Date: 20070716

Docket: T-416-07

Citation: 2007 FC 752

Ottawa, Ontario, July 16, 2007

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

CANWEST MEDIAWORKS INC.

Applicant

and

THE MINISTER OF HEALTH and
THE ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR ORDER AND ORDER

[1] The Minister of Health and the Attorney General of Canada are the Respondents in an Application for judicial review brought by CanWest MediaWorks Inc. (CanWest). In this motion, the Respondents seek to have the Application dismissed. Alternatively, they ask the Court to stay the Application until the final outcome of an action brought by CanWest in the Ontario Superior Court of Justice (Court File Number 05-CV-303001PD2).

Background

[2] CanWest, through its affiliates, has an interest in many forms of media, including print, television and online publications. CanWest relies on advertising revenues from these various media. In Canada, that advertising is subject to certain limitations imposed by the provisions of the *Food and Drugs Act*, R.S.C. 1985, c. F-27 (FDA) and the *Food and Drug Regulations*, C.R.C., c. 870 (FDR). Under these limitations, all persons are prohibited from what is known as "direct-to-consumer advertising" (DTCA) of prescription drugs. CanWest does not believe that these limitations are consistent with s. 2(b) of the *Canadian Charter of Rights and Freedoms*. Accordingly, on December 23, 2005, it commenced an action in the Ontario Superior Court of Justice seeking to have the relevant provisions of the FDA and FDR declared to be contrary to the Charter (the CanWest Charter challenge). That action has yet to be heard.

[3] During this period while it awaits final resolution of its Charter challenge, CanWest is concerned about magazines imported to Canada from the United States, U.S. television commercials that have appeared on Canadian television and internet publications that are accessed by Canadians. These forms of U.S. media allegedly contain DTCA. On March 13, 2007, CanWest filed an Application for judicial review in this Court seeking an order of *mandamus* requiring that the Respondents investigate and prosecute breaches of the DTCA prohibitions by American entities.

Issues

[4] The motion raises the following issues:

1. Should the Application for judicial review be dismissed on the basis that:

    a. CanWest does not have standing to bring the application?

    b. the preconditions for *mandamus* cannot be met?

2. In the alternative, should the Application for judicial review be stayed until the disposition of the CanWest Charter challenge in the Ontario Superior Court of Justice?

[5] For the reasons that follow, I have determined that CanWest has no standing to bring the Application for judicial review. The lack of standing is determinative. Therefore, I do not need to consider the other issues and will grant the Respondent's motion to dismiss.

Statutory Framework

[6] The relevant provisions which CanWest wishes to have enforced in this Application (and seeks to quash in the proceedings before the Ontario Superior Court of Justice) are s. 3(1) of the *FDA* and s. C.01.044 of the *FDR*. Section 3(1) of the *FDA* states as follows:

3. (1) No person shall advertise any food, drug, cosmetic or device to the general public as a treatment, preventative or cure for any of the diseases, disorders or abnormal physical states referred to in Schedule A.	3. (1) Il est interdit de faire, auprès du grand public, la publicité d'un aliment, d'une drogue, d'un cosmétique ou d'un instrument à titre de traitement ou de mesure préventive d'une maladie, d'un désordre ou d'un état physique anormal énumérés à l'annexe A ou à titre de moyen de guérison.

[7] Section C.01.044 of the *FDR* provides that:

(1) Where a person advertises to the general public a Schedule F Drug, the person shall not make any representation other than with respect to the brand name, proper name, common name, price and quantity of the drug.	(1) Quiconque fait la publicité auprès du grand public d'une drogue mentionnée à l'annexe F doit ne faire porter la publicité que sur la marque nominative, le nom propre, le nom usuel, le prix et la quantité de la drogue.
(2) Subsection (1) does not apply where	(2) Le paragraphe (1) ne s'applique pas lorsque :
(*a*) the drug is listed in Part II of Schedule F; and	*a*) la drogue est mentionnée à la partie II de l'annexe F;
(*b*) the drug is	*b*) la drogue est :
(i) in a form not suitable for human use, or	(i) soit présentée sous une forme impropre à l'usage humain,
(ii) labelled in the manner prescribed by paragraph C.01.046(*b*).	(ii) soit étiquetée de la façon prévue à l'alinéa C.01.046*b*).

