Federal Court  Cour fédérale

Date: 20160517

Docket: T-1422-13

Citation: 2016 FC 554

Ottawa, Ontario, May 17, 2016

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

ÉQUITERRE AND
DAVID SUZUKI FOUNDATION

Applicants

and

MINISTER OF HEALTH

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The judicial review requested is unusual in that in many ways, the Applicants have essentially succeeded in obtaining the goal of the litigation – the initiation of "special reviews" of certain pest control products. While mootness is a relevant issue, for reasons outlined, it is appropriate for this Court to deal with some of the issues raised as being moot. For the Applicants, this is a test case of Ministerial powers.

[2] The subject matters of this judicial review are various decisions of the Pest Management Regulatory Agency [Agency or PMRA], the delegate of the Respondent Minister, regarding whether to initiate "special reviews" of certain pest control products pursuant to sections 17(2) and (5) of the *Pest Control Products Act*, SC 2002, c 28 [Act].

[3] The principal issues in this matter are:

a) Are the issues moot?

b) When must the Minister (through the Agency) initiate a special review of a registered product? Is the review mandatory or discretionary?

c) What constitutes "reasonable time" for a decision on whether to initiate a special review?

d) Was the decision in respect to a product arguably banned in Norway lawful, or was the Agency *functus*?

[4] The Applicants' request for relief is broad-ranging, and as will be seen, only partially successful.

The relief sought is:

1. An order declaring that the Agency erred in law by refusing to initiate three special reviews under s 17(2) of the Act regarding pest control products containing trifluralin, chlorthal dimethyl and trichlorfon;

2. An order in the nature of *mandamus* ordering the Minister or her delegate to immediately initiate two special reviews under s 17(2) regarding pest control products containing trifluralin and chlorthal dimethyl;

3. An order declaring that the Minister or her delegate failed, refused and unreasonably delayed the performance of her mandatory duty to initiate a special review under s 17(2) of the Act of the pest control products containing any of 26 active ingredients prohibited by OECD countries for all uses for environmental or health reasons;

4. An order in the nature of *mandamus* ordering the Minister or her delegate to immediately initiate special reviews under s 17(2) of the Act of pest control products containing any of 26 active ingredients prohibited by OECD countries for all uses for environmental or health reasons;

5. An order declaring that the Agency was *functus officio* or acted without jurisdiction when it purported to reconsider, reverse or cancel its statutory decision made on December 30, 2013 to initiate a special review of registered pest control products containing difenoconazole;

6. An order declaring that the Agency's decision to reconsider, reverse or cancel its statutory decision made on December 30, 2013 to initiate a special review of registered pest control products containing difenoconazole is of no force and effect;

7. An order declaring that the Minister or her delegate has unlawfully failed or refused to perform her duty to initiate a special review under subsection 17(2) relating to pest control products containing difenoconazole;

8. An order in the nature of *mandamus* ordering the Minister or her delegate to immediately initiate a special review of pest control products containing difenoconazole; and

9. Costs as outlined in the Applicants' Memorandum of Fact and Law.

[5] The Applicants have abandoned all *mandamus* and declaratory relief orders sought for 6 of the 26 special reviews in issue.

II. Background

A. *Regulatory Scheme*

[6] Pest control products are regulated by the Agency on behalf of the Minister under the authority of the Act.

[7] The principal objective of the Act is to prevent unacceptable risk to people and the environment from the use of pest control products.

