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PRACTICE

RELATED SUBJECTS: COMPETITION, ADMINISTRATIVE LAW

Motion to strike brought by respondent relating to notice of application filed by applicants Empire Company Limited, Sobeys Inc. — In their application, applicants seeking judicial review of decision by Commissioner of Competition to commence inquiry pursuant to *Competition Act*, R.S.C. 1985, c. C-34 (Act), s. 10(1)(b)(ii) — Inquiry seeking to determine facts relating to use of restrictive covenants, exclusivity clauses, in leases entered into by applicants in certain local markets in Canada — Applicants seeking various types of relief, including order quashing or setting aside Commissioner's decision to commence inquiry on basis that it was invalid or unlawful — Applicants argued that Commissioner could not have "reason to believe" that grounds existed for making of order under Act, s. 79 because Commissioner could not have reason to believe that elements of s. 79(1) met — Also argued that decision to commence inquiry appearing to have been made for improper purpose or based on irrelevant considerations — Respondent maintained (1) that decision to commence inquiry not a type of administrative action giving rise to right of judicial review; (2) that applicants failed to allege or plead material facts regarding any affected legal rights, legal obligations or prejudicial effects resulting from decision to commence inquiry; (3) that underlying application premature — Issues: whether decision to commence inquiry reviewable by Court; if so whether applicants have alleged sufficient material facts to survive motion to strike; whether underlying application premature — In requesting that underlying application be struck, respondent referenced *Federal Courts Rules*, SOR/98-106, r. 221(1) — However, underlying proceeding is an application for judicial review, not an action — Consequently, r. 221 not applying — In this context, applicable test is whether underlying application "doomed to fail" or "so clearly improper as to be bereft of any possibility of success" — Three distinct reasons herein why motion to strike to be granted — First reason: underlying application fatally flawed in that decision to commence inquiry not reviewable because that decision not affecting any legal rights, imposing any legal obligations on targets of inquiry, or causing prejudicial effects, pursuant to test articulated in *Canada (Attorney General) v. Democracy Watch*, 2020 FCA 69, [2020] 3 F.C.R. 623 (*Democracy Watch*) — Differences between types of decisions challenged in *Democracy Watch*, in present proceeding not having any bearing on general principle that some decisions described in *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(3)(b) not subject to review — Fact that Act, s. 10(1) articulates specific, mandatory test to be applied by Commissioner in determining whether to commence an inquiry not changing fact that a decision to commence an inquiry is subject to test articulated in *Democracy Watch* — Commissioner's decision to commence an inquiry simply procedural step giving Commissioner access to formal investigative powers described in Act, s. 11(1) — Second reason: underlying application not making any allegations whatsoever regarding actual or potential impact of Commissioner's decision to commence inquiry on any legal rights of applicants, also not alleging that Commissioner's decision imposing legal obligations on them, or causing any prejudicial effects — Third reason: underlying application premature, because adequate, effective recourse available elsewhere — Motion brought pursuant to r. 399 proper mechanism for applicants to challenge decision to commence inquiry — Test articulated for r. 399 motions in *Canada (Commissioner of Competition) v. Canada Tax Reviews Inc.*, 2021 FC 921, [2022] 1 F.C.R. 232 would provide adequate, effective recourse to applicants — Test would enable applicants to seek to have any order that may be issued against them under Act, s. 11 set aside or varied on basis that inquiry was

initiated as result of political pressure, rather than on grounds set forth in s. 10(1)(b)(ii), as applicants alleged ~~[66]~~ — Would also enable applicants to challenge disclosure made by Commissioner, in application for order under s. 11 — "Reason to believe" standard set forth in Act, s. 10(1) being relatively low bar to clear — Fact Parliament chose to adopt "reason to believe" standard in Act, ss. 10(1), 103.1(7), while embracing "reasonable grounds to believe" standard elsewhere in Act, implying Parliament considers those two standards to be different — Commissioner benefitting from presumption "that actions taken pursuant to the Act are *bona fide* and in the public interest" — Consequently, "Court should refrain from making determinations at this fact finding stage which essentially reach final conclusions regarding the substantive merits of an inquiry" — While this principle would preclude garden variety challenges to Commissioner's "reason to believe" that grounds exist for making of order under Act, Parts VII.1 or VIII, as contemplated by s. 10(1), it would not preclude challenge based on robust evidence that such grounds could not reasonably exist in circumstances — However, such evidence would have to consist of more than bald, unsupported statements regarding absence of such grounds — Likewise, it generally would not suffice to simply lead evidence of clear pro-competitive purpose underlying conduct being investigated — In summary, where evidence indicating that Commissioner may have initiated inquiry on improper grounds, open to a respondent to seek to have an order issued under s. 11 set aside or varied on that basis — This ability constituting adequate, effective alternative recourse available to applicants — Underlying application therefore doomed to fail on basis of doctrine of prematurity — Motion granted.

EMPIRE COMPANY LIMITED V. CANADA (ATTORNEY GENERAL) (T-848-24, 2024 FC 810, Crampton C.J., reasons for order dated May 28, 2024, 28+7 pp.)