Date: 20080611

Docket: A-366-07

Citation: 2008 FCA 207

CORAM: **SEXTON J.A.**
BLAIS J.A.
EVANS J.A.

BETWEEN:

CANWEST MEDIAWORKS INC.

Appellant

and

THE MINISTER OF HEALTH and
THE ATTORNEY GENERAL OF CANADA

Respondents

Heard at Toronto, Ontario, on June 9, 2008.

Judgment delivered at Toronto, Ontario, on June 11, 2008.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: SEXTON J.A.
BLAIS J.A

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REASONS FOR JUDGMENT

EVANS J.A.

A. INTRODUCTION

[1] This is an appeal from a decision of the Federal Court in which Justice Snider granted a motion by the Attorney General of Canada and the Minister of Health ("the respondents") to dismiss for lack of standing an application for judicial review brought by CanWest Media Works Inc. ("CanWest"): *CanWest Media Works Inc. v. Canada (Minister of Health)*, 2007 FC 752.

[2] CanWest is a Canadian corporation which derives income from advertising placed in media in which it has an interest, including newspapers and magazines, television, and publications available online. In its application for judicial review CanWest requests an order of *mandamus* to require the respondents to investigate and prosecute American media corporations which, it alleges, distribute in Canada, in magazines, cable television, and the internet, advertisements for prescription drugs which contravene the *Food and Drugs Act*, R.S.C. 1985, c. F-27, ("FDA") and the *Food and Drug Regulations*, C.R.C., c. 870 ("FDR").

[3] This legislation prevents "Direct to Customer Advertising" ("DTCA") in Canada of prescribed drugs by prohibiting advertisements which claim that a drug treats, prevents, or cures listed medical conditions and diseases (FDA, subsection 3(1)), and restricts representations about listed drugs to a very few facts: their names, price and quantity (FDR, section C.01.044). United States' law is more permissive on DTCA.

[4] CanWest argues in this appeal that Justice Snider erred in the exercise of her discretion to grant the respondents' motion to dismiss the application for judicial review for lack of standing in two respects. First, she failed to consider whether there was a sufficiently full evidentiary record to enable her to decide the standing question as a preliminary matter on a motion to dismiss. Second, she denied CanWest public interest standing by finding that CanWest had no genuine interest in the subject matter of the application for judicial review, and by concluding that CanWest should not be afforded public interest standing because there were more appropriate litigants to challenge the respondents' failure to enforce the law.

[5] In oral argument, counsel abandoned the argument that Justice Snider had also erred in concluding that CanWest was not "directly affected" within the meaning of the *Federal Courts Act*, R.S.C. 1985, c. F-7, subsection 18.1(1) by the respondents' alleged breach of their duty to enforce the statutory prohibition of DTCA against United States' media corporations whose publications are available in Canada.

B. ISSUES AND ANALYSIS

(i) Was the motion to dismiss premature?

[6] Counsel for CanWest submitted that only in the clearest of cases should a court dismiss an application for judicial review on a motion to strike. Where, as here, it is not obvious that the applicant lacks standing, the application should be permitted to proceed so that standing can be determined on the basis of a full evidentiary record. He argued that, in this case, some aspects of the standing issue require further exploration in the context of the application itself, and that it is premature to decide standing as a preliminary question on a motion to strike.

[7] Counsel relied on *Apotex Inc. v. Canada (Governor in Council)*, 2007 FCA 374, where, writing for the Court, Sexton J.A. said (at para. 14) that a judge should not decide a motion to strike an application for judicial review without first explicitly exercising her or his discretion as to whether the standing question could properly be decided on the motion. In the present case, counsel said, Justice Snider did not address this issue, but seemed simply to assume (at para. 10) that it was appropriate to decide the motion on its merits because standing is one of the two exceptions to the

general rule that a court should only exercise its jurisdiction to strike when the application is so clearly improper as to be bereft of any possibility of success.

[8] I agree that Justice Snider did not explicitly acknowledge that, even when a motion to strike is based on the applicant's lack of standing, the court must still consider whether the standing issue is appropriately decided on the motion to strike and meets the stringent test for striking out. I should point out that this Court rendered its decision in the *Apotex* case cited above after Justice Snider rendered hers; she relied on the decision of the Federal Court (2007 FC 232), which this Court reversed.

[9] If the Motions Judge erred in this respect, this Court on an appeal may decide for itself whether, on the basis of the motion record and counsel's oral submissions, CanWest's alleged lack of standing can properly be determined on the motion. In my view, it can.

[10] At the time of the motion to strike, CanWest had filed its affidavits in the application for judicial review and has not indicated that it wishes to adduce more evidence on the main application or on the standing issue. The Court has all the material it needs to determine if CanWest has standing. For the reasons given below, CanWest clearly lacks standing on the only basis now advanced, that is, as a public interest applicant, and the application must therefore fail.

(ii) Public interest standing

[11] CanWest argues that Justice Snider erred in two respects in applying the test in *Borowski v. Canada (Minister of Justice)*, [1981] 2 S.C.R. 575. First, it is said, she committed an error of law in finding that CanWest had no "genuine interest" in the non-discriminatory enforcement of the statutory prohibition of DTCA because it was already pursuing an action in the Superior Court of Justice for a declaration that the legislation was invalid as an unconstitutional abridgement of the right to freedom of expression guaranteed by section 2(*b*) of the *Canadian Charter of Rights and Freedoms.*

[12] Counsel submitted that the Motions Judge's conclusion was illogical. It was, he said, perfectly coherent for CanWest to claim that the legislation is invalid, but also to insist that it must be enforced meanwhile in an even handed manner against Canadian and American corporations alike. If CanWest had carried DTCA in its publications, the respondents were likely to have instituted proceedings against it, in which it would have had standing to raise the invalidity of the legislation as a defence. Having decided, as a good corporate citizen, to obey the law, counsel argued that it should not now be precluded for lack of standing from challenging the legality of the respondents' failure to enforce the law, a failure which goes to the heart of the rule of law.

[13] Despite the attractive argument ably made by counsel, I cannot agree. In considering whether the appellants in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, ("*Canadian Council*") should be given public interest standing, Cory J. stated (at p. 254) that they had "demonstrated a real and continuing interest" in the general

subject matter of the litigation, namely, the problems faced by immigrants and refugees. In contrast, CanWest's interest in the enforcement of the law is merely temporary and contingent on the outcome of its action in the Superior Court of Justice for a declaration that the statutory prohibition of DTCA is invalid. This action is scheduled to be tried approximately four months from now. CanWest's principal objective is to have the legislation struck down; in the ten years that DTCA has proliferated, it has brought no proceedings, before this, to challenge the alleged failure by the respondents to enforce the law.

[14] The fact that CanWest's interest in the enforcement of the DTCA prohibition is commercial also indicates that it does not have "a real and continuing interest" for the purpose of being afforded public interest standing. Private interests are primarily relevant to determining whether persons are "directly affected" by the impugned administrative action and therefore have standing as of right.

[15] In this case, the Motions Judge concluded that CanWest was not "directly affected" because the harm that it alleged that the respondents' failure to enforce the law has caused to its commercial interests was too speculative and indirect. CanWest surely cannot rely on the same interest that did not qualify it for "private interest standing" to establish that it has a "genuine interest" for the purpose of public interest standing.

[16] The grant of public interest standing to the appellant in *Harris v. Canada (Minister of National Revenue)*, [2000] 4 F.C. 37 (C.A.) does not assist CanWest because, in that case, unlike this, the Attorney General virtually conceded that the appellant had a genuine interest in the issue.

[17] Having concluded that CanWest has no "genuine interest" in the subject matter of its application I need not deal with the submission that Justice Snider also erred in concluding that there was another reasonable and effective way to bring the issue before the Court. CanWest says that she did not consider whether "on a balance of probabilities" (*Canadian Council* at p. 252) any of the interveners opposing CanWest's action in the Superior Court of Justice would challenge the respondents' alleged failure to enforce the DTCA prohibition against American corporations.

[18] In my opinion, these interveners (members of a coalition of organizations representing, among others, the interests of consumers of pharmaceuticals products, patients, a trade union, and those who rely on employer-provided health benefit plans) are more appropriate representatives of the public interest in the due enforcement of the law than CanWest. Their intervention in the Superior Court of Justice demonstrates a willingness and an ability to resort to the law when, in their view, the public interest in upholding the statutory ban in Canada on DTCA is in jeopardy. If CanWest's action fails and the legislation prohibiting DTCA is upheld, it is not unreasonable to think that those who were willing to intervene in the action may also be willing to challenge the under enforcement of the law, even though they have not done so previously.

C. CONCLUSIONS

[19] For these reasons, I would dismiss the appeal with costs.

"John M. Evans"
J.A.

"I agree
J. Edgar Sexton J.A."

"I agree
Pierre Blais J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-366-07

(APPEAL FROM THE ORDER OF THE HONOURABLE MADAM JUSTICE SNIDER OF THE FEDERAL COURT, DATED JULY 16, 2007 IN FEDERAL COURT FILE DOCKET NO. T-416-07.)

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CONCURRED IN BY:	Sexton JA. Blais J.A.
DATED:	June 11, 2008

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