Federal Court  Cour fédérale

Date: 20150811

Docket: T-1692-14

Citation: 2015 FC 963

Toronto, Ontario, August 11, 2015

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

CHERYL ANNE SWARATH
JEROME MARIO SWARATH
CAROLE LOVERNE SHELDON
JODY BAXMEYER AND NORTHREGENTRX

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The *Public Servants Disclosure Protection Act* (SC 2005, c 46) [*PSDPA*, Act] is a disclosure regime designed to ensure that Canadians are protected by a lawful, transparent and uncorrupted public service. The preamble to the Act reinforces this purpose, stating "it is in the public interest to maintain and enhance public confidence in the integrity of public servants" and

"confidence in public institutions can be enhanced by establishing effective procedures for the disclosure of wrongdoings and for protecting public servants who disclose wrongdoings, and by establishing a code of conduct for the public sector."

[2] On July 2, 2014, the Public Safety Integrity Commissioner of Canada [Commissioner] declined to commence an investigation into the alleged misconduct of employees of Health Canada [Decision]. The misconduct, characterized by sections 8(a), (c) and (e) of the *PSDPA*, related to five allegations of wrongdoing. The Commissioner determined that four of these allegations fell outside the scope of his jurisdiction as they occurred prior to April 15, 2007, the date the *PSDPA* came into effect, and dismissed the remaining allegation on account of insufficient evidence to support that a wrongdoing had been committed. This is the judicial review of that Decision.

II. Facts

[3] NorthRegentRx is a Canadian company operated by the self-represented Applicants before this Court: Cheryl Anne Swarath, Jerome Mario Swarath, Carol Loverne Sheldon and Jody Baxmeyer. In 2004, the Applicants obtained the distribution rights in Canada and the Caribbean to Libidus, an herbal supplement intended to aid blood circulation. Libidus was purchased by NorthRegentRx as a finished product in blister sealed capsules, with ten to a box, and subsequently wholesaled to health and nutritional supplement stores.

[4] The Applicants testify that on July 13, 2006, they were contacted by Mr. Gustafson, a Health Canada Food Branch Inspectorate [HCFBI] Officer, who was following up on a health

warning issued by the United States Food and Drug Administration [US FDA] which claimed that Libidus improperly contained acetildenafil, a substance analogous to Viagra. The Applicants provided the HCFBI Officer with test results of their product from private laboratories that disputed the US FDA's statement, but the HCFBI Officer still decided to send the product to a Health Canada laboratory for further testing.

[5] On July 27, 2006, the HCFBI Officer called the Applicants to inform them that Health Canada's preliminary tests showed that the product did not contain acetildenafil, but would be further examined.

[6] On August 25, 2006, the Applicants received a letter from the Canada Border Services Agency [CBSA], informing them that it had confiscated 450 units of Libidus that were in transit to NorthRegentRx.

[7] On September 14, 2006, NorthRegentRx received a letter from the HCFBI Officer issuing a recall of Libidus. The Applicants depose that NorthRegentRx consequently lost $600,000 in sales from September 2006 to January 2007 and suffered a loss of goodwill and trust from their customers as a result of its impugned credibility.

[8] The Applicants further allege that on September 22, 2006, the HCFBI Officer instructed an employee of Health Canada, Val Huzel, to sign out the confiscated units of Libidus that had been seized on August 25, 2006 and were in the possession of a courier company, only to return

them three hours later. The Applicants speculate that the product could have been tainted by Ms. Huzel during this disruption in the chain of custody.

[9] On September 29, 2006, the HCFBI Officer mailed a letter communicating the results of the Libidus product testing performed by Health Canada. The Applicants disputed this report with the HCFBI Officer, arguing that Health Canada's evidence "looked suspiciously like two photographs from text books."

[10] Further details were provided in a March 2007 lab report and a July 12, 2007 letter from the HCFBI Officer concluding that the "Laboratory analysis conducted by Health Canada determined that samples of Libidus…contained piperdino vardenafil as an undeclared ingredient." These documents were also contested (Applicant's Record [AR], p 56). The July 12, 2007 letter further advised the Applicants that Health Canada had seized control of the 450 units of Libidus already confiscated by the CBSA due to NorthRegentRx's alleged violations of the *Food and Drugs Act* (RSC, 1985, c F-27) [FDA], and the *Food and Drug Regulations*, (CRC, c 870) [AR, p 58].

