

Federal Court



Cour fédérale

Date: 20090924

Docket: T-1359-08

Citation: 2009 FC 965

Ottawa, Ontario, September 24, 2009

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

**SANOFI-AVENTIS
CANADA INC.**

Applicant

and

**ATTORNEY GENERAL
OF CANADA**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Patented Medicine Prices Review Board (the Board) ensures that the prices of patented medicines charged by patentees are not excessive. The Board operates pursuant to the *Patent Act*, R.S.C. 1985, c. P-4 (the Act), and particularly, sections 79, 83, 86, 89 and 91, which govern proceedings and provide for the remedial powers of the Board.

[2] The applicant Sanofi-Aventis Canada Inc. is the successor company to Hoechst Marion Roussel Canada Inc. (HMRC), and in that capacity, seeks judicial review of an interlocutory decision rendered by the Board on July 30, 2008, in which the Panel of the Board constituted to

hear the matter dismissed the request of the applicant, who had made joint submissions with the Board Staff, that further Board proceedings against HMRC regarding the pricing of the medicine Nicoderm be terminated (the impugned decision). The applicant asks that the impugned decision be set aside and that the Board be prohibited from conducting a hearing on allegations of excessive pricing by HMRC.

[3] The Attorney General of Canada, who is named as the respondent, opposes the application for judicial review.

[4] The issues raised in this application can be stated as follows:

1. Should this application be dismissed given that it calls for the review of an interlocutory decision?
2. Did the Board have jurisdiction to continue the proceedings?
3. Did the Board breach principles of procedural fairness in rendering the impugned decision?
4. Is the Board's decision to continue the proceedings otherwise unreasonable?

[5] The application should be dismissed. At best, it is premature. Having had the benefit of hearing full arguments from counsel, I also find that the Board had jurisdiction to continue the proceedings, that it did not breach principles of procedural fairness and that the impugned decision is otherwise reasonable.

I. Background

[6] This is not the first judicial review brought before this Court in respect of HMRC's objections to the Board's jurisdiction to hear and decide this matter.

[7] HRMC is the exclusive distributor in Canada of Nicoderm, an aid to smoking cessation. Nicoderm is a transdermal nicotine patch. HMRC began selling Nicoderm in May 1992. Between 1994 and 2001, HMRC enjoyed the benefit, in Canada, of various patents belonging to Alza Corporation (Alza) of the United States, including Canadian Patent No. 1331340 (the '340 patent), Canadian Patent No. 1333689 (the '689 patent) and Canadian Patent No. 1338700 (the '700 patent). Alza has also applied for patents which pertain to nicotine patches; among these are Canadian Patent Application No. 2,032,446 (the '446 application) and Canadian Patent Application No. 2,040,352 (the '352 application).

[8] On March 9, 1999, HMRC submitted a Voluntary Compliance Understanding (VCU) for consideration by the Chairperson of the Board. Nonetheless, the Chairperson determined that a hearing should be held in the public interest.

[9] On April 20, 1999, the Board issued a Notice of Hearing to determine whether the applicant "is selling or has, while a patentee, sold the medicine known as Nicoderm in any market in Canada at a price that, in the Board's opinion, is or was excessive and if so, what order, if any should be made".

[10] The hearing was scheduled to commence on July 5, 1999, but in the meantime HMRC bought a motion before the Board on May 25, 1999, objecting to their jurisdiction on various grounds, including:

1. The structure and conduct of the Board, which HMRC claimed breached the principles of procedural fairness and created a reasonable apprehension of bias;
2. The nature of Nicoderm as a delivery device and not a medicine;
3. The fact that HMRC was not a patentee in respect of the '340 patent and the '689 patent;
4. The lack of the Board's jurisdiction over patent applications.

[11] On May 27, 1999, the Board Staff itself motioned the Board for production and to compel disclosure from HMRC.

