Date: 20080304

Docket: T-2072-07

Citation: 2008 FC 286

Ottawa, Ontario, March 4, 2008

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

SANOFI PASTEUR LIMITED

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] The Patented Medicine Prices Review Board (the Board) monitors and reviews the prices of patented medicines sold in Canada to ensure that those prices are not excessive. Sections 79, 83, 86, 91 and 96 of the *Patent Act*, R.S.C. 1985, c. P-4, as amended (the Act), govern, *inter alia*, such proceedings and the orders that the Board can make.

[2] If, after a hearing, the Board finds that a patented medicine has been sold at an excessive price, it may require the patentee to offset excessive revenues by reducing the price of that medicine, or some other patented medicine sold in Canada, below the "maximum non-excessive

price" or, in certain circumstances, by directing that a payment be made to Her Majesty. In addition, if the Board finds that the patentee has engaged in a "policy of excessive pricing", it may direct the patentee to do one or more of the things listed above so as to offset up to twice the amount of the excessive revenues earned.

[3] The applicant, sanofi pasteur limited, questions today the legality of an interlocutory decision dated November 26, 2007, which dismissed, prior to the commencement of such a hearing, the applicant's motion for an order that Blakes, Cassels & Graydon LLP (Blakes) be removed as counsel to the Board (the Blakes Motion) with respect to a proceeding involving the medicines Quadracel and Pentacel (the Proceeding).

[4] The applicant seeks, *inter alia*, an order quashing or setting aside the Board's decision on the Blakes Motion, as well as the Board's decisions on two additional motions heard at the same time as the Blakes Motion (defined below as the Particulars Motion and the Production Motion). More specifically, the applicant submits that a reasonably informed person would find an appearance of unfairness, bias and lack of neutrality on the part of the Board both in the process leading to the Board's impugned decisions on the three motions and in the continuous involvement in the Proceeding of Blakes as Board Counsel. This application has been heard on an expedited basis after parties agreed on November 29, 2007, to suspend the hearing before the Board which commenced on November 28, 2007.

[5] Given that this judicial review involves issues of procedural fairness and bias, I am of the opinion that the appropriate standard of review of the Board's Decision is correctness: *Hoechst Marion Roussel Canada Inc. v. Canada (Attorney General)*, (2005) 48 C.P.R. (4th) 1 at para. 61; *Leo Pharma Inc. v. Canada (Attorney General)*, 2007 FC 306, [2007] F.C.J. No. 425 (QL) at para. 17.

[6] The parties agree on the salient facts giving rise to this application for judicial review.

[7] The applicant is a pharmaceutical company that manufactures and sells medicines in Canada, including Quadracel and Pentacel (the Medicines) which are administered to immunize infants from diphtheria, tetanus, pertussis, haemophilus influenzae type b and poliomyelitis. In Canada, these vaccines are sold exclusively to the Crown. More particularly, the federal department of Public Works and Government Services Canada (PWGSC) coordinates the federal/provincial/territorial (F/P/T) Group Purchasing Program for Drugs and Vaccines in Canada for all provinces, except Quebec where purchases are made directly by the Government of Quebec.

[8] Gordon Cameron and Nancy Brooks are both litigation partners in the Ottawa office of Blakes. Blakes is a law firm of over 500 lawyers with offices not only in Canada but also in other countries. Blakes has acted, principally through Gordon Cameron, as Board Counsel to the Board since 1994. Nancy Brooks also acts as Board Counsel. In that capacity, they provide panels of the Board with legal advice and assistance during the course of proceedings conducted by the Board.

[9] In proceedings before the Board, the actual parties are the company or companies that are the subject of the proceedings and Board Staff, also represented by an external counsel. In the Proceeding, the Board Staff is represented by Guy Pratte of Borden Ladner Gervais, LLP (Borden). The Board's current panel in the Proceeding is composed of Dr. Brien Benoît, who is chair of the Board (the Chairperson), Anne La Forest, who is a lawyer and professor of law, and Tony Boardman, who is a professor of economics (collectively, the Panel).

[10] Glaxo Smith Kline (GSK) also sells vaccines in Canada. Indeed, it is the sole competitor of the applicant in Canada for the vaccines at issue in the Proceeding. From time to time, Blakes acts for GSK in corporate transactional matters. It has a retainer. It provides legal services associated with GSK's purchase and sale of various corporate interests. Blakes does not act for GSK in any regulatory proceedings including those before the Board. In the Proceeding, Torys LLP (Torys) represented GSK on its unsuccessful application for intervener status while Blakes has continued to act as Board Counsel throughout the Proceeding, as will be explained below.

