IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Awan v. Cumberland Health Authority 2005 NSSC 49

Date: 20050303
Docket: SH 214285
Registry: Halifax

Between:

Shahid I. Awan

Plaintiff

v.

Cumberland Health Authority

Defendant

Judge:	The Honourable Justice John D. Murphy
Heard:	November 22 and 23, 2004, in Halifax, Nova Scotia
Written Decision:	March 7, 2005
Counsel:	Alan V. Parish, Q.C., for the Plaintiff Peter M. Rogers and Jennifer J. Biernaskie, for the Defendant

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By the Court:

[1] The Plaintiff, Dr. Awan, and the Defendant, Cumberland Health Authority ("CHA"), have both brought Applications for Summary Judgment.

I FACTS

[2] Dr. Awan is an anaesthetist who has worked pursuant to contractual arrangements with the CHA and predecessor organizations since 1983. The CHA is a body corporate under the *Health Authorities Act*, S.N.S. 2000, c.6, and is responsible for operating the Cumberland Regional Health Care Centre. Prior to the opening of that facility, the CHA and its predecessors operated other health care facilities in the Amherst, Nova Scotia area.

[3] The pleadings and the affidavits and written submissions filed in support of the Applications provide detailed information concerning the arrangements between the parties. Those facts will only be highlighted in these reasons, and summarized to the extent necessary to provide background for the decisions made with respect to Summary Judgment Applications.

[4] During the course of the parties' relationship, contractual arrangements have been contained in Dr. Awan's initial agreement dated November 1983, a replacement agreement dated April 1989, both made with the Highland View Regional Hospital Board of Trustees, and an amending agreement, which supplemented the Second Agreement, made with the CHA during June 2002.

[5] Pursuant to those agreements, the Plaintiff (and until 2002 another anaesthetist) assumed obligations to make anaesthetic services available to the Defendant (or its predecessor), and received payment, including guaranteed minimum income. Contractual arrangements also included provisions concerning notice and payment to be received by Dr. Awan if the CHA terminated their agreement.

[6] As requirements for anaesthetic services in Cumberland County evolved, the portion of the substantial income the CHA paid the Plaintiff as a subsidy to meet guaranteed minimum income increased, and a reduced proportion was paid for medical services actually performed.

[7] During 2002, the Nova Scotia Government enacted the *Financial Measures (2002) Act*, S.N.S. 2002 c.5, Section 22, to add Section 13B (the "Amendment") to the *Health Services and Insurance Act* (R.S.N.S. 1989 c.197), ("HSIA") which regulates the provision of insured medical services in the province. The Amendment provides as follows:

> **13B** Effective November 1, 2002, any agreement between a provider and a hospital, or predecessors to a hospital, stipulating compensation for the provision of insured professional services, for the provider undertaking to be on-call for the provision of such services or for the provider to relocate or maintain a presence in proximity to a hospital, excepting agreements to which the Minister and the Society are a party, is null and void and no compensation is payable pursuant to the agreement, including compensation otherwise payable for termination of the agreement.

[8] After the Amendment received Royal Assent in May of 2002 and prior to its effective date, the CHA advised Dr. Awan that the agreement between the parties would be null and void after October 31st, 2002.

[9] The Plaintiff disputes that the Amendment rendered his contract null and void, and he commenced this action alleging that the CHA wrongfully ended the relationship between the parties without providing proper notice or payment upon termination. Initially the Attorney General of Nova Scotia was also named as a Defendant, but the Plaintiff no longer pursues a claim against that party.

[10] The CHA defends the Plaintiff's claim on the basis that its contract with the Plaintiff was terminated effective November 1st, 2002 by the Amendment, which it maintains also negated any obligations to make payment to the Plaintiff as a result of termination.

[11] Since November 2002, the Plaintiff has continued to provide anaesthetic services to the CHA under a separate contractual arrangement.

[12] During May 2004, the CHA brought Application for Summary Judgment, alleging that the Amendment abrogates the Plaintiff's contractual rights, and provides a full and complete defence to the Plaintiff's claim, leaving no arguable issues to be tried.

