Federal Court  Cour fédérale

Date: 20200806

Docket: T-1879-19
T-1880-19

Citation : 2020 FC 819

Ottawa, Ontario, August 6, 2020

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

NNS ORGANICS LIMITED, a body corporate

Applicant

and

CANADA (MINISTER OF HEALTH)
and
THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This decision relates to the applications for judicial review brought in Court File Nos. T-1879-19 and T-1880-19, which are related matters that were heard simultaneously on July 14, 2020. The Applicant, NNS Organics Limited [NNS Organics], has applied for judicial review of two decisions of the Natural and Non-Prescription Health Products Directorate of Health Canada [Health Canada], both dated November 14, 2019, suspending certain licenses issued to NNS

Organics [the Suspension Decisions]. The first of these decisions (which is the subject of Court File No. T-1879-19) suspended NNS Organics' product licences under s 20 of the *Natural Health Products Regulations*, SOR/2003-96 [the Regulations], made under the *Food and Drugs Act*, RSC 1985, c F-27 [the Act]. The second decision (which is the subject of Court File No. T-1880-19) suspended NNS Organics' site licence under s 41 of the Regulations.

[2] NNS Organics asks this Court to set aside the Suspension Decisions. It raises concerns about the reasonableness of the Suspension Decisions and the fairness of the process followed by Health Canada in arriving at the decisions. The Respondent, the Minister of Health and the Attorney General of Canada, defends the reasonableness of the Suspension Decisions and the fairness of Health Canada's process. In addition, the Respondent argues the applications should be struck on a preliminary basis, either because the applications are moot or because judicial review is premature, as the Suspension Decisions were made as part of an ongoing administrative process.

[3] As explained in greater detail below, I have concluded these applications are moot. On February 5, 2020, Health Canada decided that the license suspensions, of which it gave notice in the Suspension Decisions, were no longer necessary and effectively reinstated NNS Organics' licenses [the Reinstatement Decision]. I have considered whether the Court should nevertheless exercise its discretion to rule on the substantive issues raised in these applications. Taking into account the factors identified in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*] as governing such consideration, I conclude these factors do not militate in favour of

exercising such discretion to decide the substantive issues. Accordingly, my decision is to dismiss these applications for mootness.

II. **Background**

[4] NNS Organics is a company based in Nova Scotia, which manufactures and sells natural health products and other products, including organic dietary supplements, freeze dried fruits, vitamins and snack foods. Ms. Nancy Smithers is the founder and President of the company, and Mr. Jeremy Hunter is the General Manager. Both Ms. Smithers and Mr. Hunter swore affidavits in these applications.

[5] Mr. Hunter also swore a supplemental affidavit, which details certain events following the Suspension Decisions. The Respondent's written submissions take the position the contents of this affidavit are irrelevant, because judicial review typically proceeds based on evidence that was before the decision-maker. However, at the hearing, the Respondent clarified that it objects to the weight that should be afforded to this affidavit, not to its admissibility. Also, NNS Organics noted that, in support of its mootness argument, the Respondent relies on the Reinstatement Decision, which obviously post-dated the Suspension Decisions. Particularly with the Respondent having raised the mootness issue, I agree with NNS Organics that it should be permitted to rely on the evidence of Mr. Hunter that post-dates the Suspension Decisions.

[6] The Regulations govern the manufacture and sale of natural health products in Canada and require a party engaged in that business to hold particular licenses issued under the regulatory regime and to conform to particular manufacturing practices. The Regulations are

administered by Health Canada. Pursuant to that mandate, Compliance and Enforcement Officers with Health Canada conducted a site visit of NNS Organics' facilities on November 8 and 9, 2018. As a result of that visit, and following various written and oral communications between the parties, on December 14, 2018, Health Canada issued notices of its intent to suspend NNS Organics' products and site licenses under, respectively, ss 18(1)(a) and 39(1)(a) of the Regulations [the Notices].

[7] The Notices were issued on the basis that Health Canada had reasonable grounds to believe NNS Organics had contravened the Act or the Regulations and set out its observations of NNS Organics' non-compliance. As contemplated by ss 18(2)(b) and 39(2)(b) of the Regulations, the Notices afforded NNS Organics 90 calendar days to provide information and documentation demonstrating that the licenses should not be suspended, either because the situation giving rise to the intended suspension did not exist or because it had been corrected.