[12] The Board Staff's motion was granted on August 3, 1999. The same day, the Board rendered its decision concerning the first part of HMRC's motion and dismissed HMRC's allegations of institutional bias and breach of the rules of procedural fairness (issue 1 above). The Board's decision in respect of jurisdiction, Part I, was the subject of cause number T-1576-99. Indeed, on September 2, 1999, HMRC commenced an application for judicial review before the Federal Court. By agreement, further proceedings on the issue of excess pricing were suspended pending the outcome of HMRC's motion in respect of jurisdiction, Part II, before the Board (issues 2 to 4 above).

[13] This second part of HMRC's motion was heard before the Board from December 17-19, 1999. On March 13, 2000, the Board issued an interim order requesting additional information from the parties, and on August 8, 2000, the Board denied the second part of HMRC's motion. The Board dismissed HMRC's argument that Nicoderm is not a medicine, concluded that the '700, '689 and '340 patents all pertain to Nicoderm and found that HMRC was a "patentee" for the purposes of the '700 and '689 patents but not the '340 patent. The Board also determined that HMRC was the "patentee" with respect to the '352 and '446 patent. This second interlocutory decision dated August 8, 2000, was the subject of cause number T-1671-00. Indeed, on September 8, 2000, HMRC filed a second application for judicial review before the Federal Court.

[14] Several motions on matters of procedure in files T-1576-99 and T-1671-00 were made by HMRC and the Board.

[15] On October 25, 2000, the Board Staff made a motion to the Federal Court to be made a party to the judicial review. Around the same time, the Board filed a motion seeking intervener status. These motions were heard together by a Prothonotary of the Federal Court on March 13, 2001 and they were rejected on July 13, 2001 (*Hoechst Marion Roussel Canada v. Canada (Attorney General)*, 2001 FCT 795). Both rejections were appealed to the Federal Court (*Canada (Patented Medicine Prices Review Board) v. Hoechst Marion Roussel Canada Inc.* (11 February 2002), Ottawa T-1576-99 (F.C.)), and subsequently to the Federal Court of Appeal

(Canada (Patented Medicine Prices Review Board) v. Hoechst Marion Roussel Canada Inc., 2002 FCA 505), where they were denied.

[16] After the Board and Board Staff's motions to be made parties in the judicial review were dismissed, HMRC brought to the Court another motion to compel the production of documents in possession of the Board that were said to be relevant to the judicial review, including the Board Staff report concerning excessive pricing that was submitted to the Chairperson prior to the issuance of the Notice of Hearing. On November 14, 2003, this motion was rejected by the Prothonotary (*Hoechst Marion Roussel Canada v. Canada (Attorney General)*, 2003 FC 1343), as was the appeal which ensued (*Hoechst Marion Roussel Canada v. Canada (Attorney General)*, 2004 FC 489).

[17] On May 16, 2005, HMRC's judicial review applications were finally heard by the Court. On November 17, 2005, Justice Heneghan dismissed the application for judicial review with respect to Part I of the Board's decision on jurisdiction, and allowed in part the application for judicial review with respect to Part II of the Board's decision (*Hoechst Marion Roussel Canada Inc. v. Canada (Attorney General)*, 2005 FC 1552).

[18] In summary, the Court held that the Board had jurisdiction over Nicoderm as a "medicine" and dismissed the allegations of institutional bias and breaches of procedural fairness. As to predetermination of issues, the Board's decision to issue a Notice of Hearing did not represent the Board's conclusion on the issue of excessive pricing, but rather constituted an

allegation that was sufficiently substantiated to justify a hearing on the merits. The Court also found that HMRC was the “patentee” of the ‘700 and ‘689 patents within the meaning of section 79 of the Act. However, the Court found that the Board erred in finding that it was authorized to assert jurisdiction over the two laid-open patent applications, which are the ‘446 and ‘352 applications. Accordingly, that part of the Board’s decision in relation to jurisdiction, Part II, was quashed by the Court. The rest of the judicial review application was otherwise dismissed.

