Federal Court of Appeal | Cour d'appel fédérale

Date: 20140717

Docket: A-239-13

Citation: 2014 FCA 179

CORAM: **DAWSON J.A.**
TRUDEL J.A.
NEAR J.A.

BETWEEN:

SHIV CHOPRA AND MARGARET HAYDON

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on April 29, 2014.

Judgment delivered at Ottawa, Ontario, on July 17, 2014.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: DAWSON J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

I. Overview

[1] Dr. Shiv Chopra and Dr. Margaret Haydon (the appellants) appeal from a decision of a judge of the Federal Court (the Judge) dismissing their application for judicial review of a decision of the Public Sector Integrity Commissioner [PSIC], Mario Dion (2013 FC 644, [2013] F.C.J. No. 721 [Reasons]). Commissioner Dion had elected to conduct an independent

review of all disclosure of wrongdoing and reprisal complaint files that had been closed by his predecessor, Commissioner Christiane Ouimet, between April 15, 2007 and December 19, 2010 in order to consider whether any merited being reopened. On January 31, 2012, Commissioner Dion decided that the appellants' file should remain closed as he found that Commissioner Ouimet had acted reasonably in ceasing an investigation of the appellants' disclosure of alleged wrongdoing by Health Canada pursuant to paragraph 24(1)(*e*) of the *Public Servants Disclosure Protection Act* (S.C. 2005, c. 46) [PSDPA].

[2] On application for judicial review, the Judge held that Commissioner Dion's decision was reasonable.

[3] For the reasons that follow, I am not persuaded that the Judge committed any errors warranting our Court's intervention. As a result, I propose to dismiss the appeal with costs.

II. Facts

[4] The facts of this case involve a series of administrative decisions and legal procedures that date back 12 years. Although some of the history of the file is not directly relevant for the purpose of making a determination as to whether to dismiss or allow this appeal, it is nonetheless needed to understand the context in which this appeal is being brought as well as the issues raised by the appellants.

[5] The appellants worked as drug evaluators in the Veterinary Drugs Directorate [VDD] of Health Canada, evaluating drug submissions filed by manufacturers applying for Notices of

Compliance [NOC] to market veterinary drugs, in accordance with the *Food and Drugs Act* (R.S.C., 1985, c. F-27) [FDA] and *Food and Drug Regulations* (C.R.C., c. 870) [Regulations]. They did not agree with the regulatory standards that were being applied by the VDD, as well as its predecessor the Bureau of Veterinary Drugs, in assessing drug submissions, especially with regard to the human safety data required for the use of antibiotics and hormones in food-producing animals.

[6] In 2002, they filed a complaint with the Public Service Integrity Officer [PSIO]. First, they alleged that veterinary drugs were being approved without first obtaining the requisite human safety data, in contravention of the FDA and its Regulations. These allegations concerned the NOCs for eight enumerated drugs. Second, they alleged that VDD drug evaluators (like themselves) were being pressured by their supervisors to pass or maintain veterinary drugs without the required human safety data. Third, they claimed that drug evaluators faced disciplinary action from their department if they did not follow management's instructions "to favour the pharmaceutical lobby in the approval process for veterinary drugs" (Reasons at paragraph 6; Commissioner Ouimet's decision, appeal book, volume 8 at 2964 [Ouimet's Decision]).

[7] The PSIO examined these three allegations of wrongdoing. However, with regard to the first allegation, the PSIO only investigated whether the NOCs for five "Components with Tylan" products were issued without adequate human safety data.

[8] On March 21, 2003, the PSIO issued a report concluding that all the aforementioned allegations were unfounded. The appellants applied for judicial review of the PSIO's decision.

[9] In an order dated April 29, 2005, Mr. Justice O'Keefe allowed the application for judicial review, set aside the PSIO's report and referred the matter back to the PSIO for reconsideration. He found that while the PSIO had undertaken to investigate the approval processes for at least 8 drugs in response to the appellants' complaints, the PSIO had only done so with respect to drug products called "Components with Tylan" (*Chopra v. Canada (Attorney General)*, 2005 FC 595, [2005] F.C.J. No. 712 at paragraphs 72-73 [*Chopra 1*]).

[10] In response to Justice O'Keefe's order, the PSIO appointed a new investigator to continue the investigation of the appellants' complaints. The new investigator advised the appellants in May 2005 that the investigation would be limited to reconsidering the issues that Justice O'Keefe had judged were missing from the PSIO's 2003 decision. He asked the parties to provide him with any additional evidence and also set out a series of questions for the appellants. The appellants declined to answer but referred the investigator to the record.

