Federal Court Cour fédérale

Date: 20181108

Docket: T-1563-17

Citation: 2018 FC 1125

Ottawa, Ontario, November 8, 2018

PRESENT: The Honourable Mr. Justice Norris

BETWEEN:

DAVID RODRIGUEZ

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

JUDGMENT AND REASONS

I. OVERVIEW

[1] In the last federal election, David Rodriguez was unimpressed with the candidates from which he had to choose. His preferred option was "none of the above." However, if he were to state this preference on a ballot, the ballot would be rejected under the *Canada Elections Act,* SC 2000, c 9 [*CEA*], along with all the others that had not been filled out properly, and no record would be kept of his choice to reject all the available candidates. Mr. Rodriguez contends that

this is an unjustified limitation on his right to freedom of expression as guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms*. He seeks a declaration to this effect under section 24(1) of the *Charter.* He does not seek a remedy under section 52(1) of the *Constitution Act, 1982* with respect to any part of the *CEA*.

[2] The defendant, Her Majesty the Queen, has brought a motion for summary judgment on Mr. Rodriguez's action under Rule 213 of the *Federal Courts Rules*, SOR/98-106. The defendant contends that there is no genuine issue for trial because the action depends on a rights claim under section 2(b) of the *Charter* grounded in a positive obligation on the part of government which Mr. Rodriguez cannot establish. In the alternative, the defendant contends that even on a negative obligation conception of the right guaranteed by section 2(b) of the *Charter*, there is no genuine issue for trial. For his part, Mr. Rodriguez agrees that his claim cannot succeed if it depends on a positive right to freedom of expression but he maintains that it does not and that, at the very least, there should be a summary trial of his action.

[3] For the reasons that follow, I agree with the defendant that there is no genuine issue for trial. The determinative issue – the characterization of the right to freedom of expression upon which the claim depends – must be decided against Mr. Rodriguez. Briefly, the *CEA* does not prevent Mr. Rodriguez from expressing his rejection of all the available candidates on a ballot. While it does prevent him from communicating this opinion to others via this medium, this would constitute a limitation on his rights only if section 2(b) of the *Charter* obliged the government to permit this medium to be used for this purpose. It is plain and obvious that the necessary conditions for such a positive obligation on the part of the government cannot be

established. Accordingly, the defendant's motion is granted and Mr. Rodriguez's claim is dismissed.

II. PRELIMINARY ISSUE – WHO ARE THE PROPER DEFENDANTS?

[4] In his Amended Statement of Claim, Mr. Rodriguez named Her Majesty the Queen, the President of the Queen's Privy Council for Canada, and the Attorney General of Canada as defendants. Along with the motion for summary judgment, the defendant Her Majesty the Queen moved under Rule 76 of the *Federal Courts Rules* for an order removing the Attorney General of Canada and the President of the Queen's Privy Council for Canada as defendants. While initially resisting the motion to remove the Attorney General of Canada, in the end Mr. Rodriguez acceded to the defendant's request.

[5] Mr. Rodriguez commenced this matter as an action. In the Federal Court, an action against the Crown is brought against Her Majesty the Queen. If it is not a plaintiff's intention to seek relief against the Attorney General in her personal capacity, it is redundant to include the Attorney General of Canada as a party (*Kealey v The Queen*, [1992] 1 FC 195 at para 64; *Mandate Erectors and Welding Ltd v The Queen*, 1996 CanLII 3818 (FC)). I take the same principle to apply to the President of the Queen's Privy Council. Since the present action does not seek relief against either of these defendants in their personal capacity, the sole proper defendant is Her Majesty the Queen. For these reasons, at the hearing of this motion I directed that the other two defendants be removed from the proceeding. The Style of Cause has been amended accordingly.

III. BACKGROUND

[6] When he filed his Statement of Claim in October 2017, Mr. Rodriguez was a 26 year-old resident of Gatineau, Quebec, and a student in the English Common Law program in the Faculty of Law at the University of Ottawa.

[7] Mr. Rodriguez is a naturalized Canadian citizen. Section 3 of the *Charter* guarantees to him and to every other Canadian citizen "the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."

[8] On October 19, 2015, a federal election was held to elect members to the House of Commons of the 42nd Parliament. Mr. Rodriguez did not vote in this election "due to the inability to officially express dissatisfaction with all of the candidates available to him," according to his Amended Statement of Claim.