4 (1) In the administration of this Act, the Minister's primary objective is to prevent unacceptable risks to people and the environment from the use of pest control products.	**4 (1)** Pour l'application de la présente loi, le ministre a comme objectif premier de prévenir les risques inacceptables pour les personnes et l'environnement que présente l'utilisation des produits antiparasitaires.
(2) Consistent with, and in furtherance of, the primary objective, the Minister shall	**(2)** À cet égard, le ministre doit :
(a) support sustainable development designed to enable the needs of the present to be met without compromising the ability of future generations to meet their own needs;	**a)** promouvoir le développement durable, soit un développement qui permet de répondre aux besoins du présent sans compromettre la possibilité pour les générations futures de

	satisfaire les leurs;
(b) seek to minimize health and environmental risks posed by pest control products and encourage the development and implementation of innovative, sustainable pest management strategies by facilitating access to pest control products that pose lower risks and by other appropriate measures;	**b)** tenter de réduire au minimum les risques sanitaires et environnementaux que présentent les produits antiparasitaires et d'encourager le développement et la mise en oeuvre de stratégies de lutte antiparasitaire durables et innovatrices — en facilitant l'accès à des produits antiparasitaires à risque réduit — et d'autres mesures indiquées;
(c) encourage public awareness in relation to pest control products by informing the public, facilitating public access to relevant information and public participation in the decision-making process; and	**c)** sensibiliser le public aux produits antiparasitaires en l'informant, en favorisant son accès aux renseignements pertinents et en encourageant sa participation au processus de prise de décision;
(d) ensure that only those pest control products that are determined to be of acceptable value are approved for use in Canada.	**d)** veiller à ce que seuls les produits antiparasitaires dont la valeur a été déterminée comme acceptable soient approuvés pour utilisation au Canada.
4.1 For greater certainty, protection and consideration afforded to children in this Act shall also extend to future generations.	**4.1** Il est entendu que la protection et la considération que la présente loi accorde aux enfants s'étendent aux générations futures.

[8] An acceptable risk is based on reasonable certainty of no harm – it is a defined term.

2 (2) For the purposes of this Act, the health or environmental risks of a pest	**2 (2)** Pour l'application de la présente loi, les risques sanitaires ou

control product are acceptable if there is reasonable certainty that no harm to human health, future generations or the environment will result from exposure to or use of the product, taking into account its conditions or proposed conditions of registration.	environnementaux d'un produit antiparasitaire sont acceptables s'il existe une certitude raisonnable qu'aucun dommage à la santé humaine, aux générations futures ou à l'environnement ne résultera de l'exposition au produit ou de l'utilisation de celui-ci, compte tenu des conditions d'homologation proposées ou fixées.

[9] As with pharmaceuticals, the key ingredient of a pest control product is the "active ingredient" – the component of the product said to give the intended effects. It is largely on the basis of the active ingredient that a pest control product is approved for sale and use and registered with the Agency following its assessment process.

[10] The Act provides for both pre- and post-market assessment mechanisms for pest control products to ensure continued acceptability regarding health and environmental risks.

The two post-registration processes are re-evaluations and special reviews. Special reviews are at issue in this proceeding.

[11] Section 17(1) requires the Minister to initiate a special review where he/she has reasonable grounds to believe that the health or environmental risks of a product are unacceptable.

17 (1) The Minister shall initiate a special review of the registration of a pest control product if the Minister has reasonable grounds to believe	**17 (1)** Le ministre procède à l'examen spécial de l'homologation du produit antiparasitaire lorsqu'il a des motifs raisonnables de croire

that the health or environmental risks of the product are, or its value is, unacceptable.	que la valeur du produit ou les risques sanitaires ou environnementaux qu'il présente sont inacceptables.

[12] Section 17(2) of the Act requires the Minister to initiate a special review when an OECD member country prohibits all uses of an active ingredient for health or environmental reasons.

17 (2) Without limiting the generality of subsection (1), when a member country of the Organisation for Economic Co-operation and Development prohibits all uses of an active ingredient for health or environmental reasons, the Minister shall initiate a special review of registered pest control products containing that active ingredient.	**17 (2)** Sans que soit limitée la portée générale du paragraphe (1), lorsqu'un pays membre de l'Organisation de coopération et de développement économiques interdit l'utilisation d'un principe actif pour des raisons sanitaires ou environnementales, le ministre procède à l'examen spécial des produits antiparasitaires homologués contenant ce principe actif.

[13] However, sections 17(4) and (5) contain less mandatory review requirements where a person requests a review. The Minister is then only required to decide, within a reasonable time after receiving such a request, whether to initiate a special review and to give reasons for the decision on whether to initiate a special review.

17 (4) Any person may request a special review of the registration of a pest control product by making a request to the Minister in the form and manner directed by the Minister.	**17 (4)** Toute personne peut faire une demande d'examen spécial au ministre, en la forme et de la façon qu'il précise.
(5) Within a reasonable time after receiving a request, the Minister shall decide whether to initiate a special review and	**(5)** Dans un délai raisonnable suivant la réception de la demande, le ministre décide s'il procède ou non à l'examen

shall respond to the request with written reasons for the decision.	et communique à son auteur sa décision en la motivant par écrit.

[14] The Act then contains detailed provisions for the conduct of a special review including notice, information submissions, consultations and decision-making (s 28).

[15] Following a decision to grant or deny an application for product registration or an amendment of an existing registration, any person may file a notice of objection to such decision (s 35(1)).

[16] The filing of a notice of objection may trigger the establishment of a review panel to review the decision and make a recommendation to confirm, vary or rescind the decision (s 35(3)). The review panel process requires public notice, the establishment of terms of reference, an opportunity to make submissions and a hearing.

B. *Litigation Background*

[17] On October 15, 2012, the Applicants submitted a request under s 17(4) of the Act for the Minister, pursuant to sections 17(1) and (2), to initiate 30 special reviews covering 30 active ingredients alleged to have been prohibited for all uses by an OECD country for reasons of health or environmental concerns.

[18] When the special reviews had not been commenced after waiting approximately four and a half months, in response to the Applicants' status enquiry, the Agency said it had to undertake

a number of steps before a special review could be initiated – including reviewing the rationale for the OECD country's decision to determine if it was for health or environmental reasons as well as determining whether a previous Canadian decision had examined the same concerns.

[19] Approximately six months later, the Agency issued four decisions denying special reviews in respect of the following four active ingredients:

1. July 24, 2013: trifluralin [Decision 1]
2. July 24, 2013: chlorthal-dimethyl [Decision 2]
3. August 9, 2013: trichlorfon [Decision 3]
4. August 9, 2013: bifenthrin (decision not relevant to this judicial review)

[20] In August 2013, the Applicants challenged by judicial review the refusals to initiate special reviews under s 17(2) (the OECD provision) in respect of trifluralin, chlorthal-dimethyl and trichlorfon (covering Decisions 1, 2 and 3), but did not raise s 17(1) of the Act (the Ministerial-initiated review).

[21] On August 23, 2013, the Applicants filed a further judicial review challenging the unreasonable delay under s 17(5) regarding the other 26 outstanding active ingredients.

[22] In December 2013, the Minister initiated special reviews for 23 active ingredients including trifluralin and chlorthal-dimethyl, which had previously been denied.

[23] In parallel to the judicial reviews and special reviews, the Agency commenced a consultation process on draft guidelines entitled "Proposed Approach to Special Reviews – Consultation Document".

[24] A critical aspect of the Guidelines is that the Agency acknowledged that it was required to conduct a special review of pest control products containing active ingredients where all uses of that active ingredient were prohibited by an OECD member country for health or environmental concerns. This acknowledgement led to a different approach to s 17(2) situations.

[25] The Applicants objected to the proposed Guidelines in part because the Agency took the position that s 17(2) special reviews must be initiated by a request for review and because the Guidelines were silent on what constituted a "reasonable time" under s 17(5).

[26] Following initiation of the judicial reviews and the special reviews, Syngenta Canada Inc. [Syngenta] advised the Agency that seeds treated with difenoconazole for sowing were granted import authorization by the Norwegian Food Safety Authority in 2013.

The thrust of Syngenta's position is that this active ingredient should not be subject to s 17(2) special review because at least one use was now permitted in Norway.

[27] What followed on this Norwegian matter was a series of communications concerning the nature of the Norwegian Food Safety Authority decision.

[28] On February 19, 2015, the Minister issued a decision that a special review for all pest control products containing difenoconazole was not required by s 17(2) [Decision 4]. Decision 4 was based on the fact that seeds treated with difenoconazole for sowing were granted import authorization by Norway in 2013. The Applicants filed an application for judicial review of this decision on March 19, 2015.

[29] After learning of this judicial review, the Respondent submitted evidence that Norway had now approved difenoconazole for use in wheat barley, rye and triticale. To add further confusion, Norway advised that it had filed with the Secretariat of the Rotterdam Convention (an international registry of pesticides) that difenoconazole was now authorized in Norway and that it was filing a Notice of Withdrawal of its registered ban on difenoconazole.

III. Analysis

[30] Despite the convoluted history of this dispute, the issues are straightforward (see paragraph 3), as is the Court's decision.

[31] In Decisions 1, 2 and 3, the Agency did an analysis of the OECD decision to ban the three substances and, having concluded that the active ingredients had been examined in a 2008 or 2009 re-evaluation, determined that a special review was not warranted. Those decisions are in error.

[32] Decision 4 concluded that a special review was not warranted because Norway had, in 2013, granted import authorization of difenoconazole for sowing. That decision is upheld.

A. *Mootness*

[33] It is obvious that the Agency believed that, when it received a request for a special review based on a ban by OECD countries, it had discretion with respect to whether or not to conduct the special review.

The delay, which was the subject of the complaint that a decision was not made in a reasonable time, finds its genesis in the time taken for the Agency to decide whether it would commence a special review.

[34] Subsequent to the first three Decisions, the Agency issued its Guidelines wherein it effectively conceded that where there has been a ban imposed by one or more OECD countries, the Minister is required to initiate a special review. The Applicants are not prepared to accept this Guideline as a concession that they were correct in this interpretation of the Minister's duty.

[35] The issue raised by the Respondent is that the matter is moot as the special reviews are being undertaken. However, the Applicants are concerned that the Guideline is just that – a matter of policy, not law – and therefore is changeable. They are also concerned that the Guidelines do not address "within a reasonable period" and there is still a debate on that issue.

[36] It is noteworthy that the Respondent is not prepared to concede, as a matter of law, that the Minister has a mandatory obligation to initiate a special review under s 17(2). It was not prepared to consent to a declaration to that effect.

[37] This is a classic situation which is governed by the test in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, as to whether a matter that is moot can or should be heard. A court must address:

- whether there is still a live controversy;
- if there is not, whether the Court should exercise its discretion to consider the matter taking into account adversarial context (including utility of a decision), judicial economy and the role of the Court as an adjudicator of real, live disputes.

[38] Clearly there are some live issues between the parties, although the relief of *mandamus* to order special reviews is moot.

[39] In any event, there is an existing adversarial context. The Guideline under the heading "Triggers for Initiating Special Reviews" provides:

> A) Under subsection 17(1), if the Minister has reasonable grounds to believe that the health or environmental risks of a registered pest control product are, or its value is, unacceptable, a special review is initiated;
>
> B) However, under subsection 17(2) of the [Act], initiation of a special review is required: if an OECD member country prohibits all uses of an active ingredient for health or environmental reasons; **and**
>
> C) Any person may request a special review through a request made to the Minister in the form and manner prescribed… [emphasis added]

[40] It is arguable that the use of the word "and" means that the Minister's obligation to initiate a special review in the face of an OECD ban (s 17(2)) only arises upon receipt of a request (s 17(5)).

[41] The Applicants also contend that there is an adversarial context on the matter of reasonable delay. The Respondent disagrees with the Applicants on this point such that there is a sufficient adversarial context. As will be seen, there is little the Court can usefully do on this issue.

[42] As to the use of scarce judicial resources, that matter is a bit academic in view of having to hear the case to determine if mootness exists. Equally germane is that this is, to some extent, a test case, especially for the Applicants. Given the importance of environmental issues and the lack of binding authority, a determination of some of the issues may be in the public interest.

[43] This is a case primarily dealing with statutory interpretation, not government policy. It is therefore consistent with a court's adjudicative function to determine the matter.

[44] Therefore, the Court exercises its discretion, to the extent the same is applicable, to determine this judicial review.

B. *Standard of Review*

[45] The Supreme Court of Canada has reiterated that the presumptive standard of review is "reasonableness", including for interpretations of the decision-makers' home statute. The reach of that presumption is more case-dependent. However, the elegantly simple analysis in *Wier v Canada (Minister of Health)*, 2011 FC 1322, 400 FTR 212, that the Minister's interpretation of the legal standards imposed on him by statute is reviewable on the standard of correctness but the performance of the duties rests on reasonableness, does not hold the same force and effect.

[46] The Federal Court of Appeal in *Canada (Fisheries and Oceans) v David Suzuki Foundation*, 2012 FCA 40, [2013] 4 FCR 155 [*David Suzuki*], recognized that the presumption can and will be rebutted:

> [88] However, deference on a question of law will not always apply, notably where the administrative body whose decision or action is subject to review is not acting as an adjudicative tribunal, is not protected by a privative clause, and is not empowered by its enabling legislation to authoritatively decide questions of law. A standard of review analysis is still required in appropriate cases. As noted by Justices Bastarache and LeBel at paragraphs 63 and 64 of *Dunsmuir*:
>
> > [63] The existing approach to determining the appropriate standard of review has commonly been referred to as "pragmatic and functional". That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails. Because the phrase "pragmatic and functional approach" may have misguided courts in the past, we prefer to refer simply to the "standard of review analysis" in the future.
> >
> > [64] The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[47] Recognizing that the Agency is a specialized body and entitled to deference does not equate with any expertise in interpretation of the obligations imposed on the Minister. In my view, the presumption is displaced because, as noted in *David Suzuki*, this is not an administrative tribunal tasked with deciding issues of law; it has no privative clause; the issue is

the citizen's right to require the Executive to do what Parliament says it should; and the function required – interpretation of a statute – is not a matter that touches on any area of Agency expertise.

[48] Further, the issue of standard of review is largely academic. Even on a reasonableness standard, the interpretation of s 17(2) admits of only one answer.

C. *Section 17(2) – Mandatory or Discretionary*

[49] Section 17(2) contains mandatory language - "shall" – when addressing the Minister's duty to initiate a special review in the face of an OECD ban. The existence of a particular state of affairs – that an OECD ban exists – is a pre-condition to the Minister's obligation.

[50] Once that state of affairs exists, the Minister has no alternative to initiating a special review. It is not for the Minister to second guess the OECD ban. It is open to the Minister to ensure that the pre-condition exists, but once it is evident that it does, the Minister cannot refuse to initiate a special review.

[51] Section 17 is replete with mandatory language, even where there are pre-conditions that are phrased in subjective terms. Section 17(1) imposes a duty to initiate a review where the Minister has reasonable grounds for concern; s 17(3) likewise imposes that duty where a province or a federal government provides information that raises the same sorts of concerns.

[52] However, s 17(2) contains less subjectivity than s 17(1) and (3) in that under s 17(2), the Minister is not called upon to form a belief with respect to a health or environmental risk – the OECD ban is the surrogate for that determination.

[53] In a similar vein, s 17(5) imposes an obligation to decide after the passage of a "reasonable time".

[54] A request for a review under s 17(5) is not a pre-condition of the Minister's obligation under s 17(2). It does not matter how the Minister learns of the OECD ban; he or she must act. It would be inconsistent with the purpose of this provision for the Minister to know of the OECD ban and yet to not act until a person files a request for a special review.

