

Date: 20080228

Docket: T-2086-05

Citation: 2008 FC 261

[ENGLISH TRANSLATION]

Ottawa, Ontario, on February 28, 2008

PRESENT: The Honourable Mr. Justice Max M. Teitelbaum

BETWEEN:

THE HONOURABLE ALFONSO GAGLIANO

applicant

and

**THE HONOURABLE JOHN H. GOMERY, IN HIS QUALITY AS
EX-COMMISSIONER OF THE COMMISSION
OF INQUIRY INTO THE
SPONSORSHIP PROGRAM AND ADVERTISING ACTIVITIES
and THE ATTORNEY GENERAL OF CANADA**

respondents

and

THE HOUSE OF COMMONS

intervener

REASONS FOR ORDER AND ORDER

Introduction

[1] This is an interlocutory application [1] filed by the House of Commons (the House) to strike the allegations in paragraph 2(b)(i) of the Honourable Alfonso Gagliano's (the applicant) application for judicial review, dated November 22, 2005.

Facts

[2] In the wake of the events that gave rise to the Commission of Inquiry into the Sponsorship Program and Advertising Activities (the Commission), Charles Guité was ordered to testify before the House of Commons Standing Committee on Public Accounts (the House Committee).

[3] On November 22, 2004, Commissioner John H. Gomery upheld the objection of Mr. Guité's counsel to his client's being cross-examined before the Commission on the testimony he provided before the House Committee.

[4] On December 22, 2004, the applicant applied for judicial review of the Commissioner's decision before this Court. On April 27, 2005, Madam Justice Tremblay-Lamer upheld Commissioner Gomery's decision and found that the principle of parliamentary immunity applied to Mr. Guité's testimony before the House Committee. (*Gagliano v. Canada (Attorney General)*, 2005 FC 576, [2005] 3 F.C.R. 555). The applicant appealed this decision before the Federal Court of Appeal.

[5] On November 22, 2005, the applicant filed a Notice of Application for judicial review, paragraph 2(b)(i) of which contained the following allegations:

2. The Commissioner preferred the testimony of witness Charles Guité to that of the applicant, whereas:

[...]

b. Unlike the other witnesses, he had not been able to undergo full cross-examination, notwithstanding the provisions of the *Inquiries Act* and rule 7 of the Commission's Rules of Practice:

i. Regarding the witness's prior sworn statements inconsistent with his testimony before the Commission, on the grounds that these prior sworn statements were protected by parliamentary privilege; The applicant has unsuccessfully appealed to this Honourable Court to have the Commissioner's decision reviewed, and has since appealed the matter to the Federal Court of Appeal, in docket A-233-05, which is now perfected for hearing.

[6] On February 27, 2006, the Federal Court of Appeal dismissed the applicant's appeal on the grounds that the appeal had been rendered moot since the Commission had completed its work. (*Gagliano v. Canada (Attorney General)*, 2006 FCA 86, [2006] FCJ No. 338). As a result, the decision of my colleague Justice Tremblay-Lamer became final.

[7] On October 30, 2007, the House filed this motion to strike paragraph 2(b)(i).

Submissions of the House

[8] The basis for the House's motion to strike is that the issue of whether Mr. Guité's testimony is protected by parliamentary immunity has already been decided by this Court in Madam Justice Tremblay-Lamer's decision. According to the House, the doctrine of *issue estoppel* should deter this Court from revisiting the issue of the privileged nature of Mr. Guité's testimony under paragraph 2(b)(i) of the applicant's notice. The House argues that the criteria underlying the doctrine of *issue estoppel*—a branch of *res judicata*—are present in this case. These criteria, listed by the Supreme Court of Canada among others in *Angle v. Canada (Minister of National Revenue)*, [1975] 2 S.C.R. 248 (at page 254) and *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44,

[2001] 2 S.C.R. 460, (at paragraph 25), are the following: 1) that the same question has been decided; 2) that the judicial decision which is said to create the estoppel was final; and, 3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[9] The House points out that the decision creating the estoppel is that of Madam Justice Tremblay-Lamer, not that of the Federal Court of Appeal.

Submissions of the applicant

[10] The applicant alleges that the issue raised by paragraph 2(b)(i) of his Notice of Application for judicial review is different from the issue that Madam Justice Tremblay-Lamer ruled on. He maintains that the issue involves a violation of the right to procedural fairness arising from Commissioner Gomery's refusal to allow Mr. Guité's cross-examination of his testimony before the House Committee. The applicant therefore argues that he would suffer a great injustice if the motion to strike were granted, since it would then be impossible for him to attempt to correct an error of procedural fairness committed by Commissioner Gomery.

[11] In addition, the applicant alleges that the Federal Court of Appeal specifically allowed the issue to be raised again in the light of the recent Supreme Court decision in *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667.

Issue

[12] Does the principle of *issue estoppel* apply in this case?

Analysis

[13] In my opinion, the only issue raised by this motion is whether the principle of *issue estoppel* applies to the question of whether Mr. Guité's testimony is protected by parliamentary immunity. I do not believe, despite the applicant's submissions, that this is a different issue, a question of a violation of the right to procedural fairness arising from Commissioner Gomery's refusal to allow Mr. Guité cross-examination. Madam Justice Tremblay-Lamer has already found that the Commissioner's decision was correct. My colleague even specified, in paragraphs 42 and 98 of her decision, that the applicant's claim based on procedural fairness was incorrect. The applicant's argument that he never had the opportunity to truly "test" my colleague's decision on appeal does not convince me that he is therefore suffering an injustice because of the exercise of my discretion to order the striking of paragraph 2(b)(i) of his Notice of Application.

[14] I agree with the House that this case meets the three criteria for *issue estoppel*: 1) the privileged nature of Mr. Guité's testimony is the same as that ruled on by Madam Justice Tremblay-Lamer in her April 27, 2005, decision; 2) this decision was final; and 3) the parties are the same in this proceeding as in my colleague's case. For the sole reason that the principle of *issue estoppel* applies, the House's motion to strike must be granted.

[15] At this point, my role is not to examine the issue on the merits and determine whether, as the applicant contends, the state of the law has changed since *Vaid*, which would provide him with a rationale to debate the issue again. I believe it is appropriate to limit my analysis to the issue of whether the principle of *issue estoppel* applies in this case.

Conclusion

[16] For these reasons, the House of Commons' motion to strike is granted.

ORDER

THIS COURT'S JUDGMENT is that :

1. The motion be granted.

2. Paragraph 2(b)(i) of the applicant's Notice of Application for judicial review dated November 22, 2005, be struck.

“Max M. Teitelbaum”

Deputy Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2086-05

STYLE OF CAUSE: THE HONOURABLE ALFONSO GAGLIANO v. THE HONOURABLE JOHN H. GOMERY et al.

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: February 6, 7 and 8, 2008

REASONS FOR ORDER AND ORDER: Deputy Judge Max M. Teitelbaum

DATED: February 28, 2008

APPEARANCES:

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Magali Fournier	
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Raynold Langlois (Gomery)	
Marie-Geneviève Masson (Gomery)	
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