Federal Court Cour fédérale

Date: 20101206

Docket: T-541-10

Citation: 2010 FC 1228

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, December 6, 2010

PRESENT: Mr. Richard Morneau, Prothonotary

BETWEEN:

RÉGENT BOILY

Plaintiff

and

ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR ORDER AND ORDER

[1] There are two motions in the case at bar.

[2] The first motion before the Court is a motion by the defendant to essentially have the statement of claim filed by the plaintiff in the present case on April 8, 2010 struck out and the dismissal of the said action (sometimes hereinafter referred to as the motion to strike).

[3] The second motion, in response to the original motion to strike filed by the defendant on May 12, 2010, and amended on October 21, 2010, the plaintiff, on August 27, 2010, filed a motion under subsection 50(1) of the *Federal Courts Act*, R.S.C. (1985), c. F-7, (as amended), to stay proceedings in the action.

[4] After reviewing the principal facts in order to understand the context of each of the aforementioned motions, we will proceed first with an analysis of the motion to strike filed by the defendant and then, if all or part of the plaintiff's action remains, proceed with an analysis of the plaintiff's motion for a stay.

Factual background

[5] For the purposes of establishing the factual background in which to decide the motions under review, the Court considers it appropriate and reasonable to rely on the narrative found in the defendant's written submissions. The facts related below are largely drawn from the plaintiff's statement of claim and from the reasons for the decision, dated February 22, 2007, of the Quebec Court of Appeal in which the plaintiff's application for judicial review from a decision to have him extradited to Mexico was dismissed (Quebec Court of Appeal decision):

> 13. …
>
> (a) The appellant was born on March 19, 1944; he is a Canadian citizen.
>
> Quebec Court of Appeal decision, para. 6
>
> (b) In 1993, he went to Mexico to live. In 1998, he took part in marijuana trafficking. On March 9, 1998, he

was arrested in the state of Zacatecas, Mexico, in possession of 580 kilograms of marijuana.

Quebec Court of Appeal decision, paras. 7, 8 and 9

(c) On November 10, 1998, he was found guilty of committing a crime against health, namely, trafficking in illegal narcotics, contrary to section 194 of the *Federal Criminal Code*. He was sentenced to 14 years in prison.

Quebec Court of Appeal decision, paras.10 and 11

(d) While in prison, the appellant accepted an offer to escape in exchange for a sum of $70,000. On March 9, 1999, the appellant escaped with the help of a non-incarcerated accomplice. A guard was killed during the incident. The appellant then went to Canada.

Quebec Court of Appeal decision, paras. 12 to 15

(e) On March 1, 2005, the appellant was arrested at his home under a provisional arrest warrant for his extradition to Mexico.

Quebec Court of Appeal decision, par.16

(f) On April 27, 2005, Mexico sent Canada a request for extradition by way of diplomatic note, in accordance with the provisions of the *Treaty of Extradition between the Government of Canada and the Government of the United Mexican States*.

Quebec Court of Appeal decision, para.18

(g) On November 25, 2005, Justice Sophie Bourque of the Superior Court ordered the appellant's committal for extradition to Mexico, so that he might serve the remainder of his sentence for narcotics trafficking and be tried for offences that correspond to the following ones in Canadian law:

- Manslaughter, contrary to sections 234 and 236 of the *Criminal Code*;

- Escape from lawful custody, contrary to section 145(1) of the *Criminal Code*.

Quebec Court of Appeal decision, para.19

(h) The appellant does not appeal that decision.

Quebec Court of Appeal decision, para. 20

(i) On January 23, 2006, he made submissions to the Minister of Justice of Canada regarding his extradition.

Quebec Court of Appeal decision, para. 21

(j) The appellant submitted to the Minister of Justice "that his extradition would violate section 7 of the *Canadian Charter of Rights and Freedoms* because there was a serious risk that he will be tortured on Mexican territory. His extradition would also violate Canada's international obligations. Finally, it was impossible to rely in any way on any assurances Mexico may offer;"

Quebec Court of Appeal decision, para. 26

(k) On May 24, 2006, the Minister of Justice ordered the appellant's extradition to Mexico, after having considered his arguments regarding the human rights situation in that country, provided that the following four conditions were met by Mexico (diplomatic assurances):

- That it would take all reasonable precautions to ensure the appellant's safety while in Mexico;

- That it would ensure that the appellant's counsel and Canadian Embassy officials be permitted to visit him at any reasonable time;

- That it would ensure that the appellant be permitted to communicate with his counsel and Canadian Embassy officials at any reasonable time; and

- That it would make its best efforts to ensure that the appellant is brought to trial and that the trial be completed expeditiously, and that any other applications or requests, be heard expeditiously.

Quebec Court of Appeal decision, paras. 25 to 35, and Exhibit P-9

(l) The Minister of Justice also requested that his colleague, the Minister of Foreign Affairs and International Trade, ensure that "his officials in Mexico monitor Mr. Boily's case and report on the status of his well-being and the development of his case."

Quebec Court of Appeal decision, para. 33, Statement, para. 54, and Exhibit P-9

(m) Mexico complied with the demands of the Minister of Justice and provided the requested assurances. The appellant was informed of this on January 22, 2007;

Quebec Court of Appeal decision, para.36

14. The appellant subsequently appealed the decision of the Minister of Justice to the Quebec Court of Appeal, before which he argued that he would face a serious risk of torture in Mexico on the basis of three elements:

- During the interrogation that followed his arrest for trafficking in narcotics in 1998, he was treated roughly by the police;
- Because he is charged with participating in the murder of a prison guard in 1999, there is reason to fear the resentment of the other prison guards;
- According to several studies carried out by various international human rights organizations, torture is a common practice in Mexico.

Quebec Court of Appeal decision, paras. 24 and 47

15. On February 22, 2007, the Quebec Court of Appeal, after having considered the appellant's arguments, dismissed his application for judicial review of the decision of the Minister of Justice ordering his extradition:

- The Court of Appeal indicated that the Minister had determined that "the risk of torture is not high, especially since it was attenuated – or eliminated – by the assurances he sought from Mexico."

Quebec Court of Appeal decision, para.45

- The Court of Appeal cited jurisprudence to the effect that general evidence of torture is not sufficient for the Court to intervene and that an applicant must submit non-speculative evidence to lead to a conclude that they face a serious risk of torture;

Quebec Court of Appeal decision, paras. 60-61

- The Court of Appeal found that the "Minister analyzed all of the evidence that had been brought to his attention and considered the applicable principles …. Considering the serious allegations of police brutality during the arrest of Régent Boily, the charges against him, the protective measures set out in the laws and constitution of Mexico, the treaties to which this country adheres and, finally, the assurances sought from Mexico, he concluded that the request for extradition should be granted. This decision rests on an assessment of the circumstances as a whole, which make it possible to predict, to a certain degree, the future conduct of legal and prison authorities in Mexico. The applicant has not shown that the Minister's decision violated his constitutional rights, nor that the Minister committed an error of law or acted unfairly, arbitrarily or improperly. In short, he has not shown that the Minister's decision was unreasonable."

Quebec Court of Appeal decision, paras. 62-63

16. On February 22, 2007, the appellant sought leave to appeal the decision to the Supreme Court of Canada, which was denied on July 5, 2007;

17. On Friday, August 17, 2007, the appellant was extradited to Mexico. …

[6] If we return to the plaintiff's statement of claim, after having stated at paragraph 24 that he had been extradited to Mexico on August 17, 2007, the plaintiff added the following at paragraphs 25 to 27:

[TRANSLATION]