[55] Therefore, the Applicants were entitled to the commencement of a special review when the Minister became aware of the OECD ban and certainly no later than the filing of a request under s 17(4).

D. *Reasonable Time*

[56] The Applicants seek some type of declaration as to what constitutes "reasonable time". This is an impossible request because what is "reasonable time" is dependent on the facts in each case.

[57] In the present circumstances, the significant delay in deciding whether to initiate a special review stemmed from the Agency's misinterpretation of s 17(2). An unreasonable interpretation led to an unreasonable delay.

[58] The Applicants are not entitled to a declaration that the delay was unreasonable because s 17(5) is not the operative provision. What is at issue in this case is that the Minister had an immediate obligation to initiate a special review upon becoming aware of the OECD ban. Section 17(5) on the other hand gives the Minister a discretion to initiate a special review.

[59] However, there is a common law and implied statutory duty to initiate the special review required under s 17(2) in a reasonable time. Given the Agency's erroneous view of the Minister's right to decide if a review is required, the delay that occurred because of this view was unreasonable.

However, there would be no utility in making any declaration on the matter of "reasonable time".

E. *Functus Officio – Norwegian Situation*

[60] The Applicants contend that the Minister was *functus officio* when the Agency purported to reconsider, reverse and cancel the difenoconazole review.

[61] Essentially, the Applicants' position is that once the special review was finally initiated because of the OECD/Norway ban regarding difenoconazole, the subsequent change in Norway's position is irrelevant. The Applicants argue that the Minister is still required to carry

out the special review even though the pre-condition on which the Minister was required to initiate the special review has disappeared.

[62] The Applicants' position leads to a curious result regarding the special reviews. The Applicants had asked for and were refused special reviews. The Minister then decided to initiate those special reviews. If the Minister was truly *functus* in respect of Norway, the Minister was equally *functus* having decided initially not to conduct the special reviews at issue. If the Applicants' position is correct, the special reviews now being conducted are unlawful.

[63] In my view, s 17(2) must be read as containing a continuing requirement that the OECD ban exists. If the circumstance changes and a ban is lifted, there is no longer a mandatory duty on the Minister.

Depending on the circumstances, the Minister may be required under s 17(1) to initiate a special review, but the pre-conditions in that situation are quite distinct from that in s 17(2).

[64] The situation regarding Norway is complicated by the post-hearing evidence. Initially Norway appeared to take contradictory views of difenoconazole – it allowed its importation for sowing but it maintained the registration of the ban on this active ingredient at the Secretariat to the Rotterdam Convention.

[65] While the Applicants contend that the ban was in place, the better view is that there was not a complete ban in Norway. Section 17(2) is phrased in absolute terms - "… prohibits <u>all</u> uses

of an active ingredient …" [emphasis added]. The facts establish that there was at least one permitted use of difenoconazole.

[66] The new evidence confirms that Norway has now advised the Secretariat that there are a number of permitted uses of difenoconazole.

[67] Given those circumstances, the Minister had and has the authority to terminate the special review of difenoconazole.

IV. Remedy

[68] The Supreme Court in *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, has confirmed that the issuance of a declaration is discretionary and that it should not be invoked to confirm already-established rights. There must be a practical impact of a declaration.

[69] For the reasons given, the only declaration is that the Minister was required to initiate a special review under s 17(2) of the Act upon becoming aware of the ban on an active ingredient by a member country of the OECD.

[70] The Applicants shall have their costs of this judicial review despite the mixed results.

JUDGMENT

THIS COURT'S JUDGMENT is that the Minister of Health was required to initiate a special review pursuant to section 17(2) upon becoming aware of the requisite pre-condition. In view of the public interest nature of this matter, the Applicants shall have their costs on the scale provided for in Column 5 of the *Federal Courts Rules*.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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