[8] On March 14, 2019, within the 90-day deadline, NNS Organics submitted its response to the Notices. On July 10, 2019, Health Canada wrote to NNS Organics, advising that the information NNS Organics provided on March 14, 2019 was insufficient to demonstrate the situation giving rise to the intent to suspend did not exist or had been corrected. Health Canada listed outstanding deficiencies in NNS Organics' response and gave NNS Organics 15 business days to address those deficiencies by providing a Corrective and Preventative Action [CAPA] plan. After correspondence between the parties, Health Canada extended this deadline to August 30, 2019.

[9] On August 29, 2019, NNS Organics provided its response to Health Canada's July 10, 2019 correspondence. Health Canada replied by email on August 30, 2019, stating: "We will review your response and let you know if anything further is required."

[10] On November 14, 2019, Health Canada issued the Suspension Decisions that are the subject of these applications for judicial review. These decisions stated that the information NNS Organics provided in response to the Notices was deemed insufficient to demonstrate that the situation giving rise to the intent to suspend did not exist or had been corrected. The Suspension Decisions immediately suspended NNS Organics product licences and site licence under, respectively, ss 20 and 41 of the Regulations.

[11] The Suspension Decisions attached a list of outstanding deficiencies and, in accordance with ss 20 and 41 of the Regulations, provided NNS Organics 90 calendar days to submit information or documents demonstrating that the situation giving rise to the suspensions did not exist or that had been corrected—in which case, the licences would be reinstated. The Suspension Decisions also advised that, failing provision of such information within 90 days, the licences would be cancelled.

[12] NNS Organics subsequently commenced these applications for judicial review, challenging the reasonableness of the Suspension Decisions and arguing they were made without requisite procedural fairness. NNS Organics also sought interlocutory injunctions, staying the Suspension Decisions and therefore the license suspensions. On December 16, 2019, Justice Phelan granted NNS Organics' motions, staying the Suspension Decisions until the earlier of the

hearing of these applications for judicial review or a further decision by Health Canada, with costs in the cause. On December 18, 2019, Justice Phelan released his Reasons for Order in relation to the stay decisions.

[13] Further written and oral communications also took place between the parties following the Suspension Decisions, culminating with the February 5, 2020 Reinstatement Decision. Health Canada's letter conveying the Reinstatement Decision stated it had reviewed information provided by NNS Organics on January 23, 2020 and determined, through the commitments made in the CAPA plan submitted by NNS Organics, that sufficient progress had been made such that suspensions were no longer necessary. Health Canada further stated that NNS Organics would be required to demonstrate compliance with Part 3 of the Regulations (relating to good manufacturing practices) in its next site licence renewal submission, which was due by May 1, 2020. It noted certain points, identified when evaluating the CAPA plan, which NNS Organics would need to address in that renewal submission. The letter concluded by noting that failure to demonstrate compliance with Part 3 of the Regulations may result in a refusal to renew the licenses.

III. **Issues and Standard of Review**

[14] NNS Organics challenges both the reasonableness of the Suspension Decisions and the fairness of the process by which the Suspension Decisions were made. Its principal reasonableness argument turns on ss 18(2) and 39(2) of the Regulations, which provide as follows:

Natural Health Products	***Règlement sur les produits de santé***

***Regulations*, SOR/2003-196**

18 (2) Subject to section 19, the Minister shall not suspend a product licence unless

(a) the Minister has sent the licensee a notice that sets out the reason for the intended suspension; and

(b) the licensee has not, within 90 days after the day on which the notice referred to in paragraph (a) is received, provided the Minister with information or documents demonstrating that the licence should not be suspended on the grounds that

(i) the situation giving rise to the intended suspension did not exist, or

(ii) the situation giving rise to the intended suspension has been corrected.

….

39 (2) Subject to section 40, the Minister shall not suspend a site licence unless

(a) the Minister has sent the licensee a notice that sets out the reason for the intended suspension; and

(b) the licensee has not, within 90 days after the day on which the notice referred to in paragraph (a) is received, provided the Minister with

***naturels*, DORS/2003-196**

18 (2) Sous réserve de l'article 19, le ministre ne peut suspendre la licence de mise en marché que si les conditions suivantes sont réunies :

a) il a envoyé au titulaire un avis exposant les motifs de la suspension projetée;

b) le titulaire n'a pas fourni au ministre, dans les quatre-vingt-dix jours suivant la réception de l'avis visé à l'alinéa a), les renseignements ou documents montrant que la licence ne devrait pas être suspendue pour l'un des motifs suivants :

(i) la situation donnant lieu à la suspension projetée n'a pas existé,

(ii) la situation donnant lieu à la suspension projetée a été corrigée.

….

