John E. L. Duquet v. La ville de Sainte-Agathe-des-Monts

I. The Background

While the common law provinces have long recognized the utility and the availability of the declaratory action,[1] Quebec has steadfastly refused to allow its judges to express opinions unless, at least formally, a more "practical" problem was before them. As late as 1964, Taschereau J. stated:

> Dans la province de Québec l'action déclaratoire n'existe pas. Ses tribunaux ne donnent pas de consultations légales; ils jugent les litiges. Les questions académiques et théoriques où aucun *lis* n'existe leur ont toujours été étrangères. La seule crainte que peut avoir un citoyen qu'un jour une action possible peut être instituée contre lui ne justifie pas *per se* un recours en justice. La porte des tribunaux n'est pas ouverte à quiconque n'a pas d'intérêt né et actuel dans un litige.[2]

To remedy this rigidity, the Legislature introduced into the 1965 Code of Civil Procedure, articles 453 and following,[3] which were designed to provide quick solutions to very clear-cut problems and article 462 which opened the door to the type of declaratory action in existence in other provinces. It could therefore have been argued in 1966 that a fairly broad spectrum of recourses had been created, and that, subject to the limitations contained in the Code, a declaration was more available to Quebecers than to those living in common law jurisdictions.[4] However, glosses tending to limit the use of these recourses began almost at once. While the courts may not have been adverse to the principle of declaratory actions in general, they resisted fiercely the pressure to give semi-abstract opinions on law which would then bind the parties. The courts found it difficult to accept the legislators' intention to create a special channel enabling plaintiffs, at their option, to circumvent the long delays and cumbersome procedures of ordinary actions.

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[1] *E.g., Dyson* v. *A.G.* [1911] 1 K.B. 410.

[2] *Saumer* v. *A.G. (Que.)* [1964] S.C.R. 252.

[3] Art.453, C.C.P. states:

> "Any person who has an interest in having determined immediately, for the solution of a genuine problem, either his status or any right, power or obligation which he may have under a contract, will or any other written instrument, statute, order in council, or resolution or by-law of a municipal corporation, may, by motion to the court, ask for a declaratory judgment in that regard."

[4] See de Smith, *Judicial Review of Administrative Action* 3rd ed. (1973), 425 for what the effect of a declaration may be.

The result was that, save for a few established areas (such as wills),[5] declaratory judgments on motion became extremely difficult to obtain.

Perhaps the clearest judgment expressing the view prevailing until 1976 was the decision of Mr Justice Rothman in *Malartic Hygrade Gold Mine (Quebec) Ltd* v. *Quebec Securities Commission*:

> It is now well settled that the provisions in the Code of Procedure relating to declaratory judgment constitute an exceptional remedy, to be interpreted strictly, and to be limited to those specific cases, contemplated in article 453 C.P. ... . It is equally well settled that article 453 C.P. contemplates a preventative other than a curative procedure. Quite clearly, it is not to be used to assert disputed or litigious rights which should properly be tried by ordinary action or other procedure contemplated under the Code ... . Finally, the declaratory judgment procedure cannot be used to require decision from the Court on matters outside of its jurisdiction.[6]

It would be tempting to analyze at length (and with numerous examples) each of these elements. The second rule, in particular, provides fuel for truly casuistic distinctions and arguments. Fortunately, such analysis may be found in an article by Sarna whose conclusions in relation to the preventive-curative dichotomy illustrate both the difficulties and the practical effects of the distinction.

> The distinction between a preventive and curative measure is at best only theoretically [possible] ... . [I]t is contended that the distinction is a mere restatement of the view that the declaratory motion is not a vehicle for shortcutting the delays of direct actions where certain demands, in the discretion of the court, properly belong.[7]

It is clear that the courts thought it inconceivable that the legislators would want to create a new procedure, parallel to the old ones, giving certain plaintiffs an option between a "quick" and a "slow" judicial process. Therefore, they attempted to restrict the new procedure to inchoate disputes which could not yet be litigated in the ordinary way. But since courts are not there to give gratuitous opinions and since the Code itself demanded the presence of a real dispute, one could not ask for solutions to theoretical legal problems. Thus the declaratory motion was open only in those delicately calibrated situations in which a dispute had arisen but was not yet ready for ordinary litigation. The defining of such situations produced refinements of thought which would

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[5] See, *e.g.*, *Marina Dunning* v. *The Royal Trust Co.* [1975] C.S. 896.

