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Translation of Decision of the Hon. Justice Moreau RE Leave to file Amended Defences

Fédération Franco-Ténoise v. Attorney General of Canada 2005 NWTSC 108

Date: 2005~~0812~~ 0813
File: S-0001-CV- 2001000345

SUPREME COURT OF THE NORTHWEST TERRITORIES

Between:

Fédération Franco-Ténoise, Éditions Franco-Ténoises/L'Aquilon, Fernand Denault, Suzanne Houde, Nadia Laquerre, Pierre Ranger and Yvon Dominic Cousineau

Plaintiffs

- and -

The Attorney General of Canada, the Attorney General of the Northwest Territories, the Commissioner of the Northwest Territories, the Speaker of the Legislative Assembly of the Northwest Territories and the Languages Commissioner of the Northwest Territories,

Defendants

Commissioner of Official Languages for Canada and the Association franco-yukonnaise

Interveners

TEXT OF THE HONOURABLE JUSTICE M.T. MOREAU'S RULING

[Applications for amendments to the defence]

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[1] The Federal and Territorial Defendants submitted two notices of motion to obtain an order authorizing them to amend their defences, without costs.

[2] The Defendants submit that it is possible that the Plaintiffs' case might be limited by the application of paragraph 2(1) (j) of the *Limitation of Actions* Act, R.S.N.W.T., 1988, c.L-8, in view of the position recently taken by the Plaintiffs regarding the relief being sought. The Defendants submit that the proposed amendment is necessary since it will allow the Court to determine the true issues under litigation, will cause no

prejudice to the Plaintiffs and will not delay the proceedings of the case. They submit that if the Plaintiffs succeed in establishing prejudice, the appropriate relief would be an adjournment or costs.

[3] The Federal Defendant submits that it was only at the time of the hearing before the Court of Appeal in August 2005 on the application for a stay that he understood the Plaintiffs' intention to claim damages for facts dating back to a period prior to 1997. He noted the general nature of the allegations contained in the amended statement. The specific incidents alleged in paragraphs 34 to 47 only date back to May 1997. The Federal Defendant submits that it is not necessary in the present case to present the evidence by affidavit in support of the motion, citing the remarks of Justice Kent in ***Firemaster Oilfield Services Ltd v. Safety Boss (Canada) (1992) Ltd.*** (1996), 47 C.P.C. (3d) 64 (Alta Q.B.) in paragraph 6 and the file provides the relevant elements of the judicial history.

[4] As far as the relief sought in the amended statement, the Federal Defendant submits that he understood that the general damages only related to the specific incidents. He explained that he did not intend to present the argument that the actions that date back to 1982 are not open to relief in the form of a statement or an injunction, referring to the ruling ***Re: Manitoba Language Rights***, [1985] 1 S.C.R 721. Moreover, the Federal Defendant recognizes that the allegations may prove to be relevant to the issue of punitive damages. He argues that the proposed change raise questions of law on a narrow set of facts, so it will not be necessary for the Plaintiffs to restructure their overall presentation. The Federal Defendant also argues that the amendment will require no additional efforts by the Plaintiffs, except (1) to examine some witnesses about the time when the Plaintiff, the Fédération Franco-Ténoise (the "FFT") became aware of the alleged problems; and (2) to prepare the additional legal arguments on the question of limitations.

[5] The Territorial Defendants point out that, pursuant to Rule 133, the Court may allow a change "at any part of the proceedings". They refer to the ruling ***Milfive Investments Ltd. v. Sefel*** (1988), 216 A.R. 196, 1998 ABCA 161, in para. 3:

> We see no reason to doubt the often-stated presumption that any amendment, however late or careless, should be allowed if there is no prejudice which cannot be compensated in costs.

[6] The Territorial Defendants argue that the Plaintiffs will suffer no real prejudice since the latter would have to prepare their legal arguments on limitations, even if this defence had been raised earlier in the proceedings.

[7] According to the Territorial Defendants, the Plaintiffs must assume a significant degree of responsibility for the presentation of the two motions at this point in the proceedings, because of the tardy disclosure of the summaries of some of the testimonies. In 2003, the Territorial Defendants had asked if the Plaintiffs were going to base themselves on allegations other than those contained in the amended statement and, in December 2004, for additional clarifications. They maintain that the question of limitations did not apply in relationship to the specific incidents alleged in the amended

statement. It was only in mid-August 2005, after the disclosure by the Plaintiffs of additional summaries of anticipated testimonies, that they realized that the Plaintiffs were claiming damages for facts prior to 1996 or 1997. Until that point in time, they had understood that the relief sought by the Plaintiffs relating to the prior period was limited to statements or injunctions with prospective operation. According to the Territorial Defendants, it is fair that the parties assume their own costs of this motion. The Defendants had to prepare their file at the last moment because of the tardy disclosure of some of the Plaintiffs' evidence.

[8] The Plaintiffs vigorously oppose the Defendants' motions. They submit that: (1) the Defendants had submitted no evidence to explain the tardiness of their motions; (2) the allegations, which in fact could be found in the statement since January 2000, refer to facts dating from 1982 to the present; and (3) the change would cause them irreparable harm. They note that the proposed amendment could have a considerable impact on the damages being sought, the Plaintiffs having already submitted their brief, which includes the calculation of damages since 1982.

[9] The Plaintiffs presented Mr. Léopold Provencher, Director General of the FFT since July 1, 2003. He testified that an adjournment would cause irreparable harm to the Plaintiffs because of their limited resources, both financial and human. He emphasized that the Plaintiffs' attorney, Maître Lepage, had done an enormous amount of work to bring this matter to trial and that he does not have the resources to redo his preparations based on new parameters. Maître Lepage himself said that he would not be in a position to proceed without an adjournment of three to four weeks to evaluate and adjust his file, in addition to preparing his arguments regarding limits. However, he confirmed that his clients were not seeking an adjournment.

[10] The Intervener, the Commissioner of Official Languages for Canada, supports the Plaintiffs' reasons. She noted that in the ***Milfive*** ruling, the party that opposed the motion did not present any evidence. On this point, Justice Côté observed in para. 2: "Sometimes want of any evidence on one side is eloquent." Moreover, the Intervener argues that she will suffer financial harm in the event of an adjournment.

[11] Rule 133 reads as follows:

> 133. The Court may, at any stage of the proceeding, allow a party to alter or amend his or her pleadings for the purpose of determining the real question in issue between the parties.

[12] The wording of the Rule is essentially the same as Alberta's Rule 132. As Justice Harradence noted in the matter of ***Reed Shaw Osler Ltd v. Wilson***, [1981] A.J. No 693 (C.A.) in para. 40:

> The fundamental principle governing the court's exercise of discretion in allowing amendment of pleadings is whether the opposing litigant will be prejudiced ...

[13] The matter of ***Dipalma v. Smart***, [1996] A.J. No. 752 (Q.B.) dealt with the defendants' appeal of a decision denying an application for change to raise a defence of limitations in a case of damages. Justice Murray reviewed the jurisprudence dealing with applications for changes to proceedings and noted the following on para. 12:

> I understand the law to be as stated by McInnes, J. in ***Theberge v. Salmon River Logging Co. and Parsloe*** (1955-56), 17 W.W.R. 659 (B.C.S.C.) at 661-2 where, quoting from and following the Court in ***Stewart v. North Metropolitan Tramways Co.*** (1885-86) 16 Q.B.D. 178, aff'd L.J.Q.B. 157, His Lordship said:
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> > "In these statements of the law just quoted the principle to be applied is clearly set forth. In that case the amendment if established at the trial would have had the effect of depriving the plaintiff of his right of action against another party. In the present case the plaintiff has lost no such right. If the proposed amendment sought by the defendants herein had been pleaded at the first opportunity it would, if it is a valid plea, have had the effect of defeating the plaintiff's claim just as effectually then as it would now. The plaintiff is therefore not prejudiced by the delay in applying for the amendment."

and Justice Murray continues:

> We are not talking in this case about estoppel. The failure of the defendants to plead the Saskatchewan statute has not caused the plaintiff's *[sic]* to conduct their case any differently than they would have had it been pled initially except possibly to incur additional legal expense which can be fully compensated for in costs. This is not a situation such as that in ***Steward v. North Metropolitan Tramways Co.*** (supra).

{Translator's note: I confirmed with Justice Moreau's Clerk that there was no paragraph 14 to this document}

[15] In the matter ***Canada (Attorney General) v. Ellis-Don Ltd.***, [2000] B.C.J. No. 492, 2000 BCCA 111, the defendant was trying to raise the defence of limitations as a result of examination for discovery by the Plaintiff's attorney. The Court of Appeal pronounced itself as follows:

> If a proposed amendment discloses a reasonable defence, it will normally be granted so the real issue between the parties may be determined and the controversy finally resolved unless there is prejudice to the other side that cannot be compensated by costs. The chambers judge considered that factor and found the prejudice to both sides equally balanced apart from the effect of the agreement. The only other factor he considered was the appellant's delay in bringing the application. That factor alone is rarely considered to be sufficient to preclude an agreement.

[16] The Plaintiffs submit that the amended statement already contained allegations likely to raise questions of limitations. For example, para. 45 alleges that the GNWT 's failure or the deliberate policy to not publish all of its advertisements in French in the Aquilon has financially harmed that institution for at least 11 years. Paragraph 46 alleges that the ongoing reductions in funding from year to year constitute a breach of the June 28, 1984 accord. In para. 61(b), the Plaintiffs are applying for an order requiring the GNWT to print and publish all written acts produced since 1982, and, in para. 61(e), the claim damages due to the breach of linguistic rights since 1982.

[17] On the other hand, the Defendants tried to clarify the evidence supporting the allegations of a systemic problem in the NWT. The clarifications were only received on the eve of the trial.

[18] The Plaintiffs will face some practical difficulties if I allow the amendments being sought. However, in my opinion, these difficulties are not insurmountable in the framework of a six-week trial and, in this case, do not constitute sufficient prejudice that would justify denying the application. I note Maître Lepage's comments during the hearing that the evidence provided by the experts will not be affected because their expert reports do not deal with the mechanism for calculating the damages. Moreover, as the Federal Defendant noted, facts dating back to 1982 may prove to be relevant to allegations of bad faith, even if I accept the defence of limitations.

[19] For these reasons, I grant the Defendants permission to submit their amended defences as proposed by now and the end of the day. I am of the opinion that the amendments are necessary for a full and complete defence of the action and to settle the true questions under litigation.

[20] However, I note that, on July 20, 2005, the Plaintiffs provided the Defendants with the supplementary summaries of witness testimonies. The Defendants could have anticipated the necessity of submitting their motions as of that time but they only did so on the eve of the trial and, in the case of the Territorial Defendants, on the third day of the trial. Maître Lepage noted that he represents the Plaintiffs without the help of other attorneys and [he] prepares his evidence after sittings. Under these circumstances, it is reasonable and fair in view of the lateness of the motions, that the Defendants shall remit an amount by way of costs sufficient to allow Maître Lepage to obtain the assistance of an attorney to undertake the research into the issues raised by the changes to the defences. I order the Federal and Territorial Defendants to remit the provisional sum of $7500 (based on 30 hours of research at $250/hour) – shared equally between the Federal Defendant and the Territorial Defendants to the Plaintiffs – as soon as practicable. The latter shall provide, at the end of the trial, an accounting for this research and, if applicable, any reimbursement in equal shares. However, in view of the objections raised by the Territorial Defendants regarding the disclosure of certain elements of evidence by the Plaintiffs, I am postponing until at the end of the trial my decision on the ultimate responsibility for these costs. Maître Lepage completed his direct examination of the first witness for the Plaintiffs. I grant him permission to ask additional questions of Mr. Lamoureux regarding the limitations defence, if he deems it to be necessary.

[21] As far as the costs relating to his motion, which has taken up half a day within the trial, the costs will be a charge to the trial.

/signed/
M.T. Moreau
J.S.C.

Heard: September 9, 2005
Rendered: September 12, 2005
Reasons submitted: September 13, 2005

Maître R.J.F. Lepage
Balfour Moss
Attorney for the Plaintiffs

Maître R. Tassé
Maître M. Faille
Gowling Lafleur Henderson LLP
Attorneys for the Defendants

Maître A. Préfontaine
Attorney for the Defendant
Attorney General of Canada

Maître P. Giguère
Attorney for the Intervener
Commissioner of Official Languages for Canada

Court file # S-0001-CV-2001000345

SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

FÉDÉRATION FRANCO-TÉNOISE, ÉDITIONS FRANCO-TÉNOISES/L'AQUILON, FERNAND DENAULT, SUZANNE HOUDE, NADIA LAQUERRE, PIERRE RANGER AND YVON DOMINIC COUSINEAU

Plaintiffs

- and –

THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES, THE COMMISSIONER OF THE NORTHWEST TERRITORIES, THE SPEAKER OF THE LEGISLATIVE ASSEMBLY OF THE NORTHWEST TERRITORIES and THE LANGUAGES COMMISSIONER OF THE NORTHWEST TERRITORIES,

Defendants

- and –

THE COMMISSIONER FOR OFFICIAL LANGUAGES FOR CANADA AND THE ASSOCIATION FRANCO-YUKONNAISE

TEXT OF THE RULING OF THE HONOURABLE JUSTICE M.T. MOREAU

[Applications for amendments to the defence]