[19] HMRC took no appeal of the judicial review in respect of the objections to the Board’s jurisdiction.

[20] As a result of the 2005 Federal Court judgment above, the amount of excess revenues charged against HMRC was decreased to about 20% of the amount previously calculated by Board Staff in 1999.

[21] Between January and February 2006, HMRC was in direct communication with the Board Staff concerning the pricing of Nicoderm. On March 11, 2006 the Board Staff confirmed that it considered it appropriate to terminate proceedings before the Board on the basis of a proposed Joint Submission by the Board Staff and HMRC.

[22] On August 28, 2006, the Joint Submission was filed with the Board. After some correspondence between the Board and the Board Staff in March and April 2007, the Panel of

the Board constituted to hear the matter ordered an oral hearing which took place on July 3, 2008.

[23] On July 21, 2008 the Panel rejected the Joint Submission and instructed the parties to continue with the proceeding according to a revised schedule. It is this latest decision which brings HMRC back before this Court through its successor company, Sanofi-Aventis Canada Inc.

II. Should this application be dismissed given that it calls for the review of an interlocutory decision?

[24] In the impugned decision, which is clearly interlocutory in nature, the Board found:

[...]

2. The Panel is not persuaded that the resolution proposed in the Joint Submission is appropriate.

3. A central premise of the Joint Submission is that sales of Nicoderm below its maximum non-excessive price (MNE) during the period from and after 1998 should be deemed to off-set excessive revenues alleged to have been earned from 1995, when the Board acquired jurisdiction over the pricing of Nicoderm, until 1997.

4. The Panel is not satisfied that this premise is consistent with the Guidelines, which appear to contemplate the off-setting of excessive revenues only by compliance with a Board order or voluntary compliance undertaking [...]

[...]

6. The Panel finds support for this conclusion in the recent decision of a differently constituted panel in the proceeding pertaining to the medicine Copaxone.

[...]

8. The panel [in that case] issued a decision on this point, in which it said:

The Guidelines do not permit a patentee to charge excessive revenues in one or several years and then offset those revenues of its own accord by reducing (or not increasing) the price of the medicine in subsequent years. Indeed, such an approach would seriously impair, if not defeat, the Board's mandate... The Panel considers these terms in the Guidelines to be an appropriate implementation of the terms of the Act, and that the Order is reflective of this.

[...]

10. The parties provided various other reasons why it would not be in the public interest to continue this proceeding, mostly related to the passage of time and the intervening events. The Panel is not persuaded that any of these reasons, or all of them taken together, warrant discontinuance of the proceeding.

[25] In considering whether or not to review an interlocutory decision, the Court must consider the presence of "special circumstances". In *Sztern v. Canada (Superintendent of Bankruptcy)*, 2008 FC 285 at paragraph 19, I noted that:

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 judgment. As I found in *Mining Watch Canada v. Canada (Minister of Fisheries and Oceans)*, 2007 FC 955, [2007] F.C.J. No. 1249 (QL) at paragraph 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.

[26] This principle was recently confirmed by the Federal Court of Appeal in *Greater Moncton International Airport Authority v. Public Service Alliance of Canada*, 2008 FCA 68, at paragraph 1 (*Greater Moncton*), where reliance is placed on recent jurisprudence which suggests that the judicial

review of interlocutory decisions should only be undertaken in “the most exceptional of circumstances” (*Fairmont Hotels Inc. v. Director Corporations Canada*, 2007 FC 95, at paragraphs 9-10; *Prince Rupert Grain Ltd. v. Grain Workers’ Union, Local 333*, 2005 FCA 401, at paragraph 2; *Canada (Attorney General) v. Brar*, 2007 FC 1268, at paragraph 29).

