Federal Court of Appeal | Cour d'appel fédérale

**Date: 20140120**

**Docket: A-205-13**

**Citation: 2014 FCA 8**

**CORAM:** **NOËL J.A.**
**GAUTHIER J.A.**
**MAINVILLE J.A.**

**BETWEEN:**

**RICHARD TIMM**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Ottawa, Ontario, on December 4, 2013.

Judgment delivered at Ottawa, Ontario, on January 20, 2014.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: NOËL J.A.
GAUTHIER J.A.

Federal Court of Appeal  Cour d'appel fédérale

**Date: 20140120**

**Docket: A-205-13**

**Citation: 2014 FCA 8**

**CORAM :** **NOËL J.A.**
**GAUTHIER J.A.**
**MAINVILLE J.A.**

**BETWEEN:**

**RICHARD TIMM**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

## REASONS FOR JUDGMENT

**MAINVILLE J.A.**

[1] This is an appeal from an order dated May 15, 2013, of Justice de Montigny of the Federal Court (the judge), who dismissed the appellant's motion to appeal an order dated April 30, 2013, of Prothonotary Morneau (the prothonotary), who allowed the motion to strike of the respondent, Her Majesty the Queen, struck the amended statement of claim of the appellant in Federal Court docket T-2076-11, and dismissed with costs his action in damages.

[2] For the reasons that follow, I would dismiss the appeal.

Background

[3] In 1995, after a trial by judge and jury, the appellant was convicted of the first degree murder of his adoptive parents. The appeal against his conviction was first dismissed in 1998 by the Quebec Court of Appeal and dismissed again in 1999 by the Supreme Court of Canada: *R. c. Timm*, [1998] R.J.Q. 3000, 131 C.C.C. (3d) 306; *R. v. Timm*, [1999] 3 S.C.R. 666.

[4] On July 25, 2001, the appellant made an application to the Minister of Justice (the Minister) under the former section 690 of the *Criminal Code*, R.S.C. 1985, c. C-46, which section was replaced in 2002 by the review mechanism for miscarriages of justice provided in sections 696.1 to 696.6 of the *Criminal Code*. In his application, the appellant submitted, among other things, that his criminal conviction was the result of a miscarriage of justice because the Crown prosecutor at his trial failed to disclose certain items of evidence.

[5] On October 22, 2009, the appellant was notified of the preliminary dismissal of his application, which dismissal was later confirmed in a final decision of the Minister on October 21, 2010.

[6] While his application was being dealt with and following its dismissal, the appellant instituted multiple judicial review proceedings raising various alleged irregularities in the consideration of his application. The last such judicial review proceeding is Federal Court docket T-680. In the aforementioned judicial review proceedings, the appellant submitted, among other things, that there was bad faith on the part of the Minister's officials who had dealt with his application, in particular for the following reasons:

1. Jacques Savary refused to disclose to the appellant the recommendations of the Honourable Jean-Marc Labrosse, citing solicitor-client privilege;

2. eight years elapsed before the preliminary report by Kerry Scullion and Isabel Schurman was filed;

3. the Criminal Conviction Review Group failed to send the appellant a copy of the investigation summary before it was submitted to the Minister;

4. Mr. Scullion and Ms. Schurman failed to include the [TRANSLATION] "applicant's defence" in that report; and

5. in his report, the Honourable Jean-Marc Labrosse made allegedly erroneous and misleading written recommendations regarding the failure to hand over photographs of a roll of tape and regarding the findings of the appellant's chemistry expert.

[7] On December 21, 2011, the appellant also instituted an action in damages against the respondent, claiming at least $75 million in compensation. His action was largely based on the irregularities listed above that were notably at issue in his application for judicial review in Federal Court docket T-680-11, which had not yet been decided at that time.

[8] On February 1, 2012, the respondent filed a motion to dismiss the action in damages. On February 6, 2012, the prothonotary stayed the proceedings in that action pending final judgment in the application for judicial review made by the appellant in docket T-680-11. Justice Bédard upheld this order of the prothonotary on February 28, 2012, except with respect to certain aspects that are not relevant to this appeal.

[9] In the end, Justice Harrington dismissed the application for judicial review in docket T-680-11 on May 2, 2012, for the reasons set out in the reasons for judgment bearing the neutral citation 2012 FC 505. The appeal from that judgment was likewise dismissed, on

November 7, 2012, for the reasons set out in the reasons for judgment bearing the neutral citation 2012 FCA 282. The Supreme Court of Canada dismissed the application for leave to appeal on March 14, 2013 (file No. 35101).

Impugned decisions

[10] On April 30, 2013, the prothonotary, relying on paragraphs 221(1)(*c*) and (*f*) of the *Federal Courts Rules*, SOR/98-106, allowed the motion to dismiss the action in damages on the basis that, in light of the decision of Justice Harrington regarding the application for judicial review in docket T-680-11, the reasons for which are cited as 2012 FC 505, the appellant's action was without merit, was patently unfounded, disclosed no cause of action, was frivolous and vexatious, constituted an abuse of process and was clearly certain to fail.

[11] The appellant appealed that decision before a judge of the Federal Court, primarily on the grounds that the prothonotary erred in law in failing to consider the principles laid down in *Canada (A.G.) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 (*TeleZone*).

[12] The judge dismissed that appeal, primarily on the basis that the appellant's action in damages [TRANSLATION] "was essentially based on the same grounds as his application for judicial review" (p. 3 of the judge's order). Of the five main grounds on which the appellant based his action and which are set out above, three were explicitly addressed and dismissed by Justice Harrington in his decision regarding the application for judicial review (p. 4 of the judge's order). As for the other two grounds, each of them was addressed and dismissed by the Federal Court in the numerous other proceedings instituted by the appellant, and particularly by Justice Gauthier in an order dated

March 30, 2011, in docket T-1526-10, and by Justice Martineau in an order dated December 16, 2009, in docket T-809-09 (pp. 4 and 5 of the judge's order).

[13] The judge therefore found as follows:

> [TRANSLATION]
> In short, the applicant could have pursued his action despite the dismissal of his application for judicial review if he had raised different grounds that had not been considered in the decision dismissing his application for judicial review. However, as shown in the preceding paragraphs, and despite the fact the he had the opportunity to put forward such grounds, the only arguments that the applicant raised in support of his action in damages were all rejected by this Court in previous proceedings. Accordingly, it would be abusive to allow the applicant to pursue his action in these circumstances, and it would not be the best use of limited judicial resources.

Issues before this Court

[14] The appellant primarily argues that the judge and the prothonotary erred in law in their decisions, (a) in that they incorrectly applied the doctrine of *res judicata* in respect of decisions concerning applications for judicial review relating to public law, so as to bar an action in damages based on private law; and (b) because, contrary to *TeleZone*, they required, as a precondition for an action in damages, that a favourable decision concerning an application for judicial review have been rendered.

Analysis

*Relevance of TeleZone*

[15] First of all, I note that the principles laid down in *TeleZone* do not apply to this case. *TeleZone* dealt primarily with the issue of whether the exclusive jurisdiction of the Federal Court in respect of the judicial review of decisions by a federal board, commission or other tribunal prevents

a litigant from bringing an action in damages against the federal Crown until the decision of such a body on which the action would be based is quashed on an application for judicial review under the *Federal Courts Act*, R.S.C. 1985, c. F-7. The Supreme Court of Canada held that it does not on the ground that the *Federal Courts Act* should be interpreted in such a way as to promote access to justice and to avoid unnecessary costs and delays for litigants wishing to seek remedies against the federal government.

[16] As Justice Binnie noted at paragraph 32 of *TeleZone*, "[t]he enactment of the *Federal Court Act*, S.C. 1970-71-72, c. 1, and the subsequent amendments in 1990 were designed to enhance government accountability as well as to promote access to justice. The legislation should be interpreted in such a way as to promote those objectives".

