allegations of Board Staff following its investigation into the pricing of Nicoderm</u>

HMRC complains that the Director of Compliance and Enforcement, in communicating Board Staff's concerns with HMRC's pricing of Nicoderm, made "definitive conclusions on the very matters that are to be determined by the Board after a hearing". HMRC raises this objection as if it were additional to the general complaint regarding the overlapping functions of the Board, though it is the Board's view that it is really derivative of the general complaint.

The conclusions in the correspondence were those of Board Staff's Director of Compliance, when she wrote to HMRC to communicate first, the preliminary and then the final results of Board Staff's investigation into the pricing of Nicoderm. These results are summarized in the statements set out in the Notice of Hearing as the allegations of Board Staff that will be considered by the Board during the course of the hearing.

The Board sees nothing offensive in Board Staff describing the results of its investigation as a series of conclusions. Board Staff have conducted an investigation for the very purpose of determining whether there is a *prima facie* case that there has been an instance of excessive pricing by a patentee under the Board's jurisdiction. In her correspondence the Director of Compliance and Enforcement was informing HMRC of the results of Board Staff's investigation and putting HMRC on notice that the matter would be put to the Chairperson to determine if he should issue a Notice of Hearing.

The results of Board Staff's investigation could have been cloaked with language such as "Board Staff believe that the evidence adduced at a hearing into this matter will establish that ...", but this is implicit given the operation of the Board and

the context of the statements. The purpose of the correspondence of Board Staff was to put HMRC on notice of the findings of the investigation and it was entirely appropriate that those findings be presented in unambiguous terms so that HMRC could respond accordingly.

The test for a reasonable apprehension of bias is:

> "What would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude."

As noted above, given that the conclusions are in no sense those of the panel of the Board that will be considering the matter, but only the allegations of Board Staff to be put before the panel for proof in a public hearing the fact that they are framed as the conclusions of Board Staff does not give rise to any reasonable apprehension of bias.

...

The Chairperson having reviewed Board Staff's report and the VCU and having decided to initiate a public hearing should not sit on the panel hearing the matter

As noted above, in reviewing the report of Board Staff, the Chairperson is undertaking a limited assessment that of whether it is in the public interest that the matter proceed to a public hearing. In the course of that assessment the Chairperson will consider 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. However, the Chairperson undertakes no analysis of whether the facts are or will be proven. Similarly, when the Chairperson initiates a public hearing despite having received a VCU, it does not entail the conclusion that any predetermination on the matter has been made.

Given the role of the Chairperson as Chief Executive Officer of the Board, the structure and operation of the Board and its mandate as an expert tribunal developing and applying relevant policies, the Board considers it to be useful and appropriate for the Chairperson of the Board to be available to sit on panels of the Board at its public hearings. The Board believes that, given the limited purpose of the Chairperson's review of the report of Board Staff and the VCU, there will be no reasonable apprehension of bias resulting from the Chairperson's inclusion on the panel of the Board at the public hearing.

[60] There is nothing in this decision to indicate either that the Board considered, or needed to consider, this Staff Report to reach its decision. The panel also shows itself to be acutely aware of the role of the Chairperson and the nature of the decision he or she makes in deciding to issue the Notice of Hearing. The contents of the Staff Report, apart from the allegations set out in the Notice

of Hearing, are not relevant to the decision on jurisdiction that the panel of the Board had to make. This is why Prothonotary Aronovitch concluded that the Staff Report "was not relied upon or evidence before the panel of the Board."

[61] The Applicant seeks to undermine this conclusion by arguing that Prothonotary Aronovitch goes too far by saying that the "enabling legislation clearly contemplates that the Chairperson and the Board have differing and separate functions." As the Board panel points out in the August 3, 1999, decision, it is the Board that has introduced the procedures to ensure a separation of functions and necessary safeguards. But the point is that the procedures exist and, as the Board panel decision makes clear, the contents of the Staff Report were not relevant to its decision and were not part of the deliberations. And, once again, there is no evidence in the August 3, 1999 decision or in the record that the Applicant ever raised with the panel the contents of the Staff Report.

[62] I see no error that Prothonotary Aronovitch made in this regard.

D. Seeking Disclosure of the Staff Report before the Panel

[63] In her decision, Prothonotary Aronovitch addressed this issue as follows:

> 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.