[27] The fact that an issue may relate to a tribunal’s jurisdiction, including allegations of bias and breach of procedural fairness, does not automatically justify immediate judicial review (*Greater Moncton*, at paragraph 2; *Sanofi Pasteur Ltd. v. Canada (Attorney General)*, 2008 FC 286, at paragraph 46 (*Sanofi Pasteur*); *Lorenz v. Air Canada*, [2000] 1 F.C. 494, at paragraphs 12 and 13 (F.C.)). There are several compelling policy reasons which militate in favour of judicial discretion, including the risk of the fragmentation of the process as well as the likelihood that such intervention will lead to additional costs and delays. Indeed, the background to this case provides ample demonstration that multiple interlocutory judicial review applications involving so called “jurisdictional matters” result in long and unnecessary delays which are time consuming and which monopolize limited judicial resources at all levels. Again, a more basic concern is that such litigation may become unnecessary in light of the Board’s ultimate decision in this matter (*Greater Moncton*, at paragraph 1).

[28] I do not believe that this case raises any special circumstances that merit immediate review by the Court. After considering potential hardship to the applicant, waste of judicial resources, delay and fragmentation, I do not believe that the applicant has raised any issue which could not be adequately determined before the Board. Fundamental to the applicant’s request is a finding of

whether or not the applicant engaged in excessive pricing, a determination best made by the Board. Considering the fact that the Board's decision to either accept or reject the Joint Submission by the applicant and the Board Staff is not in any way determinative of this issue, the applicant may very well be successful at the hearing, rendering any litigation before the Federal Court useless.

[29] In any event, for the sake of clarity, the following reasons provide additional rationale for dismissing the present judicial review application which I find to be clearly unfounded after a close examination of the applicant's most recent objections to the continuation of the proceedings before the Board.

III. Did the Board have jurisdiction to continue the proceedings?

[30] Both the applicant and the respondent agree that the standard of review for questions of jurisdiction is correctness. In the case at bar, the issue is whether the Board had jurisdiction to continue the proceedings.

[31] The applicant alleges that the Board has lost jurisdiction over the matter because pursuant to subsection 83(7) of the Act, the Board is unable to make an order against patentees who ceased to benefit from the patents in question more than three years "before the day on which the proceedings in the matter commenced." Furthermore, the applicant alleges that pursuant to section 93 of the Act, the Board is unable to hear matters when neither the Chairperson nor the Vice-Chairperson of the Board are members of the hearing panel.

[32] These are both primarily questions of statutory interpretation, and at least the first question deals with a true question of *vires*. Accordingly, pursuant to *Dunsmuir v. The Queen*, 2008 SCC 9, at paragraphs 50 and 59, these questions are to be reviewed on a standard of correctness.

Is the Board Time-Barred?

[33] Subsection 83(7) of the Act reads as follows:

<p>83. (7) No order may be made under this section in respect of a former patentee who, more than three years before the day on which the <u>proceedings</u> in the matter commenced, ceased to be entitled to the benefit of the patent or to exercise any rights in relation to the patent. (Emphasis added)</p>	<p>83. (7) Le présent article ne permet pas de prendre une ordonnance à l'encontre des anciens brevetés qui, plus de trois ans avant le début des <u>procédures</u>, ont cessé d'avoir droit aux avantages du brevet ou d'exercer les droits du titulaire. (je souligne)</p>
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[34] The applicant, who ceased to benefit from the patents in question in December 2000, suggests that the “proceedings in the matter” commence only once the hearing on the merits of the case has actually commenced before the Panel charged with hearing the matter, or at very least, once the evidence to be relied upon by the Board Staff at the hearing is submitted to the Board. Since no steps beyond the Notice of Hearing issued in 1999 had been taken until 2008, the Board is legally precluded by subsection 83(7) of the Act from continuing with a hearing.

