Federal Court  Cour fédérale

Date: 20110623

Docket: T-1389-10

Citation: 2011 FC 760

Ottawa, Ontario, June 23, 2011

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

WELLESLEY CENTRAL RESIDENCES INC.

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for the judicial review of a decision by the Minister of National Revenue (Minister) by which the Applicant's request to be designated as a "municipality" under ss 259(1) of the *Excise Tax Act*, RSC 1985, chapter E-15 as amended, was denied. The Applicant seeks an Order quashing the Minister's decision and returning the matter for reconsideration.

Background

[2] Wellesley Central Residences Inc. (Wellesley) was incorporated in 2004. It is a non-profit housing corporation and a registered charity.

[3] In September 2008 Wellesley completed construction of a residential building at 490 Sherboume Street, Toronto, Ontario, containing 112 housing units (the "Residential Facility").

[4] The Residential Facility was built for the purpose of providing accommodation, on a rent-geared-to-income basis, to persons living with HIV/AIDS and to frail seniors (residents).

[5] Under the terms of a Rent Supplement Agreement signed with the City of Toronto on July 28, 2008, Wellesley agreed to make available each of the 112 housing units to residents on a rent-geared-to-income basis and, in turn, the City of Toronto agreed to pay subsidized funding to Wellesley. In that agreement Wellesley committed itself to the rental of all of the units "to such persons as shall be referred to it" by the City of Toronto. Wellesley also agreed to enter into written leases with each resident.

[6] In recognition of the municipal services provided by Wellesley through the provision of long-term permanent affordable housing the City of Toronto, for municipal taxation purposes, designated the Residential Facility as a municipal capital facility. This designation exempted all of the housing units in the Residential Facility from municipal taxation.

[7] Under the terms of the agreement with the City of Toronto, each of the residents living in the Residential Facility is required to enter into either a standard form tenancy agreement or an occupancy agreement (rental agreement). The rental agreements created by Wellesley stipulate that residents must enter into a standard form services agreement with designated third-party service providers who will provide support to the residents in the form of, *inter alia*, personal care, homemaking, life-skills training, on-going assessment, advocacy and assistance with the activities of daily living (personal care services). Under the terms of the rental agreements, the residents acknowledge that they may be required to vacate their rental units if Wellesley determines that they no longer require third-party support or if their needs exceed the level of service that can be provided by the designated service providers. It is undisputed that Wellesley receives income only for the supply of housing and does not benefit financially from the provision of personal case services by the third-party service providers.

[8] On September 30, 2008 Wellesley asked the Minister for a municipal designation under ss 259(1) of the *Excise Tax Act*. The effect of such a designation would have been to provide Wellesley with the full municipal rebate of Goods and Services Tax and Harmonized Sales Tax (GST/HST) in connection with its supply of housing.

[9] On July 15, 2009, Philippe Nault, acting on behalf of the Minister, wrote to Wellesley declining to make the requested designation. His letter provided the following justification for the decision:

> For purposes of municipal designation, a supply that includes accommodation as one element but also includes other elements such as meals, or personal care services, or laundry, or

housecleaning may not be considered an eligible supply of long-term accommodation.
Based on the information provided by you, Wellesley has not demonstrated that it meets the criteria for municipal designation as set out in the second paragraph above. Accordingly, we are unable to designate Wellesley as a municipality pursuant to subsection 259(1) of the Act. We offer the following comments for your reference, based on our understanding of Wellesley's relevant activities.

Wellesley operates a 112-unit rental housing complex located at 490 Sherbourne Street, Toronto, Ontario (the "Residences").

In July 2008 Wellesley entered into two agreements with the City of Toronto in connection with the Residences.

Under its June 2008 *Referral Agreement* with WoodGreen Community Services ("WoodGreen"), Wellesley agrees to offer certain units to clients of WoodGreen and to consult with WoodGreen in any eviction of such clients. WoodGreen and Wellesley will meet to review the prospective resident's eligibility. In June 2008 Wellesley entered into a virtually identical *Referral Agreement* with Fife House.

The Fife House website advises that 56 of the units at the Residences will be available for persons living with HIV/AJDS, and that Fife House staff and volunteers will provide 24-hour a day support services such as personal care and homemaking and coordination with other service providers.

The WoodGreen website advises that WoodGreen will provide 24-hour a day personal support, homemaking and coordination services to seniors who require ongoing assistance with activities of daily living. These services are to be provided to residents of the other 56 units of the Residences.

The above is consistent with a November 25, 2006 news release which advised that the federal government of Canada, the Province of Ontario and the City of Toronto were working with Fife House, WoodGreen and the Wellesley Institute to build and operate a supportive housing project (the Residences). The news release refers to federal and provincial government funding for WoodGreen and Fife House supportive housing services to be provided to residents.

> Based on the information provided, the range of services provided to residents is outside the scope of the self-reliant living and qualifying activities contemplated by the subject municipal designation process. The degree of interconnectedness between Wellesley and WoodGreen and Fife House in respect of the residents indicates that the program within which Wellesley's activities take place is broader than a program to provide housing to low to moderate-income households. Accordingly, Wellesley's activities in connection with the Residences are not qualifying activities for purposes of municipal designation.
>
> [Footnotes omitted]

[10] Wellesley asked the Minister to reconsider and provided additional supporting information, including a favourable legal opinion. By letter dated August 3, 2010, Mr. Nault again declined to grant a municipal designation to Wellesley for the following reasons:

> Wellesley has entered into Referral Agreements with Fife House and WoodGreen under which it offers available units to clients of these organizations. Under the terms of the Referral Agreements, Fife House and WoodGreen meet with Wellesley to review the eligibility of their clients for residency and will discuss with Wellesley any evictions of their clients.
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> While Wellesley provides accommodation to its residents on a rent-geared-to-income basis, for purposes of municipal designation it is also necessary to consider the context in which these supplies are made. It is the CRA's policy to designate organizations as municipalities that provide long-term accommodation to residents on an RGI basis under a program to provide housing to low to moderate-income households. However, where residents are provided with a variety of services in addition to the supply of accommodation, either by the housing provider itself or by a third party, then, this supply is no longer considered an eligible activity under the administrative policy and eligibility criteria for municipal designation.
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> In Wellesley's circumstances, the supply of accommodation and the support services provided by Fife House and WoodGreen are inextricably linked and as a result, the program under which Wellesley's activities are provided takes place in a context that is broader than the provision of housing on a rent-geared-to-income

> basis for low to moderate income households. Therefore, Wellesley does not meet the administrative policy and eligible criteria for designation as a municipality for purposes of the Act.

[11] It is from the above decision that this application for judicial review arises.

Issues

[12] Was the Minister's exercise of discretion reasonable?

[13] Did the Minister fetter his discretion in the application of the applicable *Excise Tax Act* policy on municipal designations?

Analysis

[14] The parties agree that this application for judicial review concerns the exercise of a ministerial discretion for which the appropriate standard of review is reasonableness: see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 53. Wellesley's argument about a fettering of discretion raises an issue of procedural fairness for which the appropriate standard of review is correctness: see *Dorothea Knitting Mills Ltd. v Canada (Minister of National Revenue)*, 2005 FC 318, 295 FTR 314 at para 13.

[15] The *Excise Tax Act* provides neither a definition of the term "municipal service" nor a set of legislative criteria for making a municipal designation under ss 259(1). The parties agree that such designation involves the exercise of a ministerial discretion which is informed by an administrative policy developed in 1993 and revised in 2007. The 2007 Guideline (Ministerial

Guideline) entitled “Administrative Policy and Eligibility Criteria for Municipal Designation” outlines the basis for granting municipal designation in connection with the supply of residential rent-geared-to-income accommodation:

> A charity or a non-profit organization that receives government funding to supply long- term residential accommodation to tenants on an RGI basis may apply for municipal designation for purposes of subsection 259(1). We consider the supply of long-term residential accommodation to mean the rental of self-contained housing units (private living quarters which include cooking facilities and a bathroom) for periods of one month or more. The government funding must be payable to subsidize the cost of those housing units that are supplied on a RGI basis. Note that the government funding in these situations includes funding provided by a municipality. The activities described above must be undertaken within a program to provide housing to low to moderate-income households.
>
> Municipal designation does not apply to any other activities of the charity or non-profit organization such as the supply of residential units that are not on an RGI basis or for which no government subsidy is payable (sometimes referred to as market rent) or for the supply of commercial space. In addition, a supply that includes accommodation as one element but also includes other elements such as meals, personal care services, laundry or housecleaning may not be considered an eligible supply of long-term accommodation. Accordingly, the activities engaged in by operators of personal care homes and nursing homes that involve these mixed or composite supplies are not eligible activities under the administrative policy and eligibility criteria for municipal designation for purposes of subsection 259(1).
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> [Emphasis added]

[16] The Minister refused Wellesley’s request for a municipal designation on the basis that its supply of residential accommodation was “inextricably linked” to the personal care services that the residents were obliged to receive from the designated third-party service providers under their rental agreements. According to the Minister, an eligible municipal activity is one that does

not make the provision of rent-geared-to-income housing dependent upon a resident's eligibility for personal care services, whether provided by the owner or by third parties.

[17] Wellesley argues that the personal care services associated with the Residential Facility constitute a separate taxable supply by other parties and that it was unreasonable for the Minister to refuse to recognize that separation of activity for purposes of a ss 259(1) Municipal Designation. It says, in effect, that the Minister ignored the separation of functions that was part and parcel of its business model in favour of an unduly rigid and restrictive approach.

[18] The Minister, on the other hand, characterized this business model as a single activity in the nature of the operation of a personal care facility. Given the composite nature of all of the services provided to the residents, the model, according to the Minister, goes beyond the simple provision of subsidized public housing which would have justified a municipal designation. The Minister also relied on certain provisions of the rental agreements which directly linked Wellesley to the provision of personal care services, including Article 1.02 of the Tenancy Agreement:

> 1.02 You understand and agree that the Unit forms part of a "care home" within the meaning of the Residential Tenancies Act. The Unit is provided as a part of a program for people sixteen (16) years of age or over who are living with HIV/AIDS and who require services offered by Fife House. You agree that the reason you have chosen to live in the Unit is for the purpose of receiving services agreed upon between you and us in accordance to the Service Agreement you signed with Fife House (the "Service Provider"), and us, before you signed this Agreement (which services are collectively referred to as the "Services" in this Agreement). As of the date of this Agreement, the Services include;

(i) ongoing assessment, planning, implementation and evaluation of your Plan of Service developed in accordance with the Service Agreement;

(ii) hands on support and active listening;

(iii) personal care support and homemaking;

(iv) life skills teaching including daily coping skills, social skills, activities of daily living;

(v) linkage with desired services and resources;

(vi) advocacy; and

(vii) assistance with the activities of daily living when required because of symptoms experienced by the tenant arising from an HW/AIDS related illness.

A copy of your Service Agreement is attached to this Agreement as **Schedule "E"** The Service Provider has, in accordance with the referral agreement we have signed with it (the "**Referral Agreement**") nominated you as the tenant of the Unit, subject to our approval, as you must qua1ify for the Services provided by the Service Provider and for the social housing we provide. However, the Service Provider is not your landlord, as we are responsible to provide you with the Unit, to perform all of the obligations of a landlord and to provide you with the Services (even though we are providing the Services to you through the Service Provider, based upon the Referral Agreement).

[Emphasis added]

[19] Other provisions in the Occupancy Agreement similarly tie Wellesley to the delivery of personal services to the residents, including Articles 2, 4, 17 and 22.

[20] Essentially, Wellesley takes issue with the wisdom of the Minister's decision on social policy grounds. It says, with some justification, that the decision creates a barrier to the provision of affordable housing for vulnerable members of the community. Wellesley also

characterizes the rebate provisions of the *Excise Tax Act* as social welfare legislation to be interpreted liberally and in keeping with Charter values.

[21] The problem with Wellesley's argument is that there is a valid taxation rationale for the Minister's decision which was obviously considered to be paramount. That rationale is expressed in the Department of Finance Goods and Services Technical Paper of August 1989, which speaks about the need to preserve competitive taxation equity within the private and public sectors by excluding commercial activities conducted by the public sector from more favourable tax treatment. This point was addressed in the following way in the Respondent's Memorandum of Fact and Law:

> 40. Granting municipal designation to the applicant based on its legal structure would also result in unequal tax treatment between facilities where accommodation and services are provided by a single entity and facilities where the accommodation and services are provided by different entities. It would result in pressure from similar facilities that provide accommodation and services through a single legal entity to also be entitled to the municipal rebate. It would create inequities relative to other charitable and non-profit organizations that operate care facilities involving an element of accommodation, such as hospitals, nursing homes and group homes, which do not recover the GST and the federal portion of the HST at the municipal rate.

[22] It is apparent from the 2007 Departmental Guideline that the supply of municipally subsidized residential care accommodation in the nature of a nursing home or a personal care home which involves the provision of meals, personal care services, housekeeping services or the like will not qualify for a municipal designation because it represents a form of competing commercial activity. However, there is nothing in the 2007 Departmental Guideline that specifically addresses the situation here involving a contractually-linked supply of housing and

personal care service. In the absence of a specific policy, the Minister was required to adopt a principled position and he did so. Although there may be a business model available for operating the Residential Facility that will satisfy the Minister's concerns, it is apparent that the degree of contractual commingling between the provision of housing and the provision of personal care services was such that the Minister was unwilling to treat those functions as separate taxable supplies for the purposes of a municipal designation.

[23] However appealing Wellesley's counter argument may be, it is not the role of the Court on judicial review to substitute its views on policy matters for those of the Minister. This decision is transparent, intelligible, and rationally supported by the reasons given. Deference requires that it be respected on judicial review.

[24] On the issue of whether or not the Minister fettered his discretion, there is nothing about the Minister's decision which would suggest that the departmental taxation guidelines on municipal designations were elevated to a set of immutable legal principles to the exclusion of other relevant considerations. The fact that the Minister exercised his discretion in a particular way does not mean that relevant matters were overlooked. Indeed, the impugned decision reflects a clear appreciation of the particulars of the business model employed by the parties. I would add that the willingness of the City of Toronto to exempt the Residential Facility from municipal taxation has little, if any, relevance to the exercise of a discretion under the *Excise Tax Act* and no reviewable error arises from the failure by the Minister to mention that fact in his decision.

[25] The Minister is seeking costs against Wellesley. Notwithstanding the outcome of this application, I am satisfied that there was a compelling public interest component to this proceeding and that Wellesley is providing a laudable public service in its management of the Residential Facility. In the result, each party will bear its own costs.

Conclusion

[26] In the result, this application for judicial review is dismissed without costs to either party.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed without costs.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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