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Indexed as:

Ciba-Geigy Canada Ltd. v. Canada (Patented Medicine Prices Review Board) (F.C.A.)

Between
Ciba-Geigy Canada Ltd., Appellant, and
Patented Medicine Prices Review Board, Respondent

[1994] F.C.J. No. 884

[1994] A.C.F. no 884

83 F.T.R. 2 n

170 N.R. 360

56 C.P.R. (3d) 377

48 A.C.W.S. (3d) 1304

1994 CarswellNat 1796

Appeal No. A-209-94

Federal Court of Appeal
Ottawa, Ontario

Marceau, MacGuigan and Décary JJ.A.

Heard: June 7, 1994
Oral judgment: June 7, 1994

(6 pp.)

Patents of invention -- Practice -- Disclosure -- Crown -- Administrative law.

Appeal concerning the extent of disclosure required of documents in the hands of the Patented Medicine Prices Review Board. The Board had scheduled a hearing which could result in a finding the appellant was selling a drug for an excessive price. The appellant sought disclosure of all facets

of the staff investigation and all documents in the hands of the Board or its chairman. A judicial review from the Board's refusal of this request had been dismissed.

HELD: Appeal dismissed. The administrative tribunal here had economic regulatory functions and no power to affect human rights in a way akin to criminal proceedings. A trustful relationship with its investigative staff and proceeding as fairly and expeditiously as the circumstances of fairness permit were valid Board objectives. Law and policy required that some leeway be given an administrative tribunal with economic regulatory objectives in pursuing its mandate.

STATUTES, REGULATIONS AND RULES CITED:

Patent Act, R.S.C. 1985 c. P-4, s. 83.

QL Update: 940928
d/sdd

Daniel V. MacDonald, for the Appellant.
Guy Pratte, for the Respondent.
P. Andrée Wylie, for the Board.

The judgment of the Court was delivered by

1 **MacGUIGAN J.A.** (orally):-- This appeal has to do with the extent of the disclosure required to the appellant of documents in the hands of the Patented Medicine Prices Review Board ("the Board").

2 Utilizing its powers under the Patent Act ("the Act"), the Board scheduled a hearing to determine whether the drug Habitrol marketed in Canada by the appellant is being sold at an excessive price. The consequences of such a finding under s. 83 of the Act could be an order for a price reduction in the selling price, a payment to Her Majesty in the Right of Canada of an offset amount from estimated excess corporate revenue, and, on a finding of a policy of selling the medicine at an excessive price, an offset of up to twice the amount of the estimated excess revenues. This last kind of remedial order is not in play in the instant case in its current state.

3 In deciding to hold a formal hearing, once a patentee has refused to make a voluntary compliance order the Chairman of the Board considers a report from the Board staff to the effect that the market price charged for the drug in Canada exceeds the Board's guidelines. The appellant seeks the disclosure to it of all documents in the Board's possession which relate to the matters in issue in the s. 83 hearing, particularly the report on which the Chairman acted in ordering the

hearing. In its view such disclosure should extend to all the facets of the staff investigation and to all documents in the hands of the Board or its Chairman.

4 The Board refused the appellant's request for such exhaustive disclosure for the following reasons (Appeal Board, I, 3):

> In the Board's view, in a hearing before it, the party to whom the hearing relates must be provided with a level of disclosure and production which ensures that the party is fully informed of the case to be made against it. Further, the procedure followed must provide the party to whom the hearing relates a reasonable opportunity to meet that case by bringing forward its own position and by correcting or contradicting any statement or evidence related to the case which is prejudicial to its position.
>
> It is the Board's view that, in matters of the disclosure and production of information and documents in the context of a public hearing, the Board must balance its duty to give every opportunity to a Respondent to be heard against its responsibility to ensure that its orders do not have the effect of limiting its ability to discharge its responsibilities in the public interest on an ongoing basis. In order to discharge such responsibilities, the Board must be confident that it is getting candid, complete and objective advice from its staff. This is particularly the case in respect of the preliminary views it receives as to whether there is sufficient evidence to justify calling a hearing into a matter. This balancing need not in any way affect the Board's duty in law to make its decisions on the basis of the evidence placed and tested before it during a hearing.

5 On a judicial review proceeding McKeown J. upheld the Board's decision as follows (Appeal Book, I, 17):

> The Board has made a decision refusing disclosure of the documents requested and I should give such a decision curial deference unless fairness or natural justice requires otherwise. Disclosure cannot be decided in the abstract. The Board is supposed to proceed efficiently and to protect the interest of the public. This requires, inter alia, that a hearing shall not be unduly prolonged. Certainly, the subject of an excess price hearing is entitled to know the case against it, but it should not be permitted to obtain all the evidence which has come into the possession of the Board in carrying out its regulatory functions in the public interest on the sole ground that it may be relevant to the matter at hand. The Board's function is not to obtain information solely for investigative purposes; its primary

> role is to monitor prices. In its decision, the Board recognized the need to balance its duty to the applicant against limiting its ability to discharge its responsibilities in the public interest on an ongoing basis. The Board has exercised its duty properly in the case at bar.... [W]hen the statutory scheme of this Board is looked at, the Board is a regulatory board or tribunal. There is no point in the legislature creating a regulatory tribunal if the tribunal is treated as a criminal court. The obligations concerning disclosure imposed by the doctrine of fairness and natural justice are met if the subject of the inquiry is advised of the case it has to meet and is provided with all the documents that will be relied on. CIBA has been provided with much more than the minimum disclosure required to enable it to meet the case. Law and policy require that some leeway be given an administrative tribunal with economic regulatory functions, if, in pursuing its mandate, the tribunal is required by necessity to receive confidential information. It is not intended that proceedings before these tribunals be as adversarial as proceedings before a court. To require the Board to disclose all possibly relevant information gathered while fulfilling its regulatory obligations would unduly impede its work from an administrative viewpoint. Fairness is always a matter of balancing diverse interests. I find that fairness does not require the disclosure of the fruits of the investigation in this matter.

We are all agreed that the Motions Judge has correctly stated and applied the law.

6 Indeed, in emphasizing that its case is one of audi alteram partem and not of bias, counsel for the appellant expressly agreed with the law as stated by the respondent that "the concept of procedural fairness is eminently variable, and its content is to be decided in the specific context of each case" (Knight v. Indian Head School Division No. 19 of Saskatchewan, [1990] 1 S.C.R. 653, 682 (per L'Heureux-Dubé J.) and the context to be thus taken into account consists of the nature and seriousness of the matters in issue, the circumstances, and of course the governing statute. This was precisely the approach of the Motions Judge.

7 The only real issue between the parties is as to the effect to be given in this non-criminal case to the powerful reasons for decision of Sopinka J. in R. v. Stinchcombe, [1991] 3 S.C.R. 326 that in a criminal case the Crown has a legal duty to make total disclosure to the defence. Stinchcombe was applied by a Divisional Court in Ontario to the requirements of natural justice under an Ontario Human Rights Code Board of Inquiry in Ontario Human Rights Commission v. House, decided 8 November 1993 (No. 520/93). The Court in House analogized the proceedings in question to criminal proceedings and the role of Commission counsel to that of the Crown in criminal proceedings. It concluded that (p. 12):

> There is no dispute in these proceedings that the allegations made by the

> complainants are indeed extremely serious. Any racial discrimination strikes at the very heart of a democratic pluralistic society. It is, of course, of the utmost seriousness if any such racial discrimination exists or has existed in an important public institution such as a major hospital. The consequences attendant on a negative finding by a Board of Inquiry would be most severe for the Respondents as any such finding could and should seriously damage the reputation of any such individual.

8 This is where any criminal analogy to the proceedings in the case at bar breaks down. There are admittedly extremely serious economic consequences for an unsuccessful patentee at a s. 83 hearing, and a possible effect on a corporation's reputation in the market place. But as McKeown J. found, the administrative tribunal here has economic regulatory functions and has no power to affect human rights in a way akin to criminal proceedings.

9 A trustful relationship with its investigative staff and proceeding "as informally and expeditiously as the circumstances of fairness permits" are valid Board objectives.

10 We are all agreed with McKeown J. that "law and policy require that some leeway be given an administrative tribunal with economic regulatory functions . . . in pursuing its mandate."

11 The appeal must therefore be dismissed with costs.

MacGUIGAN J.A.