[17] In his appeal, the appellant confuses the principles laid down in *TeleZone* with those applicable to abuse of process. The judge and the prothonotary did not decide that the appellant was barred from bringing his action in damages because he had not first had the Minister's decision quashed. Rather, they decided that the action was an abuse of process, given that it raised essentially the same questions of law and of fact as those raised in the numerous applications for judicial review made by the appellant. *TeleZone* is therefore of no assistance to the appellant.

*Issue estoppel*

[18] The courts have developed a number of fundamental doctrines to ensure the finality of litigation. These doctrines are (1) issue estoppel, (2) cause of action estoppel, (3) the rule against collateral attack and (4) abuse of process.

[19] This appeal raises issues that involve two of these doctrines that have been notably dealt with by the Supreme Court of Canada, namely, issue estoppel, discussed in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 (*Danyluk*), and abuse of process, discussed in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (*C.U.P.E.*). I will first deal with issue estoppel and then discuss abuse of process in the following section of these reasons.

[20] It is helpful to distinguish between the concepts of *res judicata* (or cause of action estoppel) and issue estoppel. In *Erdos v. Canada (Citizenship and Immigration)*, 2005 FCA 419, 345 N.R. 11 at paras. 15 and 16, Justice Pelletier distinguishes the two concepts in the following manner:

> Cause of action estoppel prevents the relitigation of the same cause of action between the same parties. . . . Issue estoppel precludes the relitigation of the same issue between the same parties, even though the issue arises in the context of a different cause of action.

[21] According to the doctrine of issue estoppel, once the material facts and the conclusions of law or of mixed fact and law have been necessarily (even if not explicitly) determined in earlier legal proceedings, this determination is conclusive: *Danyluk* at para. 24. That said, as Justice Dickson noted in *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 (*Angle*), "[i]t will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment".

[22] Three conditions must be met before issue estoppel can apply (*Angle* at p. 254, *Danyluk* at para. 25):

(1) that the same question has been decided;

(2) that the judicial decision which is said to create the estoppel was final; and

(3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[23] However, meeting these three conditions is not enough to trigger the application of the doctrine. Indeed, an issue estoppel analysis is conducted in two distinct steps. The first step is to determine whether the moving party has established that the three conditions set out above have been met: *Danyluk* at para. 33. If the moving party is successful in this, the court must then determine whether it should exercise its discretion by allowing issue estoppel to be applied: *ibid.*

[24] Therefore, even if it is found that the three conditions for issue estoppel have been met, a court may nevertheless refuse to apply the doctrine in order to ensure that principles of fairness are adhered to. The court's discretion at the second step of the analysis must be exercised with regard to the particular circumstances of each case: see *Danyluk* at para. 67.

[25] Although the doctrine of *res judicata* (*autorité de la chose jugée*) in Quebec civil law may be similar in scope to issue estoppel in common law, the analytical framework based on common law principles is not necessarily entirely applicable to civil law: *Boucher v. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279 at paras. 1, 30 and 32; *Nasifoglu c. Complexe St-Ambroise inc.*, 2005 QCCA 559 (*Nasifoglu*); *Hanna-Harik v. Motor Vehicle Accident Claims Fund*, 172 O.A.C. 355,

228 D.L.R. (4th) 56 (C.A.) at para. 15. Indeed, as Justice Morissette remarked in *Nasifoglu* at paras. 69 and 70:

> [TRANSLATION]
>
> [69] This interpretation of article 2848 C.C.Q. gives *res judicata* (*l'exception de la chose jugée*) a scope similar to that of issue estoppel in common law. However, the doctrine of issue estoppel has a dimension that is not found in *res judicata* (l'*autorité de la chose jugée*) under the civil law. When an exception of this type is raised, be it on a motion to dismiss or as a defence on the merits, a court has the discretion to reject it, even if it is clear that the same issue has already been the subject of a judicial decision in litigation between the same parties. A striking illustration of this is the recent judgment of the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.* That judgment contains an in-depth analysis of the conditions for applying issue estoppel and of seven of the factors that a court may consider in exercising its discretion.
>
> [70] If it were possible to transplant this doctrine into civil law, I am of the opinion that, in the present case, the *res judicata* (*chose jugée*) argument would have to be rejected. Several factors favour such a solution, including the nature of the issue decided in this case and the order in which the two applications were made. However, as I understand it, *res judicata* (*l'autorité de la chose jugée*) in civil law does not allow one to limit the analysis to these considerations and to follow a line of reasoning such as the one set forth in *Danyluk*.

[26] Indeed, in Quebec, *res judicata* (*chose jugée*) is not a principle derived from case law, but a rule codified in article 2848 of the *Civil Code of Québec*, which reads as follows:

> The authority of a final judgment (*res judicata*) is an absolute presumption; it applies only to the object of the judgment when the demand is based on the same cause and is between the same parties acting in the same qualities and the thing applied for is the same.
>
> However, a judgment deciding a class action has the authority of a final judgment in respect of the parties and the members of the group who have not excluded themselves therefrom.

[27] The above-stated conditions for the application of *res judicata* (*chose jugée*) are different from those that must be met for issue estoppel. Moreover, in Quebec law, *res judicata* (*chose jugée*) is an "absolute presumption", as is indicated in the wording of the relevant article of the *Civil Code*

*of Québec*, unlike issue estoppel, which at the second stage of the analysis allows a court to exercise its discretion by refusing to apply the doctrine.

[28] Quebec courts have nevertheless developed a principle of implied *res judicata* (*chose jugée*) whose scope is similar to that of issue estoppel in that *res judicata* (*chose jugée*) bars the reconsideration of an issue on which a decision maker has already ruled: *Srougi c. Lufthansa German Airlines*, [2003] R.J.Q. 1757 (C.A.) at paras. 41 to 45; *Nasifoglu* at paras. 12, 13, 63, and 69 to 70.

[29] Therefore, contrary to the appellant's submissions, I am not satisfied that *res judicata* (*chose jugée*) does not apply in the present case. However, there is no need to make a definitive ruling in this regard, given that both the prothonotary and the judge rather based their decisions on the doctrine of abuse of process.

*Abuse of process*

[30] The doctrine of abuse of process is based on the idea that a court has an inherent discretion to terminate litigation at the preliminary stage in order to prevent abusive proceedings that bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined: *C.U.P.E.* at para. 37, citing *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.) para. 55, *per* Goudge J.A., dissenting, approved 2002 SCC

63, [2002] 3 S.C.R. 307; see also *Syndicat de professionnelles et professionnels du gouvernement du Québec (SPGQ) c. La Boissonnière,* 2013 QCCA 237 at para. 11 (*La Boissonnière*).

[31] With abuse of process, the court's primary concern is not the technical requirement of mutuality of parties, but the more general issue of judicial decision making as a branch of the administration of justice. The doctrine of abuse of process is focused on the integrity of the adjudicative process and does not take into account the parties' interests, their motives or their designation as plaintiff or defendant: *C.U.P.E.* at paras. 43, 45 to 49 and 51.

[32] Indeed as Justice Arbour wrote in *Ontario v. O.P.S.E.U.*, 2003 SCC 64, [2003] 3 S.C.R. 149 (*O.P.S.E.U.*), when the Court focuses its attention on the interests of litigants and the injustices that they may suffer if new proceedings are instituted, issue estoppel is the most appropriate doctrine to apply. Abuse of process, on the other hand, "transcends the interests of litigants and focuses on the integrity of the entire system": *O.P.S.E.U.* at para. 12.

[33] That being said, there are situations where prohibiting relitigation through the abuse of process doctrine could lead to injustices and undermine the administration of justice rather than upholding it. In *C.U.P.E.* at paras. 52 and 53, the Supreme Court of Canada lists a number of factors that a court should consider before exercising its discretion: "(1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context". Furthermore, if "the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness

would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision."

[34] The doctrine of abuse of process is applied by the courts in Quebec civil law. In *La Boissonière*, a Quebec government employee filed six complaints against his union, alleging that the union had breached its duty of representation. The Commission des relations de travail (labour relations board) dismissed the complaints, and an application for judicial review of that decision was dismissed. The employee then filed five private penal complaints. The union brought a motion to dismiss on the grounds of *res judicata*, estoppel / *fin de non-recevoir*, issue estoppel and abuse of process. The motion was allowed but that outcome was subsequently reversed on appeal before the Superior Court. In its judgment on appeal from the decision of the Superior Court, the Quebec Court of Appeal cited the paragraphs from *C.U.P.E.* setting out the principles relating to the doctrine of abuse of process and found that the situation did indeed constitute an abuse of process, thus explicitly recognizing that this doctrine applies in Quebec.

[35] In the present case, it is important to note that since 2009 the appellant has instituted at least 10 proceedings regarding his application to the Minister: *Timm v. Canada (Attorney General)*, 2012 FC 505 at para. 3. As Justice Arbour wrote with regard to the doctrine of abuse of process, "[a]lthough safeguards must be put in place for the protection of the innocent, and, more generally, to ensure the trustworthiness of court findings, continuous re-litigation is not a guarantee of factual accuracy": *C.U.P.E.* at para. 41. In the present case, the appellant is seeking to have the courts

decide the same issues over and over. This is a repetitive use of the judicial system to which the abuse of process doctrine can be applied.

[36] The circumstances of this case were therefore such as to justify the intervention of the prothonotary and the judge so as to put an end to the appellant's action in damages at the preliminary stage in order to prevent an abuse of process.

[37] As the Quebec Court of Appeal recently noted in *Procureur général du Québec c. Hinse*, 2013 QCCA 1513 at para. 144, [TRANSLATION] "if the victim of a miscarriage of justice was unable to have the Minister exercise the power provided for in sections 696.1 et seq. [of the *Criminal Code*] (and others, previously) and suffered prejudice as a result, the victim may claim compensation, but only if the Minister's decision was tainted by bad faith, which the victim has the burden of proving". However, in the judgment rendered in docket T-680-11, Justice Harrington found that there was no bad faith on the part of the Minister's officials. I therefore note that the issues that the Federal Court would have to deal with in an action in damages instituted by the appellant would essentially be identical to those that have already been addressed and dismissed in the appellant's applications for judicial review.

[38] That said, it must nonetheless be considered whether prohibiting relitigation through application of the abuse of process doctrine could lead to injustices and undermine the administration of justice rather than upholding it. None of the above-mentioned factors listed by Justice Arbour in *C.U.P.E.* at paras. 52 and 53 suggest that applying the abuse of process doctrine would undermine the administration of justice in the present case.

[39] In these circumstances, allowing the appellant to pursue his action in damages would be a waste of judicial resources and would constitute an abuse of process.

Conclusion

[40] I would therefore dismiss the appeal with costs.

"Robert M. Mainville"
J.A.

"I agree.
Marc Noël, J.A."

"I agree.
Johanne Gauthier, J.A."

**FEDERAL COURT OF APPEAL**

**SOLICITORS OF RECORD**

**DOCKET:** A-205-13

**APPEAL FROM AN ORDER OF JUSTICE DE MONTIGNY OF THE FEDERAL COURT DATED MAY 15, 2013, DOCKET NO. T-2076-11.**

| | |
|---|---|
| **STYLE OF CAUSE:** | RICHARD TIMM v. HER MAJESTY THE QUEEN |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | DECEMBER 4, 2013 |
| **REASONS FOR JUDGMENT BY:** | MAINVILLE J.A. |
| **CONCURRED IN BY:** | NOËL J.A.<br>GAUTHIER J.A. |
| **DATED:** | JANUARY 20, 2014 |

**APPEARANCES:**

| | |
|---|---|
| Richard Timm | FOR THE APPELLANT<br>(representing himself) |
| Pierre Salois | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| William F. Pentney<br>Deputy Attorney General of Canada | FOR THE RESPONDENT |