Federal Court Cour fédérale

Date: 20151215

Docket: T-2543-14

Citation: 2015 FC 1385

Ottawa, Ontario, December 15, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

CAROL LOVERNE SHELDON

Applicant

and

MINISTER OF HEALTH (CANADA)

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is a review proceeding brought under section 41 of the *Access to Information Act*, RSC, 1985, c A-1 [the Act] in relation to health product inspection records under the control of the Department of Health Canada (Health Canada).

II. Background

[2] About ten years ago, the Applicant, along with a number of other people, began marketing and distributing natural health products under the corporate name of NorthRegentRx. To that end, NorthRegentRx held a licence from Health Canada to sell its products, including the sale of Libidus, one of its primary products, which was marketed as a remedy for symptoms of erectile dysfunction.

[3] On August 4, 2006, Health Canada directed NorthRegentRx to stop the sale of Libidus on the basis that the product had undisclosed acetildenafil, which is an analogue of sildenafil (Viagra). NorthRegentRx complied with Health Canada's direction, but spent six years trying to convince Health Canada that acetildenafil was not an ingredient of Libidus.

[4] Health Canada's decision to direct NorthRegentRx to stop the sale of Libidus led the Applicant, together with her associates in NorthRegentRx, to sue Health Canada in damages. In that proceeding, the plaintiffs alleged that the decision was the result of gross negligence, arbitrariness, bad faith and malice on the part of Health Canada employees. The plaintiffs also alleged that there was a conspiracy between Health Canada and the pharmaceutical industry to suppress the distribution of Libidus. In a Judgment issued on January 22, 2014, this Court struck out the plaintiffs' action on the basis that it did not disclose a reasonable cause of action (see *Swarath v Canada*, 2014 FC 75).

[5] A few weeks before launching that action, that is on March 9, 2012, the Applicant had filed an access to information request under the Act seeking the release of "all correspondence" – which she later clarified to be emails and memos only - between Paul Gustafson, a Health Canada inspector with the Health Products and Food Branch Inspectorate, and any other Health Canada officers/branches regarding Libidus and NorthRegentRx over a period extending from July 2006 and January 2012 (the Access Request).

[6] The statutory deadline for Health Canada to respond to the Access Request was April 8, 2012. On April 4, 2012, Health Canada asked for a 120-day extension, extending the deadline to reply to the Access Request to August 7, 2012. However, this deadline could not be met. Health Canada claimed it need more time to process the Access Request as it required the processing and review of over 3,000 pages of documents as well as external consultations with three governmental entities. According to the record, these consultations were initiated in May 2013 and completed in March 2014. To that point, the Applicant's file within Health Canada's Access to Information and Privacy Office had changed hands five times.

[7] On April 3, 2014, the Applicant filed a complaint with the Information Commissioner of Canada (ICC), claiming that Health Canada had failed to respond to the Access Request within the time frames set out in the Act and was therefore deemed to have refused access. On October 23, 2014, the ICC reported on its investigation of the complaint, concluding that Health Canada had failed to comply with its "duty to assist" under subsection 4(2.1) of the Act and had placed itself in a deemed refusal situation as per subsection 10(3) of the Act as it had failed to respond to the Access Request within the statutory timeframe. However, the ICC also concluded that as a

result of its intervention, Health Canada had agreed to respond to the Access Request by October 31, 2014, which the ICC held to be a reasonable commitment under the circumstances of the case.

[8] Due to alleged unexpected technical difficulties, the October 31, 2014 deadline could not be met. The commitment date was first changed to November 18, 2014 and then to mid-December 2014, and yet again to January 7, 2015.

[9] On December 15, 2014, the Applicant filed the current proceedings, seeking an order from this Court enjoining Health Canada, in the context of the deemed refusal to process the Access Request, to release the requested records. On January 29, 2015, Health Canada responded to the Access Request by disclosing to the Applicant a redacted version of these records.

[10] The Applicant filed her memorandum of fact and law in June 2015 in support of this review proceeding where she asked the Court to order the release of an unredacted version of the requested records. The Applicant had previously filed a further complaint with the ICC regarding Health Canada's decision to exclude information from the released package. However, there is no evidence on record as to the status of that complaint.

[11] The Respondent submits that given that Health Canada responded to the Access Request in January 2015, the present proceeding is moot and ought to be dismissed. It further claims that

to the extent the Court should decide to consider the present proceeding insofar as it might pertain to the application of exemptions to the released records, the said proceeding is premature.

III. Issues

[12] The main issue to be resolved in this case is whether the release of the requested records in January 2015 has had the effect of rendering the Applicant's review proceeding moot, even if the records were released in a redacted form.

[13] In the alternative, that is if I were to consider the Applicant's review proceeding from the standpoint of the application of exemptions to the released records, as the Applicant now seems to be urging the Court to do, the issue is whether the Applicant's review proceeding is premature.

[14] Given the current state of the law on both issues, the Applicant's review proceeding must, unfortunately for her, fail on either front.

