

COURT OF APPEAL FOR ONTARIO

CITATION: Neighbour's Drug Mart Ltd. v. Ontario (Ministry of Health and Long
Term-Care), 2024 ONCA 378
DATE: 20240513
DOCKET: COA-23-CV-1050

Brown, Paciocco and Nordheimer JJ.A.

BETWEEN

Neighbour's Drug Mart Ltd.
(c.o.b. as Neighbour's Drug Mart)

Applicant (Appellant)

and

Ontario (Ministry of Health and Long Term-Care)

Respondent (Respondent)

Neil M. Abramson and Anne Lewis, for the appellant

Michael J. Sims and Kristina Yeretsian, for the respondent

Heard: May 3, 2024

On appeal from the order of the Divisional Court (Justices David L. Edwards, Robyn M. Ryan Bell, and Janet Leiper), dated March 13, 2023, with reasons reported at 2023 ONSC 1575, dismissing an application for judicial review of the decision of the Executive Officer of the Ontario Public Drug Programs for Ontario.

REASONS FOR DECISION

Overview

[1] The appellant, Neighbour's Drug Mart Ltd. ("Neighbour's"), appeals, with leave, from the Divisional Court order dismissing its application for judicial review

of the decision of the Executive Officer of the Ontario Public Drug Programs for Ontario (the “Decision”). The Decision terminated Neighbour’s Health Network System Agreement (“Operator’s Agreement”), revoked its billing privileges under s. 4.1 of the *Ontario Drug Benefit Act*, R.S.O. 1990, c. O.10 (“*ODBA*”), and suspended its entitlement to receive payment under the *ODBA*. At the hearing, we dismissed the appeal, with reasons to follow. These are those reasons.

[2] Neighbour’s submits the Divisional Court erred in applying the reasonableness standard to their review of the Decision. It contends that: (i) the Executive Officer and Divisional Court fundamentally misapprehended the record, which disclosed that the majority of the billing issues were attributable to the pharmacy’s prior owner, (ii) imposed revocation in circumstances not supported or permitted by the regulatory regime or the Operator’s Agreement, and (iii) improperly created a form of absolute liability for pharmacy owners.

[3] We are not persuaded by these submissions.

[4] The application of the regulatory regime to the facts of this case by the Executive Officer and Divisional Court understandably was informed by two factors. First, the regulatory scheme operates on the basis of an honour system that relies on operators not to submit any claims that the operator knows or reasonably ought to know are false, inaccurate or misleading. Second, Neighbour’s is a corporate operator; as such, its owner and directors are obliged

to ensure that the corporation's managers and other employees comply with regulatory requirements.

[5] Against that background, the Divisional Court reached two conclusions.

First, at para. 44 it stated:

[The Executive Officer's] reasons demonstrate that he understood the different roles played at different times by Ms. [Pivovarov] and by Mr. Salehi. The decision clearly adverted to the change in ownership and the chronology of the sale of [Neighbour's]. The decision to revoke was grounded on the need for trust and responsibility which [Neighbour's] breached, both while under the ownership and management of Ms. [Pivovarov], and then, Mr. Salehi. This accorded with the facts before the Executive Officer, and with the discussion in *Chapman's Pharmacy* which underlined the oversight responsibilities of pharmacy owners. Simply put, the Executive Officer rejected Mr. Salehi's attempts to shift the responsibility to Ms. [Pivovarov]. This was not an unreasonable decision. [Emphasis added].

[6] Then, at paras. 45 and 46, the Divisional Court stated:

The sale of [Neighbour's] happened in August 2020 which meant that although Mr. Salehi entrusted the operation to Ms. [Pivovarov] into 2021, he had authority as the owner and corporate director during an almost 12-month period when the false or unsubstantiated claims were being made. The Executive Officer considered this shorter period, based on Mr. Salehi's submissions, when Ms. [Pivovarov] was no longer working at [Neighbour's] (April-July 31, 2021), and found that the same problematic billing practices continued. The Executive Officer concluded that this was sufficient to revoke the billing privileges of [Neighbour's] even considering that it was under new management.

Reading the reasons as a whole and in context I cannot conclude that the Executive Officer misapprehended Mr. Salehi's submissions or failed to consider Ms. [Pivovarov's] role in [Neighbour's] billing practices. [Emphasis added].

[7] Those conclusions were based on an accurate understanding of the facts; there was no misapprehension on the part of the Divisional Court or Executive Officer.

[8] Nor do we accept the second and third grounds of appeal advanced by Neighbour's. Revocation of the Operator's Agreement was not an unreasonable sanction in the circumstances, nor did it amount to a form of absolute liability. Revocation was imposed in the context of a regulatory scheme that relies on an honour system to operate. As recognized by the Divisional Court, the Decision to revoke the Operator's Agreement was based, in large part, on the significant period of time during which Mr. Salehi, as Neighbour's owner and director, did not discharge the operator's responsibility to take reasonable steps to ensure that its manager and employees did not submit claims that were false, inaccurate or misleading.

[9] Neighbour's further argues that provisions of the Operator's Agreement somehow precluded the imposition of revocation as a sanction in the circumstances. In support of its argument, Neighbour's relies on s. 11.2 of its Operator's Agreement with Ontario, which states, in part:

11.2 Change in Control or Sale, If: (a) the Operator undergoes a change In control, directly or indirectly, including a change of the controlling interest in the Operator's shares; or (b) there is a sale of all or substantially all of the Operator's assets ("Change"),

(i) the Operator shall notify the Executive Officer in writing no later than thirty (30) Days prior to the date on which the Change takes effect ("Takeover Date");

(ii) the Operator shall seek or ensure that the new owner seeks the Executive Officer's consent for the continuation of billing privileges under the ODBA following the Takeover Date, which such consent shall not be unreasonably withheld; and

(iii) if the Executive Officer provides consent under paragraph (ii), the Operator or new owner shall complete and submit to the Ministry an updated *Application for ODP Registration*.

...

11.2.2 Despite paragraph (ii) of section 11.2, the Executive, Officer shall not give consent for the continuation of billing privileges under the ODBA unless the new owner assumes all of the rights and liabilities of the former Operator under this Agreement. Despite the foregoing, the assumption by a new owner of the Operator's rights and liabilities under this Agreement shall not release the Operator from any of its outstanding liabilities under this Agreement.

[10] Neighbour's contends that by consenting to the continuation of the company's billing privileges after Mr. Salehi purchased its shares from Ms. Pivovarov, the Executive Officer signaled that he was satisfied no problem existed with the pre-change of control billings of Neighbour's under the *ODBA* that

could merit a sanction of revocation or termination of the Operator's Agreement. Consequently, the consent given by the Executive Officer to the change in control of Neighbour's precluded him from subsequently terminating the Operator's Agreement.

[11] We are not persuaded by this argument. First, such an interpretation of the significance of the Executive Officer's consent simply is not apparent from the language of s. 11.2. Second, the argument is undercut by the plain language of s. 11.2.2 that stipulates "the new owner assumes all of the rights and liabilities of the former Operator under this Agreement." That would include the liabilities – financial and regulatory – resulting from Neighbour's submitting unsubstantiated and overpayment claims.

[12] For those reasons, we see no reversible error in the Divisional Court dismissing the appellant's application for judicial review. The appeal is dismissed.

[13] In accordance with the agreement reached by the parties, Ontario, as the successful party, is entitled to its costs of the appeal fixed in the amount of \$8,750.00, inclusive of disbursements and applicable taxes.

"David Brown J.A."
"David M. Paciocco J.A."
"I.V.B. Nordheimer J.A."