[11] On March 15, 2007, Board Staff issued through Borden a Statement of Allegations claiming the applicant charged excessive prices for the Medicines from 2002-2006 and engaged in a policy of excessive pricing. On March 27, 2007, the Board issued through Sylvie Dupont, Secretary of the Board, a Notice of Hearing regarding these allegations. Blakes was retained as Board Counsel in the Proceeding. The applicant delivered its Response and Amended Response to the allegations on April 18, 2007 and October 15, 2007 respectively. Board Staff's Reply was delivered on May 9, 2007. In the meantime, GSK filed a Notice of Motion on April 25, 2007, seeking leave to intervene

in the Proceeding. GSK advocated the position that if the applicant is found to have charged excessive prices, it should be precluded from offsetting excessive revenues through lower prices since such a remedy would adversely affect GSK. As will be subsequently explained, GSK's motion to intervene was denied by the Board on July 26, 2007.

[12] I pause here to mention that the Notice of Hearing, dated March 27, 2007, contains an invitation to any person who claims an interest in the subject matter of the Proceeding to make a motion for leave to intervene, on or before April 25, 2007. While there is no affidavit from Board Counsel, I am ready to accept that Blakes played no role in GSK's motion to intervene.

[13] This leaves unanswered the question of when GSK was made aware that Blakes was also acting as Board Counsel in the Proceeding. I note that GSK's motion to intervene dated April 25, 2007 is addressed to Ogilvy Renault LLP (Ogilvy) as counsel for sanofi pasteur, to Borden as counsel for the Board and to Sylvie Dupont as Secretary of the Board. GSK's reply representations dated June 12, 2007 are no longer addressed to Ogilvy but to Davies Ward Phillips & Vineberg LLP (Davies) as counsel for sanofi pasteur. Again, GSK's reply is addressed to Borden as counsel for the Board and to Sylvie Dupont as Secretary of the Board. There is no reference whatsoever in the documents prepared by Torys on behalf of GSK to Blakes as Board Counsel.

[14] Board Staff did not take a position with respect to GSK's motion for leave to intervene. However, as Board Counsel, Blakes would likely be involved at some point in the drafting and/or the review of decisions made by the Board, including the decision relating to GSK's motion for

leave to intervene. At page 3 of the Board's decision of July 26, 2007 which dismissed GSK's motion, signed on behalf of the Board by its Secretary, I note that Gordon Cameron appears as Board Counsel. That being said, I have no way of ascertaining whether or not Gordon Cameron was present during and/or participated in any way in the Board's deliberations.

[15] There are multiple references in the Board's decision related to various legal provisions and concepts flowing from the Act and the caselaw. The Board specifically mentions that it "is aware of the impact of each of its decisions, on persons other than those appearing before it in any given proceeding, and takes the interests of those persons into account whether or not they are independently represented in a proceeding" (para. 14) (my underlining). It also notes that "[t]he panel was able to reach its decision on GSK's application without reliance on the submissions of sanofi pasteur concerning the motives of GSK in seeking intervener status in this proceeding" (para. 21). These passages, more particularly the first one, clearly suggest that if the Board finds that the allegations of excessive pricing are substantiated, it will consider at that time the adverse impact a certain remedy may have on competitors of the applicant (such as GSK). Thus, the position taken by the applicant that the continuous participation of Blakes as Board Counsel in the Proceeding raises a reasonable apprehension of bias and deprives the applicant of a fair hearing.

[16] Before the motion made by GSK was decided by the Board, the applicant, having learned that Blakes is counsel to GSK on corporate matters, raised concerns on May 23, 2007 with Board Counsel arguing, *inter alia*, that Blakes' current relationship with GSK and the Board might give rise to a reasonable apprehension of bias and this, notwithstanding the fact that Blakes had not yet

obtained the requisite waivers from its respective clients. Between June and October of that year, the applicant made repeated requests to Blakes to remove itself as Board Counsel.

[17] On June 15, 2007, Blakes provided the applicant with a letter from the Chairperson advising that the Board had no difficulty with Blakes being Board Counsel in the Proceeding. Thereafter, Blakes informed the applicant that GSK had not provided a waiver. At the same time, Blakes advised that if the applicant was uncomfortable with Blakes continuing as Board Counsel, Blakes would recommend that it be replaced by new counsel.

