Date: 20090527

Docket: T-1971-08

Citation: 2009 FC 554

Vancouver, British Columbia, May 27, 2009

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

AYC PHARMACY LTD.
and NIKHIL BUHECHA

Applicants

and

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA as represented
by THE MINISTER OF HEALTH,
ATTORNEY GENERAL OF CANADA
and FIRST CANADIAN HEALTH
MANAGEMENT CORPORATION INC.

Respondents

REASONS FOR ORDER AND ORDER

[1] This is an appeal of the Order of the Prothonotary dismissing the respondents' motions to strike the applicants' Notice of Application for Judicial Review.

[2] The applicants (collectively referred to as AYC) operate a pharmacy. First Canadian Health Management Corp. (FCH) administers the direct billing and payment process related to claims

made under the Non-Insured Health Benefits Program (NIHB). Health Canada created the NIHB which provides eligible registered members of First Nations and recognized Inuit and Innu persons with medically necessary health-related goods and services not covered by other federal provincial territorial or third-party insurance plans.

[3] On November 21, 2007, AYC and FCH entered into a written agreement allowing AYC to be a provider of pharmaceutical products to clients of the NIHB; they would then be reimbursed directly through FCH for these products and services. Section 8 of that agreement sets out the rights to terminate the agreement – either on notice, for cause without notice, or after giving notice of deficiencies which have not been cured. The termination provision has previously been considered by Justice Sharlow, as she then was, in *687764 Alberta Ltd. v. Canada (Minister of Health)*, [1999] F.C.J. No. 545; 166 F.T.R. 87. In that case, the termination was made for cause without notice. In this case, the agreement was terminated at the end of the calendar year by giving at least 90 days written notice.

[4] FCH provided that notice of termination in a letter dated September 30, 2008. One day prior, FCH informed AYC in a letter dated September 29, 2008, that it had been selected for an on-site audit of the claims paid to it on behalf of the NIHB be clients. The close timing of these led AYC to the view that they were connected. This, they claim, created a reasonable expectation that if the audit disclosed concerns they would have an opportunity to discuss them with FCH with a view to convincing them to withdraw the termination notice.

[5] That audit was completed and a report issued on November 19, 2008, which indicated that AYC had been overpaid. Counsel for AYC wrote to FCH challenging some aspects of the audit and advising that AYC had cured the noted deficiencies; he asked that the notice of termination be deferred in order that the parties could further discuss the audit. FCH responded indicating that the contract would terminate on December 31, 2008, as previously advised.

[6] The respondents brought a motion to strike the Notice of Application on the grounds that the termination of the agreement between AYC and FCH is not subject to judicial review and on the basis that the application is bereft of any possibility of success. They submitted that the relationship between AYC and FCH was a matter of private contract law and did not concern the decision of a "federal board, commission or other tribunal". They further submitted that in terminating the agreement, FCH was not acting as an entity which exercised or purported to exercise jurisdiction of powers conferred by or under an Act of Parliament, and therefore the jurisdiction of this Court was not engaged. Additionally and in any event, the respondents submitted that the applicants had no right to be heard before the agreement was terminated, citing the decision in *867764 Alberta Ltd.* Lastly, they submitted that even if FCH was considered a public authority or the alter ego of a public authority, the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 stands for the proposition that public law duties are not engaged when the relationship is contractual.

[7] In dismissing the motion, the Prothonotary held that although the respondents "raised compelling arguments" he was not satisfied that the application was bereft of any possibility of

success, or that the respondents' objection should be entertained on an interlocutory motion in the absence of the full evidentiary record.

[8] The test to be applied in considering appeals from the decision of a Prothonotary has been stated by the Federal Court Appeal in *Merck & Co. v. Apotex Inc*., [2004] 2 F.C.R. 459. Discretionary orders of a Prothonotary ought not to be disturbed on an appeal unless the question raised is vital to the case or the orders are clearly wrong in the sense that the exercise of discretion by the Prothonotary was based upon a wrong principle or upon a misapprehension of the facts. In those cases, the Court may review that matter *de novo*.

[9] The respondents submit that the vital issue in this case is the effect of the agreement "on the rights of FCH and AYC when one party decides to terminate the agreement with 90 days notice." This Court has held that it is not the question but the result that determines whether or not the issue is vital: See *Peter G. Whyte Management Ltd. v. Canada*, [2007] F.C.J. No. 931, 2007 FC 686; *Chrysler Canada Inc. v. Canada*, 2008 FC 1049; *Apotex Inc. v. AstraZeneca Canada Inc.*, [2009] F.C.J. No. 179, 2009 FC 120. Accordingly, where a proceeding has been struck that decision is vital to the final issue of the case as it effectively disposes of the action or application before the Court; however, in cases such as the present where the Prothonotary has not struck the proceeding, the decision has not determined the matter and thus it cannot be said to be vital to the case.

[10] Accordingly, in this case, in order to conduct a review *de novo* the Court must find that the Prothonotary misapprehended the facts or proceeded on a wrong principle. There is no suggestion

by the respondents that the Prothonotary misapprehended the facts of this case. They submit that he proceeded on a wrong principle.

[11] The respondents submit firstly that the Prothonotary erred in failing to apply the principle that because the relationship between AYC and FCH is a contractual one, it is a matter of private law and judicial review is not available as it does not contemplate the involvement of Canada. In this case, however, the applicants take the position that AYC is the alter ego, or an administrative arm, of the Minister of Health. If established, that might bring the matter within the jurisdiction of this Court. While this submission appears somewhat tenuous on the record as it currently stands, it cannot be said that it is bereft of any possibility of success, particularly as a full record has not yet been developed.

[12] The respondents submit secondly that the Prothonotary erred in failing to properly consider the decision in *Dunsmuir* and they rely on the dissenting judgment of Deschamps J. in *Société de l'assurance automobile du Québec v. Cyr*, [2008] S.C.J. No. 13, 2008 SCC 13 as an illustration of the impact of the *Dunsmuir* decision. Justice Deschamps found that there was a contractual relationship between the parties and wrote that "the deficiencies that justify resorting to the rules of public law are not present where there is an established contractual relationship."

[13] It is submitted on these authorities that the application for judicial review is thus bound to fail. If so, it is bereft of any possibility of success and ought to be struck at a preliminary stage.

[14] Without doubt these decisions will pose a substantial hurdle for the applicants in this matter. Last month the Federal Court of Appeal in *Irving Shipbuilding Inc. v. Canada (Attorney General)*, [2009] F.C.J. No. 449, 2009 FCA 116 observed that the impact of these decisions was such that judicial review was all but ousted when dealing with commercial arrangements.

> In *Dunsmuir* the Court considered (at paras. 102-17) the appropriateness of imposing a duty of fairness prior to the dismissal of a Crown employee and office holder. The Court decided that, as a general rule, a duty of procedural fairness, and remedies other than damages for breach of contract, have no place in the legal relationship between the Crown on the one hand, and office holders and employees on the other, when their relationship is rooted essentially in contract.
>
> Admittedly, the facts of our case are different from those in *Dunsmuir* because the appellants have no contractual rights against PWGSC. Nonetheless, the broader point made by both *Design Services* and *Dunsmuir* is that when the Crown enters into a contract, its rights and duties, and the available remedies, are generally to be determined by the law of contract.
>
> Finally, if a case arose where the misconduct of government officials was so egregious that the public interest in maintaining the essential integrity of the procurement process was engaged, I would not want to exclude the possibility of judicial intervention at the instance of a subcontractor. However, given the powerful reasons for leaving procurement disputes to the law of contract, it will only be in the most extraordinary situations that subcontractors should be permitted to bring judicial review proceedings to challenge the fairness of the process.
>
> [Emphasis added]

[15] It is submitted on these authorities that the application for judicial review is thus bound to fail. If so, it is bereft of any possibility of success and ought to be struck at a preliminary stage. The Federal Court of Appeal left open the possibility that there might be some instances where judicial review was appropriate, even in the face of a commercial contract. In my view, it cannot be

said at this stage of the proceeding that this case is one where the possibility of judicial review clearly and obviously can be said to not be available; a full record is required before such a determination can be made. I find that the Prothonotary did not proceed on a wrong principle in failing to strike on the basis of the decision in *Dunsmuir*. Accordingly, the appeal is dismissed with costs to the applicants.

ORDER

THIS COURT ORDERS AND ADJUDGES that the respondents' appeals are dismissed with costs to the applicants.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1971-08
STYLE OF CAUSE:	AYC PHARMACY LTD. and NIKHIL BUHECHA v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by THE MINISTER OF HEALTH, ATTORNEY GENERAL OF CANADA and FIRST CANADIAN HEALTH MANAGEMENT CORPORATION INC.
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	May 25, 2009
REASONS FOR ORDER AND ORDER:	ZINN J.
DATED:	May 27, 2009

APPEARANCES:

Christopher Harvey, Q.C.	FOR THE APPLICANTS
Toireasa Jespersen	FOR THE RESPONDENT HER MAJESTY THE QUEEN IN RIGHT OF CANADA
Ryan Dalziel	FOR THE RESPONDENT FIRST CANADIAN HEALTH MANAGEMENT CORPORATION INC.

SOLICITORS OF RECORD:

MACKENZIE FUJISAWA LLP Vancouver, BC	FOR THE APPLICANTS
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Vancouver, BC	FOR THE RESPONDENT HER MAJESTY THE QUEEN IN RIGHTOF CANADA
BULL HOUSSER & TUPPER LLP Vancouver, BC	FOR THE RESPONDENT FIRST CANADIAN HEALTH MANAGEMENT CORPORATION INC