[6] [1974] C.S. 398, 399.

[7] Sarna, *The Scope and Application of the Declaratory Judgment on Motion* (1973) 33 R. du B. 493, 497.

have pleased scholastic philosophers and the number of potential declaratory judgments was drastically reduced by this new dogma. While it could not be said that articles 453 and following fell into desuetude during the period prior to the *Duquet* decision, it is clear that these articles were not fully exploited.

This state of affairs provoked much criticism. While no one wished to give certain parties ways of evading proper procedural delays, it was difficult to see why a problem that could be formulated clearly enough to be settled without the delays and disruptions which invariably attend a law suit should not be so settled. Secondly, if a point of law was truly in doubt, it was surely advisable to solve it clearly, without creating the distortions that issues of fact frequently create in plenary hearings. It is difficult to disagree with the conclusions of Professor Claude Ferron:

> Il y aurait peut-être lieu de revaloriser cette procédure et d'y recourir plus souvent en cas de silence, d'obscurité ou d'insuffisance de la loi ou de tout écrit visé pour l'article 453 C.P.[8]

While Professor Ferron probably envisaged a legislative review, the Supreme Court of Canada was able to accomplish everything he and other "activists" hoped for in its recent judgment of *John E.L. Duquet* v. *La ville de Sainte-Agathe-des-Monts*.[9]

II. The Judgment

John Duquet owned a house in the resort town of Ste-Agathe-des-Monts. The house was situated in an outlying part of the town, where no normal municipal services were available. Nevertheless, the town decided to apply its by-law concerning the collection of water tax from property owners to Mr Duquet. Duquet's reply was to serve a motion for declaratory judgment to the effect that the town had no right to tax him without providing the benefits of the tax.

At first instance,[10] the Superior Court decided that the proper recourse was an action to annul the by-law, holding that a declaration could not lie in a "curative" matter and that therefore he had chosen the wrong procedure. The Court of Appeal confirmed, adding the following:

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[8] Ferron, *Le jugement déclaratoire en droit québécois* (1973) 33 R. du B. 378, 385. See also the views of Dussault in *Traité de Droit Administratif Canadien et Québécois* (1974), T.II, 1030.

[9] [1977] 2 S.C.R. 1132.

[10] C.S. Terrebonne no 67203, Mar.7, 1974 (Legault J.).

> Dépasser les limites rigoureuses, fixées par l'article 453 n'aurait qu'un effet, celui de détruire l'économie de notre *Code de Procédure civil* en créant un second système d'institution et d'audition des litiges ... .[11]

Undaunted, Duquet pressed his suit to the Supreme Court of Canada, where his persistence was finally rewarded:

> Avec respect, je dois dire que la décision de la Cour d'appel fait rien moins que rayer du *Code* l'art.453. En effet, quand aura-t-on une "difficulté réelle" qui ne constitue pas un "litige" ... .[12]

This first blow at the academic preventive-curative distinction was strengthened by the following comment about article 453: "Il est évident que l'on a voulu rendre la requête largement applicable."[13]

Finally, Mr Justice Pigeon enumerated the following fundamental rules which can be viewed as a fairly exhaustive summing up:

> 1) [P]our décider si le cas peut faire l'objet d'une requête en jugement déclaratoire, il n'y a pas lieu de recherche si la demande est préventive ou curative, on doit s'arrêter seulement à considérer si elle entre dans le cadre de l'art.453;
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> 2) la distinction n'étant pas d'ordre public, celui qui veut se plaindre de ce qu'on aurait dû procéder par action doit le faire dès la présentation de la requête et il faut le considérer comme y ayant renoncé s'il conteste par écrit.[14]

It is true that Pigeon J. did not intend to deprive the Court of all discretion:

> "[R]ien n'empêche le juge, s'il croit que l'on abuse de cette procédure, d'ordonner que l'affaire soit instruite comme s'il s'agissait d'une action."[15]

Despite this, it is clear that Mr Justice Pigeon intended a radical relaxation of impediments to the use of article 453.[16]

III. The Conclusions

It is obvious that the elimination of the preventive-curative distinction will render the declaration more accessible to litigants in the way in which Sarna and Ferron may have desired.[17] We are

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[11] [1975] C.A. 764, 765.