[18] In the meantime, as required by the schedule for the Proceeding, during August and September 2007, Board Staff and the applicant exchanged the documents, will says of lay witnesses and expert evidence that they intended to rely on at the hearing. The schedule provided that the pre-hearing conference would take place on October 31, 2007 and the first three days of the hearing would be held on November 28, 29 and 30, 2007.

[19] Ultimately, in September 2007, two months before the commencement of the hearing, the applicant asked Blakes to step down as Board Counsel in the Proceeding. Blakes confirmed that it would recommend to the Board that it be replaced. Indeed, on October 10, 2007, Blakes advised the applicant that it had recommended to the Board that it step down as Board Counsel in the Proceeding, but that the Board had refused to accept this recommendation.

[20] In response to this news, the applicant wrote to Blakes on October 18, 2007, outlining the history of the issue, setting out the applicant's concerns and reasons for its request that Blakes step down as Board Counsel and requesting that a copy of the letter be provided to the Board. By letter dated October 26, 2007 signed by its Secretary, the Board responded directly to the applicant. The Board expressed its disagreement with the Applicant's concerns, suggested that the applicant reconsider its position, and stressed its considerable reliance on Blakes' services, which were described as "invaluable". The Board advised that if the applicant wished to pursue the matter, it should file a motion to be heard at the pre-hearing conference scheduled for October 31, 2007.

[21] The Board also stressed that Blakes had undertaken the role as Board Counsel for over a decade and during that time had acted with independence, irrespective of any relationship it may have had with pharmaceutical companies. The Board also assured the applicant that "if the Panel makes a finding of excessive pricing, the Panel will not seek advice from Mr. Cameron on how the excess revenues should be offset, or any related remedies issue".

[22] On October 30, 2007, the applicant filed a motion for an order that Blakes be removed as Board Counsel with respect to the Proceeding. The Board convened a pre-hearing conference on October 31, 2007 to hear the Blakes Motion. At that time, the Board also heard the applicant's motion for particulars (the Particulars Motion) and Board staff's motion for production (the Production Motion).

[23] At the outset of the pre-hearing conference, the Board Chairperson advised that the Board wished to hear the Blakes Motion last, so that the Board could have the assistance of Blakes on the legal issues associated with the Particulars and Production Motions.

[24] In response, applicant's counsel confirmed her position that the involvement of Blakes in the Proceeding raises an appearance of unfairness. Accordingly, in her submission, the appropriate way to proceed was to either deal first with the Blakes Motion, or to proceed in the order the Board preferred on the understanding that it was without prejudice to the applicant's position and that the applicant may rely on Blakes' involvement in the Particulars and Production Motions in support of its argument of an appearance of unfairness. The Board proceeded to deal with the motions in the order the Board Chairperson had proposed.

[25] The Particulars Motion was heard first. In that motion, the applicant sought an order requiring Board Staff to provide particulars of the allegation that the applicant engaged in a policy of excessive pricing and, in the alternative, an order striking out the allegation. The Board dismissed the Particulars Motion. Blakes was present at the hearing of the Particulars Motion and assisted the Board with respect to it.

[26] The Production Motion was heard next. In this motion, Board Staff sought an order requiring the applicant to disclose the 2007 contracts negotiated and entered into by the applicant with PWGSC and the Government of Quebec. In its response to the Production Motion, the applicant agreed to provide the 2007 contracts to Board Staff on certain terms, including

confidentiality terms. In its reply, Board Staff sought new relief and asked the Board to make a finding at the pre-hearing conference that the 2007 contracts were relevant and admissible for the purposes of the hearing. The Board granted the Production Motion and ordered that the 2007 contracts be admitted into evidence at the hearing. Blakes was present at the hearing of the Production Motion, and assisted the Board with respect to it.

