Federal Court Cour fédérale

Date: 20210712

Docket: T-475-21

Citation: 2021 FC 732

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 12, 2021

PRESENT: The Honourable Madame Justice St-Louis

BETWEEN:

SOPREMA INC

Applicant

and

ATTORNEY GENERAL OF CANADA
3313045 NOVA SCOTIA COMPANY

Respondents

ORDER AND REASONS

I. Introduction

[1] This is a motion by 3313045 Nova Scotia Company [Nova Scotia], to strike the Notice of Judicial Review [the Notice] filed by Soprema Inc [Soprema] on March 15, 2021.

[2] In its motion, Nova Scotia submits that Soprema's application for judicial review [the Application] has no chance of success because (1) Soprema lacks standing, as required under subsection 18.1(1) of the *Federal Courts Act* (RSC 1985, c F-7), since it is not *directly affected* by the matter, its interest is purely commercial and private and it does not have a public interest; and (2) the Application is time-barred, having been filed beyond the 30-day period set out in subsection 18.1(2) of the *Federal Courts Act*, because Soprema knew, at the very latest on October 6, 2020, that Nova Scotia had been issued a licence [the Licence].

[3] With its motion, Nova Scotia submitted the affidavit of Jeffrey M. Hansbro, director at DuPont, Nova Scotia's parent company, sworn on May 14, 2021, to which three exhibits are attached.

[4] Soprema's preliminary request is for the Court to strike Mr. Hansbro's affidavit because as a general rule, affidavits are not admissible in support of motions to strike applications for judicial review (*Canada (National Revenue)) v JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at paras 51 and following [*JP Morgan*]). Nova Scotia's response to this is that Mr. Hansbro's affidavit aims to reply to a request for an extension by testifying to the prejudice to Nova Scotia as a result of the time it took for Suprema to initiate its application. However, as detailed below, since Soprema's Notice addresses the decision that it received on March 12, 2021, and its Notice was filed within the prescribed time, the Court understands that the *bene esse* application for an extension is no longer necessary and that the affidavit is therefore not relevant. Thus, the Court will not consider it.

[5] For the reasons noted below, Nova Scotia's motion to strike will be allowed. In short, the Court is satisfied that Soprema's Application is so clearly improper as to be bereft of any possibility of success since (1) Soprema does not have direct or public interest standing; and (2) Soprema's Notice is fatally flawed considering that, at the hearing, it confirmed that it was challenging the decision of the Minister of Environment and Climate Change [the Minister] to not revoke the Licence issued to Nova Scotia.

II. Application for Judicial Review brought by Soprema

[6] At the stage of a preliminary motion, the facts alleged in the Notice are presumed to be true.

[7] Therefore, according to the Notice filed by Soprema, for years, it has been manufacturing rigid extruded polystyrene foam insulation panels with a hydrofluorocarbon used as foaming agent. A few other companies also manufacture these panels, including Nova Scotia, Soprema's direct competitors.

[8] In 2018, under its international obligations after the ratification of the *Montreal Protocol*, September 16, 1987, UNTS (ratified by Canada on June 30, 1988) and its amendments, Canada modified the *Ozone-depleting Substances and Halocarbon Alternatives Regulations*, SOR/2016-137 [the Regulations]. Under sections 64.5 and 65.03 of the Regulations, certain products could no longer be manufactured in or imported to Canada starting on January 1, 2021, and businesses were granted close to three years to adapt, until December 31, 2020.

[9] Soprema states that it ensured that the Regulations were respected. However, in August 2020, it learned that the Minister issued the Licence to Nova Scotia, for a duration of two years, for an “essential purpose” under sections 66 and 69 of the Regulations. Soprema states that on October 22, 2020, a representative of the Minister confirmed in a letter that the decision to issue the Licence to Nova Scotia was under review in accordance with subsection 71(1) of the Regulations. On February 12, 2021, Soprema learned that the Minister n the Licence.

[10] Soprema therefore essentially submits that the Licence the Minister issued to Nova Scotia is illegal and contrary to Canada’s obligations under the *Montreal Protocol,* and it cites the criteria from section 66 of the Regulations and the conditions from section 69.

[11] According to the statement in paragraph 1 of the Notice filed by Soprema on March 15, 2021, the Notice concerns the Minister’s decision to issue a licence to Nova Scotia for rigid extruded polystyrene [XPS] foam insulation panels for an essential purpose pursuant to sections 66, 69 and 70 of the Regulations.

[12] Paragraph 3 of the Notice also makes reference to the fact that despite a request to do so, the Minister refused to revoke this licence, as he has the power to do under subsection 71(1) of the Regulations.

[13] As the object of the Application, Soprema seeks ten remedies. The first six (paragraphs 5 to 10) refer exclusively to the Minister’s decision to issue the Licence in June 2020, and to sections 66 (essential purpose) and 69 (conditions) of the Regulations. Paragraphs 11 to 12 deal with remedies related to the Minister’s decision to not revoke the Licence in February 2021 and

refer to the same allegations of errors in law and in fact that were raised with regard to the Minister's decision to issue the Licence. Paragraph 13 deals with the relief sought in relation to the Minister's decisions to both issue the Licence and to refuse to revoke it. Lastly, paragraph 14 deals with damages, and Soprema asks for them to be withdrawn in another motion.

[14] In paragraphs 4, 13, 20 and 77 of its Notice, Soprema alleges that it is directly impacted or directly affected or has the required interest. The Notice does not include any reference to public interest standing or the related criteria.

[15] As grounds for the Application, Soprema refers only to the Minister's decision to issue the Licence, and it relies on paragraphs 18.1(4)(a), (b), (c), (d) and (f) of the *Federal Courts Act*.

[16] Soprema's arguments in support of its grounds address (1) its products and those of its competitor; (2) Canada's obligations under the *Montreal Protocol*; (3) the prohibition under the Regulations; (4) its steps to respect the Regulations; (5) the Minister's issuance of a licence for an essential purpose and Soprema's objection; and (6) the failure to meet the objective and cumulative criteria of sections 66 and 69 of the Regulations.

[17] The sections in the Notice dedicated to the evidence in support of the Application and to the request for documents pursuant to rule 317 of the *Federal Courts Rules* (SOR/98 106) do not refer to the Minister's decision to not revoke the Licence. As such, Soprema has limited the evidence it will submit and the documents it will obtain to the Minister's decision to issue the Licence and to the documents related to the application for the Licence. Soprema does not plan

to submit any evidence and is not asking (pursuant to rule 317) for any documents related to the Minister's decision to not revoke the Licence.

III. The Motion to Strike

A. *Parties' Positions*

[18] In support of its motion to strike, Nova Scotia initially submits that (1) Soprema does not have direct standing as required under subsection 18.1(1) of the *Federal Courts Act*, and does not have public interest standing either; and (2) Soprema's Application can only deal with the Minister's June 2020 decision to issue the Licence to Nova Scotia, and not the decision made in February 2021 to not revoke said Licence, such that the Application is therefore time-barred under subsection 18.1(2) of the *Federal Courts Act.*

[19] In his response, the Attorney General of Canada [the AGC], first submits that it is not clear which decision Soprema is challenging and suggests that it is the Minister's decision to issue the Licence. The AGC notes that the two decisions are distinct and governed by different regulatory regimes. The AGC also notes that the request for documents pursuant to rule 317, found in the Notice, only concerns the granting of the Licence, and that the Notice essentially shares the reasons for which sections 66 and 69 of the Regulations were not met and does not mention section 71 of the Regulations. The AGC notes that Soprema did not file a motion to be relieved of its failure to respect the deadline and that the Notice does not support the finding that an extension would be justified. The AGC shares Nova Scotia's opinion that Soprema does not have standing, although he does not adopt all of Nova Scotia's arguments. Having noted his

intent to challenge Soprema's lack of an interest at the merits phase, the AGC's arguments on this issue are rather limited.

[20] In its response record, Soprema responds that the motion to strike is premature and is unfounded. It states that it has direct standing or, alternatively, public interest standing.

[21] Regarding the time limit, in its written arguments, Soprema states that its Application concerns the [TRANSLATION] "continuing act" of issuing the Licence and refusing to revoke it, two decisions for which the factual situation, the type of remedy and the legal questions that apply are the same, namely the exception for an essential purpose set out in section 66 of the Regulations. According to Soprema, the final decision is the February 2021 decision and its Notice is therefore not time-barred. Alternatively, if the Court were to find that it is not a continuing act and that an extension should not be granted, Soprema submits that the Minister's review is, in itself, a "decision" covered by its Application, which is not time-barred.

[22] However, during the hearing, Soprema confirmed, several times, that its Notice concerns only one decision, namely the Minister's decision to not revoke the Licence, and that decision was rendered in February 2020. Soprema states that the Minister's decision to issue the Licence in June 2020 is incorporated in its Application because of the wording of section 71, which refers to section 69 of the Regulations.

[23] During the hearing, in response to Soprema's above-noted statement regarding the decision actually being challenged, Nova Scotia noted that the Notice does not raise any arguments about the test it intends to apply with regard to section 71 of the Regulations, and that

this omission is fatal. The AGC notes that the request under rule 317, contained in the Notice, is limited to the documents related to the application for the Licence and the Minister's decision to issue the Licence in June 2020, and that these documents are not relevant in the context of an application dealing with the Minister's decision to not revoke the Licence.

[24] First, considering that Soprema clearly confirmed that the decision being challenged is the Minister's decision to not revoke the Licence, and that it received this decision on February 12, 2021, I note that the deadline to file the Notice is not in question. I will therefore not address it.

[25] Moreover, and as noted during the hearing, it is relevant to review the impact of the fact that Soprema's Notice did not (1) address its public interest standing; (2) address section 71 of the Regulations, which sets out the power of the Minister to revoke a Licence and the applicable test; (3) refer to evidence related to the Minister's decision to not revoke the Licence; and (4) request documents, pursuant to rule 317, in relation to the Minister's decision to not revoke the Licence.

B. *Applicable Test*

[26] As the Federal Court of Appeal stated in *JP Morgan*, "[t]he Court will strike a notice of application for judicial review only where it is 'so clearly improper as to be bereft of any possibility of success'. There must be a 'show stopper' or a 'knockout punch' – an obvious, fatal flaw striking at the root of this Court's power to entertain the application" (at para 47 [citations omitted]).

C. *Soprema's Standing*

(1) Direct standing

[27] I agree with Nova Scotia's position and find that Soprema does not have direct standing on this, regardless, whether it is the Minister's decision to issue the Licence in June 2020 or the decision to not revoke it. Indeed, the case law confirms that Soprema, in light of the facts, is not "directly affected" by the decision as required by subsection 18.1(1) of the *Federal Courts Act.*

[28] Indeed, as the Court confirmed at paragraph 13 of *CanWest MediaWorks Inc. v Canada (Health)*, 2007 FC 752 (affirmed on appeal in 2008 FCA 207) cited by Soprema, generally, it is "accepted in the jurisprudence that, for an applicant to be considered 'directly affected', the matter at issue must be one which adversely affects its legal rights, impose legal obligations on it or prejudicially affect it directly" (at para 13 [citations omitted]). In the present case, Soprema does not meet this definition.

[29] Additionally, issuing a licence to a party does not impose rights or obligations on another party (*Ultima Foods Inc. v Canada (Attorney General)*, 2012 FC 799) and commercial or economic harm is not sufficient to grant direct standing (*Novo Nordisk Canada Inc. v Canada (Health)*, 2019 FC 822).

[30] In this case, and according to the above-noted case law, the Decision did not infringe on Soprema's rights, impose legal obligations on it or prejudicially affect it as required by the case law (see also *Bernard v Close*, 2017 FCA 52).

[31] The arguments raised by Soprema are not supported by the established case law and have no chance of success.

(2) Public interest standing

[32] In its Notice, Soprema does not address public interest standing, limiting itself to stating that it is directly impacted or affected by the Decision, as I mentioned above. Soprema did not submit an application for amendment to compensate for this omission in its Notice. Moreover, as described below, Soprema does not meet the test to be recognized as having public interest standing.

[33] The parties agree as to the applicable test to determine whether a party has public interest standing. That test is described as follows by the Supreme Court of Canada in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society* 2012 SCC 45 at para 37 (citations omitted) [*Downtown Eastside*]:

> In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts . . . . The plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing. All of the other relevant considerations being equal, a plaintiff with standing as of right will generally be preferred.

[34] However, in this case, Soprema does not meet the applicable test. Indeed, even upon preliminary review, the issue raised does not reach the threshold of a serious justiciable issue as established by the Supreme Court at paragraph 42 of *Downtown Eastside*. As Nova Scotia notes,

it is a challenge of a temporary licence, issued in the context of transitional provisions; it is not a case in which the interests of all Canadians are involved to an unusual degree (*Globalive Wireless Management Corp v Public Mobile Inc*, 2011 FCA 194 [*Globalive*]).

[35] Additionally, there is no indication that Soprema has a genuine interest in the proceedings or that it is engaged with the issues it raises, as required by the case law. Although Soprema raises issues related to the protection of the environment and Canada's compliance with its international obligations, and although it has chosen to abide by the recent regulatory amendment, there is nothing to indicate that Soprema's interest extends beyond a commercial one. The decisions on which Soprema relies, namely *Oceanex Inc. v Canada (Transport*), 2018 FC 250 and *Globalive*, involve other considerations, as argued by Nova Scotia, and do not apply in this case.

[36] Lastly, the relief sought, considering all the circumstances of the case, does not constitute a reasonable and effective means to bring the issue before the Court.

D. *Notice of Application for Judicial Review*

[37] Moreover, I find that Soprema's application for judicial review, as constituted, cannot succeed. Indeed, Soprema confirmed unequivocally at the hearing that the decision being challenged was that of the Minister to not revoke the Licence pursuant to section 71 of the Regulations, whereas its Notice fails to plead the elements related to this. The parties had the opportunity to address this issue at the hearing, and they did not ask for a chance to submit additional arguments.

[38] Mr. Justice Stratas, in *JP Morgan*, reminds us that, "[i]n a notice of application for judicial review, an applicant must set out a 'precise' statement of the relief sought and a 'complete' and 'concise' statement of the grounds intended to be argued: *Federal Courts Rules*, SOR/98 106, paragraphs 301(d) and 301(e)" (at para 38). Thus, in addition to the relief sought, the applicant must also include a statement of the grounds that, while concise, must be exhaustive. The relevant facts in support of the grounds must also be included. The applicant should not, however, include all the evidence that will be submitted to the record, or list all the individuals who will produce sworn statements in support of the application (see for example *Simpson Strong-Tie Company Inc. v Peak Innovations Inc*, 2008 FC 52; *JP Morgan* at paras 40-41).

[39] While clearly not all the evidence will be in the notice of application for judicial review, the grounds must all be stated at this preliminary stage. The case law confirms that a ground that is not stated in the notice of application cannot be raised in the party's memorandum of fact and of law: see for example *Tl'azt'en Nation v Sam*, 2013 FC 226 at paras 6 and 7.

[40] However, as noted at the hearing, Soprema's Notice (1) does not address its public interest standing; (2) does not address section 71 of the Regulations, which provides for the Minister's power to revoke and the related test; (3) does not mention any evidence in support of the Application in relation to the Minister's decision to not revoke the Licence or to section 71 of the Regulations; and (4) does not request any document, pursuant to rule 317, in relation to the Minister's decision to not revoke the Licence.

[41] With regard to the Minister's decision to not revoke the Licence under section 71 of the Regulations, the Notice is limited to asking the Court to declare that this decision is tainted by the same errors of fact and law as the Minister's decision to issue the Licence.

[42] Soprema submits that referring to factual allegations is sufficient to meet rule 301 and that simply requesting an amendment, legally, is sufficient to then be able to make this argument. Even if this were true, in this case, at no time did Soprema submit a request to amend its Notice in regard to the above-noted omissions.

[43] As the respondents have noted, the Minister's decision to not revoke the Licence is based on a regulatory power that is distinct from the power to grant a licence. Such a decision is rendered in light of new facts and new submissions and, in this case, was made several months after the Minister's decision to issue the Licence (paragraph 17, AGC's written submissions). As noted by the AGC, these two decisions result from distinct decision-making processes, each addressing different regulatory and analytical criteria. When the licence is issued, the Minister must consider the conditions set out in sections 66 and 69 of the Regulations. These conditions include, among others, the need to use a product for certain purposes and the technological or economic context of the alternative solutions. When considering a revocation of the Licence, the analysis focuses instead on the conditions under section 71 of the Regulations, particularly whether false or misleading information was provided when the licence was issued (paragraph 22, AGC's written submissions).

[44] The failure to argue the applicable test under section 71 in the Notice and request documents in relation to the decision to not revoke the Licence is fatal. It is impossible for Soprema to support its application for judicial review.

[45] Under subsection 71(1) of the Regulations, the Minister may revoke a licence if one of the section 69 conditions is not met or if there are reasonable grounds to believe that the holder of the licence provided false or misleading information. At the hearing, Soprema argued that the decision to issue the Licence was in fact incorporated in the decision to not revoke the Licence and therefore, during the hearing, could also be reviewed.

[46] However, even if, for the purposes of this motion, the argument was accepted as correct without deciding it, the issue raised would remain unresolved. Soprema confirmed that the decision being challenged is the Minister's decision to not revoke the Licence, but it did not include this in its Notice.

[47] The Notice is so clearly improper as to be bereft of any possibility of success (*JP Morgan* at para 47).

ORDER in T-475-21

THIS COURT ORDERS as follows:

1. The Motion to Strike is allowed.

2. The Notice of Application for Judicial Review is struck.

3. Costs are awarded to Nova Scotia.

"Martine St-Louis"
Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-475-21
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APPEARANCES

Christine Duchaine Catherine Boisvenue Jonathan Coulombe	FOR THE APPLICANT
Michelle Kellam Andrea Shahin	FOR THE RESPONDENTS
Guillaume Pelegrin Rosalind Cooper Mélina Cardinal-Bradette	FOR THE RESPONDENT 3313045 NOVA SCOTIA

SOLICITORS OF RECORD

Sodavex Inc. Montréal, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT
Fasken Martineau Dumoulin Montréal, Quebec	FOR THE RESPONDENT 3313045 NOVA SCOTIA