[64] The Applicant challenges this conclusion on the following grounds:

1. if the Applicant had compelled production of the Staff Report for the purposes of the hearing before the Board panel that considered the allegations of apprehended bias, the entire panel would have been exposed to the Staff Report, thereby precluding a hearing on the merits (assuming that the Applicant's allegations as well-founded) before Board members "uncontaminated" by a report that gives rise to a reasonable apprehension of bias;

2. Prothonotary Aronovitch erred in distinguishing the decision of the Federal Court of Appeal in *Beno v. Canada (Commission of Inquiry into the Deployment of Canadian Forces in Somalia - Létourneau Commission)* (1996), 207 N.R. 76 (F.C.A.) on the ground that bias was not raised from the outset in *Beno* when, in fact, in *Beno* bias was alleged at the outset;

3. Prothonotary Aronovitch erred by relying upon the decision of Gibson J. in *Canada Port Corp. v. Public Service Alliance of Canada* (1999), 164 F.T.R. 288 (T.D.) where there were no allegations of bias of the nature made by the Applicant in the case at bar and in which Gibson J. was not referred to the Federal Court of Appeal's statements in *Beno, supra*, nor the decision of Reed J. in *Majeed v. Canada (Minister of Employment and Immigration)* (1993), 68 F.T.R. 75 (T.D.) at para. 3.

[65] The alleged apprehension of bias in this case is, according to the Applicant's written argument, "that the Board, through its Chairperson, reached conclusions prior to, and on, the issuance of the Notice of Hearing that give rise to a reasonable apprehension of bias." The Applicant argues that the Staff Report is relevant to this issue and should be produced.

[66] But there is no allegation of bias as regards the Board's decision of August 3, 1999, that is, according to the Applicant's own documents, the subject of its judicial review application, and the challenge to the role of the Chairperson, however this is characterized, was a matter before the Board and is dealt with in that August 3, 1999 decision. The Applicant has set out to attack that decision through judicial review and claims that it is not attacking the Chairperson's decision to issue the Notice of Hearing but is concerned "that the Board, through its Chairperson, reached conclusions ... that give rise to a reasonable apprehension of bias." By the Board acting "through its Chairperson," the Applicant means the decision to issue the Notice of Hearing. The Applicant, it seems to me, is merely disagreeing with the Boards conclusions in its decision of August 3, 1999 concerning the separate and distinctive roles of the Board members and the Chairperson acting in his administrative capacity. This is an argument that will be dealt with at the judicial review hearing. It is not a separate allegation of bias that the case law says entitles the Applicant to supplement the record. And this is why, in my opinion, Prothonotary Aronovitch declined to accept the Applicant's arguments and relied upon the authorities she did.

[67] It is also the reason, in my opinion, why she suggested that if the Staff Report was relevant to the apprehension of bias issue, then the Applicant should have tried to make it part of the record in the motion it brought before the Board. The allegation of bias that will be raised on judicial review is exactly the same allegation that was raised before the Board, and the Board dealt with it.

[68] I find unconvincing the Applicant's explanation that it did not seek to put the Staff Report on the record before the Board because this would have contaminated all panel members and precluded a hearing on the merits. This suggests that the Applicant placed the integrity of the motion process ahead of its own interests and that there was no way to deal with contamination issues. If the Applicant chose to protect the panel members as claimed, then that is a strategic decision made by the Applicant that it must now live with. Had the Applicant sought the Staff Report at that time, any difficulties would have been addressed either prior to or as part of the Board's November 3, 1999 decision. The Applicant cannot now say that, having decided not to deal with the Staff Report at the tribunal level, it should be able to deal with it at the review level. Prothonotary Aronovitch's decision, in my opinion, reveals that she was well aware of the issues that the Applicant raised in this regard and dealt with them in accordance with the prevailing legal authorities.

[69] I am not convinced that Prothonotary Aronovitch was clearly wrong on this issue.

D. The Applicant was entitled to the production of the Staff Report in order to evidence the bias of the Board in issuing the Notice of Hearing.

[70] The Applicant says that even if the Staff Report was not before the Board, the Applicant is entitled to its production to evidence the allegations of a reasonable apprehension of bias on the part of the Board or its Chairperson.

[71] The obiter footnote in *Beno, supra*, that the Applicant relies so heavily upon for the proposition that "on 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" was not, in my opinion, intended to support the Applicant's position in this case where, having initiated proceedings before the Board challenging jurisdiction and raising the possible bias of the Chairperson, and having created the record to support that motion, the Applicant can then, on a review application that raises no further issues of bias, seek to change the record.

[72] Once again, there is nothing before me that convinces me that Prothonotary Aronovitch was not correct in her findings that the "report itself was not relied upon or evidence before the panel of the Board" and the Applicant does not establish "the report's relevance to an alleged bias of the decision-maker at issue."

Conclusions

[73] The Applicant has not convinced me that Prothonotary Aronovitch was clearly wrong within the meaning of the principles established in *Aqua-Gem*, *supra*. Consequently, this motion must be dismissed.

ORDER

THIS COURT ORDERS that

1. The motion is dismissed.
2. The Patented Medicine Prices Review Board shall have the costs of this application, payable immediately and irrespective of the cause.

"James Russell"
JFC