[9] Mr. Rodriguez contends that this circumstance is the result of several provisions of the *CEA*. The pertinent provisions are set out in the Annex to these reasons.

[10] Generally speaking, votes in federal elections must be cast on ballots prepared in accordance with section 116 of the *CEA*. Under section 117, a ballot lists the names of the candidates running in an electoral district in alphabetical order and their political party affiliation or "independent" status, as the case may be.

[11] A properly completed ballot records a single vote cast for one of the candidates listed on the ballot. Electors can mark their ballots in any number of other ways but this will typically cause the ballot to be rejected when the votes are counted. Under section 284(1) of the *CEA*, the deputy returning officer must reject a ballot if, among other things, it has not been marked in a circle at the right of the candidates' names; if it has been marked in more than one circle at the right of the candidates' names; if a vote has been cast for a person other than a candidate in the electoral district (cf. *CEA* section 76); or if there is any writing or mark on the ballot by which the elector could be identified.

[12] As a result, if Mr. Rodriguez were, for example, to write in the name of someone who was not a candidate, his ballot would be rejected. The same would be true if he wrote "none of the above" on his ballot or simply left it blank to demonstrate this choice.

[13] When the time for voting in an election ends, under section 287(1) of the *CEA*, the deputy returning officer for each electoral district is responsible for preparing a statement of the vote that sets out the number of votes in favour of each candidate and the number of rejected ballots. The *CEA* does not require the deputy returning officer to report on which provision of the Act caused a ballot to be rejected.

[14] Under section 533(a) of the *CEA*, the Chief Electoral Officer is required to prepare a report for the House of Commons that states, by polling division, the number of votes cast for each candidate, the number of rejected ballots, and the number of names on the final list of electors. The *CEA* does not require the Chief Electoral Officer to report on which provision of

the Act caused a ballot to be rejected. All rejected ballots are recorded and reported as a single entry in the electoral data for each polling division when the Chief Electoral Officer reports the election results to the House of Commons.

[15] As a matter of interest, a rejected ballot is not the same as a spoiled ballot, although common parlance often conflates the two. “Spoiled ballot” is defined in section 2 of the *CEA* as a ballot that was not deposited in the ballot box because the deputy returning officer had found it to be improperly printed or soiled (e.g. from being mishandled by someone). Unlike rejected ballots, spoiled ballots are not reported in the official results of the election.

[16] The *CEA* does not make provision for an elector to decline a ballot.

[17] In contrast, election laws in Ontario, Alberta and Manitoba all permit an elector who has received a ballot to return it and formally decline to vote. A record must be kept of the number of electors who decline to vote in this manner. See *Election Act*, RSO 1990, Chapter E.6, s 53; *Election Act*, RSA 2000, Chapter E-1, s 107.1; and *The Elections Act*, CCSM, Chapter E30, s 117(2).

[18] In 2001, private member’s bill was introduced in the House of Commons proposing amendments to the *CEA* that would permit an elector to indicate dissatisfaction with the parties and candidates listed on a ballot by formally declining the ballot (Bill C-319, *An Act to amend the Canada Elections Act (declined-vote ballots)*, First Reading March 28, 2001). However, the bill did not receive the necessary support at second reading on December 4, 2001. It was not

referred to committee and was dropped from the order paper. No such amendments to the *CEA* have been proposed since then.

[19] There is no dispute between the parties as to the operation of the provisions of the *CEA*, including the fact that ballots somehow indicating "none of the above" are not counted separately from all the others that are rejected for other reasons. The only dispute is with respect to whether this limits Mr. Rodriguez's freedom of expression as guaranteed by section 2(b) of the *Charter*.

IV. THE TEST ON A MOTION FOR SUMMARY JUDGMENT

[20] Rule 215(1) of the *Federal Courts Rules* directs that the Court shall grant summary judgment if it is "satisfied that there is no genuine issue for trial with respect to a claim or defence."

[21] The test to be applied on a motion for summary judgment is well-known. Assuming the facts pleaded to be true, is it plain and obvious that the pleadings disclose no reasonable cause of action? See, among many other authorities, *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17, and *Wenham v Canada (Attorney General)*, 2018 FCA 199 at paras 24-31.

[22] The Supreme Court of Canada explained in *Hryniak v Mauldin*, 2014 SCC 7 [*Hyrniak*], that there will be no genuine issue requiring a trial "when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to

achieve a just result" (para 49). On a motion for summary judgment, the court must consider whether a process short of a trial gives it confidence that it can find the necessary facts and apply the relevant legal principles so as to resolve the dispute (para 50).

