Date: 20070214

Docket: T-14-06
T-66-05

Citation: 2007 FC 163

[ENGLISH TRANSLATION]

BETWEEN:

FESTIVAL CANADIEN DES FILMS DU MONDE

Applicant

and

ATTORNEY GENERAL OF CANADA
and
L'ÉQUIPE SPECTRA INC.
and
LE REGROUPEMENT POUR LE
FESTIVAL DE CINÉMA DE MONTRÉAL

Respondents

REASONS FOR ORDER

[1] This is another motion to strike in this case initiated by the Attorney General of Canada on the basis that both applications for judicial review subject to the motion would have essentially become moot and would not disclose a reasonable cause of action.

Background

[2] The applicant filed two applications against two decisions made by Telefilm Canada (hereinafter Telefilm), one involving a request for proposals on September 7, 2004, and the other regarding Telefilm's decision on December 17, 2004, to accept a proposal submitted by Regroupement pour le festival de cinéma de Montréal (hereinafter the Regroupement) (docket T-66-05).

[3] In docket T-14-06, the applicant asked the Court to declare the decision to issue the call for proposals on September 7, 2004, invalid and unlawful, while in docket T-66-05, it applied for an order declaring the decision from December 17, 2004, invalid and unlawful (hereinafter the two applications for judicial review).

[4] In both dockets, the applicant also asked this Court to issue an order prohibiting Telefilm [TRANSLATION] "from making any attempt or taking any action that would have the effect of creating a new film festival in Montréal or helping an existing festival create such a festival in order to supplant the Montréal World Film Festival" (hereinafter the injunction).

[5] It should also be noted that the applicant brought actions for damages against Telefilm before the Superior Court, seeking $2,500,000 from Telefilm for non-pecuniary and exemplary damages.

[6] The Attorney General of Canada essentially argues in this motion that the Regroupement fully spent the subsidy that it received from Telefilm in 2005 for its festival held in October 2005 and that the Regroupement reportedly ceased operating permanently in July 2006. Furthermore, since 2004, Telefilm has allegedly not issued another call for proposals for a film festival grant nor taken any action that could give rise to an injunctive finding such as that sought by the applicant.

Analysis

[7] Although, surprisingly, the motion under review has not been submitted on this point, it appears to me that it is under the inherent jurisdiction of this Court, as applied by Strayer J. in *Bull (David) Laboratories (Canada) Inc. v. Pharmacia Inc. et al.* (1994), 176 N.R. 48, at pages 54–55 (*Pharmacia*) that it should be addressed.

[8] In *Pharmacia*, Strayer J. allowed that striking a judicial review be sought only in exceptional cases. On this point, the Court stated the at page 54–5:

> This is not to say that there is no jurisdiction in this court inherent or through rule 5 by analogy to other rules, to dismiss in summary manner a notice of motion which is so clearly improper as to be bereft of any possibility of success. (See e.g. *Cyanamid Agricultural de Puerto Rico Inc. v. Commissioner of Patents* (1983), 74 C.P.R. (2d) 133 F.C.T.D.); and the discussion in *Vancouver Island Peace Society et al. v. Canada (Minister of National Defence) et al*., [1994] 1 F.C. 102; 64 F.T.R. 127, at 120-121 F.C. (T.D.)). Such cases must be very exceptional and cannot include cases such as the present where there is simply a debatable issue as to the adequacy of the allegation in the notice of motion.
>
> (Emphasis added)

[9] This is the same reasoning that Nadon J. of this Court adopted in a decision on August 13, 1996 (*Tom Pac Inc. v. Kem-A-Trix (Lubricants) Inc.*, docket T-1238-96, at page 5).

[10] As stated by Strayer J. in *Pharmacia*:

> […] [T]he focus in judicial review is on moving the application along to the hearing stage as quickly as possible. This ensures that objections to the originating notice can be dealt with promptly in the context of consideration of the merits of the case.

[11] (See also *Merck Frosst Canada Inc. et al. v. Minister of National Health and Welfare et al.* (1994), 58 C.P.R. (3d) 245, at page 248, and *Glaxo Wellcome Inc. et al. v. Minister of National Health and Welfare et al.*, unreported judgment of this Court, September 6, 1996, docket T-793-96.)

[12] In this case, I consider that this motion by the Attorney General of Canada should be dismissed for the following reasons:

[13] Although it is possible to acknowledge the Attorney General of Canada's opinion with respect to the disappearance of the factual background summarized above at paragraph [6], the fact remains that the applicant still has a claim for damages in the Superior Court that ultimately is likely linked to the acknowledgment, at the outset, of the invalidity or unlawfulness of the call for proposals from September 7, 2004.

[14] Here is how the Federal Court of Appeal, in a past appeal in this case, summarized at paragraphs 2, 3, 4 and 23 of its decision from September 21, 2006, (docket A-646-05, neutral

citation 2006 FCA 305) the relationship in this case between obtaining damages and the illegality of the call for proposals from September 7, 2004:

> [2] On December 10, 2004, FFM [the applicant] filed in the Superior Court of Quebec a motion to institute proceedings for declaratory judgment and permanent injunction, in which FFM asked the Superior Court to declare unlawful the call for proposals of September 7, 2004, and sought exemplary and moral damages in the amount of $2,500,000.
>
> [3] On January 6, 2005, Telefilm Canada served in Superior Court a motion for declinatory exception on the grounds that that Court did not have jurisdiction to rule on the lawfulness of the call for proposals.
>
> [4] On January 14, 2005, FFM filed in Federal Court a notice of application for judicial review against the decisions of Telefilm Canada dated September 7, 2004, and December 17, 2004.
>
> [23] […] This Court cannot at this stage, absent evidence of the relevant facts, cut short the proceedings brought by FFM, even more so because the debate initiated by FFM regarding Telefilm Canada's civil liability is pending before the Superior Court of Montréal.
>
> (Emphasis added)

[15] It should be quickly noted in passing here that although in the Superior Court the applicant appears to only challenge the decision from September 7, 2004, the Federal Court of Appeal, in the same decision cited above, clearly sees a connection between this decision from September 7, 2004, and the decision from December 17, 2004. At paragraph [15], the Court states in part:

> [15] […] The lack of interest is certainly not clear with regard to the decision of September 7, 2004. The existence of an interest with regard to the decision dated December 17, 2004, is more problematic, given that FFM did not see fit to file a proposal. As it is possible that the outcome of the first decision could influence the

> outcome of the second, it would be best to let the entire debate follow its course.

[16] Thus, in accordance with the final approach adopted by the Federal Court of Appeal on October 27, 2005, in *The Queen v. Grenier*, (2005) FCA 348 (*Grenier*), the applicant, on January 14, 2005, appealed to the Federal Court to have the decisions from September 7 and December 17, 2004, recognized as invalid or unlawful.

[17] As it may be seen—at least the dynamics to the contrary have not been clearly established by the Attorney General of Canada—that this unlawfulness is the starting point or the cornerstone of any claim for damages, it follows from the teachings of *Grenier* that the two applications for judicial review have not become moot because there cannot be any award of damages in favour of the applicant in the Superior Court as long as, at the very least, the unlawful character of the decisions from September and December 2004 has not been recognized by this Court through the two applications for judicial review that are now consolidated. Therefore, the existence of the two applications for judicial review still have an aspect or practical element for the rights of the applicant.

[18] Furthermore, with respect to the application for an injunction, this aspect was settled by de Montigny J. in his decision from December 21, 2005. On this point, de Montigny J. noted the following at paragraph [30] of his decision:

> [30] With respect to the respondent's arguments that the wording of the application for an injunction is too vague and uncertain for the purposes of enforcement, I do not think that at this stage they warrant the dismissal of the application for judicial review or even the

> striking out of this pleading. Once again, we should never lose sight of the fact that dismissing an application is a radical measure which the courts should only use with extreme caution and which should only be allowed in exceptional circumstances. Therefore, I am of the view that it will be better to leave for the judge who must rule on the application for judicial review the task of deciding whether to grant the relief sought by the applicant, subject to possible limitation of its scope if the applicant considers that appropriate.

[19] It must therefore be considered that now, at least at the interlocutory stage, there is *res judicata* with respect to the non-striking of this application for an injunction. Furthermore, and by any chance, this finding is viewed by the Attorney General of Canada as incidental to the request for nullity and unlawfulness. Therefore, since these applications remain, these is no real harm in maintaining the motion for an injunction on this finding. It is on the merits of the respondent's file that the Attorney General of Canada should raise his arguments again in this regard.

[20] For the foregoing reasons, the Attorney General of Canada's motion to strike is dismissed.

[21] As for the costs to be awarded on this motion, I essentially share that applicant's position, mainly that the Attorney General of Canada's filing of the motion under review triggers here the application of rules 400(3)(i), (k) and 401(2) of the *Federal Courts Rules* (the Rules). Exercising my discretion in this respect, the Attorney General of Canada shall be ordered to pay the applicant, immediately following assessment, costs under the maximum of Column 4 under Tariff B.

[22] With respect to the future timelines for the readying of the two applications for judicial review, I consider that these files are at the stage of Rule 307, i.e. service of the respondent's affidavits.

[23] Accordingly, on or before March 7, 2007, the applicants shall serve and file their Rule 307 affidavits. Thereafter, the other timelines under the rules will apply.

"Richard Morneau"

Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-14-06 and T-66-05
STYLE OF CAUSE:	FESTIVAL CANADIEN DES FILMS DU MONDE Applicant and ATTORNEY GENERAL OF CANADA, L'ÉQUIPE SPECTRA INC. and LE REGROUPEMENT POUR LE FESTIVAL DE CINÉMA DE MONTRÉAL Respondents
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DATE OF HEARING:	February 12, 2007
REASONS FOR ORDER:	PROTHONOTARY MORNEAU
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