

CANADA / JUDGMENT

Moreau v. Canada

2005 FC 1184

COURT

Federal Court

DECIDED

31 August 2005

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Moreau v. Canada Court (s) Database Federal Court Decisions Date 2005-08-31 Neutral citation 2005 FC 1184 File numbers T-328-05 Decision Content Date: 20050831 Docket: T-328-05 Citation: 2005 FC 1184 OTTAWA, Ontario, the 31st day of August 2005 PRESENT: MR. JUSTICE TEITELBAUM BETWEEN: THIERRY MOREAU Plaintiff and HER MAJESTY THE QUEEN OF CANADA Defendant REASONS FOR ORDER AND ORDER

- [1] This is an action by Mr. Thierry Moreau (the "plaintiff") against Her Majesty the Queen of Canada seeking a [TRANSLATION] "declaration by this Court that, with respect to information security technology, the Export Control List (the "ECL") adopted by Her Excellency the Governor General in Council on February 6, 2003, registered as SOR/2003-52 in the Canada Gazette Part II, contains no goods, including any document or software in the form of source code, protected by paragraph 2(b) of the Canadian Charter of Rights and Freedoms (the "Charter").
- [2] The plaintiff alleges that his right to freedom of expression is infringed by the government action, specifically by the scope of the ECL, contrary to paragraph 2(b) of the Charter. However, he does not challenge the constitutional validity of the Export and Import Permits Act, or that of the ECL itself. Consequently, no notice of constitutional question was filed under section 57 of the Federal Courts Act.
- [3] Although the initial statement of claim and subsequent motions filed by the plaintiff are wordy to the point of being difficult to follow at times, it is never stated that the plaintiff's freedom of expression is infringed by any government action.
- [4] In its defence filed March 23, 2005, the defendant indicated in the final paragraph [TRANSLATION] "[to submit] that, if the Court reached the conclusion that the plaintiff's freedom of expression protected by paragraph 2(b) of the Charter of Rights and Freedoms was, in fact, infringed, the Export and Import Permits Act, as well as the ECL, are reasonable measures in a free and democratic society".
- [5] The plaintiff then filed a motion to strike out the paragraph pursuant to section 221 of the Federal Courts Rules, 1998, which was dismissed by Prothonotary Morneau on April 29, 2005. I must now rule on the appeal against that order. MOTION TO STRIKE

- [6] I will begin by examining the motion to strike brought by the defendant, which I would grant for the reasons given hereinafter.
- [7] The defendant relies on paragraphs 221(1)(a) and (c) of the Federal Courts Rules, 1998, to move for dismissal of the plaintiff's action. This rule concerning the striking out of pleadings in the Federal Court reads as follows:
221. (1) On motion, the Court may, at any time order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it
- (a) discloses no reasonable cause of action or defence, as the case may be,
 - (b) is immaterial or redundant,
 - (c) is scandalous, frivolous or vexatious,
 - (d) may prejudice or delay the fair trial of the action,
 - (e) constitutes a departure from a previous pleading, or
 - (f) is otherwise an abuse of the process of the Court. And may order the action be dismissed or judgment entered accordingly.
- (2) No evidence shall be heard on a motion for an order under paragraph (1)(a).
221. (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
- a) qu'il ne révèle aucune cause d'action ou de défense valable;
 - b) qu'il n'est pas pertinent ou qu'il est redondant;
 - c) qu'il est scandaleux, frivole ou vexatoire;
 - d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
 - e) qu'il diverge d'un acte de procédure antérieur;
 - f) qu'il constitue autrement un abus de procédure. Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.
- (2) Aucune preuve n'est admissible dans le cadre d'une requête invoquant le motif visé à l'alinéa (1)a).
- [8] The principles in the case law that apply to the dismissal of an action are well known and have been reiterated on many occasions. The Supreme Court of Canada first addressed this issue in 1980 in *Canada (Attorney General) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735. In that case, Estey J. set out the test applicable to this type of motion: "[A] court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases where the court is satisfied that 'the case is beyond doubt'"