[8] Simply put, the regulatory scheme relevant to this Application prohibits certain forms of advertising of prescription drugs.

[9] Under the statutory scheme, the Respondents have the overall authority to investigate and prosecute breaches of the legislation. The assertion of the Applicant is that, with respect to certain U.S. entities whose publications are imported into Canada or whose broadcasts are seen by Canadians or whose internet sites are viewed by Canadians, there is a breach of the DTCA prohibition.

Analysis

General Principles

[10] It is well-established that the Federal Court may dismiss a judicial review application on a preliminary motion. However, the jurisdiction is exceptional and should only be exercised in those cases where the application is so clearly improper as to be bereft of any possibility of success (*David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588, 176 N.R. 48 (F.C.A.)). Of relevance to this motion, two exceptions to the general rule against dismissal of judicial review applications have been: (a) where the applicant has no standing to bring the application (*Apotex Inc. v. Canada (Governor in Council)*, 2007 FC 232 at para. 33, 155 A.C.W.S. (3d) 1080, [2007] F.C.J. No. 312 (FC) (QL)); and (b) where the filed material did not establish the prerequisites for an order of *mandamus* (*Rocky Mountain Ecosystem Coalition v. Canada (National Energy Board)* (1999), 174 F.T.R. 17, [1999] F.C.J. No. 1223 at para. 42 (F.C.T.D.) (QL)).

Issue #1(a): Does the Applicant have standing to bring this Application for judicial review?

[11] On judicial review, the jurisdiction of the Federal Court extends to review the actions or decisions of a "federal board, commission or other tribunal" (s. 18, *Federal Courts Act*, R.S.C. 1985, c. F-7). In this case, there is no dispute that the alleged action (or, more accurately, the failure to act) of the Respondents in choosing not to enforce the provisions of the FDA is an action of a body included in s. 18 of the *Federal Courts Act*. This does not mean that any person may bring an application for judicial review against any decision of any "federal board, commission or other tribunal". An application may be made "by anyone directly affected by the matter in respect of which relief is sought" (*Federal Courts Act*, s. 18.1(1)). Thus, the person must have some link with

the action or decision – generally referred to as “standing”. If an applicant cannot establish a link, he cannot bring the application.

[12] An applicant for judicial review may have standing in one of two ways. First, an applicant may have a direct interest in the matter under review. Secondly, the Courts have recognized that, in appropriate circumstances, a party should be granted “public interest standing” to challenge actions of a “federal board, commission or other tribunal” (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231, [1989] 3 W.W.R. 97). I will examine each of these.

(a) Direct Interest

[13] It is generally accepted in the jurisprudence that, for an applicant to be considered "directly affected", the matter at issue must be one which adversely affects its legal rights, impose legal obligations on it, or prejudicially affect it directly (see, for example, *Rothmans of Pall Mall Canada Ltd. v. Canada (Minister of National Revenue)*, [1976] 2 F.C. 500 (F.C.A.), 67 D.L.R. (3d) 505; *Kwicksutaineuk/Ah-kwa-mish Tribes v. Canada (Minister of Fisheries and Oceans)*, 2003 FCT 30, [2003] F.C.J. No. 98 at para. 8 (F.C.T.D.) (QL), aff'g on other grounds 2003 FCA 484, [2003] F.C.J. No. 1893 (F.C.A.) (QL), leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 55); *Apotex*, above, at para. 20).

[14] In my view, CanWest cannot establish any direct interest in the outcome of the Application for judicial review. I begin with the orders sought by CanWest in the Application for judicial review. CanWest has applied for:

1. An order in the nature of *mandamus*, that the Respondents investigate and prosecute breaches of the DTCA prohibitions by U.S. media; and

2. A declaration that the Respondents are required to investigate and prosecute breaches of the DTCA.

[15] In its simplest terms, the only parties directly affected by the order of *mandamus* or declaration sought by CanWest would be those U.S. entities that have been identified by CanWest as allegedly being in breach of the DTCA prohibition and the Respondents.

