Federal Court  Cour fédérale

Date: 20190627

Docket: T-324-18
T-1629-17

Citation: 2019 FC 874

Ottawa, Ontario, June 27, 2019

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

WILDCHILD STOCKHOLM, INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] The Applicant brings a motion to the Court for:

a) An Order, pursuant to section 18.4(2) of the *Federal Courts Act*, converting the within judicial review applications to a single consolidated action;

b) In the alternative, an Order, pursuant to section 18.4(2) of the *Federal Courts Act*, converting the within judicial review applications to actions, which shall be heard together;

c) An Order granting leave to the Applicant to amend Notice of Application bearing Court File No. T-324-18 and to amend Amended Notice of Application bearing Court File No. T-l629-l7 upon their conversion to include, *inter alia*, a claim for damages;

d) In the alternative to paragraphs (a) to (c) above, an Order compelling the Respondent's affiant, Nick Shipley, to:

(i) answer the questions refused on his cross-examination;

(ii) produce the documents he has refused to produce; and,

(iii) provide proper answers to questions 134, 155, 214, 342, 363, 521, 547, 560, 583, as set out in the Undertakings Chart attached as Schedule "A", in respect of Court File No. 324-18;

e) An Order directing the Respondent to provide to the Applicant's counsel unredacted copies of the Certified Tribunal Records bearing Court File No. T-324-18 and Court File No. T-l629-17 in order to determine if information relevant to the within applications has been improperly redacted;

f) An Order permitting the Applicant to file supplementary evidence relating to recent comments made by Health Canada to Today's Parent; and

g) Such other and further relief as the Applicant may seek and this Court grant.

[2] As I instructed counsel at the hearing of this matter, disputes relating to the alternative relief sought – regarding refusals, the certified tribunal records, and supplementary evidence – should be brought before the Case Management Judge as soon as possible. This order will address the relief sought in items (a) through (c), above.

I. Background

[3] The Applicant, Wildchild Stockholm, Inc. [Wildchild] produces the DockATot Deluxe and DockATot Grand products [collectively, DockATots], which were offered for sale in Canada between late 2015 and August 30, 2017.

[4] Beginning in 2015, there was dialogue between Health Canada and the Applicant as to the classification of DockATots. In an email dated November 17, 2015, Ms. Wang, a Consumer Product Safety Officer at Health Canada, indicated that if Wildchild removed all advertisements and references to sleep, DockATots would not be subject to the *Cribs, Cradles and Bassinets Regulations*, SOR/2016-152 [the CCBR] of the *Canada Consumer Product Safety Act*, SC 2010, c 21 [the CCPSA].

[5] On May 18, 2017, Ms. Kennedy, a Consumer Product Safety Officer at Health Canada [Kennedy] emailed Wildchild, asking that Wildchild demonstrate that the DockATot Grand complied with the CCBR.

[6] On June 13, 2017, Kennedy prepared a draft classification document which concluded that DockATots were promoted for unsupervised sleep [the Classification Request].

[7] On July 11, 2017, Kennedy advised Wildchild that Health Canada's Juvenile Sleep Products and Playpens Committee [the Committee] considered DockATots to fall under the

category of “baby nests”, and therefore asked Wildchild to provide documentation demonstrating compliance with the CCBR [the Classification Decision].

[8] On July 14, 2017, Wildchild submitted an *Access to Information Act* [ATIA] request for materials connected to, *inter alia*, the Classification Decision.

[9] On September 11, 2017, Health Canada sent letters to some Canadian retailers, ordering that retailers stop the importation and sale of DockATots.

[10] On September 15, 2017, Wildchild wrote to Health Canada requesting an order under section 32 of the CCPSA. On September 27, 2017, Mr. Barrett, the Acting Director General of the Consumer Product Safety Directorate, Health Canada wrote to Wildchild denying this request [the Enforcement Decision].

[11] On October 27, 2017, the Applicant commenced an application, in Federal Court File No. T-1629-17, seeking judicial review of the Enforcement Decision.

[12] In January 2018, the Applicant brought motions in writing on consent to amend their original notice of application, to file a second application for judicial review of the Classification Decision, and for the two applications to be heard together.