[35] I am unable to accept the submission made by the applicant which is not consistent with the wording and purpose of the Act nor with the representations made by HMRC and the Board Staff in their Joint Submission. There is a clear distinction between a “hearing” and a “proceeding” (sections

86 and 87 of the Act). Indeed, the proceedings may commence long before the Board actually receives evidence at the hearing. I am comforted by the *Guidelines* at paragraph 8.1 Chapter 2, which provide that a “Chairperson may commence a formal proceeding by issuing a Notice of Hearing and establishing a Hearing Panel of the Board for that proceeding.”

[36] Accordingly, I find that the proceedings commenced when the applicant was issued a Notice of Hearing on April 20, 1999, which was before the applicant ceased to benefit from the patents in question and, therefore, within the time frame set out in subsection 83(7) of the Act.

Is the Panel Improperly Constituted?

[37] Since the Notice of Hearing was filed in 1999, three members on the original panel set to hear the case have retired, including the Chairperson and Vice-Chairperson. The new panel does not include the current Chairperson or Vice-Chairperson. The applicant argues that the Act provides that the Board is unable to hear a case or make an order as to excessive prices in the absence of either the current Chairperson or Vice-Chairperson of the Board.

[38] The applicant refers to section 93 of the Act, which provides:

Chairperson and Vice-chairperson

93. (1) The Governor in Council shall designate one of the members of the Board to be Chairperson of the Board and one of the members to be Vice-chairperson of the Board.

Président et vice-président

93. (1) Le gouverneur en conseil désigne, parmi les conseillers, un président et un vice-président.

*Duties of
Chairperson*

(2) The Chairperson is the chief executive officer of the Board and has supervision over and direction of the work of the Board, including
 (a) the apportionment of the work among the members thereof and the assignment of members to deal with matters before the Board and to sit at hearings of the Board and to preside at hearings or other proceedings; and
 (b) generally, the conduct of the work of the Board, the management of its internal affairs and the duties of its staff.

Duties of Vice-chairperson

(3) If the Chairperson is absent or incapacitated or if the office of Chairperson is vacant, the Vice-chairperson has all the powers and functions of the Chairperson during the absence, incapacity or vacancy.
 1993, c. 2, s. 7.

Attributions du président

(2) Le président est le premier dirigeant du Conseil et, à ce titre, il en assure la direction. Il est notamment chargé de la répartition des affaires entre les conseillers, de la constitution et de la présidence des audiences et des autres procédures, ainsi que de la conduite des travaux du Conseil et de la gestion de son personnel.

Attributions du vice-président

(3) En cas d'absence ou d'empêchement du président, ou de vacance de son poste, la présidence est assumée par le vice-président.
 1993, ch. 2, art. 7.

[39] The submission advanced by the applicant that the Panel is improperly constituted is both unsustainable in law and impracticable in fact. In my opinion, there is no ambiguity in the impugned legislative provision and the answer to any alleged ambiguity can be found upon review of the wording of subsection 93(2) in French, which confirms that: “il [le président] est notamment chargé ... de la constitution et de la présidence des audiences et des autres procédures.” This makes it

clear that the Act does not require the Chairperson or the Vice-Chairperson to preside at every single hearing. Rather, they are charged with the responsibility to manage the assignment of members (including themselves) to sit and preside at hearings of the Board. The fact that the Board panel that has been assigned to the applicant's case contains neither the Chairperson nor the Vice-chairperson does not hinder the Board's ability to carry out the hearing.

IV. Did the Board breach principles of procedural fairness in rendering the impugned decision?

[40] There is no disagreement between the parties that a duty of fairness applies to the Board's decision in this case (*Hoechst Marion Roussel Canada Inc. v. Canada (Attorney General)*, 2005 FC 1552 at paragraph 73 (*Hoechst*)). Both parties also submit that breaches of procedural fairness are reviewed on a standard of correctness. I agree (*Sanofi Pasteur, supra*, at paragraph 5; *Hoechst, supra*, at paragraph 61; *Leo Pharma Inc. v. Canada (Attorney General)*, 2007 FC 306 at paragraph 17 (*Leo Pharma*)).

