Federal Court  Cour fédérale

Date: 20130612

Docket: T-452-12

Citation: 2013 FC 644

Ottawa, Ontario, June 12, 2013

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

SHIV CHOPRA
and
MARGARET HAYDON

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review by Drs. Shiv Chopra and Margaret Haydon (the Applicants) of a decision rendered on January 31, 2012, by the Public Sector Integrity Commissioner [PSIC], Mario Dion. The PSIC decided not to reopen a decision rendered by his predecessor, Commissioner Christiane Ouimet, on October 9, 2009, dismissing the Applicants' disclosure of wrongdoing against their employer, Health Canada.

Motion to remove Gérard Lambert as an applicant

[2] On April 9, 2013, a joint motion was filed by the applicant, Gérard Lambert, and the Attorney General of Canada, to remove Gérard Lambert as an applicant. The Court decided to deal with this motion as part of this decision. The motion is granted and the style of cause is amended accordingly, as above.

[3] For the reasons that follow this application for judicial review is dismissed.

II. Background and facts

[4] The Applicants were employed as drug evaluators in the Veterinary Drugs Directorate [VDD] of Health Canada. As such, they were responsible for evaluating drug submissions filed by manufacturers applying for Notices of Compliance [NOC] to market veterinary drug products, pursuant to the *Food and Drugs Act*, RSC 1985, c F-27 [*FDA*] and *Food and Drug Regulations*, CRC, c 870 [*Regulations*].

[5] In 2002, the Applicants and their late colleague, Dr. Cris Bassude, filed a complaint with the Public Service Integrity Officer [PSIO] (the predecessor to the PSIC).

[6] The PSIO summarized the Applicants' allegations as follows:

a. Notices of Compliance for five "Components with Tylan" products were issued without human safety data, contrary to the *FDA* and the *Regulations*;

b. VDD drug evaluators were being pressured by supervisors to pass or maintain a series of veterinary drugs without required human safety data; and

c. Drug evaluators faced departmental disciplinary action if they did not follow management's instructions to favour the pharmaceutical lobby in the approval process for veterinary drugs.

[7] Following its investigation, the PSIO issued its report on March 21, 2003, concluding that all three allegations were unfounded.

[8] The Applicants sought judicial review of the PSIO decision. In *Chopra v Canada (Attorney General)*, 2005 FC 595 at paras 72 and 73 [*Chopra*], Justice O'Keefe allowed the application, set aside the report and referred it back to the PSIO for reconsideration. Justice O'Keefe found that the PSIO had undertaken to investigate the drug approval processes for at least 8 drugs but only performed an analysis with respect to drug products known as Component with Tylan:

> [72] A review of the investigation report shows that in regard to the first allegation, the PSIO only did an analysis with respect to drug products known as Component with Tylan. The applicants had alleged to the PSIO, however, that there were problems with the drug approval processes for the following drugs: Revalor H, Synergistin Injectable Suspension, Baytril, rBST (rBGH), Carbodex, and Eugenol.
>
> [73] While the PSIO can decide whether a matter fits within the parameters of his jurisdiction, once he decides that it does, he must carry out an investigation of the issues. The correspondence satisfies me that the investigation was to include an investigation of the processes in more than Component with Tylan drugs. The issue of the other drugs was clearly before the PSIO and needed to be dealt

> with. I have no way of knowing what conclusions would have been reached by the PSIO had these other issues been considered.

[9] Justice O'Keefe concluded that: "[b]ecause of my finding on this issue, I need not address the other issues raised by the applicants" (*Chopra*, cited above, at para 77).

[10] Following the decision in *Chopra*, the PSIO appointed a new investigator to resume the investigation of the complaint. In May 2005, the new investigator advised the Applicants that the new investigation would be limited to reconsidering the issues Justice O'Keefe judged to be missing from the first decision.

[11] In November 2005, the investigator asked the Applicants to submit any new supplementary or additional evidence that could support their allegations as well as information related to the approval process for the drugs to be investigated. He also invited them to answer several questions. The Applicants declined to answer the questions as posed but referred the investigator to the record pointing to the material on file that answered the questions.

[12] The PSIO was replaced by the PSIC in 2007, as a result of the enactment of the *Public Servants Disclosure Protection Act*, SC 2005, c 46 [*PSDPA*].

[13] The *PSDPA* contains a transitional provision (section 54.3) which indicates that "[d]isclosures 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".

[14] Ms. Christiane Ouimet was the first PSIC appointed under the *PSDPA*. The PSIC continued the PSIO's inquiry with the same investigator. In March 2008, the investigator released his preliminary report. The Applicants were invited to comment and responded in May 2008.