IV. Analysis

[15] Section 41 of the Act provides that any person who has been refused access to a record may apply to the Court for a review of the refusal. In *Statham v Canadian Broadcasting Corporation*, 2010 FCA 315, [2012] 2 FCR 421 (FCA) [*Statham*], the Federal Court of Appeal identified three prerequisites that such a person must satisfy before applying to the Court under section 41 of the Act:

> a. The applicant must have been "refused access" to a requested record;
>
> b. The applicant must have complained to the ICC about the refusal; and
>
> c. The applicant must have received a report of the ICC under subsection 37(2) of the Act.

[16] These requirements reflect the common law doctrine that, absent exceptional circumstances, all adequate and alternate remedies must be pursued before resorting to an application for judicial review (*Whitty v Canada (Minister of the Environment)*, 2014 FCA 30, at para 8 [*Whitty*]). The complaint scheme to the ICC is one such adequate and alternate remedy.

[17] This Court's jurisdiction under section 41 of the Act has been interpreted narrowly so that once the requested information has been provided, "there is no other remedy for the Court to provide" (*Frezza v Canada (National Defense),* 2014 FC 32, at para 56, 445 FTR 299 [*Frezza*]).

[18] In *Information Commissioner of Canada v Canada (Minister of National Defence)*, 2014 FC 205, rev'd on other grounds [2015] 2 FCR 786 , rev'd 2015 CAF 56 [*Information Commissioner of Canada*], Justice Catherine Kane, at paragraphs 63-73 of her decision, provided a useful snapshot of the mechanics of the regime established by the Act. While this decision was reversed on other grounds, Justice Kane's overview of the Act remains valid:

> [63] The Act sets out its purpose in section 2. Section 6 governs how requests for records shall be made.
>
> [64] Under section 7 of the Act, the head of the government institution to which the request is made has, subject to sections 8-10, 30 days after the request is received to give notice to the requester whether or not access to the record, or part thereof, will be given and if so, to provide the records.

[65] Section 9 of the Act allows the head of a Government institution to extend the time limit set out in section 7 "for a reasonable period of time, having regard to the circumstances" if there are a large number of records and if meeting the 30 day initial time limit would interfere with the operations of the department, or if consultations are required which cannot be completed within that period, or if notice of the request is required to be given to a third party pursuant to subsection 27(1).

[66] Section 10 governs refusals to give access to the records and subsection 10(3) provides that where the records are not provided within the time limits set out in this act, the head of the institution is deemed to have refused to give access. In other words, where there is no outright notice of refusal, if the requested records are not provided within 30 days or within the period of time claimed as an extension under section 9, there is a deemed refusal.

[67] Section 30 governs complaints, i.e. who can bring a complaint and on what grounds.

[68] Sections 32-36 govern investigations by the Information Commissioner, including the requirements to notify the Government institution, determine its procedure, the privacy of complaints, and the opportunity for those affected to make submissions.

[69] Section 37 sets out the powers of the Information Commissioner regarding the results or findings of its investigation. The Information Commissioner may report her findings to the Government institution, make recommendations, and request a response. She must also report to the requester and provide the requester's response of the impugned Government institution.

[70] Section 38 requires the Information Commissioner to provide an Annual Report to Parliament. The Information Commissioner may also submit Special Reports pursuant to section 39 on matters within the scope of its powers, particularly on matters of importance that should not wait until the next Annual Report to be highlighted.

[71] Sections 41 and 42 provide that the requester who has been refused access or the Information Commissioner, following an investigation, may apply to the Court for review of a refusal.

[72] In 2006, the Act was amended to add subsection 4(2.1) to impose a duty on the head of the institution to assist a requester, including to provide "timely" access to the requested record.

> [73] The Information Commissioner has no authority to make any orders.

[19] Here, the complaint to the ICC that led to the filing of the review proceeding under section 41 of the Act concerned specifically and exclusively Health Canada's deemed refusal to respond to the Access Request. However, Health Canada has since responded to the Access Request. As is well-established, the Court is empowered to decline to hear a case where its decision will have no practical effect on the rights of the parties (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, at para 15, 57 DLR (4h) 231) [*Borowski*]. This will generally be the case where the live controversy that gave rise to the legal proceedings has disappeared. This essential element of a live, concrete and tangible controversy must be present not only when the proceedings are commenced but also at the time the Court is called upon to reach a decision (*Borowski*, at para 15).

[20] In the case at bar, the deemed refusal to respond to the Access Request is the only issue that was investigated and reported on by the ICC and the only issue that is – and can be at this stage - before the Court. The live controversy that led to the Applicant's complaint to the ICC and subsequent review proceeding – the absence of a response to the Access Request – does not exist anymore now that a response to the Request has been provided to the Applicant. In such context, granting the review proceeding, to the extent it concerns the deemed refusal to respond to the Access Request, would have no practical effect on the rights of the parties.