[23] While *Hyrniak* arose under Rule 20 of the Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194, and the *Federal Courts Rules* are worded differently, it serves as a helpful reminder of the imperatives and principles that reside in the Federal Courts' rules concerning summary judgment (*Manitoba v Canada*, 2015 FCA 57 at paras 10-17).

[24] In the present case, there is no real dispute about the evidence. The only dispute is about how to apply the relevant legal principles. This is something that can readily and fairly be determined in the context of a motion for summary judgment.

V. ANALYSIS

[25] Mr. Rodriguez contends that the provisions of the *CEA* reviewed above prevent him from officially expressing dissatisfaction with all of the candidates available to him in federal elections and that this results in an unjustified limitation of his freedom of expression guaranteed by section 2(b) of the *Charter*. In my view, while the act of rejecting all the available candidates on a ballot undoubtedly is expressive activity, the *CEA* does not restrict this activity in any way that limits Mr. Rodriguez's freedom of expression. The legislation does prevent Mr. Rodriguez (and everyone else) from using a ballot as a platform to communicate dissatisfaction with all the available candidates to others. This is because, with the way rejected ballots are counted, the public will never know how many ballots, if any, were cast with a view to rejecting all the

available candidates. However, Mr. Rodriguez's claim could succeed only if the government was required by section 2(b) of the *Charter* to permit ballots to be used for this purpose – for example, by counting and reporting publicly on the number of ballots that reflect this view, or by adopting a procedure for declining a ballot. While it is always open to the government to take such a step, section 2(b) of the *Charter* does not impose any obligation to do so. As a result, Mr. Rodriguez's action must fail.

[26] Section 2 of the *Charter* guarantees a number of "fundamental freedoms" to everyone:

> (a) freedom of conscience of religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) freedom of association.

[27] The distinction between a right and a freedom is foundational to constitutional discourse in Canada and elsewhere. Indeed, the *Charter* itself guarantees both rights and freedoms. While a clear distinction between "rights" and "freedoms" may not hold up under critical scrutiny, traditionally it has been thought to correspond to distinctions between positive and negative entitlements and between positive and negative obligations on the part of government. Consider, for example, the right to vote guaranteed by section 3 of the *Charter*. It would be an empty guarantee unless the government established and maintained the conditions necessary for free and fair elections. In other words, the right guaranteed by section 3 of the *Charter* puts a positive obligation on the government to create and protect the conditions that are necessary for its exercise. On the other hand, the guarantee of freedom of peaceful assembly under

section 2(c) of the *Charter* is generally understood only to oblige the government to refrain from interfering with or constraining an activity individuals are naturally capable of engaging in on their own. In other words, the guarantee gives rise only to a negative obligation – an obligation on the part of the government not to do certain things.

[28] In *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, Justice Dickson (as he then was) stated that "freedom can primarily be characterized by the absence of coercion or constraint" (at 336). Like the other "fundamental freedoms" guaranteed by section 2 of the *Charter*, freedom of expression is generally understood as imposing "a negative obligation on government rather than a positive obligation of protection or assistance" (*Baier v Alberta*, 2007 SCC 31 at para 20 [*Baier*], citing *Haig v Canada*, [1993] 2 SCR 995 at 1035 [*Haig*] and *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989 at para 26). Justice L'Heureux-Dubé expressed the distinction this way in *Haig*: "The traditional view, in colloquial terms, is that the freedom of expression contained in s. 2(b) prohibits gags, but does not compel the distribution of megaphones" (at 1035).

[29] However, in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, now Chief Justice Dickson observed that while a conceptual distinction between rights and freedoms is commonly drawn along the lines sketched out above, understanding the freedoms guaranteed by the *Charter* as simply the absence of interference or constraint "may be too narrow since it fails to acknowledge situations where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms" (at 361). Chief Justice Dickson was writing in dissent there but his call for caution against rigid adherence to a

distinction between "rights" and "freedoms," as traditionally understood, was taken up a few years later by Justice L'Heureux-Dubé for the majority in *Haig*.

