

CANADA / JUDGMENT

Momo's Kitchen Ltd. v. C.F.I.A.

2005 BCCA 588

COURT

British Columbia Court of Appeal

DECIDED

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2005 BCCA 588err1 Momo's Kitchen Ltd v. C.F.I.A. COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: Momo's Kitchen Ltd. v. C.F.I.A., 2005 BCCA 588 Date: 20051114 Docket: CA033318

CA033365 Between: Momo's Kitchen Ltd. Appellant (Plaintiff) And Canadian Food Inspection

Agency and George Beilhartz Respondents (Defendants) Before: The Honourable Madam Justice Saunders Oral Reasons for Judgment V. Chiang Counsel for the Appellant M. Palmer Counsel for the Respondent Place and Date: Vancouver, British Columbia November 9 and 14, 2005

- [1] SAUNDERS, J.A.: Momo's Kitchen Ltd. has two applications before me to appeal two orders dismissing two separate applications for an interlocutory injunction. The matter comes in two proposed separate appeals, our file CA033365 and our file CA033318. The first order was made by Madam Justice Baker on September 9, 2005. The second was made by Madam Justice Satanove on September 30, 2005.
- [2] The first matter was an injunction application. Momo's Kitchen Ltd. sought an order enjoining the respondents Canadian Food Inspection Agency and one of its employees, Greg Beilhartz, from issuing recalls of Momo's food products from harassment, disruption and interference of those parties with Momo's business, from contacting customers and suppliers of Momo's and from otherwise damaging its reputation. The second application was, I understand it, for similar relief although I have not been provided with a copy of that notice of motion.
- [3] Momo's is a company engaged in the manufacture and distribution of food products, primarily soy based products intended as meat substitutes. It has had a manufacturing plant in Richmond, British Columbia.
- [4] The Canadian Food Inspection Agency is a federal government agency which has authority derived from numerous (I believe I was told 14) federal statutes, including the Canadian Food Inspection Agency Act, the Consumer Packaging and Labelling Act and the Food and Drug Act. Madam Justice Baker described its mandate as ensuring "that food manufactured, imported, sold or distributed in Canada is safe and meets Canadian labelling requirements". She described its requirements in these terms:

- [12] As part of the agency's responsibilities, the CFIA takes the position that a complete list of ingredients and their derivatives must be declared on the label of almost all prepackaged foods and that if ingredients are omitted or incorrectly labelled, or if there is contamination of listed ingredients by "carryover" of other ingredients during manufacture, the results can be serious or even fatal for consumers. The legislation requires ingredients to be listed in descending order of quantity, that is, ingredients found in the product in greatest proportion should be first on the list.
- [5] Without going into the same detail as the two learned Chambers judges, the dispute can be summarized this way. The Agency became concerned that one product said to be gluten free by Momo's was not gluten free. Amongst other actions taken it asked for information about the formulation of Momo's products and specifics of ingredients. Momo's has refused to provide this information. Momo's contends that the information sought is a trade secret protected by confidentiality which it is not required to divulge to the Agency. Momo's says before me that it does not trust the Agency to keep the information confidential, that it has been targeted on an ethnic or racial basis and that it disputes the good faith of the Agency.
- [6] Before me, Ms. Chiang, on behalf of Momo's, says that an appeal of the two orders will raise s. 15 equality issues under the Charter and important issues of the confidentiality of trade secrets.
- [7] In this case Madam Justice Baker concluded that the basis for an interlocutory injunction was not established. She concluded that the claim did not raise a serious issue to be tried and that; in any event, she was not satisfied that Momo's would suffer irreparable harm or that damages would be an inadequate remedy if Momo's succeeded in its claim. Finally, she found that the balance of convenience did not favour Momo's given the potential for public harm if the Agency's concerns about incorrect or potentially misleading labelling of the contents were well founded. She referred to *R.J.R. MacDonald v. Canada (A.G.)* [1994] 1 S.C.R. 311.
- [8] On the second application Madam Justice Satanove reviewed the events that had occurred since the first application was dismissed, and found only one issue not considered by Madam Justice Baker, whether the detention of goods was lawful. After reviewing the Act she observed that a remedy for breach of the Act was detention of goods. She noted that "it is trite law when the functions of a government official are lawfully authorized; injunctions are not available to prohibit their performance (*Pacific Salmon Industries v. the Queen*, [1985] 1 F.C. 504)". She, too, dismissed the application.
- [9] On a leave application this Court generally looks at four issues: the apparent merits of the proposed appeal, is it *prima facie* meritorious; the significance, if any, of the point on appeal to the practice or the public; the significance of the point raised to the action itself and whether the appeal will unduly hinder the progress of the action. The answer on a leave application is not dictated by the answer to any single one of these issues and it is an overall assessment that must be made.

- [10] The real issue that is posed on this application for leave is whether the proposed appeal is significantly meritorious to warrant the granting of leave to appeal for it is clear that there is no significance of the point to the public, the law of injunctions being relatively well settled, and it is clear that the point raised to the action itself may be significant in that an injunction would be a significant remedy and, hence, important to the parties. As to whether the appeal would unduly hinder the progress of the action I expect that it would not.
- [11] On the question of whether the proposed appeal is sufficiently meritorious to warrant granting leave, the Agency reminds the Court that the appeal is from a discretionary order and that this Court will not allow an appeal from the exercise of the discretion unless it can be shown that the discretion was not exercised judicially, that it constituted a palpable and overriding error, or that an injustice has occurred.
- [12] Reviewing the two sets of reasons for judgment, I frankly see no possibility that a panel of this Court would interfere with either of the orders. The propositions advanced by the Chambers judges appear to me to be unassailable, and thus I fail to see the degree of merit required for leave to be granted. While I accept that the issue is of importance to Momo's, given the nature of the injunction sought, which was to enjoin a government agency from actions contemplated by legislation, I do not consider that there is merit to the appeal nor would the interests of justice be served by continuing court action over the interlocutory remedy sought in these proceedings.
- [13] It follows that the two applications for leave to appeal are dismissed. "The Honourable Madam Justice Saunders" Correction: 09 December 2005 Counsel names were reversed and should now read as follows: V. Chiang Counsel for the Appellant M. Palmer Counsel for the Respondent

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