[41] This Court, in dealing with one of the interlocutory issues raised between the Board and the applicant, pronounced on the content of the duty of fairness applicable to the Board's decisions. In *Hoechst, supra*, Justice Heneghan conducted an analysis of the factors outlined in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (*Baker*), and concluded:

73 On the basis of the foregoing, I conclude that the basic requirements of procedural fairness, as described [page564] by the Supreme Court of Canada in *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165, that is the right to an unbiased tribunal, the right to notice and the opportunity to make representations, apply to the Board's actions. However, I would grant a considerable degree of flexibility to the Board in respect of

the procedural requirements in light of the factors described in *Baker*. Subsection 97(1) of the Act clearly states that proceedings of the Board are to be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit, providing ample room for flexibility on the part of the Board, as long as natural justice and procedural fairness are respected.

[42] I fully endorse those comments. In the case at bar, before dismissing the Joint Submission and deciding to continue the proceedings, the Panel convoked an oral hearing and afforded to the applicant the opportunity to make representations.

Unreasonable Delay

[43] The applicant claims that the delay in this case between the issuance of the Notice of Hearing and the proposed date for the hearing is so long that it amounts to an abuse of process pursuant to which the Board loses its jurisdiction to hear the matter. If the proceedings continue, the Board would be in violation of principles of procedural fairness.

[44] The test used in order to determine whether delay was unreasonable is found Justice Lebel's dissent in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, at paragraph 160 (*Blencoe*):

160 As indicated above, the central factors toward which the modern administrative law cases as a whole propel us are length, cause, and effects. Approaching these now with a more refined understanding of different kinds and contexts of delay, we see three main factors to be balanced in assessing the reasonableness of an administrative delay:

(1) the time taken compared to the inherent time requirements of the matter before the particular

administrative body, which would encompass legal complexities (including the presence of any especially complex systemic issues) and factual complexities (including the need to gather large amounts of information or technical data), as well as reasonable periods of time for procedural safeguards that protect parties or the public;

(2) the causes of delay beyond the inherent time requirements of the matter, which would include consideration of such elements as whether the affected individual contributed to or waived parts of the delay and whether the administrative body used as efficiently as possible those resources it had available; and

(3) the impact of the delay, considered as encompassing both prejudice in an evidentiary sense and other harms to the lives of real people impacted by the ongoing delay. This may also include a consideration of the efforts by various parties to minimize negative impacts by providing information or interim solutions.

[45] With regard to the first consideration, in light of section 97(1) of the Act, which provides that the Board shall deal with proceedings “as informally and expeditiously as the circumstances and considerations of fairness permit,” the applicant is correct in concluding that the 9 year period from April 20, 1999 to July 21, 2008, was likely not what Parliament had in mind. However, the existence of a long delay, by itself, is not determinative and other factors must also be considered.

[46] With respect to the proceedings commenced in 1999 by the issuance of a Notice of Hearing, it is apparent that the ensuing long delay was not the sole responsibility of the Board, a factor that speaks directly to the second consideration. As recounted above, following the issuance of the Notice of Hearing, HMRC commenced two judicial review applications to prevent the Board from hearing the matter. Thus, it is the applicant’s preliminary motion objecting to the jurisdiction of the

Board and their applications for judicial review which resulted in the 6 year delay from 1999 to 2005. While the motions of the Board and Board Staff to be added as party or granted intervener status before the Court may have contributed to the delay, the precipitating event was the applicant's initial motion to the Board. For these reasons, I cannot find that the causes of the delay suggest a finding of unreasonable delay.

