Date: 20070713

Docket: T-1325-06

Citation: 2007 FC 745

Ottawa, Ontario, July 13, 2007

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

JASON WATKIN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, of a July 4, 2006 decision of the Canadian Human Rights Commission (the Commission) whereby it decided that the respondent and associated complainants had standing to institute a complaint against Health Canada, and that the matter was within its jurisdiction to decide.

BACKGROUND FACTS

[2] Jason Watkin (the respondent) is the President and CEO of Biomedia Laboratories Inc. (Biomedica), a corporation.

[3] Biomedica is entirely owned by the Nutraceutical Medicine Company Inc. (Nutraceutical), another corporate entity which itself has four shareholders, the respondent and three members of his immediate family.

[4] Biomedica sells and markets products under the name "Recovery" destined for both human and animal consumption.

[5] In February 2002, Health Canada requested that Biomedica cease and desist advertising in relation to "Recovery" as it found this advertising to be contravening of section 3 of the *Food and Drugs Act*, R.S.C. 1985, c. F-27. Through a series of events relating to continued advertising, and in the absence of a "New Drug Submission" by Biomedica for its "Recovery" products, Health Canada conducted a Health Hazard Evaluation (HHE). This in turn resulted in Health Canada's classification of both the human and animal versions of "Recovery" as a "Class II Health Hazard" and a "new drug" under the *Food and Drugs Act*, and the associated regulations. This finding was communicated to Biomedica in November 2002, as well as requesting the latter to cease the sale and promotion of "Recovery" and requesting that the products be recalled from the market.

[6] Subsequent to a full-page advertisement for "Recovery" in a national newspaper on December 7, 2007 and subsequent to letters from Health Canada reiterating its recall request, on December 20, 2002, Health Canada seized a quantity of "Recovery". It secured the seizure on the Biomedica premises with seizure tags and tape, and leaving them on-site. On that date, Biomedica expressed its interest in exporting the seized goods to the United States.

[7] On January 21, 2004, Health Canada conducted a monitoring visit to verify the status of the seized goods and found that they were missing from the location where they had been stored. There is clear evidence that Biomedica exported the products to the United States after receiving clearance from the United States' Food and Drug Administration.

[8] On June 4, 2004, the respondent filed a human rights complaint against Health Canada with the Commission (the complaint), alleging that Health Canada had adversely discriminated against Biomedica in the provision of services, contrary to section 5 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act).

[9] Specifically, he claimed that Health Canada enforced the provisions of the *Food and Drugs Act* in a manner that "gives preferential treatment to Asian businesses by regulating Asian Herbal Medicines less rigorously than it regulates non-Asian products." He submitted that for several years Health Canada has been aware of the "situation in Vancouver's 'Chinatown' where there are numerous products that do not follow the established regulations" but that there has been little or no enforcement of Health Canada policies there, despite the respondent's repeated requests and

complaints. On the other hand, the "Recovery" products have been unfairly targeted; competing products with substantially the same ingredients and product claims were not similarly subject to enforcement action by Health Canada.

[10] On December 15, 2004, the respondent amended the complaint, adding the three other Neutraceutical shareholders (Trevor, Anna and Marlene Watkin) as complainants. The amended complaint alleged that "Health Canada has acted against Biomedica, and thereby against the Watkins, in such a way as to discriminate against Biomedica, and thereby the Watkins, by giving significant preferential treatment to Asian businesses by refusing or otherwise failing to act against these businesses in the same manner in which it has acted against Biomedica and therefore the Watkins." Essentially, the amended complaint alleged that Health Canada's actions against Biomedica had a direct, adverse impact on the four members of the Watkin family, including the respondent, by virtue of their immediate interest in the corporation.

[11] The amended complaint was accepted by the Commission and its receipt was confirmed by the applicant in a January 28, 2005 letter. In response to the complaint, Health Canada requested that the Commission refuse to deal with the complaint on the grounds that it lacked jurisdiction.

