

**Date: 20080715**

**Docket: A-531-07**

**Citation: 2008 FCA 239**

**Present: EVANS J.A.  
SHARLOW J.A.  
TRUDEL J.A.**

**BETWEEN:**

**TORONTO SUN WAH TRADING INC.**

**Appellant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Dealt with in writing without appearance of parties.

Judgment delivered at Ottawa, Ontario, on July 15, 2008.

**REASONS FOR JUDGMENT BY:  
CONCURRED IN BY:**

**SHARLOW J.A.  
EVANS J.A.  
TRUDEL J.A.**

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**REASONS FOR JUDGMENT**

**SHARLOW J.A.**

[1] This appeal was commenced almost 8 months ago, and has not yet progressed to the point of the filing of an agreement as to the contents of the appeal book. Almost six months after the appeal was commenced, the respondent (the Crown) moved for an order dismissing this appeal for delay. The appellant (Toronto Sun Wah) opposes that motion and moves for an order extending the time for filing the agreement as to the contents of the appeal book and the appeal book. The Crown opposes that motion. The motions were considered together.

[2] The underlying facts, as stated by Justice Teitelbaum, relate to a salmonella outbreak in southern Ontario in November of 2005. That outbreak apparently was linked to the consumption of bean sprouts. The Canadian Food Inspection Agency (the CFIA) issued a Health Hazard Alert

notifying the general public that mung bean sprouts supplied by Toronto Sun Wah may contain salmonella bacteria. Toronto Sun Wah voluntarily recalled its bean sprouts from the market.

[3] In December of 2005, the CFIA received a request under the *Access to Information Act*, R.S.C. 1985, c. A-1, seeking information relating to the bean sprout recall investigation file at the Office of Food Safety and Recall. By April 14, 2006, the CFIA had identified the information sought and determined that some of it contained references to Toronto Sun Wah. On that date the CFIA sent to Toronto Sun Wah the third party notice required by section 27 of the *Access to Information Act*, describing the information relating to Toronto Sun Wah that the CFIA proposed to release. Toronto Sun Wah responded with a number of objections based on section 19 and section 20 of the *Access to Information Act*. The CFIA accepted some but not all of the objections and, by letter dated April 27, 2006, advised Toronto Sun Wah of its revised proposal to release information.

[4] Pursuant to section 44 of the *Access to Information Act*, Toronto Sun Wah had 20 days to commence an application in the Federal Court for judicial review of the decision of the CFIA to release information relating to Toronto Sun Wah. Toronto Sun Wah filed such an application in the Federal Court on May 16, 2006.

[5] Toronto Sun Wah was required to take a number of steps to have its application heard in the Federal Court. Several of those steps were taken outside the normal deadlines, with the Crown's consent. All records were finally filed by November 7, 2006, but the requisition for hearing had not been filed by December 12, 2006. On that date, the Federal Court issued a notice of status review.

Toronto Sun Wah responded to that notice and its application was permitted to continue. The requisition for hearing was filed on February 23, 2007. The hearing was scheduled for 9:30 a.m. on October 17, 2007.

[6] According to the affidavit filed by the Crown in support of its opposition to the extension of time now sought by Toronto Sun Wah, counsel for Toronto Sun Wah did not appear at the time scheduled for the Federal Court hearing. At 9:55 a.m., Justice Teitelbaum indicated orally that he would dismiss the application on the basis of counsel's failure to appear. However, counsel for Toronto Sun Wah did finally appear before Justice Teitelbaum made the threatened order. He heard argument on the merits and reserved his decision. One week later, on October 24, 2007, Justice Teitelbaum rendered judgment dismissing the application (2007 FC 1091).

[7] On November 23, 2007, Toronto Sun Wah filed a notice of appeal, alleging that Justice Teitelbaum erred in finding that certain information did not meet the requirements of sections 19 and 20 of the *Access to Information Act*, and in "failing to consider the public policy issues with respect to information released by a person as required by law and that such information shall remain confidential to the person to whom and for the purpose for which it is divulged."

[8] Toronto Sun Wah has not sought an order staying the judgment of Justice Teitelbaum. However, it appears from the material submitted by the Crown that the CFIA has deferred the release of the disputed information pending the outcome of the appeal.

[9] The motions before me require an understanding of the procedural history of this appeal. According to Rule 343(1) of the *Federal Courts Rules*, SOR 98/106, an agreement as to the contents of the appeal book was required to be filed within 30 days after the filing of the notice of appeal. Taking the Christmas recess into account, the deadline for that step was Thursday, January 10, 2008. One week before that deadline, counsel for Toronto Sun Wah sent a letter to counsel for the Crown enclosing a draft agreement as to the contents of the appeal book. Crown counsel responded promptly, indicating her general agreement but noting correctly that the appeal book should not include the memoranda of fact and law, statutes or authorities, and also indicating that the agreement should list the exhibits to the affidavits included in the appeal book.

