Federal Court of Appeal | Cour d'appel fédérale

Date: 20151027

Docket: A-365-14

Citation: 2015 FCA 227

CORAM: **STRATAS J.A.**
RENNIE J.A.
GLEASON J.A.

BETWEEN:

NICK MANCUSO, THE RESULTