

Date: 20060505

Docket: T-571-06

Citation: 2006 FC 570

Ottawa, Ontario, May 05, 2006

PRESENT: The Honourable Mr. Justice Harrington

PROPOSED CLASS ACTION

BETWEEN:

ROBERT GILLES GAUTHIER

Plaintiff

and

The Honourable PETER ANDREW MILLIKEN, SPEAKER OF THE HOUSE OF COMMONS, ROBERT RUMSLEY WALSH, LAW CLERK AND PARLIAMENTARY LEGAL COUNSEL, HOUSE OF COMMONS, Her Excellency MICHAELLE JEAN, GOVERNOR GENERAL OF CANADA, The Honourable IRWIN COTLER, former MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA, The Honourable VIC TOEWS, MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA, JEAN-PIERRE KINGSLEY, CHIEF ELECTORAL OFFICER, CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION, CTV TELEVISION NETWORK, GROUPE TVA INC., CANADIAN BROADCASTING CORPORATION – CBC, TONY BURMAN, EDITOR IN CHIEF AND EXECUTIVE DIRECTOR, CBC NEWS, CURRENT AFFAIRS AND NEWSWORLD, JASON MACDONALD, SPOKESPERSON THE BROADCAST CONSORTIUM, THE BROADCAST CONSORTIUM, CANWEST GLOBAL COMMUNICATIONS CORPORATION, THE CANADIAN PARLIAMENTARY PRESS GALLERY INC, THE CANADIAN BAR ASSOCIATION, CPAC, The Right Honourable PAUL MARTIN, former PRIME MINISTER OF CANADA AND former LEADER OF THE LIBERAL PARTY OF CANADA, THE LIBERAL PARTY OF CANADA, The Right Honourable STEPHEN HARPER, PRIME MINISTER OF CANADA AND LEADER OF THE CONSERVATIVE PARTY OF CANADA, THE CONSERVATIVE PARTY OF CANADA, The Honourable JACK LAYTON, LEADER OF THE NEW DEMOCRATIC PARTY OF CANADA, THE NEW DEMOCRATIC PARTY OF CANADA, The Honourable GILLES DUCEPPE, LEADER OF THE BLOC QUEBECOIS PARTY OF CANADA, and THE BLOC QUEBECOIS PARTY OF CANADA

Defendants

REASONS FOR ORDERS

[1] Robert Gilles Gauthier is a man of many parts: engineer, one-time newspaper publisher, one-time political candidate, concerned citizen and registered voter. He takes issue with the campaign leading up to the Federal General Election held on 23 January 2006, more particularly the televised debates involving the leaders of the four political parties with representation in the House of Commons at the time of its dissolution. In his view, the leaders of the 16 registered parties should all have been given the opportunity to debate. He asserts that limiting the debate to the leaders of the four incumbent parties infringed upon the fundamental rights of every Canadian voter to be provided with all available information. The media acted in breach of the Canadian Constitution, the *Charter* and other Canadian laws in concert with various government officials, and politicians who should have enforced the law, but failed to do so. Although he thus considers the election illegal, he is content to call upon the Court to rule on his complaint so that in the future the media and all concerned will fully respect freedom of expression, the political process in Canada and give proper heed to the *Elections Act* and the *Broadcasting Act*.

[2] As the lengthy style of cause shows, he has taken action against various public officials including the Governor General of Canada, the current and former Prime Minister, the Speaker of the House of Commons, as well as the Chief Electoral Officer and various television networks and individuals associated therewith.

[3] Mr. Gauthier has not only filed a statement of claim on his own behalf, but proposes that it be certified as a class action on behalf of all registered voters in Canada, some 20 million all told.

[4] Three sets of defendants promptly moved to have the action dismissed as against them on the grounds that the Federal Court does not have jurisdiction over them, or if it does because the

statement of claim does not disclose a cause of action as against them. Rule 221 of the *Federal Courts Rules* allows the Court to strike a pleading if it discloses no reasonable cause of action, and to order that the action be dismissed accordingly.

[5] Before turning to the three motions, it is necessary to briefly discuss the jurisdiction of the Federal Court and the different constitutional roles of the Sovereign, the Houses of Parliament, the Executive and the Courts. Although this brief discussion is not nuanced, it may help Mr. Gauthier, who is self-represented and who is not a lawyer, understand why all three motions are being granted.

THE JURISDICTION OF THE FEDERAL COURT

[6] The establishment and organisation of Courts in Canada is essentially a provincial matter under Section 92(14) of the *Constitution Act*, 1867. By way of exception, the Federal Parliament may, in virtue of Section 101 of the Act, create a general court of appeal for Canada, which it has, the Supreme Court of Canada. It may also establish additional courts for the better administration of the laws of Canada. There are four such courts, the Federal Court, the Federal Court of Appeal, the Tax Court of Canada and the Court Martial Appeal Court.

[7] Unlike the superior courts of record of the provinces, the Federal Court of Canada is purely a creature of statute, created by the *Federal Courts Act*.

[8] Generally speaking, the jurisdiction of the Federal Court is limited to certain subject matters. Beginning with the decision of the Supreme Court in *Canadian Pacific Ltd. v. Quebec North Shore Paper Co.*, [1977] 2 S.C.R. 1054, it has been held that the Federal Court only has jurisdiction: 1) if

the matter pertains to a federal legislative class of subject, as opposed to a provincial legislative class of subject, 2) if there is actual existing applicable Federal Law and 3) the administration of that Law has been confided to it. Perhaps the most elucidating case is *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752.

[9] The Federal Court's jurisdiction over the "Crown" differs somewhat. Historically, and again broadly speaking, the Crown could do no wrong, and thus could not be sued. In time the Crown consented to be sued, but only in certain specified Courts. Thus the Exchequer Court of Canada and the Federal Court, as its successor, had exclusive jurisdiction. However, Parliament now provides in Section 17 of the *Federal Courts Act* that the Federal Court's jurisdiction in cases in which relief is claimed against the Crown is concurrent with the provincial courts. Moreover, one or the other of the Federal Court and the Federal Court of Appeal has judicial review jurisdiction over federal boards and tribunals, in accordance with Sections 18, 18.1 and 28 of the *Federal Courts Act*.

THE CLAIM AGAINST THE SPEAKER

[10] The Honourable Peter Andrew Milliken, Speaker of this and the last House of Commons, and Robert Rumsley Walsh, Parliamentary Legal Counsel, House of Commons, have moved to have the action struck as against them because neither they personally, nor the House of Commons, as such, can be sued. They further submit that in any event neither had any role to play in organizing or supervising the televised debates. They are right on both counts.

[11] Section 17 of the *Federal Courts Act* gives the Court jurisdiction in cases in which relief is claimed against the "Crown". The "Crown" is not defined, perhaps because its meaning has been so well established that it is beyond doubt. In the third edition of their treatise, *Liability of the Crown*,

Professors Hogg and Monahan note at Section 1.4(a) that the expression the “Crown” is in fact shorthand for the executive branch of government, not the legislative branch. Executive functions are exercised by the Prime Minister and the other Ministers. It is not accurate to describe Parliament or a provincial legislature as the “Crown”. See *Wardle v. Manitoba Farm Loans Association*, [1956] S.C.R. 3.

[12] Even if the statement of claim, which is not particularly crisp, could actually be construed as an application for judicial review covered by Sections 18 and 18.1 of the *Federal Courts Act*, Section 2(2) of that Act provides for greater certainty that the Senate, House of Commons and no committee or member of either house is a “...federal Board, commission or other tribunal”. Thus, the Federal Court has no jurisdiction over these defendants who have to be considered as being sued in a representative capacity. Certainly, nothing personal is alleged against them.

[13] This is in accord with sound constitutional principle. Section 17 of the *Constitution Act, 1867* provides for one Parliament of Canada consisting of the Queen, the Senate and the House of Commons. As noted in *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R.667, there must be an equilibrium amongst the Legislature, the Executive and the Courts with each vouchsafed appropriate autonomy from the others. This present matter is not a case like *Vaid*, which went beyond parliamentary privilege and dealt with labour relations between the House and a non-legislative employee.

[14] Furthermore, neither of these defendants, nor the House of Commons in general, is implicated in general elections. The Governor General, by proclamation in virtue of Royal Prerogative, and in accordance with Section 50 of the *Constitution Act, 1867*, dissolved the 38th

Parliament on 29 November 2005, following which writs for the 39th General Election were issued. Thereafter, the House of Commons simply did not exist and would not meet again until summoned by the Governor General to meet 3 April 2006.

[15] The elections were carried out in accordance with the provisions of the *Canada Elections Act* for which the Chief Electoral Officer is responsible with no participation from the House of Commons in general, or the Speaker thereof in particular.

MOTION BY THE CHIEF ELECTORAL OFFICER

[16] Jean-Pierre Kingsley is and was the Chief Electoral Officer. It is not necessary to consider the circumstances in which the Federal Court may or may not have jurisdiction over him. There may be circumstances in which a decision he made, or failed to make, could be subject to judicial review.

