Federal Court  Cour fédérale

Date: 20101129

Docket: T-470-08

Citation: 2010 FC 1204

BETWEEN:

TEVA NEUROSCIENCE G.P.-S.E.N.C

Applicant
(Moving Party)

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER

HUGHES J.

[1] This motion brought by Teva Neuroscience G.P. –S.E.N.C. arises from a Judgment that I gave in these proceedings on November 12, 2008 allowing Teva's application for judicial review and sending the matter at hand back to the Patented Medicines Prices Review Board for re-determination. Teva now seeks an Order that the re-determination of the matter is to take place on the existing record. For the reasons that follow I am dismissing this motion. The parties are agreed that no costs are to be awarded.

[2] In brief, as to the history of this matter, Teva has for a number of years sold in Canada a drug called Copaxone. The Patented Medicines Prices Review Board, pursuant to its powers under

the *Patent Act*, RSC 1985, C.P.-4, conducted an inquiry and hearing as to whether the price at which that drug was sold was "excessive". The Board determined that the price was "excessive" and imposed certain remedies that required Teva to pay over two million dollars to the Crown. Teva sought judicial review of that decision and the matter was heard by me. In my decision dated November 12, 2009 (2009 FC 1155) I allowed the judicial review. My conclusion as stated in paragraph 76 of the Reasons was:

> *[76] Both the decisions of February 25, 2008 and May 12, 2008 will be set aside. The matter will be returned to the Board for redetermination preferably by a different panel if sufficient members can be provided for that purpose. In redetermining the matter the Board must consider all factors in section 85(1) and provide intelligible, clear reasons as to the consideration and weight given to each factor. If the Board is unable to reach a conclusion having regard to all factors under section 85(1) it must say so and then consider section 85(2) and provide intelligible, clear reasoning as to its consideration. The Board should not simply give lip service to these matters and arrive at the same result. The Board should give a thorough reconsideration of the matter without considering that it is in any way bound to arrive at the same result.*

[3] The Judgment itself was as follows:

> ***THIS COURT ADJUDGES that:***
>
> *1. The two applications are allowed;*
>
> *2. The decisions of the Board dated February 28, 2008 and May 12, 2009 are quashed and returned for redetermination by a differently constituted Board, if available, in accordance with these reasons;*
>
> *3. Teva is entitled to its costs. Counsel should within two weeks from the date of this decision provide brief written submissions as to a lump sum quantum of costs.*

[4] I gave a further Judgment, with Reasons, as to costs (2009 FC 1206) which is not relevant here.

[5] No appeal was taken in respect of my Judgment, it is a final Judgment.

[6] The redetermination was taken up by the Board which has assigned different people to deal with the matter. The hearing of the redetermination has not yet occurred. It is scheduled for March 2011.

[7] The matter that gives rise to Teva's motion concerns an Order of the Board allowing Board Staff (in effect the party opposite Teva in the Board proceedings) to introduce further evidence into the record to be placed before the Board at the hearing of the redetermination.

[8] On September 15, 2010 the Board Staff served on Teva a Notice of Motion and supporting affidavit in which the Board was requested to permit the Board Staff to file "*additional evidence to supplement the existing evidentiary record*". The evidence was described in the supporting affidavit as follows:

> *a.* *Board Staff's updated calculation of excess revenue for Copaxone from May 2002 to June 2010;*
> *b.* *The PMPRB's NEWS letter excerpts from January 2007 to April 2010 relating to the Consumer Price Index (CPI) adjustment factors;*
> *c.* *Board Staff's table outlining the International Therapeutic Class Comparison for Copaxone;*
> *d.* *Board Staff's summary of the international prices of Copaxone (based on the Respondent's Block 5 filings, and Board Staff's publicly available sources); and*
> e. *The Respondent's "Form 2 filings" (price and sales information) in relation to Copaxone from January 2007 to June 2010.*

[9] The basis for the request by the Board Staff to permit this additional evidence to be filed was set out in its Notice of Motion as follows:

> *4. At the Redetermination Hearing, Board Staff intends to argue that the Redetermination Panel should find that Copaxone is and has been sold at an excessive price in Canada since 2004.*

