



ACTING IN CONCERT TO SEND LAWFUL EMAILS IS NO CAUSE OF ACTION

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PRECIS: In *Carignan v. Bourgeois* [2009 QCCS 4047] the Quebec's Superior Court accepted to dismiss summarily an action claiming collusion between the defendants, as it found the action was clearly unfounded and doomed to fail.

Facts

In 2005, the plaintiff, Michel Carignan (hereafter: "Carignan"), was a candidate for mayoralty in the small town of Repentigny, Province of Quebec. During the campaign, the plaintiff distributed 20, 000 copies of a pamphlet called "L'Partisan" which was highly critical of his opponent, the then Mayoress, Chantal Deschamps (hereinafter "Deschamps"). Both the name and visual appearance of the said pamphlet were very similar to those of "L'Artisan", a weekly newspaper published in the area for over 30 years by Médias Transcontinental S.E.N.C. (hereafter: "Transcontinental").

Following protests from Deschamps' organizing committee and from many citizens, Transcontinental published a statement in another of its regional newspaper, denying any association with the pamphlet distributed by Carignan. Transcontinental also notified Carignan and his party to stop distributing the pamphlet and requested a public statement to the effect that there was no connection between "L'Partisan" and "L'Artisan", but to no avail.

Further to the re-election of Deschamps, Transcontinental received numerous complaints from a group of her supporters (now defendants in this action) complaining about the confusion created by the similarity in title and presentation of the publication L'Partisan to L'Artisan and urging Transcontinental to take legal action against the individuals responsible for it. In almost every email, they alleged

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that numerous voters who read “L’Partisan” were misguided into thinking it was in fact “L’Artisan” that was so critical of the Mayoress’ administration.

Transcontinental successfully sued Carignan and his political party for passing off and was awarded damages in the amount of \$22,500. This condemnation prompted Carignan to institute his own action against those supporters, in which he claims damages of \$225, 000. His contentions are that the defendants conspired to harm him, by sending emails to Transcontinental, in order to help it gather evidence of confusion that was later used in the action against him.

Following the plaintiff’s examination for discovery, defendants were seeking the dismissal of the action. They relied on the then applicable section 75.1 of the *Quebec Code of Civil Procedure* . However, while the judge was deliberating, a new law was enacted and section 75.1 was repealed in favour of new provisions attributing broader powers to judges with regards to preliminary dismissal of an action. In particular, judges can now dismiss an action without being limited to the analysis of the answers (or lack of answers) provided by a party during an examination for discovery.

Judgment

Justice Fraiberg identified two questions relevant to this case. The first one was whether the defendants committed a tort when acting in concert to convince Transcontinental to pursue legal action against Carignan. In the event the Court believed the defendants were civilly liable for their conduct, it would then need to determine whether the damages claimed by Carignan were caused by the said tort. Since the Judge concluded that neither of these questions could be answered positively, it granted the defendants’ Motion for Summarily Dismissal of the Action.

When analysing the existence of a tort, the judge observed that the plaintiff’s claim was rooted in the collusion of the defendants, aimed at providing Transcontinental with evidence of confusion that could be used in subsequent legal procedures, rather than on the content of the emails. Justice Fraiberg indicated that there was nothing wrong with working together to send emails, as long as the content of the said emails was lawful. An examination of the contentious emails revealed that the content was perfectly legitimate as the defendants were justified to assert the similarity of the publications and to complain that some citizens might have believed that the articles were in fact written by journalists from “L’Artisan”. Moreover, the possibility of confusion was admitted by Carignan himself during his trial against Transcontinental and again during his examination for discovery pertaining to the current action. Therefore the defendants can hardly be liable for complaining about it.

On the matter of the causal connection between the damages and the alleged tort, the judge affirmed that there was no direct link with the damages claimed. A plaintiff in a passing off action does not have to demonstrate that individuals were in fact confused. In order to meet his burden of proof, a plaintiff is only required to demonstrate that there was a possibility of confusion for the public in general. Such confusion could easily be established by the simple comparison of the publications at issue and therefore, the emails sent by the defendants were not essential for Transcontinental's legal action to succeed. Moreover, the Court affirmed that the chronology of events clearly demonstrated that Transcontinental planned on pursuing legal action against Carignan long before it received the defendants' emails, the notice having been published several days before it received the emails.

The judge also dismissed the claim for punitive and exemplary damages. In his reasons, he noted that none of the plaintiff's rights were in fact infringed by the defendants and therefore, no reparation could arise. The emails were sent several days after the election. As a result, neither Carignan's freedom of expression, nor his right to be candidate at an election were infringed. According to section 49 of the *Charter of Human Rights and Freedoms* (a provincial quasi-constitutional law protecting individual rights and freedoms in the Province of Quebec) no damages can be claimed in the absence of infringement of rights protected by the said Charter. The judge added that, in fact, it would be the defendants' freedom of expression and opinion that would be infringed if they were denied the right to complain about the plaintiff's actions.

For the foregoing reasons, the Court accepted the defendants' Motion to Dismiss the Action.