39 (2) Sous réserve de l'article 20, le ministre ne peut suspendre la licence d'exploitation que si les conditions suivantes sont réunies :

a) il a envoyé au titulaire un avis exposant les motifs de la suspension projetée;

b) le titulaire n'a pas fourni au ministre, dans les quatre-vingt-dix jours suivant la réception de l'avis visé à l'alinéa a), les renseignements ou documents

information or documents demonstrating that the licence should not be suspended on the grounds that	montrant que la licence ne devrait pas être suspendue pour l'un des motifs suivants :
(i) the situation giving rise to the intended suspension did not exist, or	**(i)** la situation donnant lieu à la suspension projetée n'a pas existé,
(ii) the situation giving rise to the intended suspension has been corrected.	**(ii)** la situation donnant lieu à la suspension projetée a été corrigée.

[15] NNS Organics takes the position that, in the Suspension Decisions, Health Canada suspended its licenses based on alleged contraventions of the Regulations without giving it 90 days' notice of the reasons for the intended suspensions, as required by ss 18(2) and 39(2). While the Notices, provided by Health Canada on December 14, 2018, set out reasons for the intended suspension, NNS Organics submits the Suspension Decisions listed different reasons and therefore required an additional 90-days' notice. NNS Organics argues Health Canada thereby adopted an unreasonable interpretation of the Regulations, i.e. as authorizing it to suspend the licenses without giving 90 days' notice of the specific reasons for the suspensions.

[16] NNS Organics also submits the Suspension Decisions were unreasonable because not all the evidence and facts that were essential to the decisions were before the decision-maker. This argument is based on the contents of the Certified Tribunal Record, which includes summaries of the issues and activities leading to the Suspension Decisions, but not copies of NNS Organics' various submissions to Health Canada.

[17] The parties agree the issues raised by the preceding arguments are reviewable on the standard of reasonableness.

[18] NNS Organics also challenges the procedural fairness of the Suspension Decisions. It relies principally on the August 30, 2019 email from Health Canada to NNS Organics, in which Health Canada acknowledged receipt of NNS Organics' submissions of the previous day and stated it would let NNS Organics know if anything further was required. In combination with Health Canada's past practice of following up with NNS Organics when its response was considered insufficient, NNS Organics argues it had a legitimate expectation that it would have an opportunity to provide further information to address Health Canada's concerns before Health Canada suspended its licenses. NNS Organics submits that Health Canada did not afford it the opportunity to know the case against it and respond.

[19] The parties agree the procedural fairness issues are governed by the standard of correctness.

[20] Taking into account the preliminary issues raised by the Respondent, the arguments advanced by the parties raise the following issues for the Court's consideration:

A. Are these applications for judicial review moot? If so, should the Court nevertheless exercise its discretion to decide the substantive issues?

B. Are these applications premature, because the Suspension Decisions are not final and permanent decisions?

C. Were the Suspension Decisions unreasonable?

D. Did Health Canada breach its duty of procedural fairness in making the Suspension Decisions?

IV. **Analysis**

[21] The outcome of these applications turns on the first preliminary issue raised by the Respondents, i.e. that the applications are moot. The parties argued their respective positions on this issue at the same time they argued the substantive issues, in a half-day hearing conducted by videoconference, employing the Zoom platform, on July 14, 2020. I note that, in the course of the hearing, there were several disruptions in the stability of the internet connection through which the videoconference was conducted. These disruptions appeared to affect principally the connection between NNS Organics' counsel and the Court. When a disruption occurred, I alerted counsel and asked for the disrupted submissions to be repeated. However, I have also listened to the audio recording of the hearing, which captured the submissions without the technical disruptions, to ensure that nothing was missed.

[22] Both parties relied on the Supreme Court of Canada's decision in *Borowski* as the leading authority on questions of mootness. In *Borowski*, Justice Sopinka explained the doctrine of mootness as follows:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice.

> The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[23] Applying the analytical structure explained in *Borowski*, the first question is whether the applications are moot. If not, then the Court should decide them. If they are moot, this raises the second question, whether the Court should nevertheless exercise its discretion to decide them.

[24] The Respondent argues these applications are moot, because the effect of the Reinstatement Decision is that the Suspension Decisions ceased to apply of February 5, 2020. Therefore, says the Respondent, there is no longer a live dispute between the parties, and reaching a conclusion on the substantive issues raised by the parties would have no practical effect. The Respondent recognizes the Court has discretion to decide these applications, even if they are moot, but submits that the factors relevant to the exercise of this discretion do not warrant such a result.

[25] NNS Organics takes the position that these applications are not moot and that, even if they are, the Court should exercise its discretion to decide them. It advances three main arguments in support of its position.