[15] On October 8, 2009, the PSIC issued her decision. Ms. Ouimet decided to cease the investigation pursuant to paragraph 24(1)(*e*) of the *PSDPA*. The PSIC concluded that paragraph 24(1)(*e*) is "broad enough to include the ongoing policy debate regarding the exercise of ministerial discretion under the FDA and Regulations. Of note, a provision similar to paragraph 24(1)(*e*) was not available to the PSIO under the former Policy." The commissioner went on to state that: "[t]he existence of ministerial discretion in the Regulations reflects the intent of Parliament to allow the Minister the degree of flexibility to make informed decisions on specific matters. I do not believe that Parliament intended my Office to investigate and make recommendations on the appropriateness and sufficiency of the exercise of discretion given to a minister in federal legislation." (PSIC decision dated October 8, 2009, Applicants' Application Record, Vol. XVI, p. 5214)

[16] The PSIC also determined that the three allegations were intrinsically linked and rooted in a scientific dispute between the parties over the sufficiency of human safety data Health Canada receives from manufacturers for New Drug Submissions [NDS]. She noted that 12 other scientists at the VDD, who did not share the Applicants' scientific opinion, wrote a letter to Mr. Steve Hindle, President of the Professional Institute of the Public Service of Canada, indicating that they never felt any undue pressure to approve or not approve drugs for veterinary use.

[17] Finally, the PSIC also found that:

> "[…] [T]he investigative process that began in 2005 was premised on the assumption that the PSIO, and now my Office, in continuing the investigation, could determine the validity of the disclosers' claims that human safety data should have been obtained before approving the drugs. In my opinion, the subject-matter of the disclosure placed the PSIO, and now my Office, in the difficult position of trying to evaluate and weigh scientific evidence and ultimately arbitrate a scientific dispute between the parties.
>
> I cannot make a finding of fact on whether there has been wrongdoing or make purposeful recommendations to the chief executive when the subject-matter of the disclosure relates to a public policy debate that falls within the ambit of paragraph 24(1)(e)" (PSIC decision dated October 8, 2009, Applicants' Application Record, Vol. XVI, p. 5215).

[18] The Applicants did not apply for judicial review of the PSIC's decision.

[19] Commissioner Ouimet stepped down in October 2010 and Mr. Mario Dion was appointed as the new PSIC on December 20, 2010. He decided that an independent review of all disclosure of wrongdoing and reprisal complaint files closed between April 15, 2007 and December 19, 2010 be completed in order to determine whether any merited being reopened. The PSIC selected Deloitte & Touche LLP to conduct the review. The purpose of the review was to determine "[…] whether the work done during the original file analysis or investigation accurately and completely addressed the issues contained in the original disclosure or complaint. If the file review determines that the file lacked sufficient analysis and/or evidence collection, or if the rationale for reaching a decision is not clear, then the interim Commissioner will be so informed and he has the authority to order additional action be taken" (Applicants' Application Record, Vol. XVI, p. 5222).

[20] With respect to the Applicants' file, Ms. Holly Holtman, special adviser to Commissioner Dion, made the following recommendation:

> "The objective of the file review process is to evaluate the decision of PSIC and determine if they are in accordance with *PSDPA*. In this case, the then Commissioner ceased the investigation on the basis of s. 24(1)(e), concluding that the subject-matter of the disclosure or the investigation relates to a matter that results from a balanced and informed decision-making process on a public policy issue. The decision–making process was set out in the *Food and Drug Act Regulations* which provided the Minister of Health with the discretion to determine the amount of science required to satisfy the Notice of Compliance approval process for veterinary drugs.
>
> In my view this assessment was correct. The determination of the level of science required is within the Minister's discretion under the *Food and Drug Act, and the pursuant Food and Drug Act Regulations* .Accordingly, the then Commissioner acted reasonably in exercising her discretion top cease the investigation on the basis of s. 24(1) (e)".

She went on to state that:

> " Following extensive review of the file documentation of the complexity of the veterinary drug approval process, I agree that the determination of allegations #2 and #3 - that scientists faced undue pressure, and potential punishment if they did not reach a conclusion that supported the pharmaceutical industry and the expectations of their manager, are " intrinsically linked to the first allegation, as they are premised on the Disclosers' same scientific opinion that human safety data was disregarded". Accordingly I agree that the decision to cease the investigation into these allegations on the basis of s. 24 (1) (e) of the *PSDPA* was correct." (Applicants' Application Record, Vol. XIX, pages 5965 and 5966, Recommendation to Commissioner re: D-015)

[21] On January 31, 2012, Commissioner Dion issued a letter informing the Applicants that he would not be reopening their file. The PSIC concluded that:

> "[…] the former Commissioner's assessment was correct. The determination of the level of science required is within the Minister's discretion under the *Food and Drug Act* and regulations established under its regime. Accordingly, the then Commissioner acted

> reasonably in exercising her discretion to cease the investigation on the basis of s. 24(1)(e) of the [*PSDPA*]" (Applicants' Application Record, Vol. I, p. 33).

[22] Commissioner Dion acknowledged that "there were procedural shortcomings with respect to the investigation at the point when it was ceased in the fall of 2008" but held that they were not determinative and "played no role in the final outcome" (Applicants' Application Record, Vol. I, p. 33).

III. Relevant legislation

[23] The applicable sections of the *Public Servants Disclosure Protection Act*, SC 2005, c 46 are appended to this decision.

IV. Issues and standard of review

A. Issues

[24] The parties have adopted different views on the issues raised in this matter.

[25] The Applicants have identified the following issues:

1. ***Did the PSIC err in failing to consider the public interest?***
2. ***Did the PSIO/PSIC act contrary to the Federal Court's decision on these matters?***
3. ***Can an exercise of discretion constitute a wrongdoing under the PSDPA?***

4. ***Was the wrongdoing in question subject to a balanced and informed decision-making process on a public policy issue?***

5. ***Was the process that led to the PSIO/PSIC decisions fair?***

[26] The Respondent raised the following issues:

1. ***What is the degree of discretion that can be exercised by the PSIC under subsection 24(1) of the PSDPA?***

2. ***Should the decision in this instance not to reopen the file be set aside?***

[27] The subject of this judicial review is the PSIC's decision, dated January 31, 2012, not to reopen the investigation terminated by Commissioner Ouimet. Consequently, the Court finds that the only issue in this case is the following:

i. ***Did the PSIC err in not reopening the investigation of the Applicants' allegations closed by Commissioner Ouimet?***

B. Standard of review

[28] The Applicants submit that the applicable standard of review is correctness since in making his determination, the Commissioner committed significant legal errors and failures to apply certain aspects of the statute. These, in their opinion, are clearly of central importance given the public interest aspect of the case. Consequently, the correctness standard should apply. They referred the Court to, among others, the following cases: *Alberta (Information and Privacy Commissioner) v*

Alberta Teachers' Association, 2011 SCC 61 at paras 39-46 and *Shire v Canada (Minister of Citizenship and Immigration)*, 2012 FC 97.

[29] The Respondent argues that the applicable standard is reasonableness since the issue raised by this application is Commissioner Dion's decision not to re-open a file. The Respondent relies on the recent decision of this Court in *Detorakis v Canada (Attorney General)*, 2010 FC 39, where the standard of review applicable to the Commissioners' decision not to pursue an investigation further pursuant to paragraph (1)(*a*) of section 24 of the *PSDPA* was found to be reasonableness.

[30] In the absence of a legislative provision prescribing otherwise, a non-adjudicative body's decision to reopen a case is discretionary (see *Kurukkal v Canada (Minister of Citizenship and Immigration)*,, 2010 FCA 230 at para 4; *Noor v Canada (Minister of Citizenship and Immigration)*, 2011 FC 308 at para 27; *Trivedi v Canada (Minister of Citizenship and Immigration)*, 2010 FC 422 at para 17; *Nouranidoust v Canada (Minister of Citizenship and Immigration)*, 172 FTR 115 at para 24; and *Zutter v British Columbia (Council of Human Rights)*, 1995 CanLII 1234 (BC CA) at para 34). Discretionary decisions attract the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paras 51 and 53).

V. Parties' submissions

A. Applicants' submissions

(i) *The PSIC decision is inconsistent with the Federal Court's decision*

[31] The Applicants submit that the PSIC's reopening decision is inconsistent with Justice O'Keefe's decision in *Chopra*, cited above. They claim that neither the PSIO nor the PSIC conducted their investigation in accordance with the Court's directives in *Chopra*. Furthermore, the Applicants contend that the Court's concerns with the PSIO's initial investigation went beyond its failure to examine the approval process for certain drugs.

[32] The Applicants argue that the Court, in *Chopra*, cited above, specifically noted that a review of the approval process for the non-investigated drugs might have had an effect on the second allegation, relating to the pressure to approve drugs. The Applicants submit that it would certainly have also had an impact on the third allegation and that all these matters were interlinked. Because these other allegations were never fully investigated, the reopening of the decision cannot be justified.

(ii) *The exercise of discretion can be wrongdoing*

[33] The PSIC justified closing the file on the basis that it need not review the exercise of ministerial discretion. The Applicants raise a number of issues with this reasoning. First, they note that despite the fact that Health Canada relied on this argument in *Chopra*, cited above, the Court nonetheless ordered a more detailed and extensive investigation of their allegations.

[34] Second, they argue that accepting such a proposition leads to the inevitable conclusion that ministerial discretion could never amount to wrongdoing and will always be immune from scrutiny.

[35] Third, the PSIC's rationale also assumes that the wrongdoing in question is limited to the point at which the Minister exercised his discretion to grant the NOC. The Applicants submit that wrongdoing could be found in a number of steps leading to the Minister's decision to grant the NOC. For example, they point to the initial decision in 1998 to waive the human safety data requirement.

[36] Fourth, the Applicants contend that it would be shocking that a decision that could have a significant impact on the health and safety of Canadians be immune from review under the *PSDPA* because it involved ministerial discretion at the end of the regulatory process.

[37] Fifth, the status of the *PSDPA*, as public interest legislation, necessarily leads to the conclusion that the exercise of ministerial discretion can be considered wrongdoing under it. Indeed, paragraph 8(*d*) of the *PSDPA* specifically mentions that the Act applies to "an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of a public servant". That language, according to the Applicants, does not suggest a limitation that protects the exercise of discretion from review.

[38] The Applicants argue that the fact that discretion was involved is irrelevant. In order to ensure public health and safety, the PSIO was obliged to determine whether the exercise of that discretion was conducted properly.

[39] The flaw in the PSIC's approach, according to the Applicants, is demonstrated by the facts in this case. The Applicants maintain that the use of Tylosin in animals meant for human consumption is harmful because it will contribute to antimicrobial resistance in humans and could also cause other harmful effects. Parliament could never have intended for this situation to go unchecked simply because the decision to approve the drugs resulted from a Minister's discretionary decision.

[40] The Applicants submit that there is no doubt that Component with Tylan was approved without human safety data. Even if one was to argue that safety data was considered, the PSIO/PSIC should have determined whether that data was sufficient or not. Furthermore, while the PSIO is correct that the Preparation of Veterinary New Drug Submissions Guidelines issued by Health Canada (Guidelines) are not obligatory, it should nevertheless have investigated why the recommended practice for approving drugs was waived in this situation. That is to say, it should have verified whether the waiver of the normal requirements was justifiable or whether it was influenced by improper reasons. They claim that the PSIC's decision is exceptionally disconcerting, given that the PSIO initially undertook to determine not only the nature of the discretion exercised but also whether it was appropriately used in this case.

[41] The Applicants contend that the only justification for the decision to avoid requesting human safety data is the following two-sentence email:

> Hi Joy: The amount of tylosin tartrate (29mg) used as a local antimicrobial for the implant will not pose any additional health risk to the consumers. Review of the submissions by the Human Safety Division is not needed. Man Sen (Applicants' Application Record, Vol. V, p. 1368).

[42] The Applicants argue that this could hardly constitute a justifiable basis for ignoring an established practice and not requesting human safety data.

[43] Beyond this concern, the Applicants submit the PSIO/PSIC failed to address numerous other issues they raised, including: 1) the pressure to pass or maintain drugs of dubious safety; 2) the numerous examples of retaliation they experienced; and 3) their systemic concerns about the culture which discouraged debate and encouraged approval within the Department.

[44] They argue that the PSIC's view that the second and third allegations should not be investigated because they are "intrinsically linked" to the first has no logical foundation. For one, the allegation with respect to the pressure to approve drugs is independent from the Tylosin approval issue. The Applicants submitted that there was a culture which favoured approval of drugs over rigorous scientific review of new drug submissions. Second, the PSIC could not conclude that the first allegation was intrinsically linked to the second and third when it did not review all of the drugs that were in question. Since the PSIO/PSIC did not investigate the drugs they were directed to investigate by this Court in *Chopra*, cited above, it could not conclude that there would not have been evidence of reprisal in their approval processes.

[45] The failure to investigate these allegations represents a complete failure to respect the intent and spirit of the *PSDPA*.

(iii) *The PSIC erred in relying on paragraph 24(1)(e) of the PSDPA*

[46] Commissioner Ouimet refused to deal with the Applicants' disclosure pursuant to paragraph 24(1)(*e*) of the *PSDPA* because she found that its subject "relates to a matter that results from a balanced and informed decision-making process on a public policy issue". The Applicants argue that in order to justify a decision based on this provision, Commissioner Ouimet was required to make a finding of fact that all of its conditions were met, which she failed to do. The PSIC did not point to any "formal decision-making process" which dealt with the issues raised by the Applicants. Rather, Commissioner Ouimet seems to have simply assumed that such a process had taken place based on the fact that the issues had been the object of some debate and had also been discussed publicly.

[47] The Applicants submit that even if the Court finds that Commissioner Ouimet properly relied on paragraph 24(1)(*e*) in deciding to stop the investigation into the allegations regarding specific drugs, there is nothing in her decision which indicates that the other two allegations related to a matter resulting from a balanced and informed decision-making process on a public policy issue are interlinked.

(iv) *The PSIC failed to consider the public interest or the quasi-constitutional status of the PSDPA*

[48] Commissioner Ouimet failed to acknowledge the quasi-constitutional status of the legislation she was applying or that its ruling was effectively limiting the Applicants' rights in that regard.

B. Respondent's submissions

[49] The Respondent directed the Court to the scheme of the *PSDPA* and its preamble clearly indicating that the Act strives to strike the appropriate balance between two important principles. In doing so, the Commissioner is granted discretionary powers to cease an investigation or refuse to deal with a disclosure in the circumstances outlined in section 24 of the *PSDPA*.

[50] The PSIC's decision to cease an investigation into a disclosure for one of the motives listed in subsection 24(1) of *PSDPA* is highly discretionary. The Commissioner "may refuse to deal with a disclosure or to commence an investigation - and he or she may cease an investigation - if he or she is of the opinion that" one of the motives listed applies. According to the Respondent, subsection 24(1) of the *PSDPA* contains a gatekeeper's function and it entrusts the Commissioner with the necessary discretion to determine whether it is appropriate or not to pursue the investigation of a complaint.

[51] The Respondent also argues that the exercise of the Commissioner's discretion was not limited by the decision in *Chopra*, cited above. The Court, in *Chopra*, referred it for reconsideration, not for a particular result. The Respondent submits that the PSIO followed the directives of the Court and resumed the investigation into the drugs it had neglected to examine before.

[52] What is more, according to the Respondent, the Court's order pre-dated the enactment of the *PSDPA*. Section 54.3 of the Act, the transitional provision, directs that disclosures made prior to the coming into force of the Act "are to be continued as though they had been made under this Act".

Consequently, both Commissioners Ouimet and Dion could legitimately rely on paragraph 24(1)(*e*) in their respective decisions.

[53] The Respondent also argues that Commissioner Ouimet's decision was reasonable. As she explained in her decision, the disclosure involved differences of scientific opinion between the Applicants and their employer on the interpretation of the *FDA* and the *Regulations*. These were differences she was not equipped to resolve, particularly when the applicable legislation entrusts the Minister of Health with broad discretion to set the regulatory standards.

[54] The Respondent also underlines that Commissioner Ouimet justifiably relied on the Preliminary Report produced by the new investigator assigned to re-examine the disclosure in accordance with the directives of the Court in *Chopra*, cited above. Regarding the first allegation, the Report found that the drugs in question had either been approved with the requisite data or not approved at all. The investigator concluded that none of the drugs in question were approved in a process that contravened the *FDA* or its *Regulations*.

[55] On the second allegation, the investigator concluded that the evidence reviewed did not allow him to conclude that drugs were approved as a result of pressure put on the Applicants.

[56] As for the third allegation, the investigator reviewed examples of disciplinary actions and related documentation and concluded that, in view of the general nature of the Applicants' assertions and the lack of more specific supporting information, the allegation is unfounded and no further investigation is necessary.

[57] Pointing out that neither Commissioner Ouimet nor Dion found that the investigation was perfect. Respondent submits that the question Commissioner Ouimet reasonably asked herself, however, was whether further investigation would serve a purpose. She concluded that it would not because the subject matter of the three allegations was rooted in differences of scientific opinion on the adequacy and sufficiency of the *FDA* and its *Regulations*. According to the Respondent, that conclusion was open to the Commissioner.

[58] The Respondent also underlines that the Applicants have not disputed Commissioner Dion's finding that the procedural shortcomings had no impact on the final outcome.

[59] Contrary to the Applicants' assertions in their memorandum, the Respondent argues that Commissioner Ouimet was not required to make an explicit finding of fact that all the requirements of paragraph 24(1)(*e*) had been met. Nor was Commissioner Dion in his decision not to reopen the file, the decision at issue here. Citing the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, the Respondent maintains that adequacy of reasons is not a stand alone basis for quashing a decision.

[60] The Respondent submits that Commissioner Dion decided not to reopen the Applicants' file because he was of the view that Commissioner Ouimet had been correct in her assessment under paragraph 24(1)(*e*) of the *PSDPA*. This conclusion was reasonably open to him.

VI. Analysis

[61] The decision under review in the case at bar is that issued by Commissioner Dion on January 31, 2012. He decided not to reopen the investigation into the Applicants' file further to a general review he undertook of his own volition of all the files closed by the former Commissioner between April 15, 2007 and December 19, 2010. This is not a judicial review of Commissioner Ouimet's 2009 decision to cease the investigation pursuant to paragraph 24(1)(*e*) of the *PSDPA*. The Applicants have failed to challenge that decision within the delay found at subsection 18.1(2) of the *Federal Courts Act*, RSC 1985, c F-7.

[62] A decision to review a file to determine whether Commissioner Ouimet's 2009 decision was within the ambit of the *PSDPA* is more limited in scope. The ability of an administrative body to reopen a decision, in the absence of a statutory power, is generally limited by the principle of *functus officio*.

[63] The Supreme Court of Canada discussed the foundations of the principle of *functus officio* and its application to administrative tribunals in *Chandler v Alberta association of architects*, 1989 CanLII 41 (SCC), [1989] 2 SCR 848 [*Chandler*]:

> 19 The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in *In re St. Nazaire Co.* (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:
>
> 1. where there had been a slip in drawing it up, and,

2. where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, [1934] S.C.R. 186.

[…]

21 To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

22 Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in *Grillas, supra*.

23 Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute. See *Huneault v. Central Mortgage and Housing Corp.* (1981), 41 N.R. 214 (F.C.A.).

24 In this appeal we are concerned with the failure of the Board to dispose of the matter before it in a manner permitted by the *Architects Act*. The Board intended to make a final disposition but that disposition is a nullity. It amounts to no disposition at all in law. Traditionally, a tribunal, which makes a determination which is a nullity, has been permitted to reconsider the matter afresh and render a valid decision. […]

25 If the error which renders the decision a nullity is one that taints the whole proceeding, then the tribunal must start afresh. Cases such as *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.); *Lange v. Board of*

> *School Trustees of School District No. 42 (Maple Ridge) (1978)*, 9 B.C.L.R. 232 (S.C.B.C.) and *Posluns v. Toronto Stock Exchange*, [1968] S.C.R. 330, referred to above, are in this category. They involve a denial of natural justice which vitiated the whole proceeding. The tribunal was bound to start afresh in order to cure the defect. (See *Chandler*, cited above, at paras 19 and 21 to 25)

[64] Based on *Chandler*, cited above, administrative tribunals have the jurisdiction to reopen a decision for which there is no right to appeal in the following cases: 1) they may always reopen a proceeding if there was a denial of natural justice which vitiates or nullifies it (see *Chandler*, at para 25; and *Nazifpour v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 35 at para 36); 2) "there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation" (the new evidence ground) (*Chandler* at para 22); 3) jurisdictional error (*Chandler* at para 24); and 4) failure to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose (*Chandler* at para 23).

[65] Absent a legislative intent to the contrary, it is clear that an administrative tribunal may reopen a proceeding for a denial of natural justice, a jurisdictional error or a failure to address an issue fairly raised by the proceedings.

[66] In the case at bar, the PSIC decided to have all disclosure of wrongdoing and reprisal complaint files closed between April 15, 2007 and December 19, 2010 re-examined in order to decide whether any of them should be reopened. No right of appeal exists against the PSIC's decision to close an investigation. Neither the *PSDPA* nor the *Public Servants Disclosure Protection Tribunal Rules of Procedure*, SOR/2011-170, empowers the PSIC to reopen closed complaint files.

As was noted in *Kurukkal v Canada (Minister of Citizenship and Immigration)*, 2009 FC 695 at para 60, aff'd 2010 FCA 230), legislative silence on the jurisdiction to reopen a non-adjudicative decision does not necessarily reflect Parliament's intention to prevent it. Furthermore, the Court finds that something more than silence (i.e an express statutory intention) is required to exclude the well-recognized common law exceptions to the principle of *functus officio* described in *Chandler*, cited above. The PSIC possesses the jurisdiction to reopen an investigation on the grounds described in *Chandler*.

[67] As noted above, the PSIC stated the purpose of the review process was to determine:

> " […] whether the work done during the original file analysis or investigation accurately and completely addressed the issues contained in the original disclosure or complaint. If the file review determines that the file lacked sufficient analysis and/or evidence collection, or if the rationale for reaching a decision is not clear, then the interim Commissioner will be so informed and he has the authority to order additional action be taken" (Applicants' Application Record, Vol. XVI, p. 5222).

[68] Several of the issues identified in this passage are recognized by the case law as acceptable grounds for reopening a decision. For example, ensuring that the investigation completely addressed the issues in the original complaint falls within the "failure to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose" exception from *Chandle*r, cited above.

[69] In his January 31, 2012 decision (the "reopening decision"), the PSIC noted the following:

> "Within the additional submissions provided on June 13, 2011, your lawyer outlined some procedural concerns he had with respect to the investigation. After an extensive review of the Preliminary Report of the PSIC investigation, I agree that the [*sic*] there were procedural

> shortcomings with respect to the investigation at the point when it was ceased in the fall of 2008" (Applicants' Application Record, Vol. XVI, p. 5236).

[70] Despite recognizing that there were procedural fairness issues with the PSIO/PSIC investigation, the PSIC concluded that those issues had no impact on the final outcome.

> "[…] [T]he previous Commissioner made a decision to cease the investigation given that she was of the opinion that the subject matter of the investigation related to a matter that resulted from a balanced and informed decision making process on a public policy issue. The previous Commissioner did not make a determination on the basis of the preliminary conclusions of the incomplete investigation. Accordingly, in my opinion, the deficiencies with respect to the investigative process played no role in the final outcome." (Applicants' Application Record, Vol. XVI, p. 5236)

That finding is not challenged by the Applicants.

[71] Having determined that Commissioner Dion had the authority to decide to review Commissioner Ouimet's decision and, applying the appropriate standard of review, the Court must now determine whether his conclusion that Commissioner Ouimet was correct in relying on paragraph 24(1)(*e*) of the *PSDPA* to cease the investigation of the Applicants' complaint of wrongdoing by Health Canada was reasonable.

i. ***Did the PSIC err in not reopening the investigation of the Applicants' allegations closed by Commissioner Ouimet?***

[72] The Court's role is not to reweigh the evidence that was placed before Commissioner Dion but to determine whether he made an error in assessing the file before him.

[73] The Court finds that no such error was committed for the following reasons.

[74] The Court cannot find any omission to deal with the evidence adduced by the Applicants in respect of this review. The Applicants argue that it was not open to Commissioner Ouimet to rely on paragraph 24(1)(*e*) to cease the investigation because that decision is contrary to the spirit of the *PSDPA* and its quasi-constitutional status. The Court disagrees. Firstly, there is no jurisprudence affirming that the *PSDPA* is quasi-constitutional. It is clear from the preamble of the *PSDPA* that it is meant to strike a balance between a public servant's duty to his employer and his right to freedom of expression guaranteed under the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. The fact that a right guaranteed under the *Charter* is at stake will not elevate that statute to a quasi-constitutional status. In *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 at para 23, the Supreme Court quoted the following passage from the Federal Court of Appeal in *Canada (Attorney General) v Viola*, [1991] 1 FC 373, at page 386, in order to demonstrate the kind of characteristics required to grant a piece a law quasi-constitutional status :

> "The 1988 *Official Languages Act* is not an ordinary statute. It reflects both the Constitution of the country and the social and political compromise out of which it arose. To the extent that it is the exact reflection of the recognition of the official languages contained in subsections 16(1) and (3) of the *Canadian Charter of Rights and Freedoms*, it follows the rules of interpretation of that Charter as they have been defined by the Supreme Court of Canada. To the extent also that it is an extension of the rights and guarantees recognized in the Charter, and by virtue of its preamble, its purpose as defined in section 2 and its taking precedence over other statutes in accordance with subsection 82(1), it belongs to that privileged category of quasi- constitutional legislation which reflects "certain basic goals of our society" and must be so interpreted "as to advance the broad policy considerations underlying it."

