Saumur v. The Attorney-General for Quebec [1]

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Actions — Practice and Procedure — Declaratory Judgments in Quebec — Validity of Provincial Statute — Necessary interest required to institute an action — An Act respecting Freedom of Worship and the Maintenance of Good Order, 2-3 Eliz. II, c. 15 (S. Que., *1953-4)*

Shortly after Saumur had in 1953 (in a Supreme Court decision [2] holding certain Quebec City by-laws invalid as infringing the Freedom of Worship Act [3]), vindicated his right freely to distribute his religious pamphlets, the provincial Legislature enacted a statute [4] prohibiting on pain of fine and imprisonment dissemination, by speech in public places, by press, radio or television, or in publications distributed from door to door or in public places, of matter

> "containing abusive or insulting attacks against the practice of a religious profession or the religious beliefs of any portion of the population of the Province, or remarks of an abusive or insulting nature respecting the members [in French the much stronger words "propos de caractère outrageux ou injurieux *pour* les membres" — italics added] or adherents of a religious profession."

This statute purported in effect to sweep away the right publicly to disseminate opinions offensive to others, and the appellant sought to have it declared invalid as dealing essentially with civil liberties —

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[1] [1964] S.C.R. 252; (1964) 45 D.L.R. (2d) 627; sustaining [1963] B.R. 116; (1963) 37 D.L.R. (2d) 703. Proceedings on exception to the form: [1956] B.R. 565; (1956) 5 D.L.R. (2d) 190.

[2] [1953] 2 S.C.R. 299; see also [1952] B.R. 475.

[3] A pre-Confederation statute of the Legislature of the Province of Canada; reserved for the signification of Her Majesty's pleasure, August 30, 1851; assented to by the Queen in Council May 15, 1852; proclaimed by the Earl of Elgin in the Canada Gazette, June 9, 1852. Statutes of Canada 14-15 Vict. c. 175; Consolidated Statutes of Canada, 1859, c. 74; continued in R.S.Q. 1888, Art. 3439; R.S.Q. 1909, Art. 4387; R.S.Q. 1925, c. 198; R.S.Q. 1941, c. 307.

[4] An Act Respecting Freedom of Worship and the Maintenance of Good Order 2-3 Eliz. II c. 15 (S.Q., 1953-4).

freedom of thought, conscience, and expression — and as such beyond provincial legislative power. The statute — if not in contemplation of law, at least in public notoriety — was especially directed at the appellant's sect, the Witnesses of Jehovah, and he accordingly sought a declaration of its invalidity against the Attorney-General for Quebec, the City of Quebec, and the head of the Provincial Police. The Superior Court, upholding the validity of the statute, dismissed his suit; the Court of Queen's Bench, declining to hear the constitutional question, dismissed his appeal, on the ground that he had in any event no cause of action.

In an opinion delivered in French by the Chief Justice, a Full Bench dismissed the appeal to the Supreme Court of Canada on the grounds, apparently, (a) that Saumur had no interest or title to sue, no right infringed, no cause of action; (b) that the Courts do not give advisory opinions or legal consultations or decide academic questions; and (c) that there is in Quebec with a few statutory exceptions no declaratory judgment.

A unanimous Court pronounced with one voice on a seemingly self-evident matter; and indeed, the first and second of these reasons were so obviously sound, the resulting dismissal of the appeal so plainly correct, as to cause the third ground to be glossed over. The first two grounds are in effect only a refusal to give an advisory opinion, and if that were the only result of this case, the appellant might derive some consolation from learning that George Washington himself was unable to elicit legal opinions on Franco-American relations from a Supreme Court every member of which he had appointed, and on partisan grounds to boot. But Taschereau C.J.'s opinion goes much further; it purports virtually to wipe the declaratory judgment from the law of Quebec. This would be sufficiently serious if decided with a clear understanding of what was being done; but when the "declaratory action" is in one breath identified [5] with "legal consultations", "academic and theoretical questions", "absence of *lis*", "mere fear of possible suit some day", and is furthermore coupled [6] with a discussion of advisory opinions given on references by federal and provincial governments, the question arises whether we are not in the presence of an elementary confusion between actions for declaratory judgments and actions where there is no actual controversy or conflict between existent legal interests.

The difference between advisory opinions and declaratory judgments was well explained by the United States Supreme Court when

[5] [1964] S.C.R. 252 at 257.

[6] *Ibid.*, at p. 256.

it sustained [7] the Federal Declaratory Judgments Act against the charge that the act provided for advisory opinions in violation of the strict constitutional separation of the judicial power from the executive and legislative powers. In the words of Chief Justice Hughes:

> "The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests... It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts... Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages... And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required."

Little study is needed of experience in other jurisdictions to convince of the economy and efficiency of the declaratory judgment in doing justice. The prerogative writs and direct actions in nullity — both well-established and quite respectable in Quebec — already in many cases free the parties from the need to commit themselves irrevocably to their own views of their rights: no one challenges the decisions of administrative tribunals by waiting until the officers of the law come to enforce their orders, and by then resisting them in order to bring an assault case before the courts. Those with legal interest to sue can take appropriate proceedings immediately. By generalising this principle, the declaratory judgment covers appropriate situations not already dealt with by prerogative writs or other actions.

Desirable in itself, the declaratory judgment is easily founded on statutory texts in Quebec. The Chief Justice himself points to Article 509 of the Code of Civil Procedure, which allows court decisions on disputed questions of law arising from agreed submissions of fact. Of course, the Chief Justice is quite right in — literally — underlining the fact that that section does not allow the obtaining of opinions — so that it avails the appellant nothing — but that section shows how little reason there is to condemn gratuitously the declaratory judgment for its guilt by supposed association with the advisory opinion. A basis can be found in Article 3 of the Code of Procedure whose very object is to avoid frustrating the right for lack of a remedy. No one proposes to infringe Article 77, which requires actual interest in legal proceedings.

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[7] *Aetna Life Insurance Co.* v. *Haworth* (1937) 300 U.S. 227, 240-41.

Cursory examination of such works as Zamir's study, *The Declaratory Judgment*,[8] easily replaces suspicion of the declaration with conviction of its great value. Fortunately, the matter is not entirely closed in Quebec. The Court rightly ruled that Saumur had no interest to sue; that, surely, is an objection stopping the matter *in limine*, and rendering *obiter* the *dictum* that if he had had an interest to sue, he could not have done so by action for declaratory judgment. Furthermore, the Court did not address itself to the distinction between advisory opinions and declaratory judgments; its decision is therefore distinguishable as a condemnation, properly speaking, of advisory opinions, not of declaratory judgments. Otherwise, this civil law judgment by a civil law judge in a civil law jurisdiction must survive to mock the civilian jurists who so readily taunt the common law for its obsession with the remedy to the exclusion of the right. Being over one hundred years old, the declaration qualifies as an antique; its importation into Quebec (or its discovery therein) can surely not now offend even more conservative tastes. If (to change the metaphor) the rule of *obiter dictum* can deflect the inadvertent blow given by this case, the Supreme Court can surely re-examine this promising child, the declaratory judgment, and, on the next occasion, refrain from wilfully destroying it.

[8] I. Zamir, *The Declaratory Judgment* (London, 1962).