[11] In March 2008, the Applicants reached out to J. David Graham, a former drug chemist with Health Canada who concluded, contrary to Health Canada's reports, that "the testing failed to prove the presence of piperidenafil and the determination of the amount of piperidenafil is flawed" (AR, p 161). The Applicants also obtained the assistance of their Member of Parliament in January 2009, who wrote a letter to the Minister of Health in an effort to recapture the regulatory approval for Libidus.

[12] After a failure to come to terms with the representatives of Health Canada, including a meeting in April 2010 that was postponed by the Applicants to allow them time to acquire further evidence related to their scientific evaluation and business loss valuation, a statement of claim for damages was filed in Federal Court.

[13] Justice Mosley struck the statement of claim for failing to disclose a reasonable cause of action in *Swarath v Canada*, 2014 FC 75, concluding that:

> [29]… there is no proximity in the relationship of the parties that would make it reasonable to impose a duty of care on the defendants to ensure that their examination of the products and administration of the regulatory scheme does not result in economic damage to the plaintiffs.

[14] On March 31, 2014, the Applicants filed a disclosure of wrongdoing with the Office of the Public Sector Integrity Commissioner of Canada. The Commissioner synthesized the Applicants' submissions into five allegations of wrongdoing, conducted by various Health Canada employees (Respondent's Record [RR], p. 10):

1. A failure to rescind a direction to halt the sale of Libidus, even though the Applicants had shown that the product was not contaminated with a prescription drug;

2. A failure to follow the proper sampling procedures in the testing of Libidus;

3. Gross mismanagement, as a result of relying on "flawed science" to establish the presence of an undeclared prescription drug in Libidus;

4. Recalling Libidus based on the private interests of the HCFBI Officer, who went to work for a direct competitor of the Applicants for a two year period after the completion of the Libidus investigation in July 2007. The Officer eventually returned to Health Canada, which the Applicants allege creates a perception that there was a conflict of interest;

5. The destruction of 450 boxes of Libidus on July 12, 2007 without the Applicants' consent.

[15] In his Decision dated July 2, 2014, the Commissioner declined to investigate the allegations noted in the disclosure, concluding that allegations #1-4 listed above pre-dated April 15, 2007, the date the *PSDPA* came into force. Thus, the Commissioner found that he lacked the jurisdiction to address the first four allegations.

[16] The Commissioner therefore only made a substantive ruling with respect to the final allegation. Regarding this fifth allegation, the Commissioner found that there was inconclusive evidence that 450 units of the seized product had been destroyed. In any event, even if these units were destroyed, he found that the consent of the courier company, UPS, which had been in possession of the boxes since the time of its seizure, would have been sufficient authorization under the law to properly destroy the product. The Commissioner concluded that since the Applicants did not provide any information to suggest that consent for destruction from UPS had not been obtained, he had no reason to believe that the officials of Health Canada contravened section 27(1) of the *FDA*. Therefore, the Commissioner had no reason to believe a wrongdoing had been committed, pursuant to section 33 of the *PSDPA*.

III. Preliminary Issues

[17] There are two preliminary issues I shall address before reviewing the reasonableness of the Commissioner's Decision.

[18] First, upon request of the Respondent, and as directed at the hearing, I allow the style of cause to be amended from the Office of the Public Sector Integrity Commissioner of Canada to

the Attorney General of Canada, in accordance with Rule 303(2) of the *Federal Courts Rules* (SOR/98-106).

[19] Second, three days before the hearing, the Applicants filed a motion for leave to file a supplementary affidavit and leave to file additional evidence. At the hearing, after arguments on this point, I informed the litigants that I would reserve my decision on whether to admit this evidence.

[20] As the Federal Court of Appeal emphasized in *Mazhero v Canada (Industrial Relations Board)*, 2002 FCA 295 at para 5, "the discretion of the Court to permit the filing of additional material should be exercised with great circumspection" (see also *Boshra v Canadian Association of Professional Employees*, 2010 FCA 72 at para 3). I agree with the Respondent that the additional evidence, which stemmed from an access to information request and which was not before the Commissioner, is of little relevance to whether the Commissioner's discretion was exercised reasonably on the record before him (*Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 88 at para 10 [*Forest Ethics*]). The short time frame the Respondent was given to examine the additional evidence was also prejudicial (*Forest Ethics* at para 12). I therefore decline the motion and will proceed on the basis of the judicial review as it was initially brought.