[75] The Court does not find that the *PSDPA* possesses the qualities necessary to give it a quasi-constitutional status.

[76] The Applicants argue that Commissioner Ouimet erred when she applied paragraph 24(1)(*e*) and that Commissioner Dion repeated the same error in concluding that such a determination was available because all decisions entail the exercise of a certain discretion hence all decisions taken by a person in authority could theoretically be excluded from scrutiny. Such an application, according to the Applicants, voids the Act of any effectiveness.

[77] The Court does not accept this interpretation. Commissioner Dion clearly states that: "The determination of the level of science required is within the Minister's discretion under the *Food and Drug Act"*. In order to come to such a determination, the Commissioner necessarily had to assess whether the Minister's decisions with respect to the approval of the drugs at issue and his determination of the required level of scientific evidence to warrant such approvals followed the *Regulations*. In *Chrétien v Canada*, 2002 FCT 506 at para 24, the Court stated that :

> [24] The Supreme Court, per McIntyre has dealt with the deference which courts must show when a decision has been made in the exercise of a discretionary power. See *Maple Lodge Farms v. Government of Canada*, 1982 Can LII 24 (SCC), [1982] 2 S.C.R. 2, at 7: It is, as well, a clearly established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith, and where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

[78] It is clear from the above, and contrary to the Applicants' contention, that there are occasions where the Courts will and can intervene.

[79] Furthermore, as the Court reviews the discretion granted to the Commissioner under section 24, it is apparent that the section affords several grounds on which the Commissioner can rely to refuse to deal with a disclosure. In sum, the Act grants the Commissioner a broad discretion. In *Detorakis v Canada (Attorney General),* 2010 FC 39 at para 106, the Court states that:

> [. . .]
>
> i. The discretionary power under section 24(1) is extremely wide. Its apparent objective is to allow the PSIC to decide whether it is in the public interest to investigate a complaint or to determine, on the basis of the information provided by a complainant, whether the matter could be better dealt with under another Act. The PSIC's office must be taken to have some expertise in this matter;
>
> [. . .]

[80] In the present instance, that discretion was exercised in 2009 taking into consideration that section 24 now applied to the Applicants' complaint in view of the section 54.3's transitional provision.

[81] The Applicants argue that, in order for the Commissioner to refuse to deal with their disclosure pursuant to paragraph 24(1)(*e*) of the *PSDPA* because she found its subject "relates to a matter that results from a balanced and informed decision-making process on a public policy issue", she was required to make a finding of fact that all the conditions necessary to the application of the paragraph were met, which she failed to do.

[82] As the Court reviews the evidence adduced before the Commissioner, it is apparent that she was faced with significant differences in scientific opinion between the Applicants, their employer and some of their colleagues and co-workers. She also had before her the *Regulations*, the *FDA* and the applicable standards. It is evident to the Court, as we review Commissioner Dion's reasons and his decision to leave the file closed, that all these were considered and that an implicit finding of fact was made. That decision fell within a range of possible outcomes as the scientific debate could not be resolved by the Commissioner.

[83] The Applicants also argue that the Court in *Chopra*, cited above, found that a proper investigation of the approval processes for all of the drugs listed in the disclosure could have an impact on the assessment of their file. The Court disagrees. The *ratio decidendi* of the decision in *Chopra* was that the PSIO had undertaken to examine the approval procedure for 8 veterinary drugs but only examined the procedure for Component with Tylan drugs. While the PSIO had concluded that Ministerial discretion was properly exercised with regards to Component with Tylan drugs, the Court had "no way of knowing what conclusions would have been reached by the PSIO had these other issues been considered" (*Chopra*, at para 73).

[84] After the decision in *Chopra*, cited above, the PSIO investigated the approval processes for the remaining drugs listed in the Applicants' disclosure and concluded, in its Preliminary Report, that Ministerial discretion had been properly exercised.

[85] Mr. Ron Calvert, the investigator assigned to the file, concludes that no drugs were approved in a way that was contrary to the *FDA* and its *Regulations*, and that the investigation did not permit him to conclude that veterinary drugs were approved in the absence of human safety data as a result of pressure exerted on the disclosers at Health Canada, or that the drug evaluators faced disciplinary action for failure to follow management's instructions by favouring the veterinary pharmaceutical drug lobby (see Preliminary Investigation Report dated March 12, 2008, Applicants' Application Record, Vol. XIII, page 4312). Clearly this finding reconciles the Commissioners' decisions with Justice O'Keefe's judgment. Mr. Calvert came to the aforementioned conclusions after a review of the approval process for the drugs that Justice O'Keefe had found missing.

[86] Both Commissioners Ouimet and Dion had before them these conclusions that found that the Minister had acted within the limits of his delegated authority.

