

Federal Court of Appeal



Cour d'appel fédérale

Date: 20110519

**Dockets: A-59-11
A-60-11**

Citation: 2011 FCA 172

Present: MAINVILLE J.A.

BETWEEN:

NAGIB TAJDIN and ALNAZ JIWA

Appellants

and

HIS HIGHNESS PRINCE KARIM AGA KHAN

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 19, 2011.

REASONS FOR ORDER BY:

MAINVILLE J.A.

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REASONS FOR ORDER

MAINVILLE J.A.

[1] The appellant Nagib Tajdin has brought a motion seeking an order staying, pending the outcome of these consolidated appeals, paragraphs 4 to 9 of the judgment of Harrington J. in Federal Court docket T-514-10 dated March 4, 2011 (the “Judgment”) (the reasons for which are dated January 7, 2011 and cited as 2011 FC 14), as well as an order expediting the hearing of the appeals.

Background

[2] The respondent is the spiritual leader of the Shia Imami Ismaili Muslims, of which there are approximately 15 million worldwide located in over 25 countries. The respondent commenced an action in Federal Court alleging that the appellants had infringed his copyright in his Farmans and Talikas contained in a book entitled “Farmans 1957-2009 – Golden Edition Kalam-E Iman-e-Zaman” (the “Golden Edition”) and in MP3 sound recordings (the “MP3”) produced, published, distributed and sold by the appellants. A Farman is an address given before an audience, and a Talika is a brief written religious message.

[3] The Judgment under appeal granted the respondent’s motion for summary judgment and ordered and adjudged in its paragraphs 1 to 3 that copyright subsisted in the Farmans and Talikas authored by the respondent and reproduced in the Golden Edition and in the MP3, and that the respondent was the owner of such copyright. The Judgment also declared that the appellants infringed this copyright (para. 4), granted a permanent injunction prohibiting the appellants from *inter alia*, producing, publishing, selling, giving away, promoting, making available or distributing any work that infringes the respondent’s copyright in the Golden Edition and accompanying MP3 (para. 5), and ordered the appellants to deliver up all copies thereof (para. 6).

[4] The Judgment also ordered a reference for the determination of damages or profits owing to the respondent (para. 7), pre-judgment and post-judgment interest on any amount awarded in the reference (para. 8) and the payment forthwith of the costs of the proceedings fixed at \$30,000 (para. 9).

[5] The appellants have appealed the Judgment to this Court on various grounds. The appellant Tajdin now seeks a stay of paragraphs 4 to 9 of the Judgment and raises numerous arguments for this purpose. However, distilled to their essence, the appellant Tajdin's arguments in support of the stay may be summarized as follows:

- a. a stay of paragraphs 4 to 7 of the Judgment is justified since all remaining copies of the Golden Edition and the accompanying MP3 have been delivered up, and the appellants have already undertaken not to publish any additional copies until the appeals have been decided. In addition, delivering the original contents of the Golden Edition and of the accompanying MP3 would deprive the appellant Tajdin of essential documents to practice his faith, as well as deprive him of evidence for the trial should the appeals be successful or should he initiate new proceedings against third parties.
- b. a stay of paragraphs 7 and 8 is required since the reference for the determination of damages or profits pending the disposition of the appeal would create a burden on appellant Tajdin who currently resides in Kenya and who would thus be required to travel to Canada to prepare for this reference. There is also a preoccupation that the reference proceedings will be used by appellant Tajdin's opponents as a means of harassing him.
- c. finally, the costs order in paragraph 9 of the Judgment should be stayed since appellant Tajdin alleges that the opposing attorneys had submitted that these costs were to be paid to the benefit of a charity, and not to the respondent personally as

ordered in the Judgment. Nevertheless, appellant Tajdin is prepared to pay the amount into court pending the outcome of the appeals.

Analysis

[6] The issue to be determined on this motion is whether the appellant Tajdin has satisfied the test for the granting of a stay as established by the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 S.C.R. 110 and in *RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311. First, a preliminary assessment must be made of the merits of the appeals to ensure that there is a serious question to be determined. This is a low threshold, since the Court must be satisfied that the issues raised are neither vexatious nor frivolous. Second, it must be determined if the party bringing the motion for a stay would suffer irreparable harm if the stay were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusing of the stay pending a decision on the merits of the appeals. The elements of the test are conjunctive, in that the party seeking the stay must succeed on all three elements.

[7] For the purposes of determining this motion, it is only necessary to consider the second element of the test, namely whether the appellant Tajdin will suffer irreparable harm should the stay be refused. I will consequently consider the issue of irreparable harm in regard to each of the impugned paragraphs of the Judgment.

[8] Since appellant Tajdin states that he is committed not to publish any additional copies of the copyright material until these appeals are decided, there is consequently no evidence of any irreparable harm in the event paragraphs 4 and 5 of the Judgment are not stayed.

[9] Appellant Tajdin's real objection is rather to paragraph 6 of the Judgment which requires him to "deliver up all copies of the Golden Edition and the Farmans and Talikas contained therein, and MP3 audio bookmark in [his] possession, care or control, and all other wares, labels, packages, signage, advertising materials, plates or moulds or other materials or things in [his] power, custody or possession, which refer to all or any part of, or which are used to produce, the Golden Edition and the Farmans, Talikas and MP3 audio bookmark contained therein ..." Though appellant Tajdin has delivered up all copies of the Golden Edition and the accompanying MP3, he objects to delivering up the original materials used to produce the Golden Edition and the accompanying MP3 arguing that this would impede the practice of his faith, as well as deprive him of evidence for trial should his appeal be successful or should he initiate new proceedings against his opponents in his religious community.

[10] I agree with the respondent that the Judgment, including its paragraph 6, does not impede appellant Tajdin from practicing his faith, since he will continue to have access to the Farmans and Talikas in the same manner and by the same authorized means as all other members of the Ismaili faith. The Judgment seeks to preclude the publication and distribution of unauthorized Farmans and Talikas and does not impede in any manner the distribution of such materials by other means authorized by the respondent acting as the spiritual leader of the Ismaili faith.

[11] As for depriving the appellant Tajdin of evidence for trial or in new proceedings, it is useful to note that both parties have stated that the heart of the dispute is a fundamental disagreement between the appellants and the Ismaili leadership (including the head of Jamati Institutions, Shafik Sachadina) over the collection, editing and distribution of Farmans: respondent's written representations at para. 5; moving party's reply written representations at para. 1. Appellant Tajdin fears that should he deliver up the original materials used to produce the Golden Edition and the accompanying MP3 before the appeals have been decided, these materials could be destroyed or otherwise tampered with, thus impeding his defence in an eventual trial or in new legal proceedings. The respondent has however undertaken to ensure the preservation and safe-keeping of any such documents or materials delivered up or produced by either of the appellants: respondent's written representations at para. 48. In light of this undertaking, which shall be included in the order issued with these reasons, no irreparable harm will be suffered by appellant Tajdin pending the outcome of these appeals even if paragraph 6 of the Judgment is not stayed.

[12] Nor will appellant Tajdin suffer irreparable harm because the reference ordered pursuant to paragraphs 7 and 8 of the Judgment will continue during the appeal process. The appellant Tajdin's fear that these reference proceedings will be used by his opponents as a means of harassing him are ill founded, since the judge or other person designated by the Chief Justice of the Federal Court who will conduct the reference can take the appropriate measures to ensure that there is no such abuse of the proceedings. As for the costs and inconvenience resulting from appellant Tajdin's travel from his residence in Kenya, I note that this appellant has been residing in Kenya since 2005 and has nevertheless been able to vigorously defend the action taken against him by the respondent,

including this appeal. The appellant has also travelled extensively to various locations, including Tajikistan, Afghanistan, India, the United Kingdom, France, Pakistan, the USA, Syria, Uganda, Tanzania, Madagascar, and the Ivory Coast, in order to gather Farmans and publish the Golden Edition. In these circumstances, I fail to see what irreparable harm would befall the appellant Tajdin by the mere fact that he will be required to travel for the purposes of the reference.

[13] I also note that section 156 of the *Federal Courts Rules*, SOR/98-106 provides that a reference is normally to be conducted in “the simplest, least expensive and most expeditious manner” and that the expense of a reference and the inconvenience thereof are not alone normally sufficient to justify a stay since, in the event of a successful appeal, these can be compensated through a monetary award: *Baxter Travenol Laboratories of Canada Ltd. v. Cutter (Canada) Ltd.*, [1981] F.C.J. No. 1143 (Q.L.), 54 C.P.R. (2d) 218.

[14] Concerning the costs order in paragraph 9 of the Judgment, appellant Tajdin is ready to pay this amount into court pending the outcome of the appeals, and the respondent is willing to accept such an arrangement. A consequential order shall follow.

[15] Finally, appellant Tajdin seeks an order to expedite the hearings of the consolidated appeals, but he submits no specific reasons to justify his request. Nevertheless, the respondent consents to such relief on the basis that Ismailis would benefit from a speedy resolution of this legal proceeding. Though I appreciate the respondent’s concerns, most litigants before this Court would also benefit from a speedy resolution of their own legal proceedings.

[16] In the absence of any other cogent and convincing arguments to expedite these appeals, I fail to see why the parties to these appeals should be given priority over other litigants before this Court. I further note that insofar as the parties dutifully follow the *Federal Courts Rules* governing these consolidated appeals, and consequently serve and file within the specified time frames the appeal book, their respective memorandum of fact and law and a requisition for hearing, and insofar as the parties keep their agendas reasonably open for a hearing date, these appeals could easily be heard and disposed of in a reasonably short time.

[17] No costs have been sought on this motion by either of the parties, and consequently no order as to costs shall be issued.

"Robert M. Mainville"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS: A-59-11
A-60-11

STYLE OF CAUSE: NAGIB TAJDIN and ALNAZ JIWA
v. HIS HIGHNESS PRINCE KARIM
AGA KHAN

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: MAINVILLE J.A.

DATED: May 19, 2011

WRITTEN REPRESENTATIONS BY:

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