[47] With respect to the impact of the delay and the existence of prejudice, the applicant claimed that the length of the delay itself led to a presumption of prejudice. I cannot accept this blunt statement considering the fact that the applicant caused much of the delay itself. This conclusion is further strengthened by the fact that the applicant failed to present to the Court any evidence of prejudice suffered or of a change in position or reliance on the delay. Furthermore, the applicant has not been able to show that as a result of the delay, their ability to respond to the allegations has been impaired (*Kaburda v. Dental Surgeons of British Columbia*, 2000 BCSC 481, at paragraph 38. Given that the applicant was aware of the case against them since they received the Notice of Hearing on April 20, 1999, it cannot be said that the applicant has suffered any prejudice as a result of the delay in proceedings. Indeed, the effect of the 2005 Federal Court judgment is to restrain the period of examination solely to the patents in issue and not the two patent applications made by Alza; this decision did not change the case against the applicants in that they must still face the allegation of excessive pricing.

[48] In conclusion, I find that there is no abuse of process or breach to procedural fairness because of the long delay in this case.

Independence of the Panel

[49] The applicant also claims that in failing to accept the Joint Submission of the Board Staff and HMRC, the Panel merged the roles of adjudicator (normally carried out by the Panel charged of hearing the matter) and prosecutor (normally carried out by the Board Staff), compromising the right of the applicant to have the case decided by an independent and impartial tribunal.

[50] Justice Heneghan in *Hoechst, supra*, at paragraph 83, has already determined that in carrying out their normal responsibilities, “there is sufficient institutional impartiality between the overlapping functions as performed by individuals working as Board Staff or serving as members of the Board panel.” Indeed, in the course of oral argument before this Court, the applicant’s counsel conceded that there was no issue with regards to the independence of the prosecutor. In concurring with HMRC in the request to discontinue the proceedings, Board Staff did not withdraw the allegations previously made that there was excessive pricing. Since the Joint Submission does not determine the issue of whether HMRC engaged in excessive pricing, the issue remains very much alive. This issue must be decided by the Panel who remains independent from Board Staff. A well informed person would see no reasonable apprehension of bias on the part of the Board panel in deciding to hear the matter.

[51] The applicant also seems to assert that the Panel is *functus officio* and had no other choice but to accept the Joint Submission to terminate the proceedings. The applicant has not provided any evidence from the Act or *Guidelines* in support of such an assertion, which again is clearly unsupported in law and fact. While the Board Staff may have been responsible for bringing the

issue of excessive pricing before the Board, it remains that it was the Chairperson who took the decision to commence a formal proceeding by issuing a Notice of Hearing and establishing a hearing Panel for the Board for that proceeding (see paragraph 8.1 of Chapter 2 of the *Guidelines*).

[52] It is on the basis above which I distinguish the case at bar from the authority cited by the applicant in support of its position, *McKeown v. Royal Bank of Canada*, 2001 FCT 81 (*McKeown*). In that case, which concerned a complaint of unjust dismissal made by a Bank employee under Part III of the *Canada Labour Code*, R.S.C. 1985, c. L-2, the foundation of the tribunal's ability to decide the matter was removed because their jurisdiction was triggered by the complaint of the applicant. Since the latter had withdrawn her complaint, the tribunal had overstepped its jurisdiction in going ahead with the complaint. *McKeown* does not apply to the present case because unlike in *McKeown*, there is no statutory requirement of having a valid subsisting claim before the Board can proceed with a hearing. Therefore, the unwillingness of the Board to accept the Joint Submission does not call into question the independence of the adjudicator.

Legitimate expectations of the applicant

[53] The applicant also claims that as a result of their understanding of Board practices in other proceedings which dealt with off-setting excess revenues, they expected that the Board would not continue the present proceedings because the reduction in their prices had off-set any excess revenue they may have previously accumulated. This argument must also fail.

[54] First, it is well established that the doctrine of legitimate expectations does not give rise to substantive rights (*Baker, supra*, at paragraph 26).

[55] Second, the applicant has not provided any cogent or convincing evidence of where their expectation comes from. They simply refer to a VCU executed for another product, but nowhere in this document does the Board state that as a result of a voluntary reduction in prices, the company can off-set any excess revenue they may have previously collected.