[30] Justice L'Heureux-Dubé accepted that "a philosophy of non-interference may not in all circumstances guarantee the optimal functioning of the marketplace of ideas" (at 1037). Citing the former Chief Justice's comments with approval, she stated that language expressing distinctions between rights and freedoms or between negative and positive entitlements or obligations "cannot be used in a dogmatic fashion." She then continued as follows:

> The distinctions between "freedoms" and "rights", and between positive and negative entitlements, are not always clearly made, nor are they always helpful. One must not depart from the context of the purposive approach articulated by this Court in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. Under this approach, a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required. This might, for example, take the form of legislative intervention aimed at preventing certain conditions which muzzle expression, or ensuring public access to certain kinds of information (*Haig* at 1039).

[31] This situation did not arise in *Haig* itself. The case concerned referenda that were held in 1992 regarding constitutional amendments proposed in the Meech Lake Accord. Two referenda were held – one in Quebec under provincial legislation and another in the rest of Canada under federal legislation. Mr. Haig had recently moved from Ottawa to Hull, Quebec. Since he lived in Quebec, he was not eligible to vote in the federal referendum but, under Quebec law, he had not lived in the province long enough to be eligible to vote in the Quebec referendum. Mr. Haig brought an application in the Federal Court, Trial Division, seeking orders on *Charter* grounds that would permit him (and other similarly situated Quebec residents) to vote in the federal

referendum. When the matter finally reached the Supreme Court of Canada, a majority found that his inability to vote in the federal referendum did not violate his rights under sections 3, 2(b) or 15(1) of the *Charter*. With respect to the section 2(b) claim, the majority held that while a referendum is undoubtedly a platform for expression, it is a creation of legislation and section 2(b) does not impose upon a government any positive obligation to consult its citizens through this particular mechanism, nor does it confer upon all citizens the right to express their opinions in a referendum. See *Haig* at 1040-42.

[32] Similarly, writing for the majority in *Native Women's Assn. of Canada v Canada*, [1994] 3 SCR 627, a case raising *Charter* objections to the government's decision to fund some Aboriginal organizations and permit them to participate in constitutional discussions but not others, Justice Sopinka held that section 2(b) of the *Charter* "does not guarantee any particular means of expression or place a positive obligation upon the Government to consult anyone" (at 663).

[33] Eventually, however, a constitutional challenge to under-inclusive government action based on a fundamental freedom succeeded before the Supreme Court of Canada. In *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 [*Dunmore*], a majority of the Court found that even a classical freedom like freedom of association required positive government action if the following criteria were met. First, the claim must be grounded in fundamental *Charter* freedoms and not simply in a particular statutory regime. Second, the claimant must demonstrate that his or her exclusion from the statutory regime in question results in a substantial interference with the exercise of protected activity. A claimant is not required to demonstrate that the exercise of a

fundamental freedom is impossible but he or she must be seeking more than a particular channel for exercising fundamental freedoms. (If the purpose of the legislation is to limit the protected activity, this can also be taken into account in the analysis.) Third, the government must be accountable for any inability to exercise the fundamental freedom (because, for example, it is responsible for the statutory regime from which the claimant is excluded). See *Dunmore* at paras 24-33. These conditions were all found to be satisfied in *Dunmore* and Ontario labour relations legislation that excluded agricultural workers was declared unconstitutional.

[34] While *Dunmore* concerned freedom of association, the three factors required for a successful challenge to under-inclusive legislation were considered to be applicable to section 2 of the *Charter* generally, including of course freedom of expression (*Baier* at para 29). Still, *Dunmore* carved out only a narrow exception to the usual rule that "freedoms" do not impose positive obligations on the state. As Justice Deschamps later stated for the majority in *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31 [*Greater Vancouver*], where the government creates a means for individuals to engage in expressive activities, "it is generally entitled to determine which speakers are allowed to participate. A speaker who is excluded from such means does not have a s. 2(b) right to participate unless she or he meets the criteria set out in *Baier*" (at para 29).

[35] Drawing on *Dunmore*, the Court had held in *Baier* that in cases where the question arises as to whether a positive right claim is being made under section 2(b) of the *Charter*, the following analytical steps should be followed. First, the court must consider whether the activity for which the claimant seeks section 2(b) protection is a form of expression. If it is, then second,

the court must determine whether the claimant claims a positive entitlement to government protection, or simply the right to be free from government interference. If it is a positive right claim that is being advanced, then third, the court must consider the three *Dunmore* factors, outlined above. If the claimant cannot satisfy all three criteria, the section 2(b) claim will fail. If the three *Dunmore* factors are satisfied, then section 2(b) has been infringed and the analysis shifts to section 1 of the *Charter*. See *Baier* at para 30.