[27] The third and final motion heard by the Board at the pre-hearing conference was the Blakes Motion. At this point, the Chairperson made this pronouncement:

> Because of the nature of the third motion that is going to be heard today, we asked counsel from Blakes, Gordon Cameron and Nancy Brooks, to recuse themselves, which they have done, so that we could hear Ms. Forbes' argument in an unobstructed environment, let's say.
>
> We have all of the exchange of correspondence, beginning in the spring, up until just recently, so, Ms. Forbes, go ahead.
>
> (Transcript of pre-hearing conference, page 289 of the applicant's record)

[28] The Chairperson omits to mention at this point that, in addition to the material provided by the applicant, a memorandum dated October 30, 2007, from Gordon Cameron and Nancy Brooks, of four pages, had been prepared. The latter providing Blakes' views with respect to the bias issues raised by the applicant and legal reasoning and analysis which would permit the Board to distinguish cases cited by the applicant and to conclude, on the facts of this case, that a well-informed person, having thought the matter through, would not conclude that there is an apprehension of bias (Memorandum of October 30, 2007, applicant's record, 486-489).

[29] Had the memorandum of Blakes of October 30, 2007 not been referred to by Professor Emeritus David Mullan in the opinion he prepared (described below), the applicant would have been kept ignorant of the fact that Blakes was advising the Board on the very issue, bias, upon which the Panel had "asked counsel from Blakes, Gordon Cameron and Nancy Brooks, to recuse themselves […] so that [the Panel] could hear [the applicant's counsel's] argument in an unobstructed environment." At this point, one may reasonably asks itself why a document which was not part of the Board's public record on October 31, 2007 was sent in the first place to Professor Mullan, unless the Panel intended to rely on it in making its decision dismissing the Blakes Motion.

[30] Without any advance notice to the applicant, before rendering its decision regarding the motion for removal, the Board sought an opinion from Professor Mullan. Professor Mullan in his opinion dated November 18, 2007 concluded that the involvement of Blakes as Board Counsel did not give rise to a reasonable apprehension of bias as there was no connection between the matters on which Blakes had represented GSK in the past and the Proceedings. Professor Mullan found that this is not a case where Blakes had confidential information pertaining to GSK that could impact on the Proceeding. Similarly, the Proceeding was not a matter in which GSK had a direct interest.

[31] On November 20, 2007, the applicant was first advised of Professor Mullan's involvement and given an opportunity to respond to his opinion. Upon reviewing Professor Mullan's opinion, the applicant became aware that Professor Mullan had access to material that it did not possess. The applicant sought and received copies of this additional material, which included the memorandum

from Blakes dated October 30, 2007, the day before the pre-hearing conference, with respect to the merits of the applicant's motion for its removal. The applicant provided further submissions to the Board in response to Professor Mullan's opinion.

[32] In its Decision dated November 26, 2007, the Board dismissed the applicant's motion for the removal of Blakes as Board Counsel. The Board stated that it had "considered the written and oral submissions of the [applicant] on October 20, 2007, the written report of Professor Emeritus David Mullan which was disclosed to the [applicant] along with all underlying documents and correspondence, and the response of the [applicant] to that material dated November 23, 2007 […]." The Board summarized the applicant's concerns that the continued involvement of Blakes as Board Counsel results in an appearance of bias, lack of neutrality and unfairness as Blakes currently represents GSK, the applicant's competitor with respect to the Medicines and an attempted intervener in this matter. The Board noted that GSK in its intervener motion materials advocated for a remedy in the Proceeding that is adverse to the applicant's interest. The Board also acknowledged that the duty to act fairly includes the right to an impartial and independent decision and that the process should not give rise to a reasonable apprehension that the Board or Board Counsel is biased.

[33] Nevertheless, in dismissing the applicant's motion, the Board stated as follows:

> The [Board] is entitled to have counsel assist it in the course of its hearings provided that the role of counsel is confined within limits that are consistent with the principles of fairness and natural justice. Blakes was not retained by GSK in its application to intervene and does not represent GSK in any regulatory proceedings and is restricted to corporate transactional matters. As such, Blakes does not owe a duty of loyalty to GSK in these proceedings. Blakes thus has no conflicting duty of loyalty to GSK and to the Board.

> Furthermore the [Board] is obliged to make its own independent decision in matters coming before it. Given this, there is no reasonable apprehension of bias, nor a lack of neutrality, not is there any unfairness.

[34] The applicant filed a Notice of Application on November 28, 2007 seeking to have the Decision judicially reviewed. After the filing of a motion to obtain an order to stay the proceeding, the parties agreed on November 29, 2007 the Proceeding would be adjourned pending the determination of this judicial review, on the basis that an expedited hearing date could be obtained with the assistance of the Court. The hearing was scheduled for February 4, 2008.