[11] In 2006, the *Public Servants Disclosure Protection Act* was enacted in order to provide a procedure for the disclosure of wrongdoings in the public sector and to protect persons who disclose these wrongdoings. The PSDPA created the office of the Public Sector Integrity Commissioner, which replaced the PSIO, and provided the PSIC with the mandate to investigate disclosures of alleged wrongdoings.

[12] The PSDPA provided a transitional provision, section 54.3, that stipulated that any prior disclosures under the Treasury Board Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace that were being dealt with by the PSIO upon the PSDPA coming into force, were to be continued as though they had been made under the PSDPA.

[13] The PSDPA also introduced subsection 24(1), which provided the PSIC with the discretion to cease an ongoing investigation if certain criteria are met. Of relevance to this case is paragraph 24(1)(*e*) which states:

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	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 :
…	[…]
(*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;	*e*) que les faits vises par la divulgation ou l'enquête résultent de la mise en application d'un processus décisionnel équilibré et informé;
[Emphasis added.]	[Non souligné dans l'original.]

[14] Ms. Christiane Ouimet was appointed as the first PSIC and she continued the PSIO's inquiry into the appellants' file. The investigator released his preliminary report in March 2008. He found that the appellants' allegations of wrongdoing were unsubstantiated and invited the appellants' comments and responses.

[15] With regard to the first allegation, he did not find that any veterinary drugs were approved in a way that contravened the FDA or its Regulations. Rather, the drugs at issue had been approved with the required data or had not been approved.

[16] He also concluded that the evidence before him did not support the appellants' second allegation, that drugs were approved without the requisite safety data because of pressure placed on Health Canada drug evaluators.

[17] Finally, he found that the information with which he was provided did not support the third allegation, that drug evaluators faced disciplinary action if they did not favour the pharmaceutical lobby.

[18] The appellants responded to his report in May 2008.

[19] On October 8, 2009, Commissioner Ouimet decided to cease the investigation pursuant to paragraph 24(1)(*e*) of the PSDPA. She found that the three allegations were interconnected and that they were "rooted in differences in scientific opinion related to the sufficiency and adequacy of the FDA and Regulations" (Ouimet's decision, appeal book at 2974). More specifically, she pointed out that these complaints were linked to a scientific dispute between the parties regarding the sufficiency of human safety data Health Canada receives from manufacturers for new drug submissions. She explained that her office was placed in the position of trying to evaluate and weigh scientific evidence and that the subject matter of the disclosure relates to a public policy debate that falls within the scope of paragraph 24(1)(*e*). She also noted that the "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" and that Parliament did not intend that her office "investigate and make recommendations on the appropriateness and sufficiency of the exercise of discretion given to a minister in federal legislation" (Reasons at paragraph 15; Ouimet's decision, appeal book at 2973).

[20] In sum, Commissioner Ouimet found that the investigation ought to be ceased pursuant to paragraph 24(1)(*e*) because the alleged wrongdoings were connected to the appellants' view that the Minister was not requiring adequate human safety data for the drug approval process in the FDA Regulations. According to Commissioner Ouimet, a debate over what human safety data ought to be required is a public policy issue that falls within the scope of paragraph 24(1)(*e*).

[21] The appellants did not apply for judicial review of Commissioner Ouimet's decision. As a result, the file was closed and Commissioner Ouimet's decision became final.

[22] In October 2010, Commissioner Ouimet stepped down and on December 20, 2010, Mr. Mario Dion was appointed as the new PSIC. He decided to hire Deloitte & Touche LLP to conduct an independent review of all disclosure of wrongdoing and reprisal complaint files that had been closed between April 15, 2007 and December 19, 2010 in order to consider whether any merited being reopened. The review was conducted to assess whether Commissioner Ouimet's decisions were made in accordance with the PSDPA (Commissioner Dion's decision, appeal book, volume 1 at 73 [Dion's decision]). The review was also intended 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" (Reasons at paragraph 19; Correspondence between counsel and the Office of the PSIC between February 2011 and January 2012, appeal book, volume 8 at 2981).