[17] The statement of claim must be read against the law. So read, it discloses no cause of action against him. Sections 332 and following of the *Canada Elections Act* deal with broadcasts, more particularly the distinction between political broadcasts and public affairs programming. There is a broadcasting arbitrator who deals with the allocation of paid and free airtime amongst political parties. Those broadcasts are controlled by the parties themselves, and are not the subject of Mr. Gauthier's complaint. I am persuaded by the reasons of Mr. Justice Borins in *R. v. Canadian Broadcasting Corp. (CBC)*, [1992] O.J. No. 957 (QL), 72 C.C.C. (3d) 545, who pointed out that the *Canada Elections Act* made no reference to leadership debates. It still does not. He drew the distinction between the requirement of the Act to provide paid and free time to political parties and public affairs programs which include he said, and I agree, leadership debates. He concluded:

As I have mentioned, there is no express reference in the Canada Elections Act, in the Broadcasting Act or in the Television Broadcasting Regulations to leadership debates. Only the provision by broadcasters and network operators of paid and free time to the political parties, and its allocation, are governed by legislation. Neither statute provides a legal framework covering debates. Neither statute delegates to the C.R.T.C. the authority to require that broadcasters and network operators organize and present debates and to require that they invite the leader of each political party to participate in a debate. Had Parliament intended to include leadership debates within the scope of political broadcasts governed by the Canada Elections Act one would expect to find an express provision requiring broadcasters and network operators to produce debates, as well as rules for selecting participants in a debate and, perhaps, guidelines in respect to the format of the debate.

[18] That decision was handed when a CRTC Guideline called for the leaders of all political parties to be given an opportunity to debate. That Guideline has since been rescinded.

THE CLAIM AGAINST THE BROADCASTERS

[19] Having been apprised of the Federal Court's jurisdiction as aforesaid and being unable to point to any Statute which gave the Federal Court jurisdiction over them, Mr. Gauthier acquiesced in the dismissal of his action as against the Canadian Parliamentary Press Gallery, CTV Television Inc. (a.k.a. CTV Television Network), Canadian Broadcasting Corporation, Tony Burman, Jason MacDonald, Canwest Global Communications Corporation and CPAC. The CBC is not a government agent for these purposes. (*National Party of Canada v. Canadian Broadcasting Corp. (CBC)*, [1993] A.J. No. 677, *Natural Law Party of Canada v. Canadian Broadcasting Corp. (CBC)*, [1994] 1 F.C. 580). An order granting their motion, but without costs, was signed the day of the hearing.

CONCLUSION AND COSTS

[20] All three motions are granted. The names of the defendants who have successfully moved to have the statement of claim struck and the action as against them dismissed shall be deleted from the style of cause. The Speaker and the Chief Electoral Officer shall each have costs fixed in the amount of \$750. The “Broadcasters” have been awarded no costs.

“Sean Harrington”

Judge

FEDERAL COURT
NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-571-06

STYLE OF CAUSE: Proposed Class Action

ROBERT GILLES GAUTHIER v.

The Honourable PETER ANDREW MILLIKEN, SPEAKER OF THE HOUSE OF COMMONS, ROBERT RUMSLEY WALSH, LAW CLERK AND PARLIAMENTARY LEGAL COUNSEL, HOUSE OF COMMONS, Her Excellency MICHAELLE JEAN, GOVERNOR GENERAL OF CANADA, The Honourable IRWIN COTLER, former MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA, The Honourable VIC TOEWS, MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA, JEAN-PIERRE KINGSLEY, CHIEF ELECTORAL OFFICER, CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION, CTV TELEVISION NETWORK, GROUPE TVA INC., CANADIAN BROADCASTING CORPORATION – CBC, TONY BURMAN, EDITOR IN CHIEF AND EXECUTIVE DIRECTOR, CBC NEWS, CURRENT AFFAIRS AND NEWSWORLD, JASON MACDONALD, SPOKESPERSON THE BROADCAST CONSORTIUM, THE BROADCAST CONSORTIUM, CANWEST GLOBAL COMMUNICATIONS CORPORATION, THE CANADIAN PARLIAMENTARY PRESS GALLERY INC, THE CANADIAN BAR ASSOCIATION, CPAC, The Right Honourable PAUL MARTIN, former PRIME MINISTER OF CANADA AND former LEADER OF THE LIBERAL PARTY OF CANADA, THE LIBERAL PARTY OF CANADA, The Right Honourable STEPHEN HARPER, PRIME MINISTER OF CANADA AND LEADER OF THE CONSERVATIVE PARTY OF CANADA, THE CONSERVATIVE PARTY OF CANADA, The Honourable JACK LAYTON, LEADER OF THE NEW DEMOCRATIC PARTY OF CANADA, THE NEW DEMOCRATIC PARTY OF CANADA, The Honourable GILLES DUCEPPE, LEADER OF THE BLOC QUEBECOIS PARTY OF CANADA, and THE BLOC QUEBECOIS PARTY OF CANADA

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: May 2, 2006

REASONS FOR ORDER: HARRINGTON J.

DATED: May 5, 2006

APPEARANCES:

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