

Federal Court of Appeal



Cour d'appel fédérale

Date: 20120515

Docket: A-31-12

Citation: 2012 FCA 146

**CORAM: LÉTOURNEAU J.A.
GAUTHIER J.A.
TRUDEL J.A.**

BETWEEN:

RICHARD TIMM

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Montréal, Quebec, on May 15, 2012.

Judgment delivered from the Bench at Montréal, Quebec, on May 15, 2012.

REASONS FOR JUDGMENT OF THE COURT BY:

TRUDEL J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Montréal, Quebec, on May 15, 2012)

TRUDEL J.A.

[1] This is an appeal of a Federal Court decision (2012 FC 83) by which Mr. Justice Scott dismissed the appeal of the appellant, Richard Timm, from an order by Prothonotary Richard Morneau.

[2] The Prothonotary had allowed the motion of the respondent (then the defendant) to strike and dismiss Mr. Timm's action without giving Mr. Timm the opportunity to amend his originating pleading. This order thus put an end to the \$2-million action in damages instituted by Mr. Timm against Her Majesty the Queen, in which he contended that two lawyers representing the Attorney General of Canada and three Correctional Service of Canada employees had committed perjury and deliberately attempted to obstruct justice in a previous action commenced between the same parties (file T-1110-10 settled out of Court a few days before the hearing date).

[3] The perjury referred to by Mr. Timm consists of the arguments made by counsel for the respondent on a motion to quash subpoenas, filed in T-1110-10, and of the sworn statements of the witnesses called by Mr. Timm, in which they stated that they were not tendered their attendance fees in accordance with section 42 of the *Federal Courts Rules*, SOR/98-106.

[4] Section 42 reads as follows:

Personal service of subpoena

42. No witness is required to attend under a subpoena unless the subpoena has been personally served on the witness in accordance with paragraph 128(1)(a) and witness fees and travel expenses have been paid or tendered to the witness in the amount set out in *Tariff A*.

[Emphasis added.]

Signification à personne

42. Un témoin ne peut être contraint à comparaître aux termes d'un *subpoena* que si celui-ci lui a été signifié à personne conformément à l'alinéa 128(1)a) et qu'une somme égale à l'indemnité de témoin et aux frais de déplacement prévus au tarif A lui a été payée ou offerte.

[Je souligne.]

[5] On appeal before this Court, Mr. Timm has raised a number of arguments, including three of greater importance. First, Mr. Timm argues that he tendered the witness fees to the persons required to appear using the preprinted subpoena form. According to Mr. Timm, this form, which sets out the attendance money that each person who testifies is entitled to receive, constitutes the tender referenced by Rule 42 (Appellant's examination, November 22, 2011, Appeal Book, Volume 1, Tab D, at page 73, lines 12ff). Thus, the prosecuted lawyers and witnesses who state that he failed to tender the prescribed attendance money are committing a fault that incurs their liability.

[6] The appeal cannot succeed on this point. Form 41, which prescribes the contents of a subpoena, clearly states that the attendance money for the number of days indicated "is served with this subpoena, calculated in accordance with Tariff A of the *Federal Courts Rules*".

[7] The evidence clearly shows that the appellant did not give the prescribed amounts to the persons summoned in order to ensure their attendance at the hearing. What is more, the prosecuted counsel did not sign any affidavits or make any sworn statements. No allegations of perjury can be made against them.

[8] Second, Mr. Timm contends that the Prothonotary lacked jurisdiction to rule on the facts of his case because the amount at stake exceeds that of a simplified action, that is, \$50,000.

[9] This argument must also fail. The Federal Court judge was right to conclude as he did, relying on *First Canadians' Constitution Draft Committee the United Korean Government (Canada) v. Canada*, 2004 FCA 93, 238 DLR (4th) 306, in which this Court stated “that a prothonotary has jurisdiction under Rule 50(1) to decide a motion to strike an action made under Rule 221 whatever the amount claimed in the action”.

[10] Third, Mr. Timm argues that the judge and the Prothonotary erred in declaring that his action was purely vexatious. This conclusion is at best a question of mixed fact and law, which is not reviewable unless a palpable and overriding error has been made. To the contrary, the very nature of the proceedings could support this conclusion.

[11] Regarding the other arguments raised by Mr. Timm, we agree with the Federal Court judge and the Prothonotary that they are without merit and that the action in support of which they are raised has no chance of succeeding.

[12] Consequently, the appeal will be dismissed with costs.

“Johanne Trudel”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-31-12

STYLE OF CAUSE: Richard Timm v.
Her Majesty the Queen

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: May 15, 2012

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TRUDEL J.A.

DELIVERED FROM THE BENCH BY: TRUDEL J.A.

APPEARANCES:

Richard Timm SELF-REPRESENTED

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