**Date: 20080930**

**Docket: T-470-08**

**Citation: 2008 FC 1091**

**Toronto, Ontario, September 30, 2008**

**PRESENT: Madam Prothonotary Milczynski**

**BETWEEN:**

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

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

## REASONS FOR ORDER AND ORDER

[1] Teva Neuroscience G.P.-S.E.N.C. ("Teva") seeks judicial review of the Patented Medicine Prices Review Board's decision dated February 25, 2008 that Teva's drug Copaxone was priced excessively, as well as the Board's final order and reasons dated May 12, 2008 that Teva was required to make payment to Her Majesty the Queen in Right of Canada as a consequence.

[2] On this motion, Teva seeks leave to file portions of its supporting affidavit and application record in accordance with Rule 152 of the *Federal Court Rules*, and to vary the schedule in this matter. Teva has filed the consent of the Respondent and a draft order. For the reasons below, however, the motion is dismissed.

[3] Rule 152 of the *Federal Courts Rules* provides that where material is required by law to be treated confidentially or where the Court has so ordered, a party may file the material in such a manner that the public does not have access to that part of the Court file.

[4] Pursuant to Rule 151 of the *Rules*, before making such an extraordinary order, the Court must be satisfied that the material should be treated as confidential, outweighing the public interest in open and accessible court proceedings. This is not a casual exercise nor should the exceptional relief sought by any party be taken lightly. The test is clear, as set out in the Supreme Court of Canada decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, the fundamental question is whether the right to freedom of expression and the integrity and principle of an open judicial process should be compromised. A confidentiality order should only be granted when there is sufficient evidence before the Court to satisfy the Court that it is necessary to prevent a serious risk to an important interest, including a commercial interest, and whether the salutary benefits of the order including the right of the litigants to a fair trial outweigh its effects on the public interest in open courts.

[5] In this case, Teva seeks to have two categories of information sealed. As defined in the draft order, they are:

(i) the information that it and the Patented Medicine Prices Review Board staff agreed to treat as confidential during the proceeding before the Board; and

(ii) those documents which the Patented Medicine Prices Review Board ordered should be treated as confidential.

[6] Both categories of information are more generally described in the affidavit of Brad Elberg, a lawyer with the law firm representing Teva. The information that was kept confidential by agreement is described as "proprietary pricing information about Copaxone's Average Transaction Price, its Maximum Non-Excessive Price, and other confidential information that Teva was required to provide to Board Staff as part of its regulatory filing under the *Patent* Act" (specifically this information is what is described in the regulatory filing Block 4).

[7] In support of maintaining the confidentiality of this information in this proceeding, Mr. Elberg's affidavit states that he is advised by Teva's General Manager, Mr. Jon Congleton, that "Teva has always considered this information to be confidential, has always treated it as confidential, would not disclose it upon request, that the disclosure of this information to its competitors would cause direct and substantial harm by providing a competitive advantage to its competitors, and that such disclosure may also damage Teva's relationship with its customers". But for the requirements of the *Act*, this information would not have been disclosed outside of Teva's corporate organization.

[8] On the basis of these assertions and the evidence as filed, I am unable to conclude that this part of Teva's non-public pricing information should be sealed and that public access to the Court

file should be restricted. It is not clear from the motion record what this information even is or how its disclosure could cause Teva harm or create an unfair advantage to its competitors such that the result, as between pharmaceutical companies or the impact on the pharmaceutical industry, is not in the public interest. The motion record simply refers to defined terms without any definition or elaboration that would assist the Court and the draft order simply makes reference to "those documents" that were "treated as confidential" by agreement between Teva and Board staff. The Court cannot, however, merely serve as a rubber stamp to whatever agreements counsel may enter into regarding confidentiality and the sealing of public records – an open court process and the public interest can only be curtailed in clear cases.

[9] With respect to the information that was ordered to be kept confidential by the Board, this information is described as Teva's proprietary international pricing information for Copaxone. The confidentiality of this information was challenged by Board staff, and made the subject of a preliminary hearing and order of the Board that granted the confidentiality order sought by Teva.