[23] On January 31, 2012, Commissioner Dion issued a letter to the appellants notifying them that he would not be reopening their file, as he found that Commissioner Ouimet had "acted reasonably in exercising her discretion to cease the investigation on the basis of [paragraph] 24(1)(e) of the [PSDPA]" (Dion's decision, appeal book at 73). He explained that Commissioner Ouimet was correct that the "parameters for the decision-making process for the approval of veterinary drugs was set out in regulations made pursuant to the [FDA], 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" (*Ibidem*). He found that the subject matter of the disclosure related to this required amount of science, and that it was reasonable to conclude that this falls within the ambit of paragraph 24(1)(*e*) as it relates to a matter that results from a "balanced and informed decision-making process on a public policy issue" (*Ibidem*).

[24] He also acknowledged that while there had been procedural shortcomings with regard to the investigation when it ended in the fall of 2008, these did not play a role in Commissioner Ouimet's final decision.

[25] The appellants brought an application for judicial review of Commissioner Dion's decision.

III. Federal Court Decision

[26] The Judge dismissed the appellants' application for judicial review as he found that Commissioner Dion did not err in deciding not to reopen the investigation of the appellants' allegations.

[27] Although the appellants had argued that Commissioner Dion's decision was reviewable on a standard of correctness, the Judge held that the standard of review was reasonableness. He reasoned that absent legislation requiring that a decision be reviewed, a non-adjudicative body's decision to reopen a case is discretionary and discretionary decisions attract a standard of reasonableness according to *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraphs 51, 53 [*Dunsmuir*].

[28] The Judge explained that neither the PSDPA nor the *Public Servants Disclosure Protection Tribunal Rules of Procedure* (SOR/2011-170) gives the PSIC the power to reopen a closed complaint file. However, the PSIC nonetheless has the jurisdiction to reopen an investigation on the basis of the exceptions to the principle of *functus officio* set out in *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, [1989] S.C.J. No. 102 [*Chandler*]. In *Chandler*, the Supreme Court explained that administrative tribunals may reopen a decision for which there is no right to appeal in a number of cases, including where there is a failure to dispose of an issue which is fairly raised by the proceedings and the tribunal was empowered by its enabling statute to dispose of that issue (Reasons at paragraph 65). The Judge explained that ensuring that the investigation addressed fully the issues in the original complaint falls within

this exception and thus Commissioner Dion had the authority to review Commissioner Ouimet's decision (Reasons at paragraph 68).

[29] The Judge also clarified that the decision under review is Commissioner Dion's. The Judge was not charged with undertaking a judicial review of Commissioner Ouimet's decision to stop the investigation pursuant to paragraph 24(1)(*e*); the appellants had failed to challenge that decision within the delay period set out at subsection 18.1(2) of the *Federal Courts Act* (R.S.C., 1985, c. F-7). Rather, the Federal Court's role was simply to determine whether Commissioner Dion erred in not reopening the investigation of the appellants' allegations. Thus, the Judge needed to decide whether it was reasonable for Commissioner Dion to conclude on the basis of the record before him that "Commissioner Ouimet was correct in relying on paragraph 24(1)(e) of the PSDPA to cease the investigation of the [appellants'] complaint of wrongdoing by Health Canada" (Reasons at paragraph 71).

[30] Having established that Commissioner Dion had the authority to review Commissioner Ouimet's decision and having clarified the applicable standard of review and the scope of this review, the Judge then proceeded to dismiss each of the appellants' arguments on the merits.

[31] The appellants argued before the Judge that Commissioner Ouimet had erred in relying upon paragraph 24(1)(*e*) to cease the investigation and thus Commissioner Dion erred in not reopening their file. In support of this argument, they alleged that Commissioner Ouimet neglected to consider the public interest or the quasi-constitutional status of the PSDPA, and failed to find that the conditions of paragraph 24(1)(*e*) were met. They also maintained that

Commissioner Ouimet's interpretation and application of paragraph 24(1)(*e*) problematically has the effect of shielding the Minister's discretionary decisions from scrutiny and prevents these decisions from being considered wrongdoing. They argued that Commissioner Dion's decision not to reopen the file is also inconsistent with Justice O'Keefe's decision in *Chopra I*, as Justice O'Keefe had ordered a more extensive investigation. They further suggested that Commissioner Ouimet erred by finding that the appellants' second and third allegations – regarding undue pressure and reprisals – need not be addressed because these complaints were linked to their first allegation regarding the lack of human safety data.

[32] The Judge rejected each of these arguments. He found that the PSDPA does not possess the qualities needed to give it quasi-constitutional status, and there is no jurisprudence that provides that it possesses this status.