[13] On January 23, 2018, Prothonotary Milczynski granted leave to amend the notice of application in T-1629-17. On January 24, 2018, Justice Heneghan granted an extension of time

for the Applicant to file an application for judicial review of the Classification Decision (which became Federal Court File No. T-324-18).

[14] On February 8, 2018, Respondent's counsel advised the Applicant of two documents with the notation of 'confidential' that would be included in the Certified Tribunal Record [CTR] for T-324-18, and asked whether the Applicant had any reservations. On or about February 21, the Respondent provided the entire CTR to the Applicant.

[15] On March 23, 2018, Prothonotary Aalto was assigned as Case Management Judge.

[16] On April 26, 2018, the Applicant brought a motion seeking a confidentiality order in respect of a number of documents within the CTR for T-324-18.

[17] On August 20, 2018, Wildchild submitted additional ATIA requests for disclosure relating to emails between two Health Canada employees about DockATots, the risk assessment conducted by Health Canada for DockATots, and communications regarding the enforcement steps taken by Health Canada with respect to "baby nests" and related products. These requests remain unanswered.

[18] On August 23, 2018, the Case Management Judge ordered that a redacted CTR for T-324-18 be filed in the public record, and an unredacted version remain sealed in the Registry for only the Court and counsel's use.

[19] On November 22, 2018, the Court ordered that the two matters be heard over four days beginning June 24, 2019.

[20] On December 7, 2018, the Applicant served two affidavits to be used in both matters, as well as an expert report.

[21] In a letter dated December 21, 2018, the Respondent raised objections that portions of the affidavit evidence, as well as the expert report, were not proper in the context of a judicial review proceeding. The Respondent highlighted the distinctions between a judicial review and an action.

[22] The Respondent brought a motion to strike. On February 22, 2019, the Case Management Judge struck the entire expert report, as well as paragraphs and exhibits from each affidavit.

[23] The Respondent subsequently agreed to allow the Applicant to file 88 pages of reply evidence by way of a supplementary affidavit.

[24] On March 22, 2019, the Respondent's two affidavits, both sworn by Mr. Shipley, were served on the Applicant [the Shipley Affidavits].

[25] On April 16, 2019, Applicant's counsel stated that they wished to schedule two days of cross-examination, and that they wished to file further reply evidence. On April 17, Respondent's counsel objected to the filing of reply evidence, suggested that one day of cross-examination would be sufficient, and again advised of the evidentiary limits to a judicial review.

[26] At a case management teleconference on April 29, 2019 the Applicant advised it would bring a motion seeking to file a supplementary affidavit. The Case Management Judge advised the parties to proceed with two days of cross-examination beginning May 7, 2019.

[27] On May 7 and 8, 2019, Mr. Shipley was cross-examined on his two affidavits. Several undertakings were provided and some advisements or refusals were provided. The resulting transcripts are roughly 300 pages in length.

[28] On May 13, 2019, the Case Management Judge ordered that paragraphs 1 to 4, 7, and 8 of the supplementary affidavit evidence be allowed.

[29] During the cross-examinations of Mr. Shipley, counsel for the Applicant noticed that meeting minutes of the Committee, regarding the definition of bassinets under the CCBR, had been redacted in the Shipley Affidavits but not redacted in the ATIA documents. In a letter dated May 15, 2019, the Applicant requested unredacted copies of the exhibits to the Shipley Affidavits and the CTR, to be reviewed by counsel only, to ensure no further relevant information had been redacted.

[30] Between May 14 and 21, 2019, the Respondent provided answers to various undertakings, and clarified its position on all refusals and under advisements. The Respondent again reiterated the limited evidentiary scope of a judicial review.

[31] Wildchild learned of an article published by Today's Parent regarding a third party product, where Health Canada is quoted as stating "Health Canada is aware of the Fisher Price Rock 'n Play Soothing Seat… Since this seat is not intended for sleep, it is not subject to the Cribs, Cradles and Bassinets Regulations." On May 16, 2019, Wildchild requested that the Respondent provide a copy of the quoted email.

[32] The Applicant now brings this motion seeking relief outlined above. The judicial review hearings have been rescheduled to December 5 and 6, 2019.