IV. Issues

[21] This judicial review turns on the following questions:

a) Was the Commissioner's Decision to dismiss the first four allegations occurring prior to the enforcement date of the PSDPA reasonable?

b) Was the Decision reasonable with respect to the fifth allegation?

V. Standard of Review

[22] In the seminal case of *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], the Supreme Court of Canada concluded that Courts are presumed to review administrative decisions for reasonableness (*Dunsmuir* at para 146). This means that this Court must assess whether the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47).

[23] In their Notice of Application, the Applicants pled that "the Public Sector Integrity Commissioner of Canada refused to exercise its jurisdiction; thus breaching a principle of procedural fairness and ignoring evidence." Breaches of procedural fairness are reviewed on a standard of correctness in order to ensure that parties have a meaningful opportunity to present its case fully and fairly (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Uniboard Surfaces Inc v Kronotex Fussboden GmbH*, 2006 FCA 398 at para 7; *Agnaou v Canada (Attorney General)*, 2015 FCA 30 at para 36 [*Agnaou*]).

[24] However, the nature of the Applicants' submissions to this Court indicate that the Applicants' concerns go to the substance of the Decision – that is, whether it was unreasonable for the Commissioner to decline to investigate the alleged wrongdoing - rather than whether they were given a meaningful opportunity to present their case fully and fairly to the Commissioner.

[25] In *Grain Services Union (ILWU-Canada) v Freisen*, 2010 FCA 339, the Federal Court of Appeal reviewed a decision by the Canada Industrial Relations Board concluding that a collective agreement was not in force at the time an application to revoke the certification of a Union had been filed (*Grain Services* at para 3). Justice Mainville, writing for a unanimous Court, held that the Board's determination of whether a collective agreement was in force was based on its interpretation of the *Canada Labour Code*, and reviewed on a standard of reasonableness (*Grain Services* at paras 30-31).

[26] Similarly, in this case, the Commissioner interpreted the *PSDPA*, his home statute, to determine whether the timing of four of the five alleged instances of impropriety fell within the jurisdictional ambit of the Act. I would apply reasonableness to these determinations.

[27] I shall also apply reasonableness to my assessment of the Commissioner's Decision with respect to the fifth allegation, which was addressed on its merits, as the Federal Court of Appeal and the Federal Court have concluded that this standard applies to decisions reflecting the discretion of the Commissioner not to pursue an investigation of wrongdoing (*Agnaou* at paras 25 and 35); *Detorakis v Canada (Attorney General)*, 2010 FC 39 at paras 15-16; *Agnaou v Canada (Attorney General)*, 2014 FC 86 at para 19 [*Agnaou FC*]).

VI. Analysis

A. *Was the Commissioner's Decision to dismiss the first four allegations occurring prior to the enforcement date of the PSDPA reasonable?*

[28] The Applicants posit two arguments regarding the Commissioner's Decision to decline to address four of the five allegations they put forward because the allegations occurred prior to the date the *PSDPA* came into force.

[29] The first is that the *PSDPA*, which received royal assent on November 25, 2005 and came into force on April 15, 2007 (section 60), was meant to replace the *Treasury Board Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*, ensuring that investigations were to continue in a seamless fashion. In short, while the form of the Commissioner's jurisdiction shifted, his ability to investigate matters did not (AR, p 221, para 11).

[30] Second, according to the Applicants, the allegations had an ongoing element, as demonstrated by the HCFBI Officer's final letter confirming the completion of the recall arrived on July 12, 2007, almost 3 months after the Commissioner's office had opened. Thus, the continuing nature of these allegations brings them within the purview of the *PSDPA*.

[31] With regard to the first argument, section 54.3 of the *PDSA* is a transitional provision which addresses disclosures that had initially been made under the *Treasury Board Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace:*

> 54.3 Disclosures under the Treasury Board Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace that are being dealt with on the coming into force of this section are to be continued as though they had been made under this Act.

[32] The record does not indicate that the Applicants made any complaints under the *Treasury Board Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*. Since the Applicants made their complaints to the Commissioner after the *PSDPA* had come into force, section 54.3 has no application in these circumstances.

