



SUPERIOR COURT OF JUSTICE
COUR SUPÉRIEURE DE JUSTICE

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Date: November 3, 2006

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MESSAGE: **Can West Media Works Inc. v. Attorney General of Canada**
Court File No. 05-CV-303001PD2

Endorsement dated November 3, 2006

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COURT FILE NO.: 05-CV-303001PD2

DATE: November 3, 2006

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CanWest Media Works Inc. (Applicant) v. Attorney General of Canada
(Respondent)

BEFORE: LAX J.

COUNSEL: *S. Shrybman*, for the Proposed Intervenors, Moving Parties
A. Lokan & Leslie Miller, for CanWest Media Works Inc., Applicant/Responding
Party on the motion
R. Levine, for the Attorney General of Canada, Respondent/ Responding party on
the motion

HEARD: November 1, 2006

ENDORSEMENT

[1] The Moving Parties are an *ad hoc* coalition of groups and one individual, who collectively bring this motion for leave to intervene under Rule 13.01 in a pending application between CanWest Mediaworks Inc. and the Attorney General of Canada. The application is a Charter challenge to the statutory prohibition on direct-to-consumer advertising of prescription drugs ("DTCA"). The Attorney General takes no position on the motion. CanWest opposes the motion.

[2] Rule 13 permits two distinct forms of intervention: Rule 13.01 permits a non-party to intervene in a proceeding as a party and envisages that the intervenor will become involved in the fact-finding process and contribute to the evidentiary record to be put before the court. Rule 13.02 provides for a person to intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument without becoming a party.

[3] The criteria for granting leave on either basis are: (a) whether the proposed intervenor has a sufficient direct interest in the case; (2) whether the proposed intervenor can make a useful

contribution and assist the court; and (c) whether delay or prejudice will be caused by the intervention: *Halpern v. Toronto (City) Clerk (2000)*, 51 O.R. (3d) 742 (Div. Ct.).

[4] The coalition comprises the Canadian Health Coalition, the Canadian Federation of Nurses Union, Women and Health Protection, the Communications, Energy and Paperworkers of Canada, the Canadian Union of Public Employees, Terence Young, the Society for Diabetic Rights and the Medical Reform Group. While their particular interests and expertise vary, the coalition shares a common interest in public policy and the law reform process as it pertains to health care in general and the regulation of pharmaceutical products in particular.

[5] The coalition represents the interests of consumers of pharmaceutical products, patients requiring medication, employees who rely upon health benefit plans provided as a term of their employment, health care professionals who have direct responsibilities for prescribing and administering medicines and reporting adverse reactions to pharmaceutical products and advocacy organizations with a mandate to promote the enforcement of regulations concerning pharmaceutical product marketing.

[6] Some of the groups within the coalition are more recently established with small memberships; others have a broad constituency and have played a leadership role through publications, presentations to parliamentary and legislative committees and educational and advocacy activities. Much of the work of the coalition is intended to inform public opinion, stimulate informed discussion and debate and influence health policy and law. They have worked individually and collaboratively. The knowledge, experience and expertise of the coalition members varies, but collectively, they have a demonstrated record of interest and expertise with Canadian pharmaceutical policy and law, including statutory and regulatory control of DTCA of prescription drugs. Their interests together and individually, would be directly affected if current regulatory controls of DCTA were quashed or weakened. Presumptively, they meet at least one of the criteria under Rule 13.01.

[7] The core request of the Moving Parties is to be granted party status in order to complete the evidentiary record on three issues relevant to section 1 of the Charter. They are: (1) the impact of DCTA on women and particularly younger women who have been the target group for

several recent pharmaceutical advertising campaigns in Canada; (2) the impact of DCTA on demand for and the price of pharmaceutical products that are covered by employee health benefit plans, and the consequential effect of rising drug costs on access to necessary health care services for workers, and on labour management relations as well as on particular patient groups, such as diabetics; and (3) the impact of DCTA on prescribing practices and its potential to increase the risk of adverse drug reactions, particularly from the perspective of nurses who, as front-line workers, are frequently first observers and reporters of adverse drug reactions.

[8] The Attorney General of Canada has filed evidence pertaining to the economic and social impacts of DCTA and describing the regulatory approach adopted by several other OECD countries that also restrict prescription drug advertising. It will not be putting forward evidence on the impact of DCTA on women, the cost of insured drug programs and its consequences for the collective bargaining process. It will be adducing evidence on the impact of DCTA on prescribing practices.

[9] Greater latitude is given on intervenor motions in cases involving Charter challenges, but it is more common to grant status as a friend of the court under Rule 13.02. This may be because more applications for intervenor status are made at the appellate level where it is more appropriate to make an order under this Rule. *Halpern* and *Canadian Blood Service v. Freeman*, [2005] O.J. No. 2159 (Ont. Master); aff'd [2006] O.J. No. 1532 (S.C.J.) are examples of cases where party status intervention was granted in the court of first instance.

[10] CanWest raises three main objections to party status intervention: (1) the coalition has no proven track record of intervening in constitutional cases; (2) none of the eight proposed intervenors meet the criteria for intervention and should not be permitted to band together to circumvent the intervention requirements; (3) they have not demonstrated that they have any tangible evidence to bring to the case.

[11] CanWest points out that EGALE was granted party status in both *Halpern* and *Canadian Blood Service*, partly on the basis of its proven track record as an intervenor in Charter cases. A proven track record is only a useful criterion if there has been an opportunity to develop one. Equality rights cases have been before the courts for many years. It was not suggested that the

- 4 -

coalition had been refused leave to intervene in other cases and in fact, the Canadian Health Coalition was granted *amicus* standing by the Supreme Court of Canada in *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791. I do not give effect to this objection.

[12] There is nothing objectionable about a joint application and it should be assessed on this basis. I note that EGALE's intervention in equality rights cases was sometimes in coalition with other equality-seeking groups: *Canadian Blood Service*, per Master Beaudoin at para. 11. I accept that several of the coalition members have considerably less institutional knowledge and experience than others, but I do not agree that none of the eight proposed intervenors meet the criteria for intervention. I am satisfied that collectively they meet the criteria for intervention.

[13] The threshold for determining whether the proposed evidence will in fact assist the court should not be a high one, but the material should disclose a sufficient evidentiary basis to demonstrate what the coalition can contribute to the formation of the record. On the record before me, there is considerable variation in the quality of the evidence. Some of the material consists of lay opinion, correspondence, newsletters or web postings, which has limited evidentiary value. I question whether the record demonstrates a distinct nursing perspective. On balance, the Moving Parties have provided sufficient representative material to demonstrate that they have some evidence to offer that will make a useful contribution to the evidentiary record and that is distinct from the material of the Attorney General. I refer in particular to the policy paper, *More for Less*, as an example of the kind of evidence that can provide a useful part of the record.


[14] CanWest has yet to file its reply evidence and no cross-examinations of witnesses has yet to be conducted. While granting party status to the Moving Parties will occasion some delay, it can be managed through appropriate terms of this order and the supervision of the case management judge. I therefore grant the Moving Parties leave to intervene as an added party on the terms that they:

- (a) adhere to all timetables;
- (b) be limited to filing two affidavits;
- (c) limit their evidence to the impact of DCTA on health benefit costs and its impact on women;

- 5 -

- (d) make their witnesses available for cross-examination and participate in cross-examinations of the Applicant's witnesses on the above issues without duplicating questions posed by the Respondent;
- (e) limit their oral and written argument to the above issues;
- (f) not be allowed to seek costs and not be liable for costs to any party;
- (g) be collectively represented by the same counsel;
- (h) not limit in any way the ability of the Respondent to provide a full defence to the Application.

[15] The parties agree there should be no order as to costs.


LAXJ.

DATE: November 3, 2006