[10] In late January of 2008, Crown counsel contacted counsel for Toronto Sun Wah to inquire about the status of the agreement. He indicated that he would follow up, but he apparently did not do so and he did not contact her again. She reached the conclusion that Toronto Sun Was no longer interested in pursuing the appeal and, on May 8, 2008, she filed the Crown's motion to dismiss the appeal for delay.

[11] On May 9, 2008 after the Crown's motion record was served on Toronto Sun Wah, counsel for Toronto Sun Wah told Crown counsel that after their correspondence in early January of 2008 he had expected to receive her consent to the contents. He does not explain why he expected her to consent to an agreement that she thought was incorrect. Nor does he explain why he did not contact her, or follow up with her after she had contacted him in late January. In any event, he enclosed a revised agreement making the changes she had suggested at the outset. Crown counsel confirmed

her agreement in principle with the revised agreement, but declined to sign it because she had already filed a motion to dismiss the appeal.

[12] On May 20, 2008, counsel for Toronto Sun Wah filed a motion record opposing the Crown's motion to dismiss the appeal, and also filed a motion record seeking an extension of time for filing the agreement as to the contents of the appeal book and the appeal book. By that date, over 4 months had passed since the date on which the agreement as to the contents of the appeal book should have been filed. The Crown opposes the motion for an extension of time.

#### Discussion

[13] It is convenient to deal first with the motion of Toronto Sun Wah to extend the time for filing the agreement as to the contents of the appeal book and the appeal book.

[14] An order granting or refusing an extension of time is discretionary. The applicable principles are summarized in the leading case, *Canada (Attorney General) v. Hennelly* (1999), 244 N.R. 299, [1999] F.C.J. No. 846 (QL) (F.C.A.). The underlying consideration is that justice must be done between the parties. The factors to be considered are:

- (a) whether there has been a continuing intention to pursue the appeal;
- (b) whether the appeal has some merit;
- (c) whether any prejudice arises from the delay; and
- (d) whether there is a reasonable explanation for the delay.

[15] In this case it is convenient to consider the first and fourth factors together. The filing of the notice of appeal and the initial attempt by Toronto Sun Wah to obtain the Crown's agreement as to the contents of the appeal book indicate an intention to pursue the appeal up to the early part of January 2008. However, no action was taken by Toronto Sun Wah after that time, until it was faced with the Crown's motion to dismiss in early May. The only explanation offered for the four months of inaction is that the Toronto Sun Wah was expecting the Crown's consent to the initial incorrect version of the agreement as to the contents of the appeal book. In my view that is not a satisfactory explanation, particularly in light of the Crown's unanswered attempt to follow the matter up in late January. I conclude that Toronto Sun Wah has established neither a continuing intention to appeal nor a reasonable explanation for the delay.

[16] As to the second factor, there is very little on the record from which I can determine whether there is merit to the appeal. It would appear that the key point of interest to Toronto Sun Wah is that the disputed information was provided to the CFIA pursuant to an investigation. However, the material filed by Toronto Sun Wah refers to no legal principles or authorities from which I can discern how Toronto Sun Wah proposes to use that general notion as the basis for a challenge to the correctness of Justice Teitelbaum's decision.

[17] As to the third factor, there is no allegation of prejudice to the Crown. However, the Crown argues that the party who requested the information has already waited for some years for a final response, and may well be prejudiced by further delay. There is no evidence to support that argument, no doubt because the identity of the requester and the reasons for the request are not

legally relevant in litigation involving a dispute about the disclosure of information under the *Access to Information Act*. However, I accept that it is normally reasonable to presume that undue delay in the disclosure of information under the *Access to Information Act* may be prejudicial to the requester. Toronto Sun Wah argues that the disclosure of the disputed information will be prejudicial to it, but that argument assumes that the appeal has merit and, for the reasons explained above, that assumption does not appear to be well founded. On balance, it appears to me that the factor of prejudice favours the position of the Crown.

[18] For these reasons, I would dismiss the motion of Toronto Sun Wah for an extension of time. As that will preclude Toronto Sun Wah from proceeding with this appeal, it follows that I would also allow the Crown's motion to dismiss the appeal, and dismiss the appeal with costs.

“K. Sharlow”

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J.A.

“I agree.  
John M. Evans J.A.”

“I agree.  
Johanne Trudel J.A.”



**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-531-07

**STYLE OF CAUSE:** Toronto Sun Wah Trading Inc.  
v. Attorney General of Canada

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

**REASONS FOR JUDGMENT BY:** SHARLOW J.A.  
EVANS J.A.  
TRUDEL J.A.

**DATED:** July 15, 2008

**WRITTEN REPRESENTATIONS BY:**

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FOR THE APPELLANT

Glynis Evans

FOR THE RESPONDENT

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