[33] Second, there is a presumption in the common law that legislation is not meant to apply retroactively, unless such a construction is expressly or by necessary implication required by the language of the Act (*Gustavson Drilling (1964) Ltd v Minister of National Revenue*, [1977] 1 SCR 271 at p 279 [*Gustavson*]; *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at para 69). This Court has not seen any explicit language or the presence of some ambiguity in the *PSDPA* which could serve to rebut that presumption.

[34] The question of the time at which the first four acts of wrongdoing manifested themselves is one of mixed fact and law, for which this Court is required to show deference (*Smith v Alliance Pipeline Ltd*, 2011 SCC 7 at para 26; *Rennie v VIH Helicopters Ltd*, 2015 FCA 25 at para 15).

[35] Indeed, the Commissioner acknowledged the Applicants' submissions that the nature of Health Canada's alleged malfeasance, including its failure to prove the presence of undeclared prescription drugs in Libidus and its failure to rescind the direction halting the sale of Libidus, was ongoing in nature and thus subject to the *PSDPA* (RR, p 8).

[36] The Commissioner nonetheless concluded that "each of these incidents took place prior to April 15, 2007 when the Act was formally enacted as a Federal law." In my view, it is within the range of reasonable options available to the decision maker to make the determination that some of the allegedly nefarious behaviour was not ongoing in nature simply because occasional administrative correspondence had been exchanged after the contested acts in allegations 1-4 had transpired.

[37] Therefore, I find the Commissioner's Decision to decline to investigate for lack of jurisdiction on the first four allegations to be reasonable, because each can be traced to incidents which occurred between August and September 2006 and prior to the *PSDPA's* entry into force.

B. *Was the Decision otherwise reasonable?*

[38] The final allegation, for which the Commissioner acknowledged jurisdiction, was that on July 12, 2007, the HCFBI Officer contravened section 27(1) of the *Food and Drugs Act* when he requested the destruction of 450 units of Libidus without the Applicants' consent. Section 27(1) of the *Food and Drugs Act* states:

> 27. (1) Where an inspector has seized an article under this Part and its owner or the person in whose possession the article was at the time of seizure consents to its destruction, the article is thereupon forfeited to Her Majesty and may be destroyed or otherwise disposed of as the Minister or the Minister of Agriculture and Agri-Food may direct.

[39] The Commissioner decided that there was no information to suggest that the units had indeed been destroyed, and in any event, that no wrongdoing had occurred since the carrier

company was capable of providing the consent necessary for the destruction of the product (AR, p 9). Thus, there was no contravention pursuant to section 8(a) of the *PSDPA*, which states:

> 8. This Act applies in respect of the following wrongdoings in or relating to the public sector:
>
> (a) a contravention of any Act of Parliament or of the legislature of a province, or of any regulations made under any such Act, other than a contravention of section 19 of this Act;

[40] After the hearing in this case, both parties were invited to provide further submissions on what constitutes a wrongdoing within the meaning of section 8(a) of the *PSDPA*.

[41] In their Further Submissions of April 1, 2015, the Applicants described the definition of wrongdoing in the following manner: "A mistake is an error in judgement…wrongdoing is knowing it is a mistake but continuing to do it anyway."

[42] The Respondent countered that a wrongdoing is determined by "whether there has been a breach or a 'contravention' of an Act or a regulation." The Respondent further argued that while a "technical breach" of an Act or Regulation would fall under the ambit of section 8(a) of the *PSDPA*, the Commissioner retained the discretion to decline to investigate the wrongdoing pursuant to section 24(b), the subject matter of the investigation not being sufficiently important.

[43] In my view, there is little evidence before me to indicate that a contravention of section 27(1) of the *Food and Drugs Act* occasioned by the destruction of the 450 units of Libidus seized by Health Canada occurred in this case.

[44] In his reasons, the Commissioner acknowledged that boxes of Libidus had been transferred for destruction, but concluded that "there is no information to suggest that the product, was in fact, destroyed." At the hearing, the Applicants conceded that they had no evidence to suggest otherwise.

[45] To this date, the status of these boxes remains unclear. Nevertheless, as the Respondent points out in their Further Submissions, Health Canada's letter informing the Applicants that the units of Libidus would be "removed for destruction" does not equate to a "request for destruction". In other words, since the "request for destruction" may not have been issued yet, this leaves open the possibility that the fifth allegation of wrongdoing may not even have manifested itself.