[36] How does this test apply to Mr. Rodriguez's claim?

[37] I understand the first step of the analysis to be the same as that under *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 [*Irwin Toy*]. The court must determine whether the activity is within the protected sphere of free expression. If the activity "conveys or attempts to convey a meaning, it has expressive content and prima *facie falls* within the scope of the guarantee" (*Irwin Toy* at 969).

[38] It is indisputable that marking a ballot or even leaving it blank in order to record one's rejection of the available candidates is an act that conveys or attempts to convey meaning. It has expressive content and, therefore, *prima facie* falls within the scope of the guarantee of freedom of expression. We must, therefore, move on to the next step.

[39] The second step asks whether Mr. Rodriguez is advancing a positive right claim. This is the crux of this motion. As I indicated at the outset, Mr. Rodriguez agrees that his claim cannot succeed if it is a positive right claim.

[40] Mr. Rodriguez maintains that he is only advancing a negative right claim, and not a positive one. He submits, correctly, that he is entitled to have access to the platform provided by the *CEA* but contends that he faces a restriction on the content that he can express on that platform. Mr. Rodriguez argues that, as in *Greater Vancouver*, he is not seeking a particular means of expression from which he has been excluded but, rather, the freedom to express himself by means of an existing platform he is entitled to use without undue state inference.

[41] I do not agree. To the extent that Mr. Rodriguez is prevented from communicating the message he wishes on the platform established by the *CEA*, this is because the platform is intended to serve a completely different purpose than the one he seeks to use it for. The *CEA* establishes a method for determining who will sit in the House of Commons by holding elections and determining who the victorious candidates are. Not designing that platform so that it can also be used for an unrelated purpose – i.e. to express “officially” one’s rejection of all the available candidates – is not a restriction on expression that can be challenged by a negative right claim. The situation would be very different if, for example, the *CEA* required Mr. Rodriguez to fill out a ballot in a particular way that did not allow him to reject all the available candidates, or if it imposed some sort of sanction on anyone who did not abide by the rules concerning how ballots should be filled out. Simply put, there is no government action here that could engage a negative right claim. But does this mean that Mr. Rodriguez must, therefore, be raising a positive right claim?

[42] *Baier* and *Greater Vancouver* provide helpful guidance on what makes a claim a positive right claim. In *Baier*, Justice Rothstein stated for the majority that to “determine whether a right

claimed is a positive right, the question is whether the appellants claim the government must legislate or otherwise act to support or enable an expressive activity" (at para 35). In *Greater Vancouver*, the Court cautioned against reading this test too broadly. Writing for the majority, Justice Deschamps stated (at para 34):

> The words "act to support or enable", taken out of context, could be construed as transforming many freedom of expression cases into "positive rights claims". Expression in public places invariably involves some form of government support or enablement. Streets, parks and other public places are often created or maintained by government legislation or action. If government support or enablement were all that was required to trigger a "positive rights analysis", it could be argued that a claim brought by demonstrators seeking access to a public park should be dealt with under the *Baier* analysis because to give effect to such a claim would require the government to enable the expression by providing the necessary resource (i.e., the place). But to argue this would be to misconstrue *Baier*.

Rather, "'support or enablement' must be tied to a claim requiring the government to provide a particular means of expression" (*Greater Vancouver* at para 35).

[43] In my view, this is precisely what Mr. Rodriguez is seeking. His complaint is that the government has not provided him with a particular means of expression – namely, having the rejection of all available candidates counted as part of the election results. It is the government's failure to do this, Mr. Rodriguez contends, that infringes his rights under section 2(b) of the *Charter*. This can only be understood as a positive rights claim. His argument depends on the premise that the government is under a positive obligation to act in a certain way to facilitate the expressive activity in which he wishes to engage. In other words, for his argument to succeed, the government must be obliged to permit a platform designed for one purpose to be used for a completely different purpose as well.

[44] As he acknowledges, unlike the situations considered in *Haig*, *Dunmore*, or *Baier*, Mr. Rodriguez is not excluded from a statutory regime as a matter of law. He was free to cast a ballot in the last federal election in the manner of his choice. He would also have been free to receive a ballot and then return it uncompleted. Mr. Rodriguez chose not to participate in the election provided for by the *CEA* because, if he were to do any of these things, it would not be reflected in the election results or reported publicly. His only complaint is that the government has not designed the voting process in a way that permits him to express a particular opinion by a particular means. This necessarily is a positive right claim.

