

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20110322

Docket: A-62-10

Citation: 2011 FCA 114

**CORAM: BLAIS C.J.
SHARLOW J.A.
STRATAS J.A.**

BETWEEN:

**TRUEHOPE NUTRITIONAL SUPPORT LIMITED,
and DAVID HARDY**

Appellants

and

**THE ATTORNEY GENERAL OF CANADA
and THE MINISTER OF HEALTH OF CANADA**

Respondents

Heard at Calgary, Alberta, on March 22, 2011.

Judgment delivered from the Bench at Calgary, Alberta, on March 22, 2011.

REASONS FOR JUDGMENT OF THE COURT BY:

STRATAS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Calgary, Alberta, on March 22, 2011)

STRATAS J.A.

[1] This is an appeal from the judgment of Justice Campbell of the Federal Court: 2010 FC 63.

A. Background

[2] The appellant, TrueHope Nutritional Support Limited, markets and sells a substance to treat mental illness. For some time, it has not accepted Health Canada's jurisdiction under the *Food and Drug Act*, R.S.C. 1985, c. F-27 to assess the safety and regulate the marketing and sale of this substance in Canada. Health Canada maintains that the sale of the substance in Canada and the marketing of the substance in Canada offend a number of provisions of the Act and the Regulations.

[3] This matter arises from an attempted importation into Canada in 2003 of a small shipment of the substance. Health Canada intercepted it at the border, seized it as non-compliant under paragraph 23(1)(d) of the Act, and detained it under section 26 of the Act. Today, Health Canada still possesses the shipment. Paragraph 23(1)(d) and section 26 read as follows:

23. (1) Subject to subsection (1.1), an inspector may at any reasonable time enter any place where the inspector believes on reasonable grounds any article to which this Act or the regulations apply is manufactured, prepared, preserved, packaged or stored, and may

...

(d) seize and detain for such time as may be necessary any article by means of or in relation to which the inspector believes on reasonable grounds any provision of this Act or the regulations has been contravened.

23. (1) Sous réserve du paragraphe (1.1), l'inspecteur peut, à toute heure convenable, procéder à la visite de tout lieu où, à son avis, sont fabriqués, préparés, conservés, emballés ou emmagasinés des articles visés par la présente loi ou ses règlements. Il peut en outre :

...

d) saisir et retenir aussi longtemps que nécessaire tout article qui, à son avis, a servi ou donné lieu à une infraction à la présente loi ou à ses règlements.

26. An inspector who has seized any article under this Part shall release it when he is satisfied that all the provisions of this Act and the regulations with respect thereto have been complied with.

26. L'inspecteur, après avoir constaté que les dispositions de la présente loi et de ses règlements applicables à l'article qu'il a saisi en vertu de la présente partie ont été respectées, donne mainlevée de la saisie.

[4] In the Federal Court, TrueHope and its principal, David Hardy (the appellants), challenged Health Canada's decision to seize and detain the substance. They also challenged the constitutionality of paragraph 23(1)(d) and section 26 of the Act. They invoked sections 7 and 8 of the Charter in support of these challenges. Sections 7 and 8 of the Charter provide as follows:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

8. Everyone has the right to be secure against unreasonable search or seizure.

8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

[5] As part of their challenges, the appellants submitted in the Federal Court that the section 7 security of the person rights of the users of the substance were infringed: the users could not obtain the substance and so their health was impaired. The Federal Court judge held that the appellants did not have standing to invoke the users' rights in support of their challenge and so he ruled the appellants' evidence on this issue inadmissible. The Federal Court judge went on to dismiss the appellants' challenges under sections 7 and 8 on their merits.

B. Analysis

[6] We agree with the result reached by the Federal Court judge although, as explained below, not necessarily for all of the reasons he offered in support of that result. This appeal must be dismissed.

