

Federal Court of Appeal



Cour d'appel fédérale

A-136-89

CORAM: HUGESSEN J.A.
STONE J.A.
LINDEN J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant
(Defendant)

- and -

**SMITH KLINE & FRENCH LABORATORIES LIMITED,
SMITH KLINE & FRENCH CANADA LIMITED
GRAHAM JOHN DURANT, JOHN COLIN EMMETT
and CHARON ROBIN GANELLIN**

Respondents
(Plaintiffs)

Heard at Ottawa, Ontario, Tuesday, May 13, 1997.

Judgment rendered from the Bench, May 13, 1997.

REASONS FOR JUDGMENT OF THE COURT
DELIVERED BY:

HUGESSEN J.A.



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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario,
Tuesday, May 13, 1997)

HUGESSEN J.A.

This is an appeal by the Attorney General from an order of MacKay J. refusing to vary the terms of certain confidentiality orders which had been issued by the Court, on consent of all parties, in the course of litigation in which the respondents had unsuccessfully attacked the compulsory licensing provisions of the *Patent Act*. The Attorney General sought and seeks to be relieved from

the confidentiality orders to which he had consented so as to allow him to make available to the Minister of National Revenue certain materials relevant to alleged transfer pricing of goods acquired by the respondent Smith Kline & French Canada Limited from offshore affiliates; the materials did not emanate from that respondent. Although the Minister of National Revenue wishes to have access to these materials for the purpose of an income tax audit, neither he nor the Attorney General has invoked the specific and extensive statutory powers conferred upon him by the *Income Tax Act*. This fact significantly distinguishes the present case from this Court's recent decision in *ATG Limited v. The Attorney General of Canada*². Indeed, all that was invoked by the Attorney General both before MacKay J. and before us was the Court's discretionary power, in an appropriate case, to vary the terms of orders restricting access to documents in its possession. After a thorough and careful analysis, MacKay J. concluded that he should not exercise that discretion as requested. He said:

If counsel for the Attorney General consents to an order that evidence be maintained in confidence, or if he is subject to such an order even without consent, that order should not be varied merely because there arises some other public interest, collateral to the action in which the order is made. Only the most exceptional reason would warrant variation of the order. Otherwise, the interests of justice served by the modern discovery process would tend to be frustrated. Parties engaged in actions by or against the Crown would seek to avoid disclosure of information which might at some future date, regardless of the outcome of the original action, be sought for use by the Crown for some purpose unrelated to the original action. This might be the case particularly if information sealed as confidential in court records were to be made available to the Minister of National Revenue when he is engaged in reassessing tax liability of any party who might have been involved in an action with the Crown.

That responsibility of the Minister, assessing liability for tax, is an ongoing one, in no way dependant upon documents or other evidence provided in actions in this or any court. In this case that responsibility existed in relation to the Canadian corporate respondent before the original action was commenced, throughout the proceedings and it continues today. It is not a new responsibility even though it may be a new circumstances that a decision has apparently been made to conduct a special audit of

that respondent's tax liability. This is not, it seems to me, a compelling reason to now vary the "Confidentiality Orders" made earlier in the action between the parties and with consent of the applicant.

(Appeal Book, Vol. III, at pages 223-224)

We are quite unable to say that the judge committed any error of principle, gave weight to irrelevant matters or overlooked any relevant factor.

The appeal will be dismissed with costs.



J.A.

FEDERAL COURT OF APPEAL

A-136-89

B E T W E E N :

THE ATTORNEY GENERAL OF CANADA

Appellant
(Defendant)

- and -

**SMITH KLINE & FRENCH LABORATORIES
LIMITED,
SMITH KLINE & FRENCH CANADA LIMITED
GRAHAM JOHN DURANT, JOHN COLIN
EMMETT
and CHARON ROBIN GANELLIN**

Respondents
(Plaintiffs)

REASONS FOR JUDGMENT OF THE COURT

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.:

A-136-89

STYLE OF CAUSE:

The Attorney General of Canada v.
Smith Kline & French Laboratories
Limited,
Smith Kline & French Canada
Limited
Graham John Durant, John Colin
Emmett
and Charon Robin Ganellin

PLACE OF HEARING:

Ottawa, Ontario

DATE OF HEARING:

May 13, 1997.

REASONS FOR JUDGMENT OF THE COURT:

(Hugessen, Stone & Linden J.J.A.)

RENDERED FROM THE BENCH BY:

Hugessen J.A.

APPEARANCES:

Mr. Roger Leclaire

for the Appellant

Mr. Robert W. Staley

for the Respondent

SOLICITORS OF RECORD:

Mr. George Thomson
Deputy Attorney General of Canada
Ottawa, Ontario

for the Appellant

Bennett Jones Verchere
Toronto, Ontario

for the Respondent