[35] In the meantime, on December 10, 2007, the applicant was provided with a copy of a letter from GSK to Blakes, dated November 28, 2007, in which GSK advised that it had no objection to Blakes acting as Board Counsel in the Proceeding.

[36] The applicant does not contest the right of the Board to retain counsel. Instead, the applicant argues that a reasonably informed person would find an appearance of unfairness, bias and lack of neutrality in the Proceeding as a result of the fact that Board Counsel also owes a duty of loyalty to a party that has urged the Board to accept a position that is adverse to the applicant. The applicant argues the following factors heighten the reasonable apprehension of bias arising from Blakes' involvement in the Proceeding: Blakes' current client will be harmed if a certain remedy is imposed by the Board; Blakes' role in the Proceeding is significant; Blakes participated in the decision-making process of the Blakes Motion (and did so in a manner not disclosed to the applicant until after the motion was argued); and, the Board, in stating that it wished to continue to use Blakes as

Board Counsel, placed itself in an adversarial position to the applicant. The Board erroneously relied on an analysis normally undertaken to determine whether a lawyer is in a conflict of interest which is not applicable in the current situation: a reasonable apprehension of bias or unfairness can exist in the absence of a finding of a legal conflict of interest. Further, the fact that the Board has an obligation to independently reach a decision is not a sufficient answer the concerns raised by the applicant. If it were, an allegation of bias would never succeed. Finally, the applicant submits that since the Board erred with respect to the Decision, the Board's other two decisions with respect to the Particulars Motion and the Production Motion should also be set aside.

[37] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (Baker), the Supreme Court of Canada stated that procedural fairness requires that decisions be made by an impartial decision-maker and free from any reasonable apprehension of bias. The parties do not contest the fact that the Board owes a duty of fairness to the applicant and that this duty requires that any decision in the Proceedings be made by an impartial decision maker and free from a reasonable apprehension of bias. Likewise, in *Baker*, above, the Supreme Court of Canada recognized that the duty of procedural fairness is flexible and depends upon an appreciation of the context of the particular statute and the rights affected. Again, the parties readily acknowledge this fact. The parties are in further agreement that the test to determine a reasonable apprehension of bias was set out by de Grandpré J. writing in dissent, in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at page 394, as follows:

> ... As already seen by the quotation above, the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information ... [t]hat test is "what would an informed

> person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly."

Finally, the parties agree that an administrative tribunal such as the Board may retain counsel provided that Board counsel's presence does not give rise to a reasonable apprehension of bias or other procedural fairness and natural justice concerns.

[38] As the parties are in agreement regarding the state of the law with respect to reasonable apprehension of bias, the issue on the merits would be whether, based on the facts as they arise in this particular case, a reasonably informed person would find an appearance of unfairness, bias and lack of neutrality in the Proceeding as a result of the fact that Board Counsel also represents GSK, the applicant's competitor, in corporate matters. But there is a preliminary issue that must first be addressed.

[39] Following the hearing on the merits, the Court noted that the application for judicial review of the interlocutory decisions rendered with respect to the Blakes Motion, as well as the other two procedural decision of the Board (regarding the Particulars Motion and the Production Motion), may have been premature. Indeed, this is the very position advocated by the Attorney General of Canada in another case decided today by the Court where the applicant is seeking to judicially review an interlocutory decision rendered by a delegate of the Superintendent of Bankruptcy, which rejected the applicant's motion for the delegate's recusal: *Sztern v. Deslongchamps et al*, 2008 FC 285 (*Sztern*). By directions of the Court, the parties filed supplemental written representations addressing the issue of prematurity in both cases.

[40] Both the applicant and the respondent in this case (and in *Sztern*) agree that in accordance with *Szczecka v. Canada (Minister of Employment and Immigration)* (1993), 116 D.L.R. (4th) 333, [1993] F.C.J. No. 934 (QL) (*Szczecka*), a judicial review application of an interlocutory judgment should not be entertained absent special circumstances.