[33] He also explained that Commissioner Ouimet made an implicit finding of fact that all the conditions required for the application of paragraph 24(1)(*e*) were met, and that Commissioner Dion noted this in reviewing her decision and deciding to leave the file closed.

[34] The Judge found that while section 24 affords the PSIC broad discretion, it does not shield all decisions of individuals in positions of authority from scrutiny and does not render the PSDPA ineffective. Rather, the Judge explained that in order to conclude that "the determination of the level of science required is within the Minister's discretion under the Food and Drugs Act" the Commissioner was required to assess whether the Minister's decisions regarding the approval

of drugs and the level of scientific evidence required to enable these approvals accorded with the Regulations (Reasons at paragraphs 77-79).

[35] The Judge also held that Commissioners Ouimet and Dion's respective decisions were not inconsistent with that of Justice O'Keefe. Commissioners Ouimet and Dion had before them the conclusions of the investigator assigned to the file following Justice O'Keefe's decision, and the investigator concluded that no drugs were approved in a way that was contrary to the FDA and its Regulations and the appellants' allegations of undue pressure and reprisals were unjustified. Thus, he found that Commissioner Ouimet's decision – that a more thorough investigation would not change her conclusion – was reasonable on the basis of the evidence before her.

[36] Finally, the Judge found that it was open to the Commissioner to find that the second and third issues were interrelated with the first and that Commissioner Ouimet did not fail to dispose of any issues before her.

[37] The Judge concluded that Commissioner Dion's decision was reasonable since he considered the evidence before him and found that Commissioner Ouimet's determination was properly based on paragraph 24(1)(*e*). As a result, the Judge found that the appellants had failed to establish that Commissioner Dion committed a reviewable error when he assessed his predecessor's decision to close the investigation of their complaint.

IV. Analysis

A. *Standard of Review*

[38] On an appeal of an application for judicial review our Court must determine whether the court below identified the appropriate standard of review and applied it correctly (*Telfer v. Canada (Revenue Agency)*, 2009 FCA 23, [2009] F.C.J. No. 71 leave to appeal to S.C.C. refused, 33095 (June 11, 2009) at paragraphs 18-19). If it did not, this Court must then assess the administrative decision in light of the appropriate standard of review (*Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19; [2003] 1 S.C.R. 226 at paragraph 43).

[39] The appellants suggested that this case ought to be reviewed on a standard of correctness as it raises general questions of law that are of central importance to the legal system as a whole and involves matters of public interest or a quasi-constitutional nature. The appellants also point out that the PSDPA does not contain a privative clause and the PSIC does not have expertise in interpreting this statute.

[40] The respondent, in turn, maintained that prior jurisprudence of the Federal Court establishes that the standard of review applicable to the PSIC's interpretation and application of subsection 24(1) is reasonableness (see *Detorakis v. Canada (Attorney Genera)*, 2010 FC 39, [2010] F.C.J. No. 19 [*Detorakis*]). It also pointed out that the wording of paragraph 24(1)(*e*) provides the decision-maker with wide discretion to cease an investigation if the PSIC is "of the opinion" that it meets the criteria set out in that provision.

[41] In my view, these arguments confuse the scope of the application for judicial review. The Judge was not required to review whether Commissioner Ouimet erred in her interpretation or application of paragraph 24(1)(*e*). Rather, it was Commissioner Dion's decision not to reopen the file that was subject to judicial review before the Federal Court.

[42] The Judge did not err in concluding that Commissioner Dion's decision was reviewable on a standard of reasonableness. Commissioner Dion was not legally required to undertake a review of Commissioner Ouimet's decision. He elected to do so in order to assess whether Commissioner Ouimet's decision accorded with the PSDPA, whether the analysis and investigation was sufficient and whether she provided adequate reasons for her decision. He also retained the discretion to decide whether or not to take action on the basis of his review.

[43] Commissioner Dion was also further constrained by the principle of *functus officio*. He was only able to reconsider his predecessor's decision because, as the Judge pointed out, it fell within one of the exceptions to this principle set out in *Chandler*.

[44] The Judge correctly pointed out that in the absence of legislation mandating a review, a non-adjudicative body's decision to voluntarily reopen a case is a discretionary decision and that discretionary decisions are reviewable on a standard of reasonableness (*Dunsmuir* at paragraphs 51 and 53).