[12] An investigator from the Commission prepared an investigator’s report in relation to the complaint. The final version of the report, dated February 17, 2006, advised that the matter was within the Commission’s jurisdiction and should be referred to the Canadian Human Rights Tribunal (CHRT) for a hearing. The Commission subsequently decided that the respondent had

standing to bring the complaint and that the matter was within its jurisdiction, pursuant to subsection 41(1) of the Act. This decision was communicated to the applicant in a July 4, 2006 letter and the present application for judicial review was initiated soon thereafter.

[13] It is worth noting that Neutraceutical commenced a civil action in British Columbia Superior Court against Her Majesty the Queen and the Minister of Health, seeking damages of approximately $4.5 million in relation to Health Canada's enforcement activities against Biomedica, arising from the same factual situation as the present application.

ISSUES

1. Whether the Commission has the jurisdiction to deal with the complaint against Health Canada.
2. Whether Health Canada is a "service provider" within the meaning of section 5 of the Act.

ANALYSIS

[14] Subsection 41(1) exempts the Commission from dealing with any complaint beyond its jurisdiction or that would be more appropriately dealt with through another Act of Parliament. According to subparagraph 44(3)(b)(ii) and paragraph 41(1)(c), the Commission must dismiss a complaint that is beyond its jurisdiction. Subsection 40(1) specifies that any individual, or group of individuals, may bring a complaint against any person for discriminatory actions.

[15] A pragmatic and functional analysis reveals that the issue pertaining to the jurisdiction of the Commission must be reviewed on a correctness standard (*United Parcel Service of Canada v. Thibodeau*, 2005 FC 608, [2005] F.C.J. No. 762 (QL); see also *Bouvier v. Canada (Attorney General).*, [1996] F.C.J. No. 623 (T.D.) (QL)**;** *Taylor v. Canada (Attorney General)*, [1997] F.C.J. No. 1748 (T.D.) (QL) at para. 8).

[16] The applicant submits that the Commission erred in law by failing to dismiss the complaint pursuant to section 44 of the Act. It exceeded its jurisdiction in deciding to deal with the respondent's complaint against Health Canada, as it relates to the latter's enforcement activity against a corporate entity, not an individual. A corporate entity does not have standing to file a complaint under the Act, and neither can the respondent file such a complaint on its behalf. Further, Health Canada is not a "service provider" within the meaning of section 5 of the Act. Additionally, the Commission breached the applicant's right to procedural fairness and natural justice by inadequately reviewing the complaint before rendering a decision.

[17] The applicant submits that the allegations in the complaint deal fundamentally with Health Canada's enforcement activities against Biomedica, not the respondent or the other three Watkin family members personally. Health Canada specifically requested that the Commission refuse to deal with the complaint under subsection 41(1) of the Act on the grounds that it lacked jurisdiction.

[18] The respondent submits that Biomedica is only an "operating name" and merely acts as a "vehicle" for the operation of Neutraceutical, as the latter owns 100% of Biomedica's shares.

Income received from the operation of Biomedica, a closely held corporation, is the sole source of family income for the respondent and three other members of his family. The issue of jurisdiction was duly considered by the Commission following submissions by the parties, and subsequent to the consideration of the investigator's report, and its decision should stand.

[19] Further, the respondent submits that he had standing to file the complaint by virtue of his "sufficiently direct and immediate" interest in the discrimination alleged on behalf of the company; the Commission's decision in this regard is consistent with a previous decision of the Canadian Human Rights Review Tribunal.

[20] The respondent submits that the Commission was justified in assuming jurisdiction over the matter, and its decision is consistent with the decisions of the Canadian Human Rights Tribunal in *Bader v. Canada (National Health and Welfare)*, [1996] C.H.R.D. No. 1 (*Bader* 1996; the initial Tribunal) as affirmed by *Bader v. Canada (National Health and Welfare)***,** [1998] C.H.R.D. No. 1 (*Bader* 1998; the Review Tribunal).