[46] So the question for this judicial review is, given this ambiguous state of affairs, was it reasonable for the Commissioner to conclude that there was no evidence of a wrongdoing? In coming to my conclusion, I must restrict myself to the evidentiary record that was before the administrative decision maker (*Delios v Canada (Attorney General)*, 2015 FCA 117 at para 42 [*Delios*]).

[47] The Federal Court of Appeal in *Agnaou* emphasized the wide discretion available to the Commissioner in the determination of whether to investigate (*Agnaou* at paras 66 and 70). In the light of the dearth of evidence before the Commissioner regarding whether Health Canada had even destroyed the boxes, I cannot say that the Commissioner's choice declining to exercise his discretion to investigate is unreasonable.

[48] The Commissioner also noted, in the alternative, that if the boxes of Libidus had been destroyed, this was done with the permission of UPS and would be sufficient to constitute "consent" within the meaning of section 27(1) of the *Food and Drugs Act*. Given that there was no jurisprudence cited for legal requirements of obtaining consent under this provision, and that the matter has not been argued before me, this is a legal conclusion which may or may not be valid. To seek the answer to this legal issue, Health Canada's alleged decision to request destruction of the boxes would need to be judicially reviewed. The judicial review at bar is the improper proceeding in which to review those actions, because this judicial review does not concern the actions of Health Canada, but rather the Commissioner's Decision to decline to investigate the alleged malfeasance.

[49] In pointing out that there may not have even been a technical breach of the *Food and Drugs Act*, I take this to mean that the Commissioner made an implicit finding, in the language of section 33 of the *PSDPA*, that he did not believe "on reasonable grounds that the public interest requires an investigation." In other words, there is no proof that Health Canada breached the *Food and Drugs Act* by destroying the contested property, and even if it did, this was done in the context of a good faith exercise of statutory interpretation.

[50] In *Chopra v Canada (Attorney General)*, 2014 FCA 179 at paras 33 and 59, the Federal Court of Appeal upheld a similar implicit finding of fact made by the Trial Judge in the judicial review of a PSDPA decision. At the Trial level, Justice Scott (as he then was) concluded that the Public Sector Integrity Commissioner implicitly found that all the conditions necessary to the application of section 24(1)(e) had been met, despite not having been explicitly considered by

the Commissioner in his reasons (*Chopra v Canada (Attorney General)*, 2013 FC 644 at paras 81-82).

[51] It would have been preferable in this case for the Commissioner to have made this logical route explicit. However, as the Supreme Court of Canada noted in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16 [*Newfoundland Nurses*], "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met."

[52] As the Commissioner made clear on multiple occasions, he did not believe any wrongdoing, as defined in sections. 2 and 8 of the *PSDPA*, occurred in this case. In reviewing the record, I do not find sufficient evidence to merit overturning the Commissioner's Decision, as it does not appear that the Commissioner overlooked crucial evidence or made factual findings entirely at odds with the evidence before him (*Delios* at para 27). *Newfoundland Nurses* cautions against judges rendering certain omissions ― in this case that there were no reasonable grounds requiring an investigation ― to be determinative in the face of an otherwise reasonable outcome (*Newfoundland Nurses* at paras 15-17).

VII. Conclusion

[53] While I have sympathy for the financial toll the proceedings by Health Canada against Libidus took on the Applicants, I see no evidence in the record which indicates that Health Canada's employees acted in an improper or maliciousness manner. Consequently, I find the

Decision of the Commissioner not to further investigate the Applicants' allegations to be a reasonable one, and would dismiss the judicial review.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is dismissed.
2. There are no questions proposed for certification.
3. The style of cause shall be amended from the Office of the Public Sector Integrity Commissioner of Canada to the Attorney General of Canada.
4. I conclude by reiterating my appreciation for Ms. Swarath's able and impressive presentation to the Court on behalf of the Applicants. No costs will be ordered under the circumstances.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1692-14
STYLE OF CAUSE:	CHERYL ANNE SWARATH ET AL v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	MARCH 26, 2015
JUDGMENT AND REASONS:	DINER J.
DATED:	AUGUST 11, 2015

APPEARANCES:

Cheryl Anne Swarath Self-Representing for the Applicants	FOR THE APPLICANTS
Dhara Drew	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Self-Represented	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Winnipeg, Ontario	FOR THE RESPONDENT