B. *The merits of the appeal*

[45] On appeal, the appellants raise similar issues as they had before the Judge. They argue that the Federal Court and the PSIC erred in interpreting the PSDPA, as their interpretation precludes the review of discretionary decisions of the Minister of Health, even if these constitute wrongdoing. They contend that the PSIC ought to have been required to assess whether the Minister's exercise of discretion – with regard to the level of science required – was performed in a proper manner, despite paragraph 24(1)(*e*). They also argue that the PSIC and the Federal Court ought to have considered Health Canada's Guidelines, as well as whether there was wrongdoing within the meaning of section 8 of the PSDPA and point out that the PSIC's review of the evidence before it was insufficient given that the PSIC recognized that there were issues with regard to procedural fairness. They maintain that the PSIC and the Federal Court ought to have considered the quasi-constitutional status of the PSDPA. They suggest that Commissioner Dion erred in not explicitly dealing with their second and third allegations and that the Judge and Commissioner Ouimet erred in finding that these allegations were linked to the first allegation. They also allege that the PSIC erred in relying upon paragraph 24(1)(*e*) to cease the investigation, and that the PSIC failed to demonstrate that the conditions of this paragraph were met: namely, that the Minister's conclusion with regard to the scientific data required for drug approval actually resulted from a balanced and informed decision-making process on a public policy issue.

[46] Many of these arguments are inappropriate attempts to review Commissioner Ouimet's decision to cease the investigation pursuant to paragraph 24(1)(*e*). In using the term "PSIC" the

appellants often fail to specify whether they are referring to Commissioner Ouimet or Commissioner Dion; however, the context of their arguments reveals that they commonly use this term to refer to Commissioner Ouimet. It ought to be emphasized, once again, that it was Commissioner Dion's decision that was subject to judicial review. Commissioner Ouimet's decision was final and binding. Our Court is not permitted to review indirectly that which we are not permitted to review directly. Rather, our task is simply to determine whether the Judge erred in finding that Commissioner Dion's decision to not reopen the file was reasonable on the evidence before him.

[47] The Judge opted to respond to each of the appellants' arguments in turn. In my view, however, such an analysis is unnecessary and not warranted for this appeal. Rather, only two of the issues the appellants raise are sufficiently relevant to merit being addressed here: the adequacy of Commissioner Dion's Reasons and Commissioner Dion's alleged failure to review the manner in which the Minister exercises his discretion under the Regulations.

[48] Commissioner Dion's decision was not rendered unreasonable by the fact that he did not state explicitly that he agrees with Commissioner Ouimet that the appellants' second and third complaints are linked to the first. Nor was it unreasonable for him not to demonstrate clearly that the conditions for paragraph 24(1)(*e*) were met. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 stands for the principle that the adequacy of reasons is insufficient grounds for quashing a decision. It is implied that Commissioner Dion agrees with Commissioner Ouimet on these points. It is evident that he did not ignore or overlook the second and third complaints as he lists them in his reasons.

[49] Moreover, Commissioner Dion was not required to provide evidence that the decision-making process for determining the amount of human data required under the Regulations results from a "balanced and informed decision-making process". Commissioner Ouimet was required to provide some rationale for why *she believed* that paragraph 24(1)(*e*) applied and she did so. Even if one suggests that Commissioner Ouimet ought to have provided a more detailed explanation for why she was "of the opinion" that the subject matter of the investigation fell within the ambit of paragraph 24(1)(*e*), once again, the Judge was tasked with reviewing the reasonability of Commissioner Dion's decision, not Commissioner Ouimet's.

[50] Commissioner Dion's decision provided for "justification, transparency and intelligibility within the decision-making process" and fell within the "range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir* at paragraph 47). He provided several reasons why he believed that the file should remain closed. He explained that in his view Commissioner Ouimet acted reasonably in ceasing the investigation under paragraph 24(1)(*e*). More specifically, he pointed out that he shared Commissioner Ouimet's view that the complaints were related to the amount of science required and that this is a public policy issue that is determined through ministerial discretion and is set out in the Regulations. He also explained that any deficiencies with regard to the investigation did not play a role in the outcome of Commissioner Ouimet's decision, as she did not base her decision to cease the investigation on the preliminary conclusions of the incomplete investigation. Rather, according to Commissioner Dion, Commissioner Ouimet's decision was made solely on the basis of paragraph 24(1)(*e*).

[51] I find therefore that it was open to the Judge to conclude that Commissioner Dion's decision was reasonable.

V. Proposed Disposition

[52] As a result, I would dismiss the appeal with costs.

"Johanne Trudel"

J.A.

"I agree.
Eleanor R. Dawson J.A."

"I agree.
D.G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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