[21] In reaching a finding of discrimination in *Bader* 1996, above, the initial Tribunal had to address the issue of whether or not the complainant, Mr. Bader, was entitled to claim relief where the impact of the alleged discriminatory practice was on a corporation in which he and his wife were the directors and the only shareholders. The initial Tribunal concluded that it did have the jurisdiction to deal with the complaint. In reviewing that decision, the Review Tribunal in *Bader* 1998, above, concluded that the initial Tribunal had not erred in finding that the discriminatory

enforcement had a “sufficiently direct and immediate impact” on the complainant, entitling him to claim relief under the Act.

[22] The Review Tribunal in *Bader* 1998, above at paragraph 30, also concluded with regard to the argument that the company had no status to complain under the Act, that:

> (…) there is an identity of interest here, and from the perspective of standing, it is not possible to distinguish between the actions directed against the Complainant and the actions directed against the company. In the present case, the interests of Mr. Bader and his company have merged and the substantive wrong is the same in either instance.

[23] I respectfully disagree with the conclusions of the initial Tribunal and Review Tribunal in both of the *Bader* decisions cited above. I also distinguish *Canada (Secretary of State for External Affairs) v. Menghani***,** [1994] 2 F.C. 102, [1993] F.C.J. No. 1287 (T.D.) (QL) and *Singh (Re) (C.A.)*, [1989] 1 F.C. 430, [1988] F.C.J. No. 414 (C.A.) (QL), relied upon by the respondent, as they deal with allegations of discrimination against individual human beings and do not support the proposition that a shareholder (or shareholders) of a corporation may advance a human rights complaint on behalf of that corporate entity.

[24] The Act expressly refers to “individuals” and “persons”, implicitly drawing a distinction between the two. For instance, sections 2 and 5 of the Act are clear that it applies to “any individual” subject to discrimination. Subsection 40(1) of the Act specifically states that any “individual” or “group of individuals” may file a complaint. In contrast, that subsection as well as subsection 40(3) provides the Commission with the discretion to initiate a complaint where a

"person" engages in discriminatory behaviour. Thus, the legislator expressed its intent that while both a human and non-human "person" may engage in a discriminatory practice, only a human "individual" may be the victim of such a practice within the ambit of the Act.

[25] Whereas s.35 of the *Interpretation Act*, R.S., c. I-21, defines the word "person" to include a corporation, it is clear that if Parliament had intended to extend the protection of the human rights legislation at issue to a corporate entity, it would have used the word "person" instead of "individual".

[26] This interpretation is clearly bolstered by sections 2 and 3 which list the prohibited grounds of discrimination under the Act as race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted. These are all characteristics applicable only to human individuals and clearly are not applicable to corporate "persons".

[27] Furthermore, while recognizing that the interpretation of section 15 of the *Charter* does not necessarily mirror that of the Act, it nevertheless provides useful guidance. This Court has consistently held that a corporation is not an "individual" for the purposes of section 15 of the *Charter*, *Olympia Interiors Ltd. v. Canada*, [1999] F.C.J. No. 643 (T.D.) (QL) at para. 105; aff'd (1999) F.C.J. No. 1474 (C.A.) (QL); *Jose Pereira E. Hijos, S.A. v. Canada (Attorney General)*, [1996] F.C.J. No. 1669 (T.D.) (QL) at para. 46). I see no reason to deviate from this approach in relation to the interpretation of the Act, as in the present matter.

[28] In my opinion, it is clear that the Act was intended to protect individual human beings, and not corporate entities, from discrimination. The Commission did not have the jurisdiction to deal with a complaint alleging discriminatory practices against a corporation such as Biomedica.