II. Analysis

[33] As outlined in *BBM Canada v Research In Motion Limited*, 2011 FC 960 at paragraph 10 [*BBM*], the *Federal Courts Rules* provide for two distinct types of originating proceedings:

> [10] The *Federal Courts Rules* provide for two types of originating proceedings – an action or an application. Each is governed by its own procedure. An action, generally speaking, encompasses pleadings which identify the issues, require production of all relevant documentation, oral discovery followed by a pre-trial and trial with viva voce evidence. An application, on the other hand, is intended to be a summary proceeding. It does not engage the full panoply of procedural requirements of an action. It also is heard on a paper record comprising by way of evidence only the affidavits of the parties and the cross-examinations thereon which are not as extensive as discoveries and are primarily limited to the issues raised in the affidavits.
>
> [Emphasis added.]

[34] Subsection 18.4(2) of the *Federal Courts Act* grants this Court discretion to order the conversion of an application for judicial review into an action, thereby allowing for discovery and live witnesses.

[35] Each case involving an application for conversion turns on its own distinct facts and circumstances (*Association des crabiers acadiens Inc v Canada (Attorney General)*, 2009 FCA 357 at para 37 [*Crabiers Acadiens*]. However, there are factors that should be considered to better frame this exercise of discretion (*Crabier Acadiens* at paras 37-64):

a) the nature of the challenge at issue;

b) the nature of the impugned decision;

c) the insufficiency of affidavit evidence; and

d) the need to facilitate access to justice and avoid unnecessary cost and delay.

[36] In *Nosistel v Canada (Attorney General)*, 2018 FC 618 at paragraph 78, Justice Gascon outlined the "rare exceptional circumstances" where a judicial review may be converted into an action, citing *Crabiers Acadiens*, above:

> [78] Therefore, a judicial review may be converted into an action in rare exceptional circumstances, which the Federal Court of Appeal describes as follows: 1) when an application for judicial review does not provide appropriate procedural safeguards where declaratory relief is sought; 2) when the facts allowing the Court to make a decision cannot be satisfactorily established through mere affidavit evidence; 3) when it is desirable to facilitate access to justice and avoid unnecessary cost and delay; or 4) when it is necessary to address the remedial inadequacies of judicial review, such as the award of damages (*Crabiers Acadiens* at para 39).

[37] The Applicant argues that the restricted nature of judicial review prevents Wildchild from presenting an accurate and complete case to the Court, suggesting that the current record produced by the Respondent fails to answer crucial and relevant questions as to how Kennedy arrived at the Classification Decision, as well as issues regarding how Health Canada has regulated competitor products. In particular, the Applicant cites:

(i) the Respondent's production of an affiant, Mr. Shipley, who was not involved in the Classification Decision and hence could not answer many questions;

(ii) the Respondent's failure or refusal to produce relevant documentation;

(iii) the existence of allegedly improper redactions in the CTRs which only recently came to light; and

(iv) the Respondent's undertaking to make inquiries with Ms. Fairfull, regarding whether the Committee distinguished between "toddler nests" and "baby nests", which the Respondent advised could not be completed because Ms. Fairfull is on leave until November 2019.

[38] The Applicant argues that in these circumstances, the Respondent has taken actions which militate against the Applicant's right to full and fairly advance their application, and hence an action is necessary for the Court to properly consider Wildchild's allegations.

[39] The Applicant also highlights Prothonotary Aalto's statement in *BBM* at paragraph 20 that some factors affecting conversion will not become clear until evidence has been exchanged, and submits that such is the case here. Moreover, the Applicant argues that there is no prejudice to anyone but the Applicant in the timing of the conversion sought, nor should the principle of finality in conducting a judicial review have any bearing on this proceeding.

[40] As outlined above, the Applicant's concerns regarding improper refusals, redactions, and undertakings will be addressed by the Case Management Judge. To the extent the Applicant's concerns are found to have merit, any deficiencies will be addressed and rectified well before the December hearing date, and will not adversely affect adjudication on the merits.

[41] The remaining crux of the Applicant's argument appears to be that while it is "apparent in the record before the Court" that there was bias or procedural unfairness, further evidence could be available through the broader disclosure regime of an action. In particular, the Applicant cites the Respondent affiant's lack of personal knowledge, credibility concerns with this affiant, and a lack of evidence regarding Health Canada's enforcement actions relating to third parties.

[42] I will review the factors outlined by the Federal Court of Appeal in *Crabiers Acadiens*.

A. *Nature of the challenge at issue and the impugned decisions*

[43] The Classification Decision and the Enforcement Decision are administrative decisions made by delegates of the Minister of Health, and would normally be challenged by way of judicial review to reach a timely conclusion.

[44] While the Applicant raises the potential for a damages claim, there is a lack of specificity as to the nature of the action the Applicant would seek to bring, or the cause(s) of action that would be advanced therein, upon which they would ask for damages.

[45] The impugned decisions are challenged as having been made with insufficient evidence, and as being procedurally unfair and biased. These are arguments that may be determined by a judge on judicial review, and do not warrant conversion.

B. *Insufficiency of affidavit evidence*

[46] The sufficiency of evidence underlying the decisions will be a matter for the hearing judge in determining the reasonableness of the impugned decisions, and an alleged lack of evidence underlying the decisions does not weigh in favour of conversion. Similarly, the evidence in the record, once the parties resolve issues regarding refusals, redactions, and supplementary evidence, is more than sufficient to allow the hearing judge to determine issues of procedural fairness or bias.

[47] The Applicant also suggests that the evidentiary record is insufficient because of (1) the Respondent's affiant's lack of personal knowledge, and (2) that the Court will be asked to draw an adverse inference from the affiant's lack of knowledge.

[48] However, the Applicant has twice been permitted to file reply evidence, and has been afforded two full days to cross-examine the Respondent's affiant on his affidavits. In these circumstances, I am of the opinion that the evidentiary record is more than sufficient. Any issues of credibility can be properly assessed and decided by the hearing judge having regard to the affidavits and the transcripts from cross-examination.

[49] The Applicant also argues that there may be "other evidence," which may be fruitful in determining procedural fairness and reasonableness in these matters, that would emerge in the course of an action – this argument is speculative at best.

C. *Facilitate access to justice and avoid unnecessary delay*

[50] Judicial review is meant to be a timely, summary proceeding allowing the state to implement its administrative decisions with minimal delay if the decision is challenged and found lawful or, if found unlawful, to quickly make corrective measures so that the decision complies with law and can take effect (*Crabiers Acadiens* at para 31).

[51] This motion is the sixth distinct motion attempting to contour the scope of these matters, which were commenced approximately 20 months ago. I recognize that cross-examinations were only recently completed. Nonetheless, the Respondent has repeatedly highlighted the procedural limitations of a judicial review, beginning in the fall of 2018.

[52] After some twenty (20) months since these proceedings were commenced, converting these applications into one or more actions would increase costs and further delay adjudication on the merits. This factor weighs decidedly in the Respondent's favour.

D. *Conclusion*

[53] This is the sixth motion brought before the Court to pin down the evidentiary boundaries of these applications. The ship has sailed on any potential for these matters to be converted to an action. Having considered the factors outlined in *Crabiers Acadiens,* and having regard to the circumstances of this matter, I decline to exercise my discretion to order conversion.

[54] Given the outcome of this motion, I need not address arguments regarding costs thrown away. Costs are awarded to the Respondent, to be assessed at Column III of Tariff B.

ORDER in T-324-18 and T-1629-17

THIS COURT'S ORDER is that:

1. The Applicant's motion is dismissed.

2. The Applicant's request for alternative relief in the nature of: (i) further answers to questions refused during cross-examination; (ii) access to unredacted certified tribunal records; and (iii) filing of supplemental evidence, shall be raised with the case management judge as soon as possible, and he shall determine the relevance and propriety of these issues including the need for any confidentiality concerning redactions made in the certified tribunal records.

3. Costs to the Respondent to be assessed in accordance with Column III of Tariff B.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-324-18, T-1629-17
STYLE OF CAUSE:	WILDCHILD STOCKHOLM, INC. v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
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