[87] The issue at hand is whether the investigation of the approval processes was sufficiently thorough. This is clearly distinguishable from the case in *Chopra*, cited above, where there had been no investigation. Commissioner Ouimet decided that a more thorough investigation would not change her conclusion given that the same issue of a scientific disagreement was at the heart of the approval process for each drug. This conclusion was reasonable and open for her to make in view of the evidence on file. Commissioner Dion reasonably exercised his discretion not to reopen the Applicants' file since he came to a similar conclusion based on the evidence on file.

[88] To the extent that the Applicants are invoking the ground that Commissioner Ouimet failed to dispose of an issue which was fairly raised by the proceedings by not properly addressing the

second and third applications, their argument must fail. This ground for reopening applies when an administrative decision-maker fails to dispose of an issue and not whether it was properly disposed of. Furthermore, the finding that the issues were interrelated was open to Commissioner Dion in view of the evidence adduced before her by the Applicants that they were under pressure because of their scientific beliefs and the reprisals allegedly taken against them.

[89] The Court is of the view that Commissioner Dion's decision was reasonable since he took into consideration all the elements before him and found that his predecessor's determination was properly based on paragraph 24(1)(*e*). The evidence on file could reasonably bring about such a conclusion.

[90] In view of the fact that the Applicants have failed to establish that Commissioner Dion committed a reviewable error when he assessed his predecessor's decision to close the investigation of their complaint, the Court rejects this application for judicial review with costs.

[91] The parties having suggested the amount of costs to be paid, whether the Applicants or the Respondent were successful, the Court awards costs of $ 5 000.00 to the Respondent.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed with costs of $5 000.00 payable by the Applicants to the Respondent.

"André F.J. Scott"
Judge

ANNEX

Section 8, subsection 24(1) and section 54.3 of the *Public Servants Disclosure Protection Act,* SC 2005, c 46 provide as follows:

Wrongdoings

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;

(*b*) a misuse of public funds or a public asset;

(*c*) a gross mismanagement in the public sector;

(*d*) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of a public servant;

(*e*) a serious breach of a code of conduct established under section 5 or 6; and

(*f*) knowingly directing or counselling a person to commit a wrongdoing set out in any of paragraphs (*a*) to (*e*).

Actes répréhensibles

8. La présente loi s'applique aux actes répréhensibles ci-après commis au sein du secteur public ou le concernant :

a) la contravention d'une loi fédérale ou provinciale ou d'un règlement pris sous leur régime, à l'exception de la contravention de l'article 19 de la présente loi;

b) l'usage abusif des fonds ou des biens publics;

c) les cas graves de mauvaise gestion dans le secteur public;

d) le fait de causer — par action ou omission — un risque grave et précis pour la vie, la santé ou la sécurité humaines ou pour l'environnement, à l'exception du risque inhérent à l'exercice des attributions d'un fonctionnaire;

e) la contravention grave d'un code de conduite établi en vertu des articles 5 ou 6;

f) le fait de sciemment ordonner ou conseiller à une personne de commettre l'un des actes répréhensibles visés aux alinéas *a*) à *e*).

Right to refuse

24. (1) The Commissioner may refuse to deal with a disclosure or to commence an investigation — and he or she may cease an investigation — if he or she is of the opinion that

(*a*) the subject-matter of the disclosure or the investigation has been adequately dealt with, or could more appropriately be dealt with, according to a procedure provided for under another Act of Parliament;

(*b*) the subject-matter of the disclosure or the investigation is not sufficiently important;

(*c*) the disclosure was not made in good faith or the information that led to the investigation under section 33 was not provided in good faith;

(*d*) the length of time that has elapsed since the date when the subject-matter of the disclosure or the investigation arose is such that dealing with it would serve no useful purpose;

(*e*) the subject-matter of the disclosure or the investigation relates to a matter that results from a balanced and informed decision-making process on a public policy issue; or

(*f*) there is a valid reason for not dealing with the subject-matter of the disclosure or the investigation.

Refus d'intervenir

24. (1) Le commissaire peut refuser de donner suite à une divulgation ou de commencer une enquête ou de la poursuivre, s'il estime, selon le cas :

a) que l'objet de la divulgation ou de l'enquête a été instruit comme il se doit dans le cadre de la procédure prévue par toute autre loi fédérale ou pourrait l'être avantageusement selon celle-ci;

b) que l'objet de la divulgation ou de l'enquête n'est pas suffisamment important;

c) que la divulgation ou la communication des renseignements visée à l'article 33 n'est pas faite de bonne foi;

d) que cela serait inutile en raison de la période écoulée depuis le moment où les actes visés par la divulgation ou l'enquête ont été commis;

e) que les faits visés par la divulgation ou l'enquête résultent de la mise en application d'un processus décisionnel équilibré et informé;

f) que cela est opportun pour tout autre motif justifié.

Continuation

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.

Continuité

54.3 Toute divulgation engagée, à l'entrée en vigueur du présent article, aux termes de la politique du Conseil du Trésor intitulée Politique sur la divulgation interne d'information concernant des actes fautifs est continuée conformément à la présente loi.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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