[29] The allegations in the Respondent's complaint fundamentally deal with Health Canada's actions against Biomedica. The amendments made to the complaint, to the effect that actions taken against Biomedica in effect have a direct impact on the respondent and the three other shareholders of Neutraceutical, do not alter the fact that the enforcement actions by Health Canada were directed against the corporate entity of Biomedica and not the respondent. Indeed, this element is undisputed by the parties and recognized by the Commission.

[30] It is trite law that a corporation is a separate legal entity, distinct from its shareholders and its directors. Only a corporation can bring a claim for a wrong done to it; a shareholder in a corporation cannot assert a personal cause of action for damages sustained by the corporation in which she or he holds shares. I adopt the following summary of the relevant principles as articulated by the Ontario Court of Appeal in *Meditrust Healthcare Inc. v. Shoppers DrugMart*, [2002] O.J. No. 3891 (C.A.) at paragraphs 12, 13:

> **12** The rule in *Foss v. Harbottle* provides simply that a shareholder of a corporation - even a controlling shareholder or the sole shareholder - does not have a personal cause of action for a wrong done to the corporation. The rule respects a basic principle of corporate law: a corporation has a legal existence separate from that of its shareholders. See *Salomon v. Salomon*, [1897] A.C. 22, 66 L.J. Ch. 35 (H.L.). A shareholder cannot be sued for the

> liabilities of the corporation and, equally, a shareholder cannot sue for the losses suffered by the corporation.
>
> **13** The rule in *Foss v. Harbottle* also avoids multiple lawsuits. Indeed, without the rule, a shareholder would always be able to sue for harm to the corporation because any harm to the corporation indirectly harms the shareholders.

[31] While *Foss v. Harbottle* was decided over 160 years ago, its continuing validity in Canada was affirmed by the Supreme Court of Canada in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165.

[32] Accordingly, the respondent lacks standing in his capacity as a shareholder of Nutraceutical to bring a complaint under the Act regarding the alleged discrimination by Health Canada against Biomedica. The respondent and Biomedica are separate legal entities, and from a legal standpoint the complaint at issue does not personally involve the respondent.

[33] In choosing to structure his business affairs through the creation of two incorporated entities, Biomedica and Neutraceutical, the respondent obtained a variety of benefits, not the least of which was limited liability. As stated by the Ontario Court of Appeal in *Meditrust*, above, at paragraph 31, in so doing one "…must take not only the benefits of that structure, but also the burdens."

[34] It is only in exceptional cases that a court may disregard separate corporate entities for the benefit of innocent third parties, "piercing the corporate veil" when the corporate structure has been used by the corporation's principals as a sham or to perpetrate a fraud (*Meditrust*, above, at para. 31; *642947 Ontario Ltd. v. Fleischer et al.* (2001), 56 O.R. (3d) 417 (C.A.). The present matter clearly

does not fall under such an exception. The respondent (and possibly the three other members of the Watkin family cited in the amended complaint) created a structure in which to operate the business through the creation of two corporations. The respondent cannot accept the benefits of operating through these corporate entities and simultaneously seek to “pierce the corporate veil” for the purposes of pursuing a human rights complaint.

[35] I conclude that the respondent lacked the standing necessary to bring a complaint under section 5 of the Act. Further, the Commission did not have the jurisdiction to consider a complaint where the “victim” was a corporate “person” and not an “individual”. In failing to dismiss the complaint, the Commission erred in law by exceeding its jurisdiction. Accordingly, it is unnecessary to deal with the issue of whether or not Health Canada is a “service provider” within the meaning of section 5 of the Act, or whether the applicant’s procedural fairness rights were breached by the Commission.

[36] For these reasons, the application for judicial review of the decision is granted. The decision of the Commission is set aside. The respondent's complaint against Health Canada under section 41 of the CHRA is dismissed with costs.

JUDGMENT

THIS COURT ORDERS that the application for judicial review is granted, the Commission's decision is set aside, and **t**he respondent's complaint against Health Canada under section 41 of the Act is dismissed with costs.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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