[41] The applicant notes that special (or exceptional) circumstances warranting immediate judicial review of a tribunal's interlocutory decision have been found to exist where the jurisdiction of the tribunal was in issue. (*Zündel v. Canada (Human Rights Commission)* (2000), 256 N.R. 125, [2000] F.C.J. No. 678 (QL)(Zündel); *Pfeiffer v. Canada (Superintendent of Bankruptcy) (T.D.)*, [1996] 3 F.C. 584; and *Canada (Minister of Public Safety and Emergency Preparedness) v. Chrichlow*, 2007 FC 122, [2007] F.C.J. No. 210 (QL)). Indeed, in *Zündel*, the Federal Court of Appeal indicated that matters like bias may well go to the very jurisdiction of a tribunal and therefore constitute special circumstances that warrant immediate judicial review of a tribunal's interlocutory decision. It would be unfair to refuse to intervene when the underlying decision denies a party the benefit of a fair hearing, discloses grounds for an apprehension of bias, or curtails a party's substantive rights: *Fairmont Hotels Inc. v. Director Corporations Canada*, 2007 FC 95, [2007] F.C.J. No. 133 (QL).

[42] Applying these principles, the applicant submits that special circumstances exist which justify judicial review of the Board’s decision on the Blakes Motion at this juncture. The Blakes Motion is premised on an allegation of a reasonable apprehension of bias (which was evident from

the outset of the pre-hearing conference) and which, if not remedied, amounts to a potentially fatal flaw that goes to the very legality of the Board and its jurisdiction. The applicant argues that part of the rationale for refusing applications for judicial review of an interlocutory ruling is that it may ultimately be totally unnecessary: a complaining party may be successful in the end result, making the application for judicial review of no value. This is not the situation with the Blakes Motion. Regardless of what decision the Board makes on the merits of the Proceeding, the fundamental flaw in the fairness will remain.

[43] Likewise, the applicant submits that there will be no unnecessary delays, expenses or fragmentation of cases in this situation as the Proceeding has not progressed past opening statements and has been stayed pending the determination of this judicial review. The applicant submits that it could not have proceeded more diligently and that any inconvenience that may be associated with this judicial review application is outweighed by the value of a prompt review of the decision on the Blakes Motion. In short, if a fair hearing is denied because of a reasonable apprehension of bias, this fatal flaw cannot be cured by the Board's final decision on the merits.

[44] Finally, the applicant submits that *Ipsco Inc. v. Sollac, Aciers d'Usinor* (1999), 246 N.R. 197, [1999] F.C.J. No. 910 (QL) (Ipsco) is distinguishable from the facts as they arise in this case. In *Ipsco*, the Federal Court of Appeal refused to judicially review a decision by the Canadian International Trade Tribunal (CITT) disqualifying the applicant's counsel from participating in the hearing as his appearance was found to create a reasonable apprehension of bias. The Federal Court of Appeal concluded that the matter was interlocutory in nature (since its determination does not go

to the merits of the issue in dispute before the CITT), and, therefore, there were no special circumstances warranting the Court's intervention at that juncture. According to the applicant, in *Ipsco*, the tribunal had removed the fatal flaw from the proceeding and therefore rendered unnecessary any need for the Court to intervene at that stage.

[45] Turning to the issue as to whether special circumstances exist that justify the judicial review of the Board's other interlocutory decisions on the Particulars Motion and the Production Motion, the applicant is of the view that these two motions stand or fall depending on whether this Court find a reasonable apprehension of bias. The setting aside of these other two decisions necessarily flows from a successful judicial review application concerning the Blakes Motion because of the law of bias.

[46] Interestingly, the respondent (represented by the Attorney General of Canada), for the most part, agrees with the submissions of the Applicant. Having conducted a cursory examination of the relevant jurisprudence, the respondent states that for matters concerning the very jurisdiction of the Board (including allegations of bias), the Court can conduct an immediate judicial review of the interlocutory decision at issue. Beyond the cases already cited by the applicant, the respondent relies on *Roulette v. Sandy Bay Ojibway First Nation*, 2006 FC 98, [2006] F.C.J. No. 377 (QL) (Roulette). In *Roulette*, this Court considered whether an application for judicial review of an interlocutory decision taken by an adjudicator acting pursuant to Part III of the *Canada Labour Code*, R.S.C. 1985, c. L-2 was premature. Counsel for the First Nation Band attempted to prevent the law firm in question from acting as counsel for the applicant (in respect of a proceeding involving complaints

brought by the applicant against the Band for unjust dismissal) on the basis of a conflict of interest. The firm had acted as general counsel for the Band for seven years prior to the termination of its general retainer by the Band. The adjudicator dismissed the objection. In *obiter*, Justice Strayer stated that if it were necessary for him to decide whether there were exceptional circumstances justifying judicial review of the interlocutory decision in question, he "would be inclined to say there are special circumstances in this case."

[47] In spite of the fact that the respondent agrees with the applicant's supplementary written representations regarding the appropriateness of judicially reviewing the decision on the Blakes Motion, the respondent is of the view that the two procedural decisions of the Board dealing with the Particulars Motion and the Production Motion are matters that "would normally wait for the final decision of the board before they are subject to review by this court."

[48] Despite the arguments raised by counsel for both parties, I do not find that there are special circumstances in this case which warrant the immediate judicial review of the interlocutory decision on the Blakes Motion, nor are there special circumstances which would allow me to review the interlocutory decisions with respect to the Particulars and Production Motions. As I stated in *Sztern*, above:

> The starting point of my analysis, per *Szczecka*, is that unless there are special circumstances there should not be an immediate judicial review of an interlocutory judgement. As I found in *MiningWatch Canada v. Canada (Minister of Fisheries and Oceans)*, 2007 FC 955, [2007] F.C.J. No. 1249 (QL) at para. 148: "The rationale for this is that applications for judicial review of an interlocutory ruling may ultimately be totally unnecessary: a complaining party may be successful in the end result, making the applications for judicial

> review of no value. Also, the unnecessary delays and expenses associated with such applications can bring the administration of justice into disrepute."

[49] The parties have failed to convince me that there are such "special circumstances" in this case. This is not a case of "systemic" bias going to the jurisdiction of the Board. To the contrary, as I concluded in *Sztern*, I am of the view that a determination of bias at the interlocutory stage in the present case runs the risk of proliferating litigation unduly.

[50] I note that the respondent is not ready to concede that this judicial review should be granted and may appeal at this stage any favourable decision on the bias issue. On the other hand, there is nothing to prevent the applicant from re-ascertaining its objections if the panel decides to hear the case and continues to retain Blakes after an unfavourable decision on the bias issue raised in this judicial review. In the latter scenario, if the applicant is appealing an unfavourable decision of the Court on the merits of the bias issue, the proceedings before the Board may or may not be stayed pending the appeal. If such appeal is unsuccessful, and a stay is granted in the meantime by a judge of the Federal Court of Appeal, this means that the hearing before the Board will have been unduly delayed for a number of months (possibly more than a year). Moreover, if a stay is not granted and the hearing proceeds before the Board, the appeal before the Federal Court of Appeal may become moot in the meantime. As can be seen, a favourable or unfavourable decision of the Court on the merits of the bias issue raised in this proceeding will proliferate litigation unduly.

[51] I am also persuaded by the reasoning of Justice Evans in *Lorenz v. Air Canada*, [2000] 1 F.C. 494, [1999] F.C.J. No. 1383 (QL) (Air Canada) who states: "I find no authority for the

proposition that an allegation of bias *ipso facto* constitutes "exceptional circumstances" justifying judicial review before the tribunal has rendered its final decision." In *Air Canada* (as in *Sztern* and this case), Justice Evans (and this Court) had the benefit of hearing the case in its entirety before rendering his decision on prematurity. This provides a valuable context within which to consider the exercise of the Court's discretion over the grant of relief.

[52] In the case at bar, having weighed factors such as hardship to the applicant, waste of judicial resources, delay and fragmentation, I am in agreement with Justice Evans' conclusion in *Air Canada*: "A non-frivolous allegation of bias that falls short of a cast-iron case does not per se constitute "exceptional circumstances", even when the hearing before the tribunal is still some way from completion, and there is no broad right of appeal from the tribunal. Nor is it to be equated with a constitutional attack on the "very existence of a tribunal" considered in *Pfeiffer v. Canada (Superintendent of Bankruptcy)*, above." Accordingly, this application for judicial review must be dismissed.

[53] Given that I am dealing with sophisticated parties who have the benefit of experienced counsel, I will not, as I did in *Sztern*, consider subsidiarily, in *obiter*, whether or not a reasonably informed person would find an appearance of bias in the case at bar. Contrary to *Sztern*, above, I must also stress that I am not in a position today to make an "informed decision" on the issues of conflict of interest and bias which led to the applicant's request to Blakes (and followed by a formal motion to the Board), that Blakes be removed as counsel to the Board in the Proceeding.

[54] Allegations of personal bias and/or conflict of interest are very serious matters. The Court is asked to make a decision that may affect the reputation and/or livelihood of some of the individuals concerned in the Proceeding including Board Counsel and the members of the Panel. I note here that there has been no affidavit from the respondent (a party that admits it has not received any instructions from the Board) setting out the proper contextual background to the hiring of Gordon Cameron and Nancy Brooks as Board Counsel; the conditions of their engagement; their particular role and involvement in the Proceeding (including, but not limited to, their access to confidential information; their presence during the Board's deliberations; and, the extent of their participation in the decision making process, if any). Nor does this Court have a thorough understanding of the work Blakes performs for GSK in corporate transactional matters; the number of past or present files with respect of same; their conditions of engagement by GSK, financial or otherwise; the importance of this account; and, all other relevant information which would permit this Court to make an informed decision on the allegations of reasonable apprehension of bias based on the perceived or actual independence and/or impartiality (or lack thereof) of Blakes, as Board Counsel, in the Proceeding. Indeed, there are no affidavits from Blakes or from GSK on these very important and possibly very litigious matters.

[55] I also stress that the applicant has taken care to craft its attack exclusively on the three unfavourable interlocutory decisions rendered by the Board following the pre-hearing conference of October 31, 2007. But Blakes also acted as Board Counsel in the process which ultimately led to the dismissal on July 26, 2007 of the intervention application made on April 25, 2007 by Torys on behalf of GSK. Therefore, if this Court were to treat the alleged bias of Board Counsel as some kind

of fatal flaw or jurisdictional impediment (as suggested by the applicant and the respondent), this would naturally affect the legality of all interlocutory decisions of the Board, including the decision to dismiss GSK's application to intervene in the Proceeding. This would mean the entire process would have to start afresh, adding costs to all parties as the hearing on the merits in the Proceeding was about to begin and actually began on November 28, 2007 (but was later delayed by consent pending the present proceeding).

[56] That being said, there is no allegation of conflict of interest or of personal bias in the Proceeding on the part of any of the Panel members, including the Chairman, who are the individuals designated to hear and decide the case. Indeed, there has been no specific request by the applicant that the members of the Board recuse themselves and I see the Blakes Motion, as well as the Particulars Motions and the Production Motion, purely as matters of procedure within the sole jurisdiction of the Board. Therefore, I have great trouble in this case to qualify the bias matter raised by the applicant as "jurisdictional" and I think both parties have overstated the extent to which the general comments made by the Federal Court of Appeal in *Zündel* actually apply to the present fact situation.

[57] That being said, a party against whom an interlocutory order has been made is not under an obligation to immediately appeal or make a judicial review application in order to preserve his rights. Indeed, the time period prescribed in subsection 18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended, does not begin to run until the final decision has been rendered (*Zündel*, above). The applicant has done what a litigant is required to do in cases where issues of natural

justice, including bias, pose a legitimate concern to that litigant. It has made its concerns or objections known to the Board and nothing prevents the applicant from re-asserting same subsequently in the process.

[58] I note at this point that the Board already assured the applicant that "if the Panel makes a finding of excessive pricing, the Panel will not seek advice from Mr. Cameron on how the excess revenues should be offset, or any related remedies issue." At this point, it is impossible to predict how the case will ultimately be decided and what, if any, remedies will be ordered by the Board. However, if the Board finds in favour of the applicant, the issue of bias becomes moot. Furthermore, it is difficult to decide in advance and without proper contextual evidence (that should have been collected from the Board by the respondent) whether the assurances described above would be sufficient or not, to alleviate any legitimate concerns of reasonable apprehension of bias with respect to Blakes' participation as Board Counsel.

[59] For these reasons, the applicant's application for judicial review is denied. No costs are ordered in view of the particular reasons of the Court to dismiss same and further considering the position taken in this case by the Attorney General of Canada with respect to the issue of prematurity.

ORDER

THIS COURT ORDERS:

The application for judicial review is dismissed without costs.

"Luc Martineau"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2072-07
STYLE OF CAUSE:	SANOFI PASTEUR LIMITED V. AGC
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	February 4, 2008
REASONS FOR ORDER:	MARTINEAU J.
DATED:	

APPEARANCES:

Ms. Sandra A. Forbes	FOR THE APPLICANT
Mr. Christopher Rupar	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Davies Ward Phillips & Vineberg LLP Toronto, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT