

CANADA / JUDGMENT

Carten v. HMTQ

2008 BCSC 7

COURT

Supreme Court of British Columbia

DECIDED

3 January 2008

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2008 BCSC 7 Carten v. HMTQ

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Carten v. HMTQ,

2008 BCSC 7

Date: 20080103

Docket: 77000

Registry: Kelowna

Between:

John Frederick Carten

Petitioner

And:

Her Majesty the Queen in Right of Canada,

Attorney General for Canada, Her Majesty the Queen in Right of the Province of

British Columbia, Attorney General for British Columbia, The Director of Family

Maintenance Enforcement Program, Themis Program Management and Consulting

Limited, Law Society of British Columbia, Kavia Carten, Tim McGee, Allan Gould,

John Horn and Brian Klaver

Respondents

Before: The Honourable Mr. Justice Curtis

Reasons for Judgment

The Petitioner

Appeared on his own behalf

Counsel for the Respondent, Her Majesty the Queen in Right of the Province of British Columbia,
Attorney General for British Columbia

Craig E. Jones

Counsel for Themis Program Management and Consulting Limited

Richard Benwell

Date and Place of Hearing:

December 14, 2007

Kelowna, B.C.

- [1] The Attorney General of British Columbia has applied under Rule 19(24) for an order that the Petition be struck on the basis that:
- (a) it discloses no reasonable claim;
 - (b) it is unnecessary, scandalous, frivolous or vexatious;
 - (c) it may prejudice, embarrass, or delay the hearing or the proceeding, and/or
 - (d) it is otherwise an abuse of the process of the court.
- [2] The Rule permits the court to order at any stage of a proceeding that the whole or part of an endorsement, pleading or petition be struck out on such grounds and that the proceeding be stayed or dismissed.
- [3] Mr. Carten filed the Petition October 25, 2007. The Petition seeks relief as follows:
- 1. A declaration that the proceedings brought against the Petitioner, herein the PCBC proceedings, in the Provincial Court of British Columbia, herein PCBC, pursuant to the provisions of the Family Maintenance Enforcement Act, herein FMEA, are a violation of the rights of the Petitioner as guaranteed by articles of the by articles 10, 11, and 12 of the United Nations Universal Declaration of Human Rights and articles 7, 11, 14, 17, 19, 23 and 26 of the United Nations International Covenant on Political and Civil Rights and the articles 2(b), 7, 9, 11 and 12 of the Canadian Charter of Rights and Freedoms.
 - 2. A declaration that the PCBC proceedings brought against the Petitioner pursuant to provisions of the FMEA that are unconstitutional and ultra vires the lawful authority of the legislature of the province of British Columbia under s. 92 of the Constitution Act, 1867.

3. An interim and permanent injunction prohibiting and restraining the Director, Family Maintenance Enforcement Program, herein FMEP, and Themis Program Management and Consulting Ltd., herein Themis, from initiating or continuing the PCBC proceedings against the Petitioner in the PCBC.
 4. An interim and permanent injunction prohibiting and restraining any and all judges of the PCBC, including Brian Klaver, from presiding at any hearings that concern the Petitioner in respect of any matters brought against him under the FMEA.
 5. A permanent injunction restraining any proceedings against the Petitioner until he has had an opportunity to acquire sufficient resources to pay competent legal counsel and such expert witnesses as counsel may advise.
 6. Such further and other relief as Counsel may advise.
 7. Costs of this proceeding.
- [4] At the hearing of this application, Mr. Carten withdrew the claims for relief sought in paragraphs 1 and 2 of the Petition.
- [5] Mr. Carten who once practised as a lawyer on Vancouver Island has accumulated child support arrears in excess of \$325,000 under a divorce order. His petition alleges that, as a result of his representation of two companies seeking compensation for business losses brought about by changes the Province of British Columbia made in its bulk water export policy, the Attorney General of British Columbia, (and others) intermeddled in his divorce proceedings, attempted to have him disbarred, appointed "regime-friendly judges" to make unfavourable rulings and influences the judges of the Provincial Court of British Columbia to the extent that that court should be prohibited from any further dealings with his case. The complete particulars of Mr. Carten's claim are set out in detail in the Petition.
- [6] An application to strike pleadings under Rule 19(24) of the Supreme Court Rules was considered by the British Columbia Court of Appeal in the case of *Young v. Borzoni*, [2007] B.C.J. No. 105. Thackray J.A. in delivering the decision of the court wrote as follows:
- ¶18 Rule 19(24)(a) provides that the court may strike out the whole or any part of a pleading on the ground that it discloses no reasonable claim and may order the proceedings to be dismissed. The appellants argue that Bouck J. erred when he dismissed their claims in tort against Mr. Borzoni.
- ¶19 The Supreme Court of Canada set out in *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 the test for striking out a statement of claim on the basis that it disclosed no reasonable claim:

[14] ... a court may strike out a statement of claim that discloses no reasonable cause of action. The rules with respect to striking out a statement of claim are much the same in other provinces. In British Columbia, for example, Rule 19(24)(a) of the Rules of Court, B.C. Reg. 221/90, states that a court may strike out a pleading on the ground that it discloses no reasonable claim.

[15] An excellent statement of the test for striking out a claim under such provisions is that set out by Wilson J. in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980:

... assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ... should the relevant portions of a plaintiff's statement of claim be struck out

The test is a stringent one. The facts are to be taken as pleaded. When so taken, the question that must then be determined is whether ... it is "plain and obvious" that the action must fail. It is only if the statement of claim is certain to fail because it contains a "radical defect" that the plaintiff should be driven from the judgment.

¶ 20 The Rules of the Supreme Court of British Columbia provide as follows:

19(1) A pleading should be as brief as the nature of the case will permit and must contain a statement in summary form of the material facts on which the party relies, but not the evidence by which the facts are to be proved.

19(9.1) Conclusions of law may be pleaded only if the material facts supporting them are pleaded.

"Material fact" is defined in *Delaney & Friends Cartoon Productions Ltd. v. Radical Entertainment Inc.*, [2005] B.C.J. No. 573, 2005 BCSC 371 at paragraph 9 as, "one that is essential in order to formulate a complete cause of action. If a material fact is omitted, a cause of action is not effectively pleaded."

¶ 25 The appellants assert that the statement of claim contains the required material facts and that they must be taken to be true and are thus beyond scrutiny. The authority usually cited in support of this proposition is *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 978 where Madam Justice Wilson referred to *Minnes v. Minnes* (1962), 39 W.W.R. 112 (B.C.C.A.) wherein Norris J.A. said at page 116 that what was required of the plaintiff on a motion to strike out a claim was to "show that on the statement of claim, accepting the allegations therein made as true, there was disclosed ... a proper case to be tried." Wilson J. concluded at page 991 that "on a motion to strike we are required to assume that the facts as pleaded are true."

¶26 A consideration of that premise was discussed in *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, often referred to as the "Cruise Missile" case. Dickson J. at page 447, said the causal link between the defendant and the alleged violation of the appellants' rights was "simply too uncertain, speculative and hypothetical to sustain a cause of action." At page 449 he cited *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735 at 740, where Estey J. said:

As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": *Ross v. Scottish Union and National Insurance Co.* (1920), 47 O.L.R. 308 (App. Div.).

However, Dickson J. went on to say at page 455:

27. We are not, in my opinion, required by the principle enunciated in *Inuit Tapirisat*, supra, to take as true the appellants' allegations concerning the possible consequences of the testing of the cruise missile. The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true. The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore be improper to accept that such an allegation is true. No violence is done to the rule where allegations, incapable of proof, are not taken as proven.

[Emphasis added.]

¶27 In Madam Justice Wilson's concurring minority reasons, she agreed that the statement of claim should be struck out. However, she wrote at pages 477 to 479 that several of the allegations in the statement of claim were "statements of intangible fact" inviting inferences and anticipating probable consequences, and that those allegations might "be susceptible to proof by inference from real facts or by expert testimony or `through the application of common sense principles'". She added:

We may entertain serious doubts that the plaintiffs will be able to prove them by any of these means. It is not, however, the function of the Court at this stage to prejudge that question. I agree with Cattanach J. that the statement of claim contains sufficient allegations to raise a justiciable issue.

¶28 In *Rogers v. Bank of Montreal* (1985), 64 B.C.L.R. 63 (S.C.) the defendants applied to strike out the writ and statement of claim as disclosing no cause of action. Mr. Justice McKenzie said, at page 101:

I cannot accept the allegations in the statement of claim "as true" in the sense of there being any actions of the defendants which were truly directed against the target separate from Abacus. It is true that the statement of claim says the allegations have a separate target but the reality is that they do not. I see only language, not reality. It is the same story with a different title.

¶29 On appeal, (1986), 9 B.C.L.R. (2d) 190 (C.A.), Mr. Justice Esson, referring to that paragraph, said at page 192:

Insofar as that passage reflects the process which was carried out at great length by Mr. Justice McKenzie of subjecting the allegations in the pleadings to sceptical analysis in order to determine their true character, I consider that to have been an entirely appropriate procedure.

Esson J.A. added that there was a necessity to go "behind the form of the proceeding in order to get at its true nature, and that must be done even when the matter is dealt with on the pleadings." However, he said at page 193 that "it was not right to go so far as to consider the intrinsic improbability that these defendants would do what they were alleged to have done. This is an application on the pleadings and essentially must be decided upon what is alleged there." He continued:

The approach taken by the chambers judge appears to have resulted from some of the language used by the Supreme Court of Canada in the Cruise Missile case [Operation Dismantle] and in particular certain observations to the effect that the court was not required to accept as true certain allegations that were made by the plaintiffs there. But those were allegations of a special nature; they were allegations to the effect that to allow testing of the Cruise missile would increase the likelihood of nuclear war. It was in relation to that that Chief Justice Dickson said [p. 455]:

The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be improper to accept that such an allegation is true. No violence is done to the rule where allegations, incapable of proof, are not taken as proven.

When regard is had to the special nature of the allegations, I think it is clear that that case must be viewed with great caution as a general authority touching on the extent to which allegations in pleadings should be taken as true in proceedings of this kind.

¶30 It is clear that great caution must be taken in relying on Operation Dismantle as a "general authority" that allegations in pleadings should be weighed as to their truth in proceedings of this kind. However, my consideration of the above authorities leads me to the conclusion that it is not fundamentally wrong to look behind the allegations in some cases. This can be taken from the statement of Estey J. in Operation Dismantle that the "rule ... does not require that allegations based on assumptions and speculation be taken as true. ... No violence is done to the rule where allegations, incapable of proof, are not taken as proven." This is also supported by the comment of Esson J.A. in Rogers that, "the process ... of subjecting the allegations in the pleadings to sceptical analysis in order to determine their true character, I consider that to have been an entirely appropriate procedure."

- [7] I have considered the allegations of fact made by Mr. Carten in his Petition and I have formed the opinion that Mr. Carten's Petition discloses no reasonable claim against any of the parties named and should be dismissed against all parties. The true nature of this Petition as pleaded reveals that there is no proper case to be tried. Mr. Carten's main concern as I understand it is that he wants the matter of his support arrears dealt with in the Supreme Court rather than the Provincial Court. It is open to him to make an application in the Supreme Court, to cancel or vary the arrears of \$325,000 and to make an appropriate order for payment of the arrears.
- [8] The Petition is dismissed against all parties. The applicant is entitled to costs upon the ordinary scale.
- [9] In addition, I grant the order sought in the Amended Notice of Motion that John Frederick Carten is prohibited from making any application in the proceeding Director, Family Maintenance Enforcement Program v. John Frederick Carten, Court file number F4136, Courtenay, in the Provincial Court of British Columbia against any person or entity that is not a party to those proceedings and from issuing any process, subpoena, notice of constitutional question, or other application related to that proceeding except through counsel or with leave of a judge of the Provincial Court or a Justice of the Supreme Court of British Columbia, provided, however, Mr. Carten shall be free to apply to the Supreme Court of British Columbia to cancel or vary the arrears which are the subject of that proceeding.

"V.R. Curtis J."

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