[45] Mr. Rodriguez cannot avoid this result by framing his action as a claim for a declaration. Even though he is not seeking to change the legislation, he must still posit a positive obligation on the part of government for his claim for a declaration to succeed.

[46] Given Mr. Rodriguez's position on this motion, this finding is sufficient to decide the matter in favour of the defendant. Nevertheless, it may still be instructive to go on to consider the *Dunmore* factors briefly.

[47] First, the defendant contends that Mr. Rodriguez's claim "rests with the operation of provisions of the legislative scheme, and not the fundamental freedoms and rights which underpin the *Charter*" (Defendant's Written Representations, para 46). I disagree. Mr. Rodriguez's claim is grounded in a fundamental freedom guaranteed by the *Charter*. He wishes to communicate a political opinion. It is indisputable that the communication of political opinions is "the single most important and protected type of expression" and that it "lies at the

core of the guarantee of free expression" (*Harper v Canada (Attorney General)*, 2004 SCC 33 at para 11 (*per* McLachlin CJ and Major J, dissenting on other grounds) and at para 66 (*per* Bastarache J)). This freedom exists independently of the statutory regime at issue here.

[48] Mr. Rodriguez's claim fails, however, on the second factor. It is plain and obvious that he cannot establish a substantial interference with the exercise of protected section 2(b) activity. Put another way, it is plain and obvious that Mr. Rodriguez is simply seeking a particular channel for exercising his fundamental freedom of expression, and *Dunmore* held that this is insufficient to ground a positive right claim (see *Dunmore* at para 25). Since there are many other ways Mr. Rodriguez could express his opinion about the candidates in the last election, the government is not required to furnish the one he would prefer.

[49] Mr. Rodriguez's pleadings do not address these questions at all. While he can be forgiven for not anticipating all of the nuances of the *Baier* framework when he first drafted his pleadings, the defendant placed the "positive right" question squarely in issue in its Statement of Defence and, even more so, in its written representations on this motion for summary judgment. Mr. Rodriguez made a valiant effort to distinguish *Baier* in his submissions on this motion but, for the reasons I have given, he was unsuccessful.

[50] The absence of pleadings or evidence capable of demonstrating a positive entitlement is fatal to this action. As the Supreme Court of Canada stated in *Canada (Attorney General) v Lameman*, 2008 SCC 14, a motion for summary judgment "must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be

pleaded or proved in the future" (para 19). Rule 214 of the *Federal Courts Rules* obliges a respondent on a motion for summary judgment to "set out specific facts and adduce the evidence showing that there is a genuine issue for trial," if such there is. Mr. Rodriguez has not done so. No doubt this is why he was prepared to concede that his claim cannot succeed if it is, indeed, a positive right claim.

[51] Since all the *Dunmore* factors must be satisfied to establish an infringement of a positive right claim under section 2(b), strictly speaking it is not necessary to address the last of them. However, for the sake of completeness, I simply note that in the absence of any reasonable prospect of establishing the inability to express an opinion about the available candidates, there is nothing for which the government must be held accountable. The third factor is not satisfied, either.

[52] I recognize that the *Baier* test was not formulated in the context of a motion for summary judgment and that to some extent it fits awkwardly in the present context (e.g. it requires determining whether a claimant has demonstrated certain things, presumably at the end of a trial). Nevertheless, it is the framework that I must apply and, with the necessary adjustments, it can be adapted to a motion for summary judgment.

[53] Applying this test, I have concluded that there is no genuine issue for trial.
Mr. Rodriguez's claim is a positive right claim and, as such, it is doomed to fail.

VI. COSTS

[54] The defendant seeks its costs on this motion. As the successful party, this would be the usual result. In my view, however, this is not an appropriate case in which to order costs. Mr. Rodriguez is self-represented. He has conducted himself responsibly throughout the course of this litigation. His written and oral submissions on this motion for summary judgment were of assistance to me. Most importantly, while I have found that there is no genuine issue for trial, this is not to say that this case did not raise issues of public importance. On the contrary, it raised serious issues concerning freedom of expression under the *Charter* and democracy. Mr. Rodriguez is to be commended for his engagement with these issues.