> 25. He was tortured upon his arrival in Mexico on August 17, 19 and 21, 2007 by guards at the prison in the state of Zacatecas, all of which is described in greater detail in the affidavit dated March 21, 2009, filed in support of these proceedings under number P-13;
>
> 26. As has been demonstrated in these proceedings, Boily was tortured subsequent to his extradition by the Minister of Justice of Canada (1) in spite of overwhelming evidence, not only of the risk but of the substantial probability that he would be tortured following this extradition and (2) due to the Minister's obstinate insistence on giving credence to the effectiveness of the diplomatic assurances by Mexico when he had overwhelming and non-contradicted evidence before him of Mexico's inability to exercise any control over its law enforcement;
>
> 27. Boily was also tortured due to the negligence of the Minister of Foreign Affairs, who completely failed to put in place any kind of mechanism before, during and after his extradition to Mexico;

[7] In addition, the plaintiff's written submissions show that in support his motion for a stay, that on the same day, namely, July 5, 2007, that the Supreme Court of Canada refused leave to appeal the Quebec Court of Appeal decision, the plaintiff submitted a Communication (hereinafter "Communication") to the *Committee Against Torture of the United Nations High Commissioner for Human Rights* (hereinafter "the Committee") under, among others, article 22 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Doc. U.N. A/39/51, p. 197 (1984), [1987] T.S. Can. No 36 (entered into force: June 26, 1987, ratification for Canada June 24, 1987, entered into force for Canada on July 24, 1987) (hereinafter the Convention Against Torture).

[8] The Communication was accompanied by request for interim measures under article 108 du *Rules of Procedure of the Committee Against Torture* (hereinafter *Rules of Procedure*); a request that was granted and in which it was requested that Canada stay the extradition of the plaintiff to Mexico.

[9] Following subsequent submissions by Canada, the interim measures were lifted, and the plaintiff was extradited to Mexico on August 17, 2007.

[10] It is also clear that the plaintiff's Communication to the Committee has not, to this day, been declared inadmissible under section 110 of the *Rules of Procedure* and the plaintiff is still awaiting the conclusions to be issued by the Committee on the merits of the motion under section 112 of the *Rules of Procedure*.

[11] By his motion for a stay, the plaintiff is seeking a stay of this proceeding until the Committee renders its decision with regard to the Communication.

Analysis

I - Defendant's motion to strike

[12] It appears from the defendant's written submissions that the motion to strike is based on paragraphs 221(1)(*a*) and (*f*) of the *Federal Courts Rules* (Rules).

[13] Rule 221 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	**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*) discloses no reasonable cause of action or defence, as the case may be,	*a*) qu'il ne révèle aucune cause d'action ou de défense valable;
(*b*) is immaterial or redundant,	*b*) qu'il n'est pas pertinent ou qu'il est redondant;
(*c*) is scandalous, frivolous or vexatious,	*c*) qu'il est scandaleux, frivole ou vexatoire;
(*d*) may prejudice or delay the fair trial of the action,	*d*) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
(*e*) constitutes a departure from a previous pleading, or	*e*) qu'il diverge d'un acte de procédure antérieur;
(*f*) is otherwise an abuse of the process of the Court,	*f*) qu'il constitue autrement un abus de procédure.
and may order the action be dismissed or judgment entered accordingly.	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.
(2) No evidence shall be heard on a motion for an order under paragraph (1)(*a*).	(2) Aucune preuve n'est admissible dans le cadre d'une requête invoquant le motif visé à l'alinéa (1)*a*).

[14] Furthermore, as the Federal Court of Appeal pointed out in the following passage from *Sweet et al. v. Canada* (1999), 249 N.R. 17, at paragraph 6 on page 23, striking out under one or more of the paragraphs of Rule 221 occurs only where the situation is plain and obvious:

> [6] Statements of claim are struck out as disclosing no reasonable cause of action only in plain and obvious cases and where the Court is satisfied that the case is beyond doubt (see *Attorney General of Canada v. Inuit Tapirisat of Canada et al.*, [1980] 2 S.C.R. 735 at 740; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441 and *Hunt v. Carey Canada. Inc.*, [1990] 2 S.C.R. 959). The burden is as stringent when the ground argued is that of abuse of process or that of pleadings being scandalous, frivolous or vexatious (see *Creaghan Estate v. The Queen*, [1972] F.C. 732 at 736 (F.C.T.D.), Pratte J.; *Waterside Ocean Navigation Company, Inc. v. International Navigation Ltd et al.*, [1977] 2 F.C. 257 at 259 (F.C.T.D.), Thurlow F.C.J.; *Micromar International Inc. v. Micro Furnace Ltd.* (1988), 23 C.P.R. (3d) 214 (F.C.T.D.), Pinard J. and *Connaught Laboratories Ltd. v. Smithkline Beecham Pharma Inc.* (1998), 86 C.P.R. (3d) 36 (F.C.T.D.) Gibson J.). The words of Pratte J. (as he then was), spoken in 1972, in *Creaghan Estate, supra,* are still very much appropriate:
>
> "… a presiding judge should not make such an order unless it be obvious that the plaintiff's action is so clearly futile that it has not the slightest chance of succeeding ..."

[15] After the text in paragraphs 25 to 27 in his statement of claim (paragraphs cited above at paragraph [6], the plaintiff structures the remainder of his statement of claim around three distinct themes based on this three arguments outlined in paragraphs 26 and 27 of his statement. Thus, the general structure of the statement is roughly equivalent to this:

Errors of the Minister of Justice:

(A) The decision to extradite Régent Boily

… (paragraphs 28 to 42)

(B) The decision to rely on diplomatic assurances

… (paragraphs 43 to 53)

Error of the Minister of Foreign Affairs:

(C) Monitoring of extradition

… (paragraphs 54 to 88)

[16] It appears clear and obvious to me that the headings of paragraphs 28 to 42 and the wording contained therein seek to call into question the Minister's decision, dated May 24, 2006, to extradite the plaintiff to Mexico. That decision, as the preceding paragraphs show, was subject to an in-depth judicial review by the Quebec Court of Appeal. In a final decision by that court, the application for review was dismissed and the Minister's decision to extradite was found not to have been unreasonable.

[17] In short, as the defendant noted in paragraph 27 of his written submissions:

[TRANSLATION]

> 27. This Quebec Court of Appeal decision has the authority of a final judgment and is *res judicata*. As such, the applicant cannot, in a civil liability proceeding, challenge either the Minister's decision to extradite him to Mexico, or the Quebec Court of Appeal's judgment upholding that decision. Such a collateral attack constitutes an abuse of process that must be sanctioned by dismissing the cause of action.

> *Toronto (City) v. (Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] 3 S.C.R. 77
>
> *Dhalla v. Canada*, 2006 FC 100

[18] The same line of reasoning applies equally to the headings of paragraphs 43 to 53 as well as their wording. The authorities cited by the defendant at paragraphs 29 and 30 of his written submissions as well as paragraphs [31], [36], [62] and [63] of the Quebec Court of Appeal decision make it abundantly clear and obvious that Canada was entitled to rely on the diplomatic assurances.

[19] It is therefore clear and evident that paragraph 26 of the statement of claim as well as the text that follows paragraph 27 up to and including paragraph 53, constitute a collateral attack on the Minister's decision to extradite and on the Quebec Court of Appeal decision. Thus, these paragraphs from the statement of claim cannot be grounds for a reasonable cause of action within the meaning of paragraph 221(1)(*a*) of the Rules in addition to constituting an abuse of process under paragraph 221(1)(*f*) of the Rules.

[20] However, the same cannot be said for the allegations made by the plaintiff at paragraphs 27, then 54 to 88 of the statement of claim. These paragraphs are essentially concerned with the alleged lack of a monitoring mechanism at Foreign Affairs to ensure at all times that the plaintiff, once in Mexico after his extradition, would not be tortured. As previously indicated, the plaintiff claims that he was tortured from August 17 to 21, 2007 (the alleged period of torture).

[21] In my opinion, this state of affairs is distinct and separate from the circumstances surrounding the Minister's decision to extradite on May 24, 2006, and the Quebec Court of Appeal decision. Indeed, the alleged period of torture occurred six (6) months after that judicial review and may be viewed independently of the decision to extradite and the decision of, or the fact that, the Minister of Justice relied on diplomatic assurances, factors that cannot now be grounds for a cause of action.

[22] In addition, counsel for the defendant referred the Court at the hearing to *Smith v. Canada (Attorney General)*, 2009 FC 228, [2010] 1 F.C.R. 3, and in particular to paragraph [54] of that decision to support the argument that section 10 of the *Department of Foreign Affairs and International Trade Act*, R.S.C. 1985, c. E-22, did not create a legal obligation to act.

[23] I do not agree with the premise, in this motion, that the *Smith* decision and the Court's statement at paragraph [54] of that decision are determinative of this matter. In that decision, Mr. Smith, a Canadian citizen sentenced to death in the United States, complained that the Canadian government had arbitrarily withdrawn diplomatic support with regard to his request for clemency addressed to U.S. authorities.

[24] The Court wrote the following at paragraph [54] of *Smith*:

> [54] Mr. Smith also contends that Canada is obliged by the principles of international law and ss. 10(2)(a), 10(2)(i), and 10(2)(j) of the DFAIT Act to take positive steps to protect him. While I do agree that the Government's decision to deny clemency assistance to Mr. Smith is hard to reconcile with Canada's international commitment to promote respect for international human rights norms including the universal abolition of the death penalty, I do not agree

> that this inconsistency creates a positive legal obligation to act. The imposition of the death penalty in the United States is not of itself a violation of international law principles and I do not find the words of s. 10 of the DFAIT Act to be sufficiently explicit to create the kind of positive duties of diplomatic protection that Mr. Smith asserts. While the evolution of international law may be in that direction, I am of the view that the Charter will provide a sufficient basis for protection such that resort to international law principles will not be required in an appropriate case.
>
> [Emphasis added]

[25] Section 10 of the *Department of Foreign Affairs and International Trade Act* reads as follows:

POWERS, DUTIES AND FUNCTIONS OF THE MINISTER	POUVOIRS ET FONCTIONS DU MINISTRE
10. (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to the conduct of the external affairs of Canada, including international trade and commerce and international development.	**10.** (1) Les pouvoirs et fonctions du ministre s'étendent d'une façon générale à tous les domaines de compétence du Parlement non attribués de droit à d'autres ministères ou organismes fédéraux et liés à la conduite des affaires extérieures du Canada, notamment en matière de commerce international et de développement international.
(2) In exercising his powers and carrying out his duties and functions under this Act, the Minister shall	(2) Dans le cadre des pouvoirs et fonctions que lui confère la présente loi, le ministre :
(*a*) conduct all diplomatic and consular relations on behalf of Canada;	*a*) dirige les relations diplomatiques et consulaires du Canada;
(*b*) conduct all official	*b*) est chargé des communications officielles

communication between the Government of Canada and the government of any other country and between the Government of Canada and any international organization;	entre le gouvernement du Canada, d'une part, et les gouvernements étrangers ou les organisations internationales, d'autre part;
(*c*) conduct and manage international negotiations as they relate to Canada;	*c*) mène les négociations internationales auxquelles le Canada participe;
(*d*) coordinate Canada's international economic relations;	*d*) coordonne les relations économiques internationales du Canada;
(*e*) foster the expansion of Canada's international trade and commerce;	*e*) stimule le commerce international du Canada;
(*f*) have the control and supervision of the Canadian International Development Agency;	*f*) a la tutelle de l'Agence canadienne de développement international;
(*g*) coordinate the direction given by the Government of Canada to the heads of Canada's diplomatic and consular missions;	*g*) coordonne les orientations données par le gouvernement du Canada aux chefs des missions diplomatiques et consulaires du Canada;
(*h*) have the management of Canada's diplomatic and consular missions;	*h*) assure la gestion des missions diplomatiques et consulaires du Canada;
(*i*) administer the foreign service of Canada;	*i*) assure la gestion du service extérieur;
(*j*) foster the development of international law and its application in Canada's external relations; and	*j*) encourage le développement du droit international et son application aux relations extérieures du Canada ;
(*k*) carry out such other duties and functions as are by law assigned to him.	*k*) exerce tous autres pouvoirs et fonctions qui lui sont attribués de droit.

[26] Although the Court in *Smith* was able to establish on the merits of the application that section 10 of the *Department of Foreign Affairs and International Trade Act* was not sufficiently explicit to allow the Court to conclude that it created an obligation of protection in the specific circumstances of that case, it does not appear to me to be clear and evident in this case that one can rule out the fact that the broad wording of section 10 might include the type of measure whose absence the plaintiff complains of.

[27] Furthermore, we know for a fact that the Minister of Justice had asked his colleague at Foreign Affairs to monitor the situation and that some action had been taken by Canadian diplomatic staff on the ground. The plaintiff essentially argues that in this regard it was too little to late, so to speak. To my mind, it will be up to the trial judge to assess those facts in detail and in their entirety.

[28] In short, it does not appear to me to be clear and obvious in this motion that paragraphs 27, and 54 to 88 of the statement of claim constitute an abuse of process or that they do not disclose a reasonable cause of action.

[29] In the interests of greater clarity and although the first paragraph of the statement of claim tends towards establishing the point, it might be worthwhile for the plaintiff to express, or even specify in his upcoming statement of claim what he mentions at paragraph 15 of his written submissions in response to this motion, namely, that:

[TRANSLATION]

> 15. The plaintiff's action does not constitute an application for judicial review of the Minister's decision dated May 24, 2006, but is in fact an application for relief from the government of Canada by reason of the fact that he was tortured in Mexico on August 17, 19 and 21, 2007 following his extradition to that country by Canadian authorities.

[30] Inasmuch as we must refer to the decision to extradite and to the reliability of the diplomatic assurances, these elements cannot of themselves be presented as errors; at best, they may be used to provide a bit of background so as to be able gain a better understanding of material facts which could possibly establish one or more errors with regard to the alleged period of torture.

[31] Moreover, in terms of having things struck, the defendant is also seeking to have struck Exhibit P-13 mentioned at paragraph 25 of the statement of claim, as well as the underlined passage from the said paragraph:

> 25. He was tortured upon his arrival in Mexico on August 17, 19 and 21, 2007 by guards at the prison in the state of Zacatecas, <u>all of which is described in greater detail in the affidavit dated March 21, 2009, filed in support of these proceedings under number P-13</u>.
>
> [Emphasis added]

[32] According to the defendant:

> [TRANSLATION]
>
> 47. Exhibit P-13 is an affidavit that was not contemporary to the events, is not provided for in the *Federal Courts Rules*, does not allow for cross-examination, and cannot therefore serve as proof of its contents.
>
> 48. This affidavit must be struck from the proceedings, in addition to the following passage "all of which is described in greater detail in the affidavit dated March 21, 2009, filed in support of these proceedings under number P-13" at paragraph 25 of the Statement.

[33] I am not of the view that this striking should occur. Affidavit P-13 certainly cannot in a proceeding serve as proof of its contents. It must at most be viewed as an appendix to the statement of claim describing the alleged torture. This document should be seen as being part of the body of the statement of claim itself and the plaintiff could certainly be cross-examined on its contents. To avoid any future complications, the plaintiff may wish to list the relevant material facts in the body of his forthcoming statement of claim.

[34] Thus, in principle and without wishing here to establish an exhaustive list at all costs, only the following should be struck out: paragraph 26 of the statement of claim and everything that follows paragraph 27 up to and including paragraph 53 of that statement, in addition to paragraph 89, and quite possibly other allegations with regard to damages. However, the Court is of the view that this would render the remaining text of the statement of claim rather painful to read. The Court instead in the order that follows these reasons prefers to grant the defendant's motion to strike and strike out the plaintiff's entire statement of claim, with costs to follow, but

subject to the plaintiff's right to re-file, within a given timeframe, a statement of claim that complies with the present reasons for order.

[35] Given that the Court is under the assumption that the plaintiff will act accordingly, it will now turn to the matter of the plaintiff's motion for a stay of proceedings pursuant to subsection 50(1) of the *Federal Courts Act*.

II - Plaintiff's motion for a stay of proceedings

[36] Subsection 50(1) of the *Federal Courts Act* reads as follows:

50. (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter	**50.** (1) La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :
(*a*) on the ground that the claim is being proceeded with in another court or jurisdiction; or	*a*) au motif que la demande est en instance devant un autre tribunal;
(*b*) where for any other reason it is in the interest of justice that the proceedings be stayed..	*b*) lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

[37] First, the Court does not consider the Committee to be a "court" within the meaning of paragraph 50(1)(*a*) of the *Federal Courts Act*.

[38] Furthermore, if the said Committee constituted such a court, certain conditions would need to be met in order to obtain a stay. Indeed, it has been established in *Safilo Canada Inc. v. Contour Optik Inc.*, 2005 FC 278, [2005] F.C.J. No 384 that:

> [27] The courts have developed a number of guidelines to determine the circumstances in which a stay of proceedings should be ordered (*Discreet Logic Inc. v. Canada (Registrar of Copyrights)* (1993), 51 C.P.R. (3d) 191, aff. by (1994), 55 C.P.R. (3d) 167 (F.C.A.); *Plibrico (Canada) Limited v. Combustion Engineering Canada Inc.*, 30 C.P.R. (3d) 312; *Ass'n of Parents Support Groups v. York*, 14 C.P.R. (3d) 263; *Compulife Software Inc. v. Compuoffice Software Inc.* (1997), 77 C.P.R. (3d) 451; 94272 *Canada Ltd. v. Moffatt*, (1990) F.C.J. No. 422; *General Foods v. Struthers*, [1974] S.C.R. 98). These guidelines have been well summarized by Dubé J. in *White v. E.B.F.*, (2001) F.C.J. No. 1073:
>
> 1. Would the continuation of the action cause prejudice or injustice (not merely inconvenience or extra expense) to the defendant?
>
> 2. Would the stay work an injustice to the plaintiff?
>
> 3. The onus is on the party which seeks the stay to establish that the two conditions are met.
>
> 4. The grant or refusal of the stay is within the discretionary power of the court.
>
> 5. The power to grant a stay may only be exercised sparingly and in the clearest of cases.
>
> 6. Consideration of whether the facts alleged, the legal issues raised and the relief sought are similar or the same in the both proceedings.
>
> 7. What are the possibilities of inconsistent findings in both courts?
>
> 8. Until there is a risk of imminent adjudication in the two different forums, the Court should be very reluctant to interfere with any litigant's right of access to justice and adjudication of claims.

> 9. Priority ought not to be necessarily given to the first proceeding over the second, or vice versa.

[39] The main question before the Committee was whether Canada had violated Article 3 of the *Convention Against Torture*, which states:

> Art. 3
>
> 1. No State Party shall expel, return…or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

[40] It appears to me that if the Court must decide this question in the context of the plaintiff's forthcoming claim, it should do so from the same perspective and within the same purview of the Committee.

[41] In addition, and in any case, as the defendant noted at paragraph 17 of his written submissions in response to the motion by the plaintiff:

> [TRANSLATION]
>
> 17. Under paragraph 22(7) of the Convention Against Torture, the Committee had no decision-making authority, only the authority to make "findings", which are non-binding, and which must be shared with the State in question and the person who made the complaint.

[42] Moreover, the plaintiff himself adduced Exhibit R-15 in support of his motion, which he submitted to the Committee to counter Canada's request that it dismiss the plaintiff's Communication. It is quite telling that, among other things, paragraphs 8 to 16 of Exhibit R-15 reveal:

