

PATENTS

Appeal from Federal Court (F.C.) decision (2017 FC 22) dismissing appellant's appeal from Prothonotary's decision (2016 FC 716) granting respondent's motion to dismiss appellant's application for judicial review seeking declaration of unconstitutionality, order prohibiting Patented Medicine Prices Review Board (Board) from commencing proceeding against appellant — Appellant selling drug Soliris — Board alleging price of Soliris excessive, seeking order to reduce price — Declaratory judgment sought by appellant related to *Patent Act*, R.S.C., 1985, c. P-4, ss. 83-86, words “in any proceeding under section 83” in Act, s. 87(1) — Appellant not raising this constitutional issue before Board — Provisions in 1993 amendments to Act giving Board its current suite of powers — Court in *Canada (Attorney General) v. Sandoz Canada Inc.*, 2015 FCA 249 (*Sandoz*) seeing 1993 amendments as enhancing Board's remedial powers, holding provisions to be constitutional exercise of Parliament's authority in relation to patents — Court holding in *Sandoz, inter alia*, that price control scheme retaining its constitutional validity when applied to non-patent owners or holders — Here, F.C. concluding that *Sandoz* binding authority, Prothonotary correct — Neither Prothonotary nor Federal Court Judge advertent to possibility of declining to hear application on basis that it was inappropriate for appellant to bypass Board and raise its constitutional challenge for first time in F.C. — Issues whether *Sandoz* binding authority, whether appellant entitled to bypass Board, bring its constitutional challenge directly to Federal Court on judicial review — Normal rule is that parties to administrative proceeding may proceed to court system only after all adequate remedial recourses in administrative process exhausted — This rule applying to constitutional issues — No reasons here justifying exception to the rule — In bypassing Board, application undermining its position as first-instance forum for decisions of fact, law within its mandate, depriving reviewing court of Board's insights on purpose, operation of challenged provisions — Since appeal fully argued on its merits, in interest of judicial economy, issue as framed by appellant considered herein nonetheless — F.C. correct in concluding that Court actually decided in *Sandoz* that provisions of Act appellant seeking to challenge validly enacted by Parliament — Court “actually decid[ing]” in *Sandoz* that price control scheme as a whole is constitutional — Its conclusion on constitutional issue element of “dispositive *ratio decidendi*” rather than merely part of “wider circle of analysis” — No doubt that Court addressing pith, substance in *Sandoz* — “Fullness” of a court's analysis not a determinant of what it decided — Court in *Sandoz* not overlooking any of Board's powers in deciding constitutionality of statutory scheme — No basis to conclude that validity of scheme not decided — Appeal dismissed.

ALEXION PHARMACEUTICALS INC. V. CANADA (ATTORNEY GENERAL) (A-51-17, 2017 FCA 241, Laskin J.A., judgment dated December 7, 2017, 26 pp.)