- [9] The courts have restated that principle on many occasions since that decision. Wilson J. expressed the principle in *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, in the following terms: "When so taken, the question is do they disclose a reasonable cause of action, i.e. a cause of action 'with some chance of success' (*Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094) or, as Le Dain J. put it in *Dowson v. Government of Canada* (1981), 37 N.R. 127 (F.C.A.), at p. 138, is it 'plain and obvious that the action cannot succeed?'".
- [10] After carefully examining the record and hearing the submissions by the parties, I am of the opinion that the plaintiff's action meets the test set out in *Canada (Attorney General) v. Inuit Tapirisat of Canada*, *supra*, and should be struck out for a number of reasons, including the following:
- a. The plaintiff's interest in this action is vague;
 - b. The plaintiff has not established the slightest damage caused by the inclusion of information security-related goods in the ECL. In fact, although the goods that he wishes to export to the United States are included in the list, he is not required to submit to any formality whatsoever, as he can export his goods to the United States without an export permit because of the bilateral agreement in force between Canada and that country;
 - c. Although the plaintiff repeatedly states that his freedom of expression has been violated, contrary to paragraph 2(b) of the Canadian Charter of Rights and Freedoms, he never explains how the ECL and, by extension, the government action, violates that freedom;
 - d. By the plaintiff's own admission, [TRANSLATION] "nothing is in dispute" and "no particular good is the subject of the present application" (see letter dated March 22, 2005);
 - e. The initial statement of claim, as well as the various motions introduced by the plaintiff, are, for the most part, statements of opinion and contain no statements of material fact that would tend to prove the cause of action;
 - f. While the allegations of fact concerning cryptography set out in the various motions brought by the plaintiff are certainly very interesting, they are immaterial from a legal standpoint;
 - g. The conclusion sought is general and unclear; and
 - h. The plaintiff is seeking a statement of principle, which this Court is not justified in making with respect to an act of the executive branch.
- [11] Pursuant to the discretion vested in me by paragraph 221(1)(a) of the Federal Courts Rules, 1998, I am allowing the defendant's motion to strike out the action on the ground that the plaintiff's action discloses no reasonable cause of action. It seems plain and obvious to me that the plaintiff's action is doomed to failure (see *Nourhaghighi v. Canada*, [1998] F.C.J. No. 1727; *Sylvain v. Canada (Agriculture and Agri-Food)*, [2004] F.C.J. No. 1955; *Pellikaan v. Canada (T.D.)*, [2002] 4 F.C. 169).

- [12] Furthermore, *Inmates of Mountain Prison v. Canada*, [1998] F.C.J. No. 573 informs us that an action is to be struck out for being "scandalous, frivolous or vexatious" when the motion fails to contain a concise statement of the material facts on which the party relies, contrary to section 174 of the Federal Courts Rules, 1998. That is the case here.
- [13] The plaintiff claims that he has a right to express his opinions on information security. No one is preventing him from doing so. However, there is a difference between freedom of expression and abuse of the Court's process, as is the case here. To quote Blais J. at paragraph 42 of *Sylvain v. Canada (Agriculture and Agri-Food)*, [2004] F.C.J. No. 1955: [TRANSLATION] It is one thing to allow any individual to have recourse to the courts; it is something else to allow a person to file a multiplicity of very similar actions . . . supported by extremely serious allegations and charges against Departments and Agencies who have specific responsibilities for public health across Canada. When a plaintiff is unable as a minimum to present at least a minimal factual foundation for his or her allegations, the courts are entitled to find the action frivolous and vexatious. That is clearly the case here. [Emphasis added.] APPEAL FROM ORDER BY PROTHONOTARY
- [14] Of necessity, this motion is moot. I will, however, explain why I would dismiss the appeal, notwithstanding the dismissal of the action.
- [15] The decision by a prothonotary to strike out a paragraph of a statement of claim, as Mr. Morneau did in this case, is discretionary. Such decisions may be set aside only where "they are clearly wrong, in the sense that the exercise of discretion was based upon a wrong principle or a misapprehension of the facts, or [where] the prothonotary improperly exercised his or her discretion on a question vital to the final issue of the case" (see *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450; *Cardinal v. Canada*, [1998] A.C.F. No. 30).
- [16] The decision whether or not to grant a motion to strike out a paragraph of a statement of claim or, in this case, a defence, is not vital to the final issue of the case. Consequently, this Court should only interfere in the case and exercise its de novo jurisdiction if the prothonotary exercised his discretion contrary to the principles recognized in the case law on such matters.
- [17] In light of the principles governing the striking out of pleadings entirely or in part, which were assessed in the first part of these reasons, I am of the opinion that Prothonotary Morneau exercised his discretion judicially and that there is no reason to intervene. MOTION TO STRIKE OUT QUESTIONS SUBMITTED ON WRITTEN EXAMINATION
- [18] Given my finding concerning the motion to strike out the action, there is no reason to examine the third issue. ORDER The plaintiff's motion on appeal from an interlocutory decision by Prothonothary Morneau dated April 29 is dismissed with costs. The motion to strike out the action is granted with costs. "Max M. Teitelbaum" JUDGE Certified true translation Michael Palles FEDERAL COURT SOLICITORS OF RECORD DOCKET: T-328-05 STYLE OF CAUSE: Thierry Moreau v. Her Majesty the Queen of Canada PLACE OF HEARING:

Montréal, Quebec DATE OF HEARING: August 17, 2005 REASONS FOR ORDER BY: THE HONOURABLE MR. JUSTICE TEITELBAUM DATED: August 31, 2005 APPEARANCES: Thierry MOREAU FOR THE PLAINTIFF Antoine LIPPÉ FOR THE DEFENDANT SOLICITORS OF RECORD: Thierry Moreau Representing himself 9130 Place de Montgolfier Montréal, Quebec H2M 2A1 FOR THE PLAINTIFF John H. Sims Deputy Attorney General of Canada Montréal, Quebec FOR THE DEFENDANT

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Prepared on 29 October 2026 · Esheria