VII. CONCLUSION

[55] For these reasons, the defendant's motion for summary judgment is granted and the plaintiff's action is dismissed. There is no order as to costs.

JUDGMENT IN T-1563-17

THIS COURT'S JUDGMENT is that

1. The motion for summary judgment is granted.
2. The plaintiff's action is dismissed.
3. There is no order as to costs.

"John Norris"

Judge

ANNEX

Canada Elections Act, SC 2000, c 9

Definitions	**Définitions**
2 (1) The definitions in this subsection apply in this Act.	**2 (1)** Les définitions qui suivent s'appliquent à la présente loi.
spoiled, in relation to a ballot or a special ballot as defined in section 177, means	***annulé*** S'agissant du bulletin de vote ou du bulletin de vote spécial au sens de l'article 177 :
(a) one that has not been deposited in the ballot box but has been found by the deputy returning officer to be soiled or improperly printed; or	**a)** le bulletin de vote qui n'a pas été déposé dans l'urne mais que le scrutateur a trouvé sali ou imprimé incorrectement;
(b) one that is dealt with under subsection 152(1), including in relation to advance polls by virtue of subsection 171(1), or subsection 213(4), 242(1) or 258(3).	**b)** le bulletin de vote annulé dans le cadre des paragraphes 152(1), 171(1) — dans la mesure où il prévoit l'application du paragraphe 152(1) aux bureaux de vote par anticipation — , 213(4), 242(1) ou 258(3).
…	…
Votes for persons not properly nominated to be void	**Nullité des votes en faveur de personnes non présentées**
76 Any votes given for a person other than a candidate are void.	**76** À une élection, tous les votes en faveur d'une personne autre qu'un candidat sont nuls.
…	…
Ballot printed in Form 3	**Impression des bulletins de vote**
116 (1) The returning officer shall, as soon as possible after 2:00 p.m. on the 19th day before polling day, authorize the printing of a sufficient number of ballots in Form 3 of Schedule 1.	**116 (1)** Dans les meilleurs délais après 14 h le dix-neuvième jour précédant le jour du scrutin, le directeur du scrutin autorise l'impression en quantité suffisante des bulletins de vote selon le formulaire 3 de l'annexe 1.

Form of ballot

(2) Ballots shall have a counterfoil and a stub, with a line of perforations between the ballot and the counterfoil and between the counterfoil and the stub.

Forme du bulletin

(2) Le bulletin de vote comporte un talon et une souche avec ligne perforée entre le bulletin de vote proprement dit et le talon et entre le talon et la souche.

Numbering of ballots

(3) The ballots shall be numbered on the back of the stub and the counterfoil, and the same number shall be printed on the stub as on the counterfoil.

Numérotation

(3) Les bulletins de vote doivent être numérotés au verso de la souche et du talon, le même numéro étant imprimé sur la souche et sur le talon.

Books of ballots

(4) Ballots shall be in books containing an appropriate number of ballots.

Carnets de bulletins de vote

(4) Les bulletins de vote sont reliés en carnets contenant le nombre approprié de bulletins de vote.

Obligation re: ballots, ballot paper

(5) Each printer shall return all of the ballots and all of the unused paper on which the ballots were to have been printed, to the returning officer.

Obligation de l’imprimeur

(5) L’imprimeur est tenu de remettre au directeur du scrutin tous les bulletins de vote qu’il a imprimés ainsi que la partie inutilisée du papier sur lequel ils devaient être imprimés.

Printer’s name and affidavit

(6) Ballots shall bear the name of the printer who, on delivering them to the returning officer, shall include an affidavit in the prescribed form that sets out a description of the ballots, the number of ballots delivered to the returning officer and the fact that all ballots were provided, and all paper returned, as required by subsection (5).

Nom de l’imprimeur et affidavit

(6) Les bulletins de vote doivent porter le nom de l’imprimeur qui doit, lorsqu’il les livre au directeur du scrutin, lui remettre une déclaration sous serment, selon le formulaire prescrit, précisant leur description, le nombre qu’il lui livre et le fait qu’il s’est conformé au paragraphe (5).

Information on the ballot

117 (1) Ballots shall contain the names of candidates, arranged alphabetically, taken from their nomination papers.

Renseignements contenus dans les bulletins

117 (1) Les bulletins de vote doivent contenir les noms des candidats, suivant l’ordre alphabétique, tels qu’ils apparaissent sur les actes de candidature des candidats.