[16] Indeed, on the record filed for the Application, CanWest has not even established a commercial impact of a successful judicial review. In argument before me, counsel for CanWest attempted to argue that a positive ruling from this Court on the Application would have positive financial implications for CanWest. It argues that, if U.S. entities are prevented from publishing DTCA in U.S. media that now finds its way into Canada, pharmaceutical companies who wish to advertise in Canada would then choose to advertise, in legally permissible ways, in CanWest's media enterprises. In other words, they submit, the playing field would be levelled. The problem with this assertion is that it is based on pure speculation. There is nothing before me to indicate that CanWest would be the beneficiary of additional advertising revenue if investigations and prosecutions against U.S. media were pursued.

[17] Even if I were to assume that CanWest has a commercial interest in the outcome of the Application, I am still not persuaded that this would be enough to make it a party "directly

affected". A commercial interest in the issues in a judicial review application, in and of itself, is not a sufficient basis for standing (*Rothmans of Pall Mall Canada Ltd. v. Canada (Minister of National Revenue)*, [1976] 2 F.C. 500, 67 D.L.R. (3d) 505 (F.C.A.); *Aventis Pharma Inc. v. Minister of Health et al*, 2005 FC 1396, 45 C.P.R. (4th) 6 at para. 19, 143 A.C.W.S. (3d) 350).

(b)Public Interest Standing

[18] In cases where no direct standing can be established, the Courts have allowed, as a matter of judicial discretion, intervention by parties asserting a public interest. One of the clearest expressions of the policy reasons for when and where to allow public interest standing was that of Justice Cory in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 at 252 - 253, where he stated:

> The increasing recognition of the importance of public rights in our society confirms the need to extend the right to standing from the private law tradition which limited party status to those who possessed a private interest. In addition some extension of standing beyond the traditional parties accords with the provisions of the Constitution Act, 1982. However, I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by a well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.
>
> The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court need not and should not be expanded. The [page253] decision whether to grant status is a discretionary one with all that that designation implies. Thus undeserving applications may be refused. Nonetheless, when exercising the

> discretion the applicable principles should be interpreted in a liberal and generous manner.

[19] Acknowledging these principles, Justice Cory in *Canadian Council of Churches* applied a tri-partite test, which has been followed in other case (see, for example, *Hartling v. Nova Scotia (Attorney General)*, 2006 NSSC 225 at para. 33; *Fraser v. Canada (Attorney General)*, [2005] O.J. No. 5580 at para. 51 (Ont. Sup. Ct. Jus.) (QL); *Peace Hills Trust Co. v. Saulteaux First Nation*, 2005 FC 1364 at para. 77) and requires the consideration of three aspects:

1. Is there a serious issue to be raised;

2. Does the plaintiff (or applicant in the case of a judicial review) have a genuine interest in the outcome of the litigation; and

3. Is there another reasonable and effective way to bring the issue before the Court?

[20] I will assume, without deciding, that there is a serious issue raised by the Application as to whether the Respondents are under a duty to investigate and prosecute U.S. entities as described in CanWest's application.

[21] The next aspect of "genuine interest" is more problematic for CanWest. In *Canadian Council of Churches*, Justice Cory accepted the genuine interest of the Council which, in his words, "demonstrated a real and continuing interest in the problems of the refugees and immigrants". It appears to me that an examination of this aspect of the test requires me to review the nature of

CanWest's interest in this Application. In other words, does CanWest have a "real and continuing interest" in the maintenance and enforcement of the DTCA legislative scheme? In my view, the answer to this question is far from clear. The instigation of a proceeding in another Court to strike down the impugned provisions seems to be a strong statement that the continuing interest of CanWest is not to maintain the existing legislation but to remove barriers to its participation in the DTCA market.

[22] CanWest argues that the unfairness of the present situation, where it is forced to comply with the statutory scheme while U.S. entities are not, gives it a genuine interest in the outcome of the Application for judicial review. While CanWest may have a "real" interest at this time in trying to create a level playing field, I do not see this as sufficient, on these facts, to grant CanWest standing.

[23] Finally, CanWest argues that there is no reasonable and effective manner for the issue of the Respondents' failure to enforce its own laws to come to Court. If CanWest does not bring this application, it asserts, who will? CanWest contends that this is a situation, as described in *Distribution Canada Inc. v. Minister of National Revenue*, [1993] 2 F.C. 26, 99 D.L.R. (4th) 440 at 449 (F.C.A.), where the matter raised by CanWest is one of "strong public interest" and "there may be no other way such an issue could be brought to the attention of the court" and, as such, standing should be granted to CanWest. I do not agree.

[24] The fact is that a coalition of a number of interested parties has already successfully sought intervener status in CanWest's Charter challenge in opposition to CanWest. It seems evident that

there are individuals and groups in Canada who are supportive of the DTCA prohibitions and who may have public interest standing to bring an application for judicial review in this Court to determine the issues (assuming that there are reviewable issues). There may be many reasons why there has been no pursuit of an order of *mandamus* in our Court by any other party. Failure, to date, by other parties (with, for example, no commercial interest or with broader health concerns) to seek *mandamus* does not elevate CanWest's interest to one of "public interest".

[25] In sum, I am not persuaded that CanWest can meet any one of the aspects for public interest standing.

[26] However, even assuming that there are some arguments that CanWest meets the three criteria, the granting of public interest standing is a matter of judicial discretion. As stated by Justice Cory in *Canadian Council of Churches*, above at 252-253. "The decision whether to grant status is a discretionary one with all that that designation implies. Thus undeserving applications may be refused." In this case, there are strong reasons why I should not exercise my discretion. This is particularly so where the very party bringing the Application for judicial review is the same party that commenced the Charter challenge in a different Court. It is also difficult to understand how an interest in levelling the playing field is anything more than a private concern.

[27] Further, resolution of the CanWest Charter challenge would greatly enhance the ability of this Court to deal with the issues underlying the Application for judicial review. That is, knowing that the impugned provisions are not in violation of the Charter (if that is the outcome of the Charter challenge) would provide the Court with a proper legal foundation to assess submissions in

an Application for judicial review. Such a conclusion could also provide other stakeholders (such as concerned individuals or public interest groups), who do not hold a possible commercial interest in the outcome, with an informed opportunity to seek *mandamus* through an Application for judicial review in the Federal Court. On the other hand, a finding by the Ontario Superior Court of Justice that the impugned provisions are contrary to the Charter could obviate the need for any judicial review. Although this argument could support an application for a stay of this Application, it also, in my view, goes to the question of standing and whether judicial discretion should be exercised. On the record before me, CanWest's standing and possible interest in the outcome of the judicial review is not likely to change as a result of its Charter challenge. Accordingly, rather than stay the Application for judicial review, the better option is to dismiss this Application for judicial review.

Conclusion

[28] In conclusion, I am not persuaded that CanWest has the requisite standing to bring this Application for judicial review. I make this finding on the basis that:

- CanWest is not directly affected by the matter that is the subject of the judicial review; and

- This is not an appropriate case in which to exercise judicial discretion to grant CanWest public interest standing.

[29] As noted, the issue of standing is determinative and there is no need to consider the other issues raised and argued before me. On the basis that CanWest lacks standing, it follows that the

Application for judicial review is bereft of any possibility of success. The motion to dismiss the Application for judicial review will be allowed and the Application for judicial review will be dismissed, with costs to the Respondents.

ORDER

THIS COURT ORDERS that:

1. The motion of the Respondents to dismiss the Application for judicial review is granted;

2. The Application for judicial review is dismissed; and

3. Costs are awarded to the Respondents.

"Judith A. Snider"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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