(1) Section 7 of the Charter and Mr. Hardy

[7] The appellants submit that Health Canada's seizure and detention of the substance has caused Mr. Hardy serious and profound harm to his psychological security, contrary to section 7 of the Charter. We reject this submission and substantially agree with the reasons and conclusions of the Federal Court judge at paragraphs 112-117. In particular, the appellants did not establish that the Federal Court judge committed any palpable and overriding error in making the factual findings he did, findings that fall well-short of the threshold necessary to establish an infringement of psychological security under section 7 of the Charter.

(2) Section 7 of the Charter and the users of the substance

[8] We assume, without deciding, that the appellants had standing to invoke the section 7 rights of the users of the substance in support of their challenges. We also assume that evidence will establish that users have encountered or are encountering difficulties in obtaining the substance and,

as a result, their health is impaired. Even on these assumptions, the appellants' section 7 challenge against paragraph 23(1)(d) and section 26 of the Act must fail.

[9] The Act and the Regulations do not prohibit users from purchasing outside of Canada and importing into Canada, for personal use, non-compliant, non-prescription substances. Since 1998, Health Canada has given guidance on this, in a policy statement entitled "Importation of Human-Use Drugs for Personal Use Enforcement Directive." Through the Directive, Health Canada has announced some restrictions: the sale of the substance must take place outside Canada, only a three month supply can be shipped at any one time, and it must be for the personal use of the purchaser. The appellants have not challenged the Directive or any of the restrictions in it.

[10] The Federal Court judge has found that under an agreement between Health Canada and TrueHope, made shortly after this challenge was commenced, users of the substance have been allowed to obtain the substance under the Directive, albeit with the restrictions imposed by the Directive. As a result, in the words of the Federal Court judge (at paragraphs 45-46), there has been "peace between Health Canada and TrueHope to the present day." In this Court, the appellants do not take issue with these findings of fact by the Federal Court judge.

[11] Therefore, any difficulties that the users have experienced or are experiencing in obtaining the substance can only be due to: (a) their failure to avail themselves of their ability to import substances purchased outside of Canada for personal use; (b) the restrictions imposed by the Directive; (c) possible non-compliance by Health Canada with the Directive; (d) the agreement

reached with Health Canada; (e) some other provision in the Act or Regulations (which has not been challenged here); or (f) any combination of these things. Paragraph 23(1)(d) and section 26, said by the appellants to infringe section 7, are not the operative cause of any difficulties.

(3) Section 8 of the Charter

[12] The appellants submit in this Court that paragraph 23(1)(d) and section 26 infringe section 8 of the Charter because they do not provide the appellants with sufficient procedural protections. They also submit that the seizure of the shipment was unreasonable under section 8 of the Charter.

[13] In our view, paragraph 23(1)(d) and section 26, when combined with the right of an aggrieved person to challenge the seizures in Federal Court, as happened here, afford sufficient procedural protections. As a practical matter, the appellants became aware of the seizure and proceeded to Federal Court and this Court, where they have had a full opportunity to contest the validity of the seizure.

[14] As for the reasonableness of the seizure in this case, we substantially agree with the reasons of the Federal Court judge in paragraph 128.

C. Conclusion and disposition

[15] Paragraph 23(1)(d) and section 26 of the Act and Health Canada's seizure and detention of the shipment in this case do not contravene sections 7 and 8 of the Charter.

[16] Therefore, we shall dismiss the appeal with costs.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-62-10

**APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE CAMPBELL
DATED JANUARY 20, 2010, DOCKET NO. T-880-03**

STYLE OF CAUSE: TRUEHOPE NUTRITIONAL SUPPORT
LIMITED and DAVID HARDY
v.
THE ATTORNEY GENERAL OF CANADA
and THE MINISTER OF HEALTH OF
CANADA

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: March 22, 2011

REASONS FOR JUDGMENT OF THE COURT BY: Blais C.J., Sharlow J.A., Stratas J.A.

DELIVERED FROM THE BENCH BY: Stratas J.A.

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