[13] Prior to the hearing of the Defendant's application, the Plaintiff also made Application for Summary Judgment, claiming that the Amendment does not apply to the relationship between the parties, and that there is no arguable issue with respect to the entitlements he claims as a result of the CHA's termination of his

contract. Dr. Awan says that pursuant to contractual terms, the CHA is liable to pay him $743,196.72, or alternatively $371,598.36.

[14] The Applications for Summary Judgment were heard together November 22nd and 23rd, 2004. Dr. Awan and the Chief Executive Officer of the CHA filed affidavits and were cross examined by opposing counsel.

II AUTHORITIES - SUMMARY JUDGMENT

[15] The parties provided comprehensive briefs containing complete reviews of the applicable authorities respecting the granting of summary judgment. I have considered **Civil Procedure Rule 13.01**, which provides that any party may apply for judgment on the ground that there is "no arguable issue to be tried" with respect to a claim or defence, as well as relevant case law, particularly the following:

> **Hercules Management Ltd. v. Ernst & Young** (1997), 211 N.R. 352 (S.C.C.)
>
> **Guarantee Co. of North America v. Gordon Capital Corp.**, [1999] 3 S.C.R. 423
>
> **Binder v. Royal Bank of Canada**, [2003] N.S.J. No. 304; 2003 N.S.S.C. 174

[16] The parties did not significantly differ in their characterization of the issue or interpretation of the authorities. Both acknowledged that the issue to be determined, with respect to each Summary Judgment Application, is whether the Amendment provides the CHA with a complete and full defence to Dr. Awan's claim. The parties agreed that to obtain summary judgment, an applicant must show the absence of any material facts upon which there could be an arguable issue that should be brought to trial.

[17] The Nova Scotia Court of Appeal in **United Gulf**, supra, and this Court in **Binder**, supra, have determined that no substantial distinction exists between the requirement in Nova Scotia Rule 13 that there be "no arguable issue to be tried", and the test that there be "no genuine issue of material fact requiring trial" applied by the Supreme Court of Canada, in **Hercules**, supra, and **Guarantee Co.**, supra. Those authorities establish that:

> The Court will consider summary judgment only where the moving party establishes that, "there is no genuine issue of material fact requiring trial," and that that threshold having been met by the applicant, the respondent fails to

> establish his claim as being one with a real chance of success. (See **United Gulf**, paragraph 8 and 9.)

[18] Where there are disputes of fact, they should be determined at trial (**United Gulf**, para. 15); however, if the Court determines on a summary judgment application that material facts are not in dispute, it ought to apply the applicable law to those facts and decide the matter (**Eikelenboom**, supra, paras. 25-30).

III MATTERS IN DISPUTE

[19] In addressing whether there is a genuine issue of material fact requiring trial, Dr. Awan and the CHA adopted opposing positions respecting several questions. Disputed matters included:

1. Whether the CHA was a "hospital" as defined in the HSIA at the material time;

2. Whether Order-in-Council 2001-474 (the "OIC"), filed as *N. S. Regulation 213/2003* under the *Hospitals Act*, R.S.N.S. 1989, c.208, was effective to approve the CHA as a "hospital";

3. Whether the Plaintiff was a “provider” of insured professional services.

4. Whether the Amendment affects only agreements stipulating compensation where a single provider undertook to provide professional services;

5. Whether the contract between the parties was one where a physician undertook to be on-call;

6. Whether the contract was one where a physician undertook to relocate or remain proximate to a hospital;

7. Whether amounts due to the Plaintiff under the contract were a type of payment affected by the Amendment;

8. Whether the Amendment, if effective, removed the Plaintiff’s common law rights.

[20] This Court should not grant summary judgment if answering one of those questions is essential to determine whether the Amendment provides the Defendant with a full and complete defence to the claim, and if that question involves a genuine or arguable dispute or issue of material fact requiring trial.

IV WAS THE CUMBERLAND HEALTH AUTHORITY A HOSPITAL?

[21] The Amendment applies only to agreements between "a provider and a hospital, or predecessors to a hospital,..."

[22] The Plaintiff vigorously maintains that the CHA was not a hospital, while the Defendant is equally adamant that it was a hospital to which the Amendment applies. If it can be determined at this time that the CHA was a hospital, either party may be entitled to summary judgment, depending upon whether other matters raised by the parties involve genuine or arguable issues of material fact. If the Court concludes now that the CHA was not a hospital, the Defendant cannot obtain summary judgment because its contract with Dr. Awan would not be affected by

the Amendment; the Plaintiff may be able to obtain summary judgment depending upon conclusions respecting other matters, and if no arguable issues of material fact remain. If the CHA's status as a hospital is dependent upon a genuine or arguable issue of material fact requiring trial, summary judgment is not available to either party.

[23] The HSIA defines hospital at Section 2(d) as follows:

> (d) "Hospital" means a hospital that has been approved under the *Hospitals Act* and any other hospital or facility that has been approved as a hospital by the Minister for purposes of this Act.

[24] Accordingly, to decide if the CHA is a hospital under HSIA, the following must be considered:

1. Whether it has been approved under the *Hospitals Act*; and

2. Whether it is a hospital or facility that has been approved as a hospital by the Minister of Health and Fitness for the purposes of the HSIA.

[25] Whether the CHA is a hospital is a question of law, which the Court should address in a Summary Judgment Application if the answer is not dependent upon resolving a genuine or arguable issue of material fact, and if there are no other arguable material factual issues which require trial.

[26] Because hospital status under HSIA requires approval under either the *Hospitals Act* or the HSIA, whether approval has occurred is also a question for resolution on a Summary Judgment Application, if material facts relevant to that issue are not in dispute. However, to rule whether the CHA has been approved, the Court must determine what events have occurred, which it can only do at this time if those events do not involve a genuine issue of material fact requiring trial.

A. HAS THE CUMBERLAND HEALTH AUTHORITY BEEN APPROVED UNDER THE *HOSPITALS ACT*?

[27] Section 2(f) of the *Hospitals Act* defines "hospital" as follows:

> (f) "hospital" means a building, premise or place approved by the Minister and established and operated for the treatment of persons with sickness, disease or injury and the prevention of sickness or disease, and includes a facility, a maternity hospital, a nurses' residence and all buildings, land and equipment used for the purposes of the hospital, or means, where the context requires, a body

> corporate established to own or operate a hospital, or a program approved by the Minister as a hospital pursuant to this Act or any other Act of the Legislature;

[28] The CHA is not a "building, premise or place", nor is it a "program"; however, the parties agree that it is a "body corporate established to own or operate a hospital", and therefore could be a hospital under the *Hospitals Act*. The parties also agree that the requirement for Ministerial approval under the *Hospitals Act* definition does not apply to a body corporate established to own or operate a hospital.

[29] Dr. Awan and the CHA disagree as to whether the CHA's status under the *Hospitals Act* is sufficient to qualify it as a hospital under HSIA. The CHA maintains that as a hospital in accordance with the *Hospitals Act* definition, it does not require Ministerial approval as a hospital in order to obtain the benefit of the Amendment. Dr. Awan emphasizes that the Amendment is an addition to the HSIA, and that the definition of hospital under Section 2(d) of that Act requires approval of all hospitals, either under the *Hospitals Act* or by the Minister under the HSIA. I find that the plain meaning of that definition supports Dr. Awan's position - to be a hospital in compliance with the HSIA definition, that there must

be either approval under the *Hospitals Act* or approval by the Minister under the HSIA.

[30] The CHA submits that if it must be approved under the *Hospitals Act* to meet the criteria to be a hospital pursuant to the HSIA, approval should be inferred from the manner in which the Cumberland Regional Health Care Centre and predecessor facilities have operated, received funding and provided insured services.

[31] The *Hospitals Act* requires a particular form of approval by the Governor in Council. Section 4(a) states:

> **4** No person shall:
>
> (a) operate a hospital pursuant to this Act unless it has been approved by the Governor in Council.

[32] Sections 17(b) and 18 of the *Hospitals Act* refer to Governor in Council approval by regulation in the following terms:

> **17** The Governor in Council may make regulations

> (b) respecting the granting, suspending or revoking of approval of hospitals and additions or alterations thereto;
>
> **18** The exercise by the Governor in Council of the authority contained in Section 17 shall be regulations within the meaning of the *Regulations Act*.

[33] Given that approval by Governor in Council is specifically required in the *Hospitals Act*, the Court should not infer, particularly in a Summary Judgment Application, that the CHA was approved, absent evidence that the requirement was followed.

[34] The CHA contends that any approval required under the *Hospitals Act* must be limited to Governor in Council approval under Section 4, and that while Section 17 permits approval by regulation, actual approval could occur by other means, and it is not mandatory to use the regulatory process set out in Sections 17 and 18. I do not interpret the legislation to allow Section 4 approval to be accomplished other than by regulation under Sections 17 and 18 of the Act. In providing that the Governor in Council may make regulations respecting the granting of approval, there is no suggestion that approval can occur in another manner. The use of the permissive “may” in Section 17 suggests that the

Governor in Council may choose whether to make regulations, but does not imply that hospitals may be approved in another manner.

[35] The CHA maintains, however, that any requirement for approval by regulation prescribed by the *Hospitals Act* was satisfied by the making of OIC, which provides as follows:

> The Governor in Council on the report and recommendation of the Minister of Health dated September 12, 2001, and pursuant to Section 4 of Chapter 208 of the **Revised Statutes of Nova Scotia**, 1989, the *Hospitals Act*, is pleased to approve District Health Authorities 1 through 8 and the Capital District Health Authority as hospitals pursuant to the *Hospitals Act*, effective on and after January 1, 2001.
>
> [The CHA is the successor to District Health Authority 5.]

[36] The OIC, although made during October 2001, was not published until December 2003, after termination of Dr. Awan's contract and after the Plaintiff advised the Defendant that the present lawsuit would be commenced.

[37] The Plaintiff claims that the OIC was not validly enacted, and alternatively that it is not effective against Dr. Awan because it was not published on or before November 1st, 2002, when the Amendment took effect.

(i) Validity Of Order in Council

[38] Dr. Awan maintains that to enact a regulation, the proper authority permitting the enactment, being the Act and section under which the regulation is made, must be expressly and correctly stated within the regulation. Section 3 of the *Regulations Act*, R.S.N.S. 1989, c. 393 provides:

> **3.** Every regulation or a certified copy thereof shall be filed in duplicate with the Registrar, together with two copies of a certificate signed by the person filing the regulation setting forth
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> (a) by whom the regulation was made;
>
> (b) the Act and the Section under which the regulation was made;
>
> (c) the date on which the regulation was made; and
>
> (d) where approval by another authority is required, the date of approval and two copies of the certificate referred to in subsection (2). (emphasis added)

The OIC incorrectly referred to Section 4 of the *Hospitals Act* as the enabling legislation instead of to Sections 17 and 18, which authorize the Governor in Council to approve hospitals by regulation. The certificate signed by

the person who filed the OIC makes no reference to the Act or section under which it was made.

[39] Dr. Awan claims that the failure to refer to proper enabling sections of the *Hospitals Act* renders the OIC invalid and of no force and effect. He does not provide authority to support that conclusion; however, the mandatory wording of Section 3 of the *Regulations Act* and comments concerning the importance of due process when promulgating regulations made by O'Hearn Co. Ct. J. in **R. v. MacLean** (1974), Carswell N.S. 16 at paras. 57-60 would seem to favour that result. Section 38 of the HSIA highlights the importance of making regulations pursuant to proper statutory authority, by designating only those made under Sections 17 and 19 of HSIA as regulations within the meaning of the *Regulations Act*. Because of my conclusion set out below concerning publication, it is not necessary to determine whether the wrong section reference invalidates the OIC.

(ii) Failure To Publish Order in Council

[40] Dr. Awan's submission that failure to publish the OIC until December 26th, 2003, (more than a year after both the effective date of the Amendment and termination of the contract), renders it ineffective as against him is based upon Section 6 of the *Regulations Act*, which provides as follows:

> **6** No regulation is invalid by reason only that it has not been published, but no person shall be affected adversely or be convicted of a contravention of a regulation that, on the date of the alleged contravention or the date the person is affected adversely, had not been published unless
>
> (a) either
>
> (i) publication of the regulation has been dispensed with under subsection (3) of Section 4, or
>
> (ii) the Act under which the regulation was made provides that a regulation made under the Act may be brought into force before it is published in the Royal Gazette; and
>
> (b) it is proved that, before the date of the alleged contravention or the date a person is affected adversely, reasonable steps had been taken for the purpose of bringing the purport of the regulation to the notice of the public or of the persons likely to be affected by it or of the person charged.

[41] Section 6 provides protection in appropriate cases from the adverse effect of an unpublished regulation. In my view, the conditions required pursuant to Section 6 to render the OIC ineffective with respect to Dr. Awan have been satisfied. No evidence suggests publication has been dispensed with, and the *Hospitals Act* does not provide that the regulation can be in force prior to publication. Dr. Awan can be adversely affected by the OIC because if the CHA does not meet the HSIA definition of "hospital" based upon Ministerial approval for purposes of that Act (an issue which will be addressed subsequently), its status as a hospital depends upon the OIC. The Amendment could not be used for the purpose relied upon by the CHA, to render Dr. Awan's contract null and void and remove the obligation to pay compensation, unless the CHA was an approved hospital. I have considered the Defendant's submission that any adversity encountered by Dr. Awan resulted from the Amendment, which it says nullifies his agreement with the CHA, and not from the OIC. I disagree with that position, as the purpose of the OIC was to approve the CHA as a hospital. If the Amendment could not affect the Plaintiff without the CHA's having been approved pursuant to the OIC, then the OIC's adverse effect is sufficiently direct to render it ineffective upon Dr. Awan under Section 6 of the *Regulations Act*.

[42] For the foregoing reasons, I have concluded that, with reference to the claims advanced in this litigation, the CHA is not a hospital that has been approved under the *Hospitals Act*.

B. WAS THE CUMBERLAND HEALTH AUTHORITY APPROVED AS A HOSPITAL BY THE MINISTER FOR THE PURPOSES OF THE HEALTH SERVICES INSURANCE ACT?

[43] The Defendant maintains that the CHA must be taken to be approved by the Minister as a hospital under the HSIA, because it received Department of Health funding and operated in compliance with Regulations promulgated under the HSIA. In my view, while not inconsistent with Ministerial approval, those considerations do not establish that the Minister approved the CHA as a hospital.

[44] The CHA also relies upon the supplementary affidavit of its Chief Executive Officer filed November 4th, 2004. However, that affidavit falls short of establishing Ministerial approval. The CEO does not refer to any information provided to him by the Minister concerning approval. Statements made by the CEO such as “as far as I am aware, the [CHA] has been treated as a hospital”

[para.5], and "I have carried out my...responsibilities...throughout my time at the CHA since 2001 on the assumption and understanding that those facilities were approved facilities..." [para.4] do not establish that approval actually occurred. Evidence that a Department of Government and the CHA acted as if the CHA had been approved as a hospital, and that the Chief Executive Officer assumed it was approved, is insufficient to establish the actual approval contemplated by the legislation.

[45] Evidence advanced by the Defendant does not establish that the CHA was a hospital approved by the Minister for the purposes of the HSIA. However, I do not accept Dr. Awan's bald assertion that there is "no evidence that the CHA was approved as a hospital by the Minister of Health pursuant to the HSIA." There is some evidence in the affidavit from the CEO of the CHA, but that evidence does not provide sufficient factual information concerning steps taken by the Minister for the Court to determine whether he has approved the CHA for purposes of the HSIA.

V CONCLUSION AND DISPOSITION

[46] In this Summary Judgment Application, the Court has sufficient factual information to determine that, with respect to matters adversely affecting Dr. Awan, the CHA was not approved under the *Hospitals Act*. The events which have occurred, including reference in the OIC to the wrong section of the *Hospitals Act*, and failure to make timely publication of an OIC which would adversely affect the Plaintiff, lead to the conclusion that the CHA does not have hospital status under the *Hospitals Act* with reference to the Plaintiff's claim.

[47] The Defendant indicated during its submission that it wished an opportunity to develop additional evidence addressing more fully the issue of Ministerial approval, and suggested that it is premature for the Court to conclude that the CHA was not approved as a hospital.

[48] I have concluded that there remains a genuine issue of material fact to be resolved prior to determining whether there has been approval by the Minister for the purposes of the HSIA . The CHA maintains the evidence will show that steps

needed to establish approval have taken place, while Dr. Awan contends otherwise. This dispute of material fact represents a genuine issue to be resolved at trial. It is accordingly premature to determine whether the CHA is a hospital. The Court cannot at this time resolve whether the Amendment provides a full and complete defence to the Plaintiff's claim, and neither party should have summary judgment.

[49] Each parties' Summary Judgment Application is therefore dismissed, because the CHA's status as a hospital is dependent upon a genuine or arguable issue of material fact requiring trial - the facts permit me to conclude that it is not a hospital under the *Hospitals Act*, but its status under the HSIA remain in dispute.

[50] Even if I had concluded that the CHA was a hospital approved under the *Hospitals Act* with respect to the Plaintiff's claim, and if there were no material facts in dispute except in relation to the Defendant's status, I would have been reluctant to grant summary judgment to the Defendant, so long as determination whether Ministerial approval had occurred for purposes of the HSIA depended upon disputed material facts. Summary judgment should be conclusive with respect to an issue it should not be granted unless there is an air of finality. In this case, a finding that the CHA was a hospital approved under the *Hospitals Act*

would have addressed only one aspect of the issue concerning the CHA's status, and might not necessarily have concluded the matter. That ruling could be reversed on appeal, in which case the CHA's status would still not be resolved, as a genuine issue of material fact relating to its being approved as a hospital for purposes of the HSIA would remain for determination at trial.

[51] The parties provided evidence and made submissions concerning several other points in issue, which are highlighted in paragraph 19. In my view, most if not all of those questions do not involve genuine issues of material fact requiring trial, and were the CHA's status as a hospital not in issue, this litigation might be resolved by summary judgment, thereby saving the parties a great deal of time and expense. Unless I ordered summary judgment, counsel for both parties requested that I should refrain from expressing views on issues other than those specifically addressed to reach the conclusion that Summary Judgment Applications be denied. Accordingly, other than to suggest that there may not be any genuine issues of material fact requiring trial except those related to the status of the CHA as a hospital, I will not state any findings with respect to other issues.

[52] I encourage the parties to consider early resolution of this case. While the Summary Judgment Applications have been dismissed, I have had the benefit of receiving extensive factual information and submissions from the parties. Counsel have comprehensive knowledge of the case and their clients' requirements. The issue which precluded granting summary judgment is relatively narrow and the evidence required to address the material facts in dispute may not be extensive. I encourage the parties to consider, under Rule 13.02(k), requesting the Court to make an order specifying facts not in dispute, or defining issues for trial. The parties could also seek my views, or those of another member of the court, during a settlement conference, particularly if scheduled after the parties have an opportunity to develop additional evidence concerning the status of the CHA.

VI COSTS, FORM OF ORDER

[53] As the parties have requested, submissions respecting costs and the form of Order may be made in writing not later than April 15, 2005. Any request to make oral representations concerning costs or the Order form should be directed to my office not later than April 11, 2005.

J.