[56] As stated by the Supreme Court in *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29, at paragraph 131:

131 The doctrine of legitimate expectation is "an extension of the rules of natural justice and procedural fairness": *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. It looks to the conduct of a Minister or other public authority in the exercise of a discretionary power including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified, that has induced in the complainants (here the unions) a reasonable expectation that they will retain a benefit or be consulted before a contrary decision is taken. To be "legitimate", such expectations must not conflict with a statutory duty. See: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170; *Baker, supra*; *Mount Sinai, supra*, at paragraph 29; *Brown and Evans, supra*, at para. 7:2431. Where the conditions for its application are satisfied, the Court may grant appropriate procedural remedies to respond to the "legitimate" expectation.

[57] In the present case there are no established practices, conduct or representations that the applicant has been able to show in these proceedings that would give rise in the Court's opinion to a

clear, unambiguous and unqualified expectation. Therefore, the applicant does not get the benefit of the doctrine of legitimate expectations.

The provision of reasons

[58] The applicant also argues that the Board did not provide adequate reasons in the impugned decision. According to the applicant, the Board did not address any of the points raised during the hearing concerning the passage of time and the public interest (or lack thereof) in continuing with the hearing. It is not contested however that the reasons do address the main argument of the joint submission, namely that the proceedings should be discontinued because the issues raised in the Notice of Hearing have been resolved.

[59] Furthermore, despite the applicant's concerns with the provision of reasons in the present case, the applicant's counsel suggested during the course of oral argument that had the Board accepted the Joint Submission, there was nothing in the Act that would require the provision of reasons, despite the Board's duty to ensure that the public interest is protected by monitoring the pricing practices of various patentees.

[60] I have carefully read the Joint Submission as well as the Board's decision and I have no difficulty in finding that the reasons provided by the Board were adequate in the circumstances. The Board was not required to provide a detailed analysis for every factor taken into consideration. Suffice it to note that the applicant had the opportunity to be heard on the question whether the

proceedings should be discontinued, and it was given an explanation of what was considered to be the most salient factors.

V. Is the Board's decision to continue the proceedings otherwise unreasonable?

[61] Lastly, the applicant argues that in refusing the Joint Submission prepared by the Board Staff and HMRC the Board otherwise acted in an unreasonable manner. This proposition was not fully developed by the applicant at the hearing before the Court as it is directly related to its main argument that the Board's reasons are inadequate. Therefore, I cannot accept this alternative argument in light of the conclusions drawn above.

[62] In any event, the Board's decision to continue with the proceedings is reasonable in the circumstances. The Board is an administrative tribunal with economic regulatory functions and as such, law and policy require that some leeway be provided to it, in pursuing its mandate (*Ciba-Geigy Ltd. v. Canada (Patented Medicine Prices Review Board)* (1994), 56 C.P.R. (3d) 377, [1994] F.C.J. 884 (F.C.A.) (Q.L.)). It must be stressed that the impugned decision is not a decision to initiate proceedings. Acting in the public interest, the Board has already determined that it is proper to proceed with the matter, and this determination was upheld by this Court in 2005.

[63] The Board is simply not bound by any recommendation made by Board Staff. To find otherwise would be to empower the Board Staff and the patentee with the ability to dictate the outcome of proceedings before the Board, a result which would be clearly inconsistent with the recognized institutional independence of the Board. The applicant has simply not met the high

burden of convincing the Court that the decision to continue the proceedings is unreasonable. The reasons provided by the Board in the impugned decision support the conclusion not to accept the Joint Submission and are reasonable in the circumstances.

VI. Conclusion

[64] In light of all the foregoing reasons, this judicial review must be dismissed.

[65] The respondent has not sought costs. Accordingly, no costs will be awarded in favour of the respondent.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed without costs.

“Luc Martineau”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1359-08

STYLE OF CAUSE: **SANOFI-AVENTIS CANADA INC.**
and
ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: September 16, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** Martineau J.

DATED: September 24, 2009

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