[10] Upon my review of the record filed on this motion, what might be regarded as proprietary at best, is the format of this information and Teva having collected and organized it. This information, however, is information that is acknowledged to be public information. Mr. Elberg states in his affidavit that "while this information may be collected from various places in the public, the disclosure of Teva's international pricing information to the public would reduce the time, effort, and associated expense that its competitors would be required to expend in order to obtain it, thereby granting them a competitive advantage that they may not otherwise have." Mr. Elberg is

further advised by Mr. Congleton that such disclosure may damage Teva's relationship with its customers. Mr. Congleton had this to say about this information in the hearing before the Board:

> "I think the reason we would like to have this kept confidential is while it is public information, it is very rare to see it compiled in this manner….It is something that our competition would obviously love to have something compiled like this. It is certainly not to say they could not generate it. It is certainly not to say that they could not get access to it, but it would be through a great deal of effort for them as opposed to if this became public information, they would easily have access to it and it would give them basically an insight into our broader global strategic pricing.."

[11] On cross-examination, Mr. Congleton agreed that the information in the charts was publicly available, and that it was most likely that Teva's competitors already had it.

> "I'm not suggesting they would be surprised. I think what this does right here, because this is our information and pricing information, it may serve as a validation for the data that they have sought out. If our competitors in the various countries are looking for the pricing, we are not going to provide it to them. They would be getting it from various customers. What I have concern about is that this would validate their research in the various countries."

[12] Finally, this exchange:

- Q. those are publicly available prices, nothing else. Isn't that right?
- A. That's true.
- Q. And if it is publicly available to you, it is publicly available to them.
- A. That's correct.

- Q. So there is no reason to believe that every piece of information on this sheet, Schedules 3 and 4, are not in the hands of your competitors already. Isn't that right?
- A. That is an assumption that I can't validate. I don't know if it is or isn't.
- Q. It is available to them.
- A. It is available to them.

[13] While the Board ruled that Teva could file this information confidentially, I cannot reach the same conclusion. That part of the motion dealing with this category of information (what was ordered to be confidential by the Board) is dismissed. The information about international pricing is in the public domain – the fact that Teva has compiled it or has it organized in a certain way, does not automatically or necessarily make it confidential – even if it eases the burden on someone else.

[14] With respect to the information that Teva and Board staff treated as confidential, as noted above, there is insufficient evidence to conclude that "Copaxone's Average Transaction Price", its "Maximum Non-Excessive Price", and "other confidential information that Teva was required to provide to Board Staff as part of its regulatory filing under the *Patent* Act" should be filed with this Court on a confidential basis. This lack of adequate evidence leaves me without the ability to determine whether there is any merit to Teva's claims and whether that part of the order sought should be granted. Giving Teva the benefit of the doubt, this part of the motion is dismissed without prejudice to a further motion being brought in respect of this category of information.

**ORDER**

**THIS COURT ORDERS that:**

1. Teva may, within twenty (20) days of the date of this Order, file a further motion pursuant to Rule 151 of the *Federal Court Rules* in respect of the information that it and the Patented Medicine Prices Review Board staff agreed to treat as confidential, and to seek an extension of time for the filing of its supporting affidavit.

2. In the event Teva does not bring a further motion, Teva shall file its supporting affidavit within twenty (20) days of the date of this Order, after which the time limits in the *Federal Courts Rules* will apply.

3. The balance of this motion is dismissed.

"Martha Milczynski"
Prothonotary

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-470-08 |
| **STYLE OF CAUSE:** | TEVA NEUROSCIENCE G.P.-S.E.N.C.<br>v.<br>ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | September 30, 2008 |
| **REASONS FOR ORDER AND ORDER:** | MILCZYNSKI P. |
| **DATED:** | September 30, 2008 |

**APPEARANCES:**

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|---|---|
| No Appearance (done in writing) | FOR THE APPLICANT |
| No Appearance (done in writing) | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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|---|---|
| Heenan Blaikie LLP<br>Toronto, Ontario | FOR THE APPLICANT |
| The Attorney General of Canada<br>Ottawa, Ontario | FOR THE RESPONDENT |