[12] *Supra*, note 9, 1138.

[13] *Ibid.*, 1141.

[14] *Ibid.*, 1142.

[15] *Ibid.*

[16] For reasons immaterial to the present essay the judgment concluded that, on the merits, Duquet and not the municipality was correct in interpreting the *Cities and Towns Act*, R.S.Q. 1964, c.193, and therefore the declaration was made in favour of Duquet; *supra*, note 9, 1146.

[17] *Supra*, notes 7 and 8.

likely to see new vigour in the procedure and many unnecessary delays and uncertainties will now be avoided. However, a note of caution should be sounded. Even if the view of the courts before *Duquet* was logically untenable, it was prompted by genuine fears about abuse of legal process. If an injustice is not to be committed by too strong a swing of the pendulum, a number of limitations will have to be kept in mind. Mr Justice Pigeon mentioned one:

> [I]l ne faut pas oublier que même interprété largement, l'art.453 ne permet pas de demander une condamnation à payer une somme d'argent."[18]

Then, as we have already seen, he went on to mention judicial discretion as a check on abuse.

The nature of this judicial discretion is not one which is easy to formulate. In the case of *R.* v. *Wray*,[19] the Supreme Court decided that the discretion which judges have to exclude prejudicial evidence is a very narrow one. On the other hand, judges have been given very great discretion in the assessing of witnesses and the making of findings of the law, and the principle of restraint in the courts of appeal is too well established to require authority.

It is suggested that in this case, the discretion would be a narrow one, similar to the one in *R.* v. *Wray*. It would probably be significant only in preventing trivial or totally improper applications and this would certainly seem to be the intention of Mr Justice Pigeon. The judicial discretion should, therefore, be viewed as an important but narrow restriction on the use of article 453 and following. On the other hand, we must remember that only the preventive-curative distinction has been eliminated, and not the other limitations on declaratory actions. Disputes must satisfy all the exigencies of article 453 in order to fall under it.

In his book on Canadian administrative law, Reid brought up another restriction: "A privative clause may effectively bar an action for a declaration."[20] Although Reid did not address himself specifically to the problems of Quebec, the fact that administrative law recourses are usually more difficult to obtain here than elsewhere would indicate that the statement would apply. There is no reason

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[18] *Supra*, note 9, 1142.

[19] (1970) 11 D.L.R. (3d) 673 (S.C.C.).

[20] Reid, *Administrative Law and Practice* (1971), 405. This has recently been confirmed in *Pierre Pelletier* v. *Jean-Marie Trudel et al* (C.S.M. no 500-05-018-536-761), a case in which the Hon. Mr Justice Lysyk refused to issue a declaration regarding Quebec's *Election Act*, R.S.Q. 1964, c.7, apparently because of a privative clause. The judgment was unmotivated. But see Allen, *Law and Order* 3rd ed. (1965), 230 for the opposite view.

to think that the *Duquet* case has in any way changed this and that article 453 can be used where the court has otherwise no jurisdiction.

This provides a means for the legislators to avoid a proliferation of declaratory actions where such proliferation would seem undesirable. Given this very powerful weapon, there is no reason to think that the *Duquet* case will weaken unduly the position of the Legislature in our system of justice.

Another point left open is whether article 453 and following can be used to obtain declarations that certain statutes are *ultra vires*. That a declaratory *action* under article 462 of the Code of Civil Procedure may be used for this purpose is now clear[21] — but can the motion make this a virtually immediate remedy? As we have seen, Mr Justice Pigeon attached great importance to the wording of article 453.[22] If literal interpretation is the rule, then invalidation of a statute (or contract) may lie outside the scope of the article, which only speaks of "rights, powers or obligations under a contract, etc., ...", seemingly taking the instrument's validity for granted. This is clearly a matter which requires judicial clarification.

The *Duquet* case itself is an example of a declaration that a regulation is *ultra vires*. That, however, could be construed as a determination of Mr Duquet's rights under the *Cities and Towns Act*,[23] and not as a declaration of nullity of an independent statute or contract. In short, it is not clear whether the effect of the *McNeil* case[23a] in which a declaratory action under article 462 of the Code of Procedure could be used to declare certain statutes *ultra vires* may be cumulated with the effect of the *Duquet* case.

The precise application of the *Duquet* case has yet to be worked out by our courts. Cases which followed *Duquet* have not established a definite "activist" or conservative trend.

Zenith Radio Corporation of Canada Ltd et L'Ordre des Audioprothesistes du Québec quotes *Duquet* and accepts the disappearance of the preventive-curative distinction.[24] On the other hand,

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[21] See *Thorson* v. *A.G. (Canada)* [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1 and *McNeil* v. *Nova Scotia Board of Censors* (1975) 5 N.R. 43 (S.C.C.). These cases did not originate in Quebec, but one cannot see why they would not apply.

[22] *Supra*, note 9, 1142.

[23] R.S.Q. 1964, c.193.

[23a] *Supra*, note 21.

[24] [1976] C.S. 1758, 1759.

Charette v. *Vincent*,[25] although it grudgingly accepts the same change, is more restrictive in tone.[26]

The Court of Appeal in *Voghel* v. *P.-G. (Qué.)*.[27] faced the criticisms levelled at it by Mr Justice Pigeon in *Duquet*. Mr Justice Rinfret quoted at length the most severe of the remarks in the Supreme Court. In no uncertain terms, he defended the old line of jurisprudence.[28] He concluded:

> Je me dois pourtant d'accepter cette décision du Tribunal supérieur; mais j'avoue le faire avec réticence vu la profonde perturbation qu'elle va sûrement causer dans l'administration de la justice.[29]

Ironically, Mr Justice Rinfret proceeded to express the hope that the legislator would intervene to restore the now discarded limitations on the use of article 453. It is probably safe to assume that although the Court of Appeal has bowed to the Supreme Court, it will give as restrictive a reading to *Duquet* as it can reasonably bear.

The case which gives grounds for the most optimism is *North America Business Equipment Ltd* v. *Tele-Star Communications Inc.*.[30] In this judgment, Vallerand J. denied the right to invoke the ordinary dilatory and declinatory exceptions to motions brought under article 453. The reason was that the article was intended to provide *quick* solutions; cumbersome procedures which would detract from this purpose would defeat the spirit of the Code.

It is to be hoped that other judges will follow this example and re-examine article 453 in the light of the Supreme Court's decision. For a number of years, it has been clear that article 453 was failing to fulfil its purpose. It is gratifying to see that the Supreme Court is trying to rectify matters without recourse to legislation.

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[25] [1976] C.S. 1760.

[26] It was held that the S.C.C. decision in *Duquet* as to the use of art.453 as a curative measure did not enable the Court to modify the words of a document so as to change their sense; the purpose of art.453 was seen to enable an applicant to have confusing or ambiguous terms clarified by way of declaration by the Court. The *ratio decidendi* (*i.e.*, the fact that courts cannot *modify* the instruments which they interpret under art.453) is unimpeachable.

[27] [1977] C.A. 197.

[28] *Ibid.*, 199. He cited, *inter alia*, *Bellerose* v. *Bellerose* [1969] C.S. 121; *Roy-Terreau* v. *Chalifour* [1969] C.S. 214; *Fefferman* v. *Bentley's Cycles and Sports Ltd* [1969] B.R. 806; *Lescale Investments Ltd* v. *Ville de Montréal* [1972] C.A. 498; and *Laflamme* v. *Drouin* [1973] C.A. 707.

[29] *Supra*, note 27, 201.

[30] C.S.M. no 500-05-021-699-776, Jan. 19, 1978 (Vallerand J.).

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