

Federal Court of Appeal



Cour d'appel fédérale

Date: 20231101

Docket: A-196-22

Citation: 2023 FCA 216

**CORAM: WOODS J.A.
LASKIN J.A.
MONAGHAN J.A.**

BETWEEN:

ACTIAL FARMACEUTICA S.R.L.

Appellant

and

THE MINISTER OF HEALTH

Respondent

Heard at Toronto, Ontario, on November 1, 2023.

Judgment delivered from the Bench at Toronto, Ontario, on November 1, 2023.

REASONS FOR JUDGMENT OF THE COURT BY:

LASKIN J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, on November 1, 2023).

LASKIN J.A.

[1] Actial Farmaceutica S.R.L. appeals from an order of the Federal Court (2022 FC 971, Fothergill J.). In its order, the Federal Court dismissed, with costs, an application by Actial for judicial review of a decision of the Minister of Health under subsection 44(1) of the *Access to Information Act*, R.S.C. 1985, c. A-1 (ATIA). The Minister's decision was rendered in response

to a request for disclosure of information pertaining to a food supplement (VSL) licensed to Ferring Inc. under the *Natural Health Products Regulations*, S.O.R./2003-196.

[2] Subsection 20(1) of the ATIA requires the head of a government institution to refuse to disclose any record that contains, among other things,

- trade secrets of a third party (s. 20(1)(a));
- financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party (s. 20(1)(b));
- information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party (s. 20(1)(c)); or
- information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party (s. 20(1)(d)).

[3] By subsections 27(1) and 28(1) of the ATIA, if the head of a government institution intends to disclose a requested record that contains (or that the head has reason to believe might contain) information in any of these categories, the head must notify the third party and give the third party an opportunity to make representations as to why the record should not be disclosed. If the head then decides to disclose the record, the third party who received the notice may, by subsection 44(1), apply to the Federal Court for a review of the matter.

[4] Here, Health Canada notified Ferring of the access request and gave it an opportunity, which it exercised, to make representations as to why the information requested should not be disclosed. The Minister decided that most, but not all, of the redactions sought by Ferring should be applied. However, information contained in two documents remained in dispute.

[5] In the meantime, Ferring had forwarded Health Canada's letter to Actial. Actial is the parent company of the supplier of VSL, the food supplement that was marketed by Ferring in Canada.

[6] Actial—not Ferring—applied under subsection 44(1) of the ATIA for judicial review of the Minister's decision. Shortly before the application was commenced, Actial had submitted to Health Canada a licence transfer notification in respect of the two licences of VSL. Shortly after the commencement of the application, Health Canada confirmed that ownership of one of the two licences—the other being “inactive”—had been transferred from Ferring to Actial.

[7] In dismissing the application, the Federal Court first considered the question of Actial's standing. It was “not persuaded” that Actial was a third party under the ATIA with standing to commence the application. It went on to find that, in any event, Actial failed to meet its burden of showing that the information in issue should be exempt from disclosure. On appeal, Actial challenges both of these determinations.

[8] I will deal with the latter determination first. There is no dispute that, in an application under subsection 44(1), the applicant bears the burden of showing that an exemption applies: *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 92. The parties also agree that the applicable standard of review on this issue is the highly deferential standard of palpable and overriding error: *Canada (Health) v. Elanco Canada Limited*, 2021 FCA 191 at paras. 32-33. This means that it is no part of our role on appeal to reweigh the evidence considered by the Federal Court.

[9] In considering the applicability of the exemptions, the Federal Court found that Actial had failed to identify the specific information that it maintained was exempt. It noted that, by contrast, “[t]he exhibits attached to the affidavits tendered on behalf of the Minister identifi[ed] numerous instances where the information Actial [sought] to protect against disclosure [was] already in the public domain.” The Federal Court then proceeded to make a series of factual findings on which it based its conclusion with respect to each exemption that Actial submitted applied.

[10] As it did before the Federal Court, Actial invokes in this Court all four of the exemptions from disclosure potentially open to it, but focuses primarily on the exemption for trade secrets. It essentially reargues on this point the case that it put forward at first instance.

[11] We have considered the record before us, the reasons of the Federal Court, and the submissions of the parties. Having done so, we can see no palpable and overriding error on the part of the Federal Court. There is, accordingly, nothing that could warrant our interfering with its determination that Actial failed to meet its burden.

[12] In light of this conclusion, there is no need for us to consider the standing issue. We decline to do so.

[13] For these reasons, the appeal will be dismissed with costs.

“J.B. Laskin”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

**APPEAL FROM THE DECISION OF THE HONOURABLE JUSTICE S. FOTHERGILL
OF THE FEDERAL COURT DATED JUNE 29, 2022, DOCKET: T-6-20**

DOCKET: A-196-22

STYLE OF CAUSE: ACTIAL FARMACEUTICA
S.R.L. v. THE MINISTER OF
HEALTH

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 1, 2023

REASONS FOR JUDGMENT OF THE COURT BY: WOODS J.A.
LASKIN J.A.
MONAGHAN J.A.

DELIVERED FROM THE BENCH BY: LASKIN J.A.

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