[26] NNS Organics' first and perhaps principal argument is that one of the main issues raised by these applications (i.e., whether Health Canada can suspend licenses without giving 90 days' notice of the reasons for the intended suspensions) will continue to have collateral consequences for the parties in the course of their ongoing regulatory relationship. Second, NNS Organics notes that, in granting the interlocutory injunction motions in these matters, Justice Phelan ordered that costs of the motions would be in the cause. It takes the position that these matters are not moot, because of the outstanding issue of costs between the parties. Third, NNS Organics again relies on Justice Phelan's decision, in that his Reasons for Order found at least two serious issues raised in the applications but refrained from pronouncing on those issues because they would be decided in the judicial review.

[27] Turning to the first *Borowski* question, it is clear these applications are now moot. As noted by the Respondents, the relief requested in the Notices of Application is to set aside the Suspension Decisions. This relief is not available, as the license suspensions imposed by the Suspension Decisions were rescinded by the Reinstatement Decisions and are no longer in effect. As there is presently no live controversy affecting the rights of the parties, these matters are moot.

[28] NNS Organics' arguments have little bearing on this question. The fact that Justice Phelan left the determination of substantive issues in these matters to the judge deciding the judicial reviews was a function of his particular role as a motions judge addressing a request for a stay. A judge deciding an interlocutory matter of that nature is often inclined to say little about the substantive issues, other than to decide whether the applicable threshold for a stay is met, so

as not to impinge upon the role of the applications judge. Justice Phelan's Order and Reasons have no impact upon the present mootness analysis. These matters were not moot when the stay was issued in December 2019, but they became moot when the Reinstatement Decision was made in February 2020.

[29] Similarly, the outstanding issue of costs of the stay motion does not, in my view, prevent the applications from now being moot. NNS Organics notes that, in *Vic Restaurant Inc v Montreal (City)*, [1959] SCR 58 [*Vic Restaurant*], one of the authorities cited in *Borowski*, the Supreme Court held the appellant had an interest in the subject matter of the appeal before the Court other than as to costs of the proceedings. Writing for the majority, Justice Locke commented further that he did not assent to the view that, even if the appellant's only interest was as to costs, the Court was without jurisdiction to hear the appeal or should not exercise that jurisdiction in certain circumstances (at para 100).

[30] I read that latter comment as *obiter* and would not regard *Vic Restaurant* as standing for the proposition that an otherwise moot matter is not so if the parties have outstanding interests as to costs. *Borowski* relies on *Vic Restaurant* not for that proposition, but for the principle that, in considering whether to decide a matter that is technically moot, a Court should consider the existence of an ongoing adversarial relationship between the parties and potential collateral consequences for the parties. Presumably, in almost any proceeding, the merits of which have become moot, the parties could argue they have an interest in the court deciding who should bear the costs of the proceeding to date. Such an interest cannot prevent the matter from being moot, or the doctrine of mootness would have very limited application.

[31] In my view, NNS Organics' principal argument, regarding the collateral effect on the parties' ongoing relationship, should be considered under the second question. *Borowski* treats the potential for collateral consequences as a factor relevant to the second question. If the reasonableness of this aspect of the Suspension Decisions could have a practical effect upon the parties going forward, that factor could militate in favour the Court exercising its discretion to decide the issue. However, that factor would not support a conclusion that the applications for judicial review are not moot.

[32] I therefore turn to the second question and consideration of NNS Organics' argument. As set out above, NNS Organics submits the Suspension Decisions are unreasonable because Health Canada did not give it the statutorily required advance notice of the reasons for which the license suspensions were imposed. NNS Organics argues the evidence demonstrates a pattern in which Health Canada repeatedly identifies concerns about its regulatory compliance, NNS Organics addresses those concerns, and Health Canada identifies new concerns. Indeed, NNS Organics submits the Reinstatement Decision represents the latest example of this pattern in that, although it rescinded the license suspensions, it also identified concerns to be addressed in NNS Organics' then upcoming license renewal submissions and raised the spectre of such renewal being refused if the concerns were not addressed.

[33] NNS Organics submits this pattern is likely to continue into the future and that, if the Court does not rule on this issue in the present applications, there will likely be further litigation between the parties, as NNS Organics is forced to challenge future Health Canada decisions made without the required notice. It therefore submits that, in the context of their ongoing

regulatory relationship, there will be collateral benefits to the parties in having this issue determined in the present proceedings.

[34] The Respondent's position is that the Notices issued to NNS Organics on December 14, 2018, provided the requisite notice of the reasons for the intended suspension, which Health Canada acted upon when making the Suspension Decisions on November 14, 2019. The Respondent submits that, in the course of the communications between the parties between those dates, which it characterizes as a collaborative process, the concerns identified through the site visit and set out in the Notices were narrowed and identified by Health Canada with greater detail and precision. Therefore, the contraventions that resulted in the Suspension Decisions were a subset of the reasons for intended suspension identified in the original Notices. With respect to the Reinstatement Decision, the Respondent argues that the license renewal process is part of the applicable regulatory regime and that Health Canada's identification of residual compliance issues in that communication represents an appropriate effort to inform NNS Organics of areas of concern to be addressed in its renewal submission.

[35] NNS Organics disputes the Respondent's characterization of these facts. NNS Organics argues that the reasons for the Suspension Decisions are not a subset of the reasons identified in the Notices and that the affidavit evidence in these matters supports its position on this point.

[36] *Borowski* provides guidance on factors to be considered in exercising the discretion to decide a matter that is moot. In her recent decision in *David Suzuki Foundation v Canada*

(Attorney General), 2019 FC 411 [*Suzuki*] at paragraph 114, Justice McVeigh summarized this guidance as follows:

> [114] In *Borowski*, Justice Sopinka underlined the fact that there are three factors to be considered in determining whether or not a moot proceeding should nevertheless continue: (i) the existence of an adversary system; (ii) the concern for judicial economy; and (iii) the obligation for the Court to be aware of its law-making function (*Ficek v Canada (Attorney General)*, 2013 FC 430 at para 17; *Collin v Canada (Attorney General)*, 2006 FC 544 at para 11 ["*Collin*"]).

[37] The first of these factors favours NNS Organics. As is evident from the articulation of the arguments above, NNS Organics remains interested in advancing its position and has done do ably in its arguments before me. The Respondent has defended its own position. The necessary adversarial relationship between the parties continues to exist notwithstanding the mootness of these proceedings.

[38] The second factor, concern for judicial economy, turns significantly on whether determination of this dispute would have a practical effect on the rights of the parties in the future because of collateral consequences of that determination. However, in my view, there would be little benefit to the parties in the Court reaching a determination of this issue in the matters at hand. This is not a situation, such as in *Vic Restaurant* for example, where there is a point of law in dispute that, if resolved, would assist the parties with their ongoing relationship.

[39] The Respondent does not argue that the Regulations entitle Health Canada to suspend licenses without giving 90 days' notice of the reasons for an intended suspension. Rather, its position is that, on the facts of these proceedings, Health Canada gave such notice. If the Court

were to decide this dispute, the principal question requiring adjudication would be whether the reasons for the Suspension Decisions were identified in the Notices given under ss 18(1)(a) and 39(1)(a) of the Regulations. The dispute between the parties therefore turns on an issue of fact, or one of mixed fact and law that is heavily factually infused. I cannot conclude that adjudication of this dispute would assist the parties with their ongoing regulatory relationship. If a similar dispute occurs in the future, it will presumably involve a different set of facts, and it is difficult to see how a ruling on the particular facts surrounding the Suspension Decisions would benefit the parties.

[40] The third factor identified in *Borowski*, the obligation for the Court to be aware of its law-making function, is engaged when there is a question of general importance to be decided (see *Suzuki* at para 123). Given the factual nature of the dispute in the present proceedings, I do not consider this factor to particularly assist the analysis. Rather, I find the influence of the second factor to outweigh the continued existence of an adversarial relationship, such that the *Borowski* analysis militates against exercising my discretion to decide these matters. The applications will therefore be dismissed, because they are moot.

V. **Costs**

[41] It remains necessary to address the costs of these proceedings. NNS Organics' argument, that costs remain outstanding from the successful injunction motions, did not convince me that these matters are not moot. However, I consider this point relevant to my decision on costs.

[42] In granting the interlocutory injunctions, Justice Phelan ordered that costs be in the cause. With the applications being dismissed, it could be concluded NNS Organics has no costs entitlement arising from Justice Phelan's decision. However, at the hearing, the Respondent raised the possibility that, in the event it prevailed in these applications, the Court consider an analysis whereby any costs entitlement arising from NNS Organics' success on the motions would be offset against costs arising from the Respondent's success on the applications, such that there would be no award of costs. I find merit to this position, and my Judgment will so provide.

JUDGMENT IN T-1879-19 AND T-1880-19

THIS COURT'S JUDGMENT is that:

1) These applications for judicial review are dismissed.

2) There is no order as to costs.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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