> [TRANSLATION]
>
> I- THE RECOURSES RELATE TO DIFFERENT SITUATIONS
>
> 8. Contrary to what Canada asserts in its findings, the proceeding before the Federal Court and the Communication before the Committee relate to different situations.
>
> 9. Indeed, the Communication before this Committee was submitted on July 4, 2007, or before Boily was actually extradited to Mexico. The motion was also accompanied by a request for interim measures to stay Boily's extradition, measures that were issued on July 6 and withdrawn on August 13, 2007.
>
> 10. In his complaint to the Committee Against Torture, Boily claimed that Canada had violated Article 3 of the Convention, which states that it is prohibited to return a person to a State where they would face a serious risk torture.
>
> 11. The complaint against Canada essentially seeks to have that country acknowledge that it violated the Convention Against Torture by extraditing Boily to Mexico on August 17, 2007, given the serious risk that he would be tortured in that country that had been demonstrated.
>
> 12. In support of his Communication before the Committee, Boily cited the foreseeable, real and personal risk that he would be tortured if he was extradited to Mexico.
>
> 13. Therefore, it is the extradition itself that is being challenged, and the fact that, given Mr. Boily's specific circumstances and the place he was removed to, it violated Article 3 of the Convention.

> 14. Canada and Boily agree that the fact that Boily was actually tortured following his removal does not constitute proof that there was a foreseeable, real and personal that he would be tortured (see paragraph 20 of Canada's observations from August 27, 2009).
>
> 15. The foreseeable, real and personal nature of the risk in this case, as Boily pointed out in his various observations, rested on the fact that a prison guard was killed during Boily's escape and the fact that torture is widespread in Mexican prisons.
>
> 16. In the action before the Federal Court, Boily criticizes Canada for the fact that he was tortured following this extradition. He is seeking redress for the fact that he was tortured, and not for the fact that he was at risk of being tortured, as he stated before the Committee (see paragraphs 89-92 of the proceeding appended to Canada's observations).
>
> [Emphasis added]

[43] In light of this context, if we return to the conditions set out in *Contour Optik*, *supra*, it is quite evident that the plaintiff has not satisfied the main criteria (1, 2, 6 and 7) established therein.

[44] As a result, the plaintiff's motion for a stay of proceedings will be dismissed, with costs.

[45] Furthermore, inasmuch as we need to consider paragraph 50(1)(*b*) of the *Federal Courts Act* and conclude that this paragraph is outside of the scope of the test in *Contour Optik*, the Court does not find, for the reasons expressed by the defendant, that the tripartite test established by the Supreme Court of Canada in *Manitoba (A.G.) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 has been met by the plaintiff. Even if it was assumed that there was a serious question to be tried in this case, it has certainly not been established that the plaintiff would

suffer irreparable harm if the proceeding were to continue. In addition, under the third part of the test, I find that the balance of convenience clearly favours pursuing the matter in Federal Court.

[46] Lastly, as was discussed at the hearing of the motions under review, the defendant in this action, in the event that the plaintiff avails himself of the right to submit a new statement of claim in this proceeding, should be referred to not as the Attorney General of Canada, but rather, as Her Majesty the Queen, in accordance with the provisions of section 48 of the *Federal Courts Act*.

ORDER

1. The plaintiff's motion for a stay of proceedings is dismissed, with costs.

2. The defendant's motion to strike is granted and the plaintiff's statement of claim is struck out in its entirety, with costs to follow, subject to the plaintiff's right to re-file, on or before January 10, 2011, a statement of claim that complies with the reasons for order that accompany this order.

3. In the event the plaintiff avails himself of the right to re-file a new statement of claim in this proceeding, the defendant should be referred to not as the Attorney General of Canada, but rather, as Her Majesty the Queen, in accordance with the provisions of section 48 of the *Federal Courts Act*.

4. The defendant will then have thirty (30) days following the filing date set out in paragraph 2, above, to serve and file its statement of defence.

"Richard Morneau"
Prothonotary,

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-541-10
STYLE OF CAUSE:	**RÉGENT BOILY** **and** **ATTORNEY GENERAL OF CANADA**
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	November 30, 2010
REASONS FOR ORDER BY:	PROTHONOTARY MORNEAU
DATED:	December 6, 2010

APPEARANCES:

Philippe Larochelle Christian Deslauriers	FOR THE PLAINTIFF
Dominique Guimond	FOR THE DEFENDANT

SOLICITORS OF RECORD:

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Myles J. Kervan Deputy Attorney General of Canada	FOR THE DEFENDANT