> *5. Board Staff seeks an order allowing it to file supplementary evidence at the Redetermination Hearing. This evidence consists mainly of the most recent regulatory filings of the Respondent, which the Redetermination Panel will require in order to properly adjudicate the matter.*
>
> *6. Board staff submits that this additional evidence must be put before the Redetermination Panel so that it may be able to:*
>
> > *a. comply with the order of the Federal Court by considering all of the factors set out in subsection 85(1) the Patent Act; and*
> >
> > *b. calculate the current amount of excess revenues using the most current price and sales information which has been filed by the Respondent since the Original Hearing.*
>
> *7. Board Staff submits that this additional evidence is based on publicly available information and the Respondent's own regulatory filings with the Board since the Original Hearing and Original Decisions. The information is unlikely to be contentious.*
>
> 8. *Board Staff submits that the additional evidence represents an update of the evidence that was already before the Board at the Original Hearing. All of the additional evidence must be submitted so that the Board can make proper decision on whether Copaxone is being or has been sold at an excessive price in any market in Canada.*

[10] The Board made an Order, recorded in the transcript of the hearing of the motion on October 4, 2010, permitting the evidence to be filed and providing for terms as to responding evidence and the postponement of the date of the hearing (now further postponed to March 2011). The Board said:

> *What we have decided to do is, in effect, allow the Board's motion on the following terms.*
>
> *The first is that the Board – there are four elements to this and then if the parties have questions or clarification points they wish to make, that's fine.*
>
> *The first point is that the Board Staff will be permitted to file the evidence as outlined in its Motion Record that relates to the time*

> *period between January 2008 to the date of the 2010 filing most recent to the yet to be determined hearing date.*
>
> *Two, the Panel accepts Teva's submissions that absent an adjournment there would be indeed prejudice in this case because we are bringing in evidence relating to the actual assessment of excessive price. Consequently, the hearing is going to be adjourned to permit Teva to file additional evidence in accordance with this decision.*
>
> *Third, the Panel will not admit any evidence which relates to the time period preceding January 2008 unless the evidence could be demonstrated that it couldn't be obtained by the exercise of due diligence in preparation for and during the original hearing. We will leave it to the parties to raise objections on that point with respect to the evidence at the relevant time rather than try to address that today with respect to any particular piece of evidence.*
>
> *Four, it is the intention of this Panel to set the date for this hearing on the 15th, 16th and 17th of December 2010 and that the Secretary of the Board will be in contact with the parties about the timelines for the submission of evidence.*

[11] Shortly thereafter Teva filed the present motion with this Court for an Order that the redetermination must take place on the existing record, that is, the additional evidence should not be considered by the Board. On the hearing of the motion before me counsel for the Attorney General raised an issue as to whether the motion was filed in a timely manner but that argument was not vigorously pursued. I am satisfied as to timeliness.

[12] I asked Teva's Counsel to set out the basis upon which it would be argued that I have jurisdiction to make the Order sought. The answer was that Teva relies upon Rules 397 and 399 of the *Federal Courts Rules of Practice* which, it was argued, allow me to revisit and revise my Judgment of November 12, 2009 to insert words to the effect that the redetermination is to be made "*on the existing record*".

[13] This is not a fresh application for judicial review of the Board's decision to allow the additional evidence into the record. Counsel for each party are agreed that, except for exceptional circumstances, the Court on a judicial review application should not review interlocutory decisions made by a Tribunal in advance of a final decision (see e.g. *Szczecka* v. *Canada (MEI)* (1993), 116 DLR (4th) 3333 (FCA) para 4; *Sanofi-Aventis Canada Inc.* v. *Canada (AG)*, 2009 FC 965 at paras. 25-26). Instead, Teva argues that Rules 397 and 399 give me the power to revise my Judgment of November 12, 2009 to state that no additional evidence should be allowed on the redetermination.

[14] Rule 397 permits the Court to reconsider an Order that it made on the basis that it does not accord with the reasons, or some matter has been overlooked or omitted or there has been a clerical error:

Motion to reconsider ***397.*** *(1) Within 10 days after the making of an order, or within such other time as the Court may allow, a party may serve and file a notice of motion to request that the Court, as constituted at the time the order was made, reconsider its terms on the ground that* *(a) the order does not accord with any reasons given for it; or* *(b) a matter that should have been dealt with has been overlooked or accidentally omitted.* *Mistakes* *(2) Clerical mistakes, errors or omissions in an order may at any time be corrected by*	*Réexamen* ***397.*** *(1) Dans les 10 jours après qu'une ordonnance a été rendue ou dans tout autre délai accordé par la Cour, une partie peut signifier et déposer un avis de requête demandant à la Cour qui a rendu l'ordonnance, telle qu'elle était constituée à ce moment, d'en examiner de nouveau les termes, mais seulement pour l'une ou l'autre des raisons suivantes :* *a) l'ordonnance ne concorde pas avec les motifs qui, le cas échéant, ont été donnés pour la justifier;* *b) une question qui aurait dû être traitée a été oubliée ou omise involontairement.* *Erreurs*

the Court.	*(2) Les fautes de transcription, les erreurs et les omissions contenues dans les ordonnances peuvent être corrigées à tout moment par la Cour.*

