Federal Court of Appeal | Cour d'appel fédérale

Date: 20250212

Docket: A-192-24

Citation: 2025 FCA 34

CORAM: **LOCKE J.A.**
LEBLANC J.A.
WALKER J.A.

BETWEEN:

EMPIRE COMPANY LIMITED AND SOBEYS INC.

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on February 12, 2025.
Judgment delivered from the Bench at Toronto, Ontario, on February 12, 2025.

REASONS FOR JUDGMENT OF THE COURT BY: WALKER J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on February 12, 2025).

WALKER J.A.

[1] Before us is an appeal of an order of the Federal Court (*per* Campton C.J.), dated May 28, 2024 (reasons at 2024 FC 810) (FC Decision). The Federal Court granted the respondent's motion to strike the appellants' application for judicial review of a decision of the Commissioner of Competition to commence an inquiry (the Inquiry) under the *Competition Act*, R.S.C. 1985, c. C-34 (the Act). The Federal Court found that the decision to commence the Inquiry was not

reviewable by the Court and, accordingly, was doomed to fail. The Federal Court stated that this conclusion was sufficient to dispose of the respondent's motion.

[2] By way of brief background, the Commissioner is required to commence an inquiry pursuant to subparagraph 10(1)(*b*)(ii) of the Act to determine the facts whenever the Commissioner has reason to believe that grounds exist for the making of an order under Part VII.1 or Part VIII of the Act, in this case, Part VIII and section 79 (abuse of dominant position).

[3] On appeal before us, the appellants contest the Federal Court's reasons for granting the motion to strike and argue that the Federal Court erred in granting the motion because the respondent had not met the onerous legal test applicable to motions to strike. The appellants emphasize that their application for judicial review is based on the Commissioner's alleged lack of jurisdiction to initiate the Inquiry and that they must be able to challenge that decision directly.

[4] As we are reviewing the Federal Court's decision striking the appellants' application for judicial review, the normal appellate standards of review apply, as described in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[5] We first find that the Federal Court correctly identified and properly applied the very high standard required to grant a motion to strike: whether the underlying application for judicial review is "doomed to fail" or is "so clearly improper as to be bereft of any possibility of

success": *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at para. 47; *Wenham v. Canada (Attorney General)*, 2018 FCA 199 at para. 33.

[6] Next, we find that the Federal Court made no reviewable error in concluding that the Commissioner's decision to undertake the Inquiry does not in and of itself affect the appellants' rights or impose legal obligations on them, and does not cause prejudicial effects (FC Decision at paras. 27, 48).

[7] Not all administrative conduct is subject to judicial review. No right of review arises where the conduct attacked "fails to affect legal rights, impose legal obligations, or cause prejudicial effects" (*Toronto Port Authority* at para. 29, citing *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, leave to appeal to SCC refused, 33208 (22 October 2009); *Canada (Attorney General) v. Democracy Watch*, 2020 FCA 69 at para. 19, leave to appeal to SCC refused, 39202 (15 October 2020) (*Democracy Watch 2020*); *Sierra Club Canada Foundation v. Canada (Environment and Climate Change)*, 2024 FCA 86 at para. 46).

[8] This Court's very recent decision in *Çolakoğlu Metalurji A.S. v. Altasteel Inc.*, 2025 FCA 29 (*Çolakoğlu*), is instructive. As in the present case, at issue before the Court was an appeal of a Federal Court decision striking an application for judicial review. The Federal Court found that the results of a reinvestigation under the *Special Import Measures Act*, R.S.C. 1985, c. S-15, was akin to an advance ruling that did not affect legal rights, impose legal obligations or cause prejudice, and was not reviewable. This Court agreed.

[9] In rejecting the argument that the Federal Court erred because the reinvestigation caused prejudice in the form of loss of revenue and the legislation gave no right of redress, this Court characterized the reinvestigation as a preliminary or interim step and referred to similar steps taken by other agencies (*Çolakoğlu* at para. 10): "For example,[…] a decision of the Competition Bureau to conduct an investigation against a business for misleading advertising, […]".

[10] The same analysis applies in this case, which focusses not on an inquiry into misleading advertising (Part VII.I of the Act) but the commencement of an inquiry into possible restrictive trade practices by the appellants (Part VIII of the Act). Despite the appellants' attempt to distinguish an "investigation" from an "inquiry", we note that the word "inquiry" is used in section 10 to refer to both Part VII.I and Part VIII.

[11] The appellants state that the very commencement of the Inquiry means that they have been impacted by the decision to do so. We do not agree.

[12] In our view, there is no palpable and overriding error in the Federal Court's finding that the appellants have identified no legal consequence or prejudice to them from the decision to commence the Inquiry. An inquiry is required to be conducted in private (subsection 10(3)) and may be discontinued at any stage (section 22). It is a preliminary administrative step that gives the Commissioner access to the formal investigative powers in the Act and those powers are subject to judicial oversight. The fact that, here, the Commissioner has applied for and obtained an order under section 11 of the Act does not undermine the Federal Court's finding that the

decision to commence the Inquiry itself has no immediate, certain and final impact on legal rights or obligations or practical prejudice (*Çolakoğlu* at para 11).

[13] Finally, we are not persuaded by the appellants' argument of reviewable errors in the Federal Court's analysis of the jurisprudence on which they relied, namely: *Moresby Explorers Ltd. v. Canada (Attorney General)*, 2006 FCA 144; *Friends of the Canadian Wheat Board v. Canada (Attorney General)*, 2011 FCA 101; *Cinémas Guzzo Inc. v. Canada (Attorney General)*, 2005 FC 691, aff'd 2006 FCA 160 (*Guzzo*), leave to appeal to SCC refused, 31548 (23 November 2006); *Charette v. Commissioner of Competition*, 2003 FCA 426 (*Charette*).

[14] There is no merit in the appellants' assertion that the clear import of this Court's decisions in *Democracy Watch 2020*, *Guzzo* and *Charette* is that a decision by the Commissioner to initiate a section 10 inquiry is judicially reviewable.

[15] In light of our findings, we need not address the Federal Court's additional, independent grounds for granting the motion to strike and will dismiss this appeal with costs.

"Elizabeth Walker"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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