[21] The Applicant claims that the review proceeding is not moot since Health Canada only partially responded to the Access Request by disclosing a redacted version of the requested

records. She says that she is entitled to a full version of these records and that the review proceeding seeks an order to that effect. However, the case law makes it clear that absent a prior investigation on the part of the ICC as to the manner in which Health Canada responded to the Access Request, it is not open to the Court to review the nature and content of the response, however imperfect and incomplete the response may appear to be to the access requester (*Statham*, above, at paras 23-24, 28-30; *Dagg v Canada (Minister of Industry),* 2010 FCA 316, at para 13 [*Dagg*]; *Information Commissioner of Canada*, above at para 47).

[22] According to the mechanics of the regime established by the Act, the Applicant's demand for an order enjoining Health Canada to disclose an unredacted version of the requested records is therefore premature. In a review proceeding initiated under section 41 of the Act on the basis of a complaint of a deemed refusal, the Court cannot rule upon the application of any exemption or exclusion claimed under the Act if the Commissioner has not investigated and reported on the claim to the exemption or exclusion (*Statham*, above at para 55; *Whitty,* above, at paras 8 and 9, *Lukács v Natural Sciences and Engineering Research Council of Canada),* 2015 FC 267, at para 31).

[23] Here, the ICC limited her investigation, as she was bound to do given the nature of the Applicant's complaint, to requiring Health Canada to respond to the Access Request so that the Applicant could then consider the merits of whatever response was provided. If not satisfied with the response, the Applicant was in turn entitled to make a further complaint to the ICC, as she appears to have done, so that the ICC could consider the merits of any exemptions or exclusions claimed under the Act by Health Canada. As previously indicated, I have no

evidence before me that this further complaint has been investigated and reported on by the ICC. At the hearing, the Applicant could not confirm the status of this complaint.

[24] Therefore, I have no choice but to find that the third prerequisite that the Applicant had to satisfy before applying to the Court under section 41 of the Act regarding the exemptions and exclusions applied by Health Canada to the requested records, that is the issuance of a report from the ICC, has not been met (*Statham*, above at para 64). The Applicant's challenge to Health Canada's decision not to disclose the "full" record is therefore premature. This is the logic of the scheme established by the Act, however imperfect and burdensome it may be perceived to be by some.

[25] The Applicant's review proceeding is therefore either moot or premature and for these reasons, ought to be dismissed.

[26] Both parties are claiming costs. Although the Applicant's Notice of Application is silent on costs, it is well-settled that a party can ask for costs at any point during the proceeding, even during the hearing (*Balogun v Canada*, 2005 FCA 350, at para 2). That is what the Applicant has done by seeking costs in the written submissions she filed in support of the review proceeding and by reiterating this demand at the hearing.

[27] According to subsection 53(1) of the Act, the costs of all proceedings in the Court under the Act shall be at the discretion of the Court and shall follow the event unless the Court orders otherwise. Subsection 53(2) of the Act provides that it is open to the Court to award costs to the

Applicant, even if he/she has not been successful in the result, if it finds that the review proceeding "raised an important new principle in relation to [the] Act." The present case is no doubt important to the Applicant but it does not raise an important new principle in relation to the Act, as contemplated by subsection 53(2).

[28] That being said, I am of the view that, in the particular circumstances of this case, each party shall bear its costs. One the one hand, as was the case in *Dagg*, above, the review proceeding was neither moot nor premature when it was commenced in December 2014. The three prerequisites under section 41 of the Act were all met. The review proceeding was rendered moot when Health Canada responded to the Access Request after the review proceeding was commenced. This was nearly three years after the Access Request had been filed. In *Dagg*, the Federal Court of Appeal found that in these circumstances, the Court should have ordered that Mr. Dagg was entitled to costs.

[29] Health Canada claims that this case does not merit an award of costs for the Applicant as it made significant efforts to release the requested records by the commitment date of October 31, 2014 and prior to the commencement of the review proceeding. It contends that these efforts were thwarted by the volume of the Access Request, the high number of documents collected for review and processing, the complexity of the records, the requirement for multiple consultations, and internal technical difficulties.

[30] However, the evidence also shows that the Access Request had changed hands at least five times within Health Canada's Access to Information and Privacy Office and that the ICC

found Health Canada to have failed to comply with its "duty to assist" under subsection 4(2.1) of the Act. Furthermore, the initial commitment date of October 31, 2014 had been changed on two occasions before the Applicant finally decided to file the review proceeding. In these circumstances, that decision was not unreasonable, abusive, or vexatious. As in *Dagg*, when her review proceeding became moot at the end of January 2015, the Applicant was entitled to costs.

[31] On the other hand, contrary to *Dagg*, where the applicant conceded that his application under section 41 of the Act had become moot and was only pursuing his application in order to seek costs (*Dagg*, at paras 5 and 13), the Applicant insisted to proceed further by seeking an order enjoining Health Canada to release an unredacted version of the requested records. This was an ill-advised decision as this endeavour, for the reasons mentioned above and assuming it was properly before the Court, was bound to fail and indeed failed.

[32] In these circumstances, exercising the discretionary power vested in the Court by subsection 53(1) of the Act, I find that neither party should benefit from a costs award. The Applicant's review proceeding shall therefore be dismissed without costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the judicial review application is dismissed, without costs.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	WINNIPEG, MANITOBA
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