Name of party

(2) The name, in the form referred to in paragraph 385(2)(b), of the political party that has endorsed the candidate shall be listed on the ballot under the name of the candidate if

(a) the candidate's nomination paper includes it;

(b) the condition described in paragraph 67(4)(c) is met; and

(c) no later than 48 hours after the close of nominations, the party is a registered party.

Designation of candidate as independent

(3) The word "independent" shall be listed on the ballot under the name of the candidate who has requested it in accordance with subparagraph 66(1)(a)(v) and may not be so listed in any other case.

Address or occupation on ballot

(5) The ballot shall list under the candidate's name the address or occupation of a candidate who makes a written request to that effect to the returning officer before 5:00 p.m. on the closing day for nominations, if the candidate and another candidate on the ballot have the same name and both candidates have chosen under subparagraph 66(1)(a)(v) to either have the word "independent" or no designation of political affiliation under their names in election documents.

…

Rejection of ballots

284 (1) In examining the ballots, the deputy returning officer shall reject one

Nom du parti

(2) Les bulletins de vote mentionnent, sous le nom du candidat, le nom, dans la forme précisée à l'alinéa 385(2)b), du parti politique qui le soutient si les conditions suivantes sont remplies :

a) le candidat l'a mentionné dans son acte de candidature;

b) l'acte prévu à l'alinéa 67(4)c) a été présenté;

c) au plus tard dans les quarante-huit heures suivant la clôture des candidatures, le parti est enregistré.

Mention « indépendant »

(3) Le bulletin de vote porte la mention « indépendant » sous le nom du candidat qui l'a demandé conformément au sous-alinéa 66(1)a)(v), et seulement dans ce cas.

Mention de l'adresse ou de la profession

(5) Dans les cas où au moins deux candidats ont le même nom et ont indiqué leur intention d'être désignés par la mention « indépendant » ou de n'avoir aucune désignation de parti dans le cadre du sous-alinéa 66(1)a)(v), les bulletins de vote mentionnent l'adresse ou la profession de ces candidats s'ils en font la demande par écrit au directeur du scrutin, au plus tard à 17 h le jour de clôture.

…

Bulletins rejetés

284 (1) Lors de l'examen, le scrutateur rejette ceux :

(a) that has not been supplied by him or her;

(b) that has not been marked in a circle at the right of the candidates' names;

(c) that is void by virtue of section 76;

(d) that has been marked in more than one circle at the right of the candidates' names; or

(e) on which there is any writing or mark by which the elector could be identified.

…

a) qu'il n'a pas fournis;

b) qui ne portent aucune marque dans l'un des cercles qui se trouvent à droite des noms des candidats;

c) qui sont nuls en vertu de l'article 76;

d) qui portent une marque dans plusieurs des cercles qui se trouvent à droite des noms des candidats;

e) qui portent une inscription ou une marque qui pourrait faire reconnaître l'électeur.

…

Statement of the vote

287 (1) The deputy returning officer shall prepare a statement of the vote, in the prescribed form, that sets out the number of votes in favour of each candidate and the number of rejected ballots and place the original statement and a copy of it in the separate envelopes supplied for the purpose.

…

Relevé du scrutin

287 (1) Le scrutateur établit, selon le formulaire prescrit, un relevé du scrutin dans lequel sont indiqués le nombre de votes recueillis par chaque candidat ainsi que le nombre de bulletins de vote rejetés. Il place l'original et une copie dans des enveloppes séparées fournies à cette fin.

…

Polling division reports

533 The Chief Electoral Officer shall, in the case of a general election, without delay, and, in the case of a by-election, within 90 days after the return of the writ, publish, in the manner and form that he or she considers appropriate, a report that sets out

(a) by polling division, the number of votes cast for each candidate, the number of rejected ballots and the number of names on the final list of electors;

Rapport — section de vote par section de vote

533 Sans délai après l'élection générale ou, dans le cas d'une élection partielle, dans les quatre-vingt-dix jours suivant le retour du bref, le directeur général des élections publie, selon les modalités qu'il estime indiquées, un rapport indiquant ce qui suit :

a) par section de vote, le nombre de votes obtenus par chaque candidat, le nombre de bulletins rejetés et le nombre de noms figurant sur la liste électorale définitive;

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

David Rodriguez	FOR THE PLAINTIFF (ON HIS OWN BEHALF)
Jyll Hansen	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANT