Federal Court of Appeal | Cour d'appel fédérale

Date: 20230616

Dockets: A-122-23 (lead file)
A-123-23
A-124-23

Citation: 2023 FCA 141

[ENGLISH TRANSLATION]

PRESENT: GOYETTE J.A.

BETWEEN:

MINISTER OF CANADIAN HERITAGE

Appellant (cross-respondent)

and

9616934 CANADA INC.
9501894 CANADA INC.
9849262 CANADA INC.

Respondents (cross-appellants)

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on June 16, 2023.

REASONS FOR ORDER BY: GOYETTE J.A.

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REASONS FOR ORDER

GOYETTE J.A.

[1] The Minister of Canadian Heritage (the Minister) is seeking, through a motion brought on May 12, 2023, a stay of the Federal Court judgment (2023 FC 432) appealed to this Court. For the following reasons, the stay is denied.

I. Background

[2] Subsection 124.5(3) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) provides that a corporation is eligible for a tax credit for its labour expenditure related to a "Canadian film or video production" (eligible production). Subsection 125.4(1) refers to the *Income Tax Regulations*, C.R.C. c. 945 (the Regulations) for the definition of eligible production. This definition excludes productions that are "advertising": subsection 1106(4) and paragraph 1106(1)(*b*) of the Regulations. A production that is advertising is therefore not eligible for the tax credit.

[3] Furthermore, to be eligible for the tax credit, a corporation must submit with their income tax return a "Canadian film or video production certificate" (certificate). This certificate is issued by the Minister in respect of an eligible production: see the definition of "certificate" in subsection 125.4(1) of the Act. In this regard, subsection 125.4(7) of the Act provides that the Minister shall issue guidelines respecting the circumstances under which the conditions in the definition of certificate are satisfied and specifies that those guidelines are not statutory instruments. In 2017, the Minister issued guidelines (the 2017 Guidelines) that indicate that a production constitutes advertising, in particular, where more than 15% of the running time consists of extolling the virtues of one or more products, services, events, organizations or businesses.

[4] In 2016 and 2017, each of the respondents submitted an application for a certificate for its production. On December 21, 2018, the Minister sent the respondents his notice of refusal to

issue the requested certificates. The Minister indicated that he was of the opinion that the productions constituted advertising because they were in the nature of infomercials where more than 15% of the running time consisted of logos and segments focusing on the advantages and positive aspects of the characteristics of cruises or hotel complexes.

[5] The respondents submitted to the Federal Court an application for judicial review of the Minister's decision.

[6] The Federal Court initially determined that the Minister had erred in his interpretation of the word "advertising" in paragraph 1106(1)(*b*) of the Regulations by incorporating in that provision a parameter that cannot be found therein: [TRANSLATION] "the 15% limit" set out in the 2017 Guidelines. To arrive at this determination, the Court relied on *Canada (Attorney General) v. Zone3-XXXVI Inc.*, 2016 FCA 242. In that case, the Federal Court of Appeal stated that it is up to Parliament, and not to the Minister, to describe a production, the Minister's role being to ensure that the production is not an excluded production.

[7] Furthermore, the Federal Court noted that the application of the 15% limit to the evidence before it gave an impression of arbitrariness. The Court added that the treatment given to other productions, while not relevant for the purposes of its decision, also gave an impression of arbitrariness.

[8] Lastly, the Federal Court considered that by not addressing certain arguments put forward by the respondents, the Minister's decision does not satisfy the requirements of reasons and

internal rationality that the Supreme Court discusses in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*].

[9] For the reasons described above, the Federal Court concluded that the Minister's refusal to issue the certificates was an unreasonable decision that does not fall within the range of outcomes which are defensible in respect of the facts, and especially in respect of the Act and the Regulations. The Court consequently allowed the application for judicial review and referred the matter back to the Minister for redetermination.

[10] As mentioned, the Minister filed an appeal with this Court. By way of a motion, he is seeking a stay of the judgment rendered by the Federal Court until this Court has disposed of the appeal.

II. Analysis

[11] There is no dispute between the parties on the test that applies in the circumstances. To be granted the requested stay, the Minister must convince the Court that there is a serious question to be tried, that he would suffer irreparable harm if the stay being sought is denied, and that the balance of convenience favours the granting of the stay: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334 [*RJR-MacDonald*]. Failure on any of the three elements cited above is fatal: *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 212 at para. 15 [*Ishaq*]; *Canada (Health) v. Glaxosmithkline Biologicals S.A.*, 2020 FCA 135 at para. 9 [*Glaxosmithkline*].

A. *Serious Question to Be Tried*

[12] In terms of whether there is a serious question to be tried, the threshold is very low. It is sufficient for the Minister to demonstrate that the motion is "neither vexatious nor frivolous": *Canada (Public Safety and Emergency Preparedness) v. LeBon*, 2013 FCA 18 at para. 10.

[13] The notice of appeal and the written submissions indicate that the appeal raises three questions, namely, whether the Federal Court erred in (1) not giving sufficient deference to the Minister; (2) comparing the productions at issue with other productions and failing to review the Minister's analysis; and (3) interpreting *Vavilov*.

[14] The respondents do not agree with the Minister's interpretation of the Federal Court's decision and have presented arguments in support of that decision. As a result, they consider that the three questions raised in the appeal are not serious.

[15] For the time being, this is not a question of ruling on the merits of the Federal Court's decision or on the merits of the parties' positions. It is sufficient to determine whether, in light of the case presented to me, I can conclude that the Minister's appeal is frivolous or vexatious. Since I am unable to arrive at such a conclusion, the first element for granting the stay is satisfied.

B. *Irreparable Harm*

[16] Irreparable harm is harm that either cannot be quantified in monetary terms or cannot be cured, usually because one party cannot collect damages from the other: *RJR-MacDonald* at 341.

[17] Relying on the affidavit of Scott White, Director of the Canadian Audio-Visual Certification Office at the Department of Canadian Heritage, the Minister claims that the Federal Court's judgment has two effects. The first is to condemn the 15% threshold that the Minister uses as a basis to determine whether a production constitutes advertising. The second effect is to reduce the Minister's discretion in interpreting what constitutes "advertising". According to the Minister, these effects mean that while awaiting this Court's ruling on the appeal, he may have to decide on not only the respondents' applications for certificates, but also all applications for certificates by adopting a more restrictive interpretation of the word "advertising". As a result, if this Court reverses the trial judgment, there is a risk (1) that certain productions will have obtained a certificate in the meantime even though they constitute advertising; (2) that there will be inequity from one production to another based on the date on which they will have been reviewed; and (3) that there will be confusion in the Canadian film production industry. This triple risk is the irreparable harm identified by the Minister.

[18] The respondents replied that in referring the matter back to the Minister for redetermination without ruling on their application to have the definition of "advertising" that is included in the 2017 Guidelines declared of no force or effect, the judgment should not have any consequences with respect to the applications for certificates submitted by other producers. This

is particularly true given that the Federal Court concluded that the interpretation of the word "advertising" that is found in the Regulations does not fall within the range of possible outcomes which are defensible "in respect of the facts and the law" and that the facts at issue are those related to the respondents' applications for certificates, not those related to other certificate applicants. In addition, as regards the impacts of the Federal Court's judgment on the redetermination that the Minister will have to make in this case, the respondents mentioned the possibility of this Court disposing of the appeal before a redetermination is made.

[19] The respondents note a significant flaw in the Minister's position: on the one hand, he is arguing that the irreparable harm results from the Federal Court's condemning the 15% threshold, and on the other hand, he is claiming that the definition of advertising that is included in the 2017 Guidelines, which includes the 15% threshold, is not binding. As the respondents have underscored, if the 15% threshold is not binding, the Federal Court's decision regarding this threshold cannot cause irreparable harm. That is the conclusion that this Court arrived at when faced with a very similar situation: *Ishaq* at para. 20.

[20] The respondents submit that the irreparable harm alleged by the Minister is hypothetical and speculative. In this regard, the respondents refer to the use of the word [TRANSLATION] "risk" in the Minister's submissions and deplore the lack of the clear and credible evidence of harm required by the case law: *Glaxosmithkline* at paras. 15–16; *Haché v. Canada*, 2006 FCA 424 at para. 11; *Fortius Foundation v. Canada (National Revenue)*, 2022 FCA 176 at para. 32 [*Fortius*]. According to the respondents, the affidavit in support of the Minister's motion is akin to the affidavit at issue in *Glaxosmithkline*, where it was decided that much of the irreparable

harm alleged by the appellant in that matter was “argumentative and speculative”: *Glaxosmithkline* at paras. 21 and 36.

[21] Lastly, the respondents note that irreparable harm cannot be based on the ordinary and inherent consequences of a trial judgment: *Fortius* at paras. 29–32. They add that the fact that the Minister has to make a redetermination in this matter is a normal consequence, as was the case in *Glaxosmithkline* (see paragraph 35), and that this consequence did not prevent this Court from finding that there was no irreparable harm in that case.

[22] I agree with the respondents’ arguments as to the lack of irreparable harm except in relation to the effects of the Federal Court’s judgment on the applications for certificates submitted by other producers. In my opinion, other producers will not hesitate to rely on the Federal Court’s judgment if they consider that this judgment supports their claims. That said, this constitutes an ordinary and inherent consequence of a trial judgment and not irreparable harm.

[23] In addition, it appears appropriate to me to add the following comments in support of my finding that the triple risk alleged by the Minister does not constitute irreparable harm.

[24] Firstly, I reviewed the Minister’s representations in his reply. I cannot accept these representations as supporting any evidence of irreparable harm.

[25] Secondly, the Federal Court did not order the Minister to issue a certificate to the respondents. Instead, it referred the matter back to him for a redetermination

[TRANSLATION] “having regard to the Act and the Regulations”: para. 67 of the Federal Court judgment. In the circumstances, I cannot conceive how such a disposition could cause harm, much less irreparable harm.

[26] Thirdly, supposing that the Federal Court’s judgment would result in harm, more specifically in the issuance of certificates [TRANSLATION] “with no right”, as the Minister claims, it seems that subsection 125.4(6) of the Act would make it possible to remedy that harm. Indeed, this subsection provides that the Minister may revoke a certificate “if the production is not a Canadian film or video production”, *i.e.*, if it is not an eligible production. Subsection 124.5(6) also provides that in the event of a revocation, the certificate is deemed never to have been issued. It follows that if this Court were to rule on the appeal in favour of the Minister after the Minister has issued certificates [TRANSLATION] “with no right”, the Minister could revoke said certificates on the basis that the productions for which they were issued are not eligible. Subject to the expiry of the normal reassessment period, such a revocation would allow the Minister of National Revenue to seek repayment of the tax credits. Subsection 124.5(6) consequently reduces to very low the risk that harm resulting from the Federal Court judgment, based on the assumption that harm has occurred, will be irreparable.

[27] In any case, the arguments submitted by the respondents and the fact that the Federal Court simply referred the matter back to the Minister for redetermination are sufficient to convince me that the Minister did not provide sufficient evidence that he would suffer irreparable harm if his motion for a stay is not granted.

[28] Given my finding that the Minister did not demonstrate that the dismissal of his motion for a stay would result in irreparable harm to the public interest, there is no need for me to review the issue of whether the balance of convenience favours the Minister. As mentioned, failure on one of the three elements of the test set out in *RJR-MacDonald* is sufficient to conclude that the requested stay should not be granted.

III. Conclusion

[29] Consequently, the motion for a stay will be dismissed, with costs in favour of the respondents.

"Nathalie Goyette"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	GOYETTE J.A.
DATED:	JUNE 16, 2023

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