[15] In the present case Teva argues that it is "manifest" from the Reasons given (2009 FC 1155) that I had intended, when ordering a redetermination, that no new evidence would be permitted. Reference is made to the decision of the Federal Court of Appeal in *Polylok Corporation v. Montreal Fast Print (1975) Ltd.*, [1984] 1 FC 713 at page 720 where Thurlow C.J. for the Court wrote in dealing with Rule 337(6) which is essentially the same as Rule 397:

> *That leaves for consideration only the wording "errors arising therein from any accidental slip or omission" in Rule 337(6). Having regard to the broad inherent authority exercised in times past by Courts to correct formal judgments or orders to make them accord with the judgment as pronounced or intended, it appears to me that this portion of the Rule should be given a scope which is broad enough to enable the Court to amend so as to make a judgment conform to what was intended when it was pronounced, but that it cannot and should not be used to authorize a judge to review or rescind his judgment or to alter it so as to reflect a change of mind as to what the judgment should have been.*

[16] I take these words as directing the Court to be very cautious before revising a Judgment under the provisions of that Rule. I ordered that the matter be "redetermined" I do not find any basis for amending the Judgment under Rule 397.

[17] Rule 399 provides that an Order may be set aside or varied for a number of reasons, the one relied upon by Teva is that the attempt by the Board Staff and subsequent Board Order permitting additional evidence is a matter arising "subsequent to the making of the order" thus requiring variance of the Order. Rule 399 provides:

Setting aside or variance

399. *(1) On motion, the Court may set aside or vary an order that was made*

(a) ex parte; or

(b) in the absence of a party who failed to appear by accident or mistake or by reason of insufficient notice of the proceeding,

if the party against whom the order is made discloses a prima facie case why the order should not have been made.

Setting aside or variance

(2) On motion, the Court may set aside or vary an order

(a) by reason of a matter that arose or was discovered subsequent to the making of the order; or

(b) where the order was obtained by fraud.

Effect of order

(3) Unless the Court orders otherwise, the setting aside or variance of an order under subsection (1) or (2) does not affect the validity or character of anything done or not done before the order was set aside or varied.

Annulation sur preuve prima facie

399. *(1) La Cour peut, sur requête, annuler ou modifier l'une des ordonnances suivantes, si la partie contre laquelle elle a été rendue présente une preuve prima facie démontrant pourquoi elle n'aurait pas dû être rendue :*
a) toute ordonnance rendue sur requête ex parte;
b) toute ordonnance rendue en l'absence d'une partie qui n'a pas comparu par suite d'un événement fortuit ou d'une erreur ou à cause d'un avis insuffisant de l'instance.

Annulation

(2) La Cour peut, sur requête, annuler ou modifier une ordonnance dans l'un ou l'autre des cas suivants :
a) des faits nouveaux sont survenus ou ont été découverts après que l'ordonnance a été rendue;
b) l'ordonnance a été obtenue par fraude.

Effet de l'ordonnance

(3) Sauf ordonnance contraire de la Cour, l'annulation ou la modification d'une ordonnance en vertu des paragraphes (1) ou (2) ne porte pas atteinte à la validité ou à la nature des actes ou omissions antérieurs à cette annulation ou modification.

[18] Teva's counsel relies on two cases in support of its submissions. The first is a decision of Gibson J. of this Court in *Smith* v. *Canada (MCI)* 2007 FC 712 in which another Judge had refused to stay a removal order of a person suffering from mental disorder on the basis that, upon returning to his home country, that person would be escorted to a nearby hospital. This condition was made on the basis of an undertaking given by the Crown to that effect. In fact this never happened. Relatives of the removed person sought a reversal of the order refusing a stay which, in effect, would mean the return of the person to Canada. Justice Gibson did that. In his Reasons he considered relevant jurisprudence including *Ayangma* and *Proctor & Gamble* at paragraphs 20-23:

> ***20*** *In Ayangma v. Her Majesty the Queen, Justice Pelletier, for the Court, wrote at paragraphs [2] and [3]:*
>
> > *Rule 399(2)(a) authorizes the Court to vary or set aside an order: "by reason of a matter that arose or was discovered subsequent to the making of the order".*
> >
> > *The jurisprudence establishes three conditions which must be satisfied before the Court will intervene:*
> >
> > *1 - the newly discovered information must be a "matter" with[in] the meaning of the Rule;*
> >
> > *2 - the "matter" must not be one which was discoverable prior to the making of the order by the exercise of due diligence; and*
> >
> > *3 - the "matter" must be something which would have a determining influence on the decision in question.*
>
> *In the foregoing quotation, and in particular in the third condition, Justice Pelletier provides that the "matter" at issue must be something which "...would have a determining influence..." on the decision in question. Given that the Order sought to be set aside or varied may, as here in respect of one order, have been made by a different judge from the one considering the motion, I do not read the words "would have a determining influence" as conclusive but rather as conditional as in "<u>might</u> have a determining influence".*

21 *In Proctor & Gamble Pharmaceuticals Canada Inc. v. Canada (Minister of Health), my colleague Justice Snider wrote:*

> *In satisfying the first part of the test, P & G must convince me that this is a new matter. The term "matter" is a word of broad import and may encompass something broader than fresh evidence... . "Matter" refers to an element of the relief sought as opposed to an argument raised before the court... . The new matter must be relevant to the facts giving rise to the original Order... .*

[citations omitted]

> *3) Matter that arose or was discovered subsequent to the making of the Order at issue*
>
> > *a) My Order dismissing the underlying application for leave and for judicial review*

22 *The alleged "matter" arising or discovered subsequent to the making of my Order dismissing the underlying application for leave and for judicial review, as with Deputy Justice Lagacé's Order denying a stay of removal, was the failure of the escorting officers, on their arrival with the Applicant in Kingston, Jamaica to ensure that he was "...transported from the airport to the Emergency Department at the Kingston Public Hospital on North Street, where he will be seen by Dr. Reed". That he was not so "transported" and that he did not, at the urging of his escorts from Canada, make his own way to the Kingston Public Hospital to meet with Dr. Reed, was not in issue before the Court. I am satisfied this constitutes a "matter" within the contemplation of Rule 399(2)(a). The question then arises, was it likely, or even conceivable, that Deputy Justice Lagacé relied on the undertaking by way of affidavit on this issue that was before him. In relation to my own Order, the question must be whether, if I had known about the issue regarding the evidence before Deputy Justice Lagacé, would I nonetheless have reached the decision that I did.*

23 *I conclude that the answer in relation to my Order must be that I would not, at least at the time that I made my Order, have made the Order that I did. Rather, since there was no compulsion in law for me to determine the question of leave on the application for leave and for judicial review when I did, it would have been the better course of action for me to have set aside the question before me until the issue surrounding Deputy Justice Lagacé's Order was resolved. In so doing, I would have preserved the jurisdiction of*

> *this Court to deal with that controversy, if necessary, and in no way would I have prejudiced either the Applicant or the Respondent.*

[19] I conclude from this analysis that the "matter arising subsequent to the Order" must be one that, if not had been discovered or arisen previous to the making of the Order would have been relevant to the factual basis giving rise to the original Order.

[20] The other case relied upon by Teva by Teva is *Canwell Enviro-Industries Ltd. v. Baker Petrolite Corporation*, 2002 FCA 481 in which the Court amended an earlier order giving an award of damages so as to include an award of interest as well. Strayer JA for the Court wrote at paragraphs 6 & 7:

> ***6*** *I believe we should treat this as a motion under paragraph 399(2)(a) and sub-rule (3) which provide as follows:*
>
> *399(2) On motion, the Court may set aside or vary an order that was made*
>
> *(a) by reason of a matter that arose or was discovered subsequent to the making of the order;....*
>
> *(3) Unless the Court orders otherwise, the setting aside or variance of an order under subsection (1) or (2) does not affect the validity or character of anything done or not done before the order was set aside or varied.*
>
> * * *
>
> *399(2) La Cour peut, sur requête, annuler ou modifier une ordonnance dans l'un ou l'autre des cas suivants :*
>
> *a) des faits nouveaux sont survenus ou ont été découverts après que l'ordonnance a été rendue; ....*
>
> *(3) Sauf ordonnance contraire de la Cour, l'annulation ou la modification d'une ordonnance en vertu des paragraphes (1) ou (2) ne porte pas atteinte à la validité ou à la nature des actes ou*

> *omissions antérieurs à cette annulation ou modification.*
>
> *It was the natural consequence of our judgment setting aside the trial judge's judgment that this removed any equitable claim which the plaintiffs had to the money paid to them. It was not unreasonable on the part of the defendants to assume that the plaintiffs would repay such money to the City together with the value of the money (i.e. interest) enjoyed by them during the period when they were not equitably entitled to it. The fact that they would object to payment of interest did not become apparent until well after disposition of the appeal.*
>
> **7** *As it is fully consistent with our decision of April 29, 2002 setting aside the trial judgment that the parties should as far as possible be returned to the position they would have enjoyed had there been no such trial judgment, and as the plaintiffs' unwillingness to acknowledge this principle constitutes a new matter, this Court should order pre-judgment (i.e. prior to our judgment of April 29, 2002 going back to October 18, 2001), and post-judgment (subsequent to that judgment) interest up until the day of full payment of these interest charges, at rates for the relevant times calculated, as provided in sub-sections 36(1) and 37(1) of the Federal Court Act, on the basis of the law of Alberta, the province where the course of action arose vis à vis the City of Medicine Hat. The parties have not provided the Court with precise terms of that law.*

[21] This case I regard as being directed essentially to a matter overlooked even though the addition of interest was triggered by a defendant's refusal to pay interest subsequent to the original judgment.

[22] In the present case I gave a Judgment that the matter be "redetermined". There has been surprisingly little jurisprudence as to what that word means. In *Torres v. Canada (MEI),* [1983] 2 F.C. 81 Heald J.A. for the majority wrote at pages 95 and 96:

> *In my view, the redetermination is, in essence, a review of the Minister's decision. Neither the*
>
> *À mon avis, ce réexamen constitue essentiellement une révision de la décision du*

statute nor the regulations provide a definition of "redetermination" as used in this statutory scheme. However, The Living Webster Encylopedic Dictionary of the English Language gives the following definition of "redetermine": "…To come again to a decision; to ascertain after reinvestigation." I think the Board is required to review the Minister's decision and to come to its own opinion as to the correctness of that decision.	*Ministre. Ni la loi ni le règlement ne donnent une définition du mot « réexamen » employé dans cette disposition législative. Voici toutefois la dédinition que donne The Living Webster Encyclopedic Dictionary of the English Language du mot « redetermine » (réexaminer) : [TRADUCTION] « … Arriver de nouveau à une décision; reconnaître pour vrai après une nouvelle enquête ». Je crois que la Commission est tenue de réexaminer la décision du Ministre et d'arriver à sa propre conclusion sur le bien-fondé de cette décision.*

[23] That decision was considering "redetermination" in the context of the then existing Immigration Act and emphasizes that much depends on the statutory framework of the relevant legislation.

[24] The Supreme Court of Canada in *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, in a split decision, considered what a Board was to do if a matter was returned to a Board for a continuation of the original proceedings. Sopinka J. for the majority wrote that, in such circumstances, additional evidence could be received. At page 86 he wrote:

On the continuation of the Board's original proceedings, however, either party should be allowed to supplement the evidence and make further representations which are pertinent to disposition of the matter in accordance with the Act and Regulation. This will	*Cependant, à la continuation des procédures initiales par la Commission, chaque partie devrait pouvoir compléter la preuve et présenter d'autres arguments pertinents aux fins de régler l'affaire conformément à la Loi et au Règlements. Cela permettra aux appelants*

enable the appellants to address, frontally, the issue as to what recommendations, if any, the Board ought to make.	*d'aborder directement la question des recommandations que la Commission devrait faire, le cas échéant.*

[25] Standing back and looking at the circumstances of the present situation, I gave a Judgment in November 2009 requiring that a matter be "redetermined". I gave no further directions as to how that redetermination was to be conducted, I gave no shopping list as to what could or could not be done. I view the present motion as one which, in effect, requires the Court to exercise continuing supervisory jurisdiction over the steps the Board may take or refuse to take in the course of conducting its redetermination. This is not the Court's function. If and when the Board makes a final decision one of the parties may, if so advised, apply for judicial review. One of the grounds asserted may be that the admission of further evidence (or whatever other procedural step is at issue) did not constitute a proper redetermination. That is a matter for another day, once the final decision of the Board is made. Teva argues that it would be wasteful to await a full hearing and final determination. That may be, but wastefulness alone is not a reason to intervene now if no proper basis for doing so has been made out. It may be, at the end of the day, that the procedures invoked by the Board had no effect on the final outcome. The Board itself is presumably equally aware that it should not make rulings of such a nature that would require its final determination to be set aside.

[26] Therefore, I will dismiss the motion.

"Roger T. Hughes"
Judge

Toronto, Ontario
November 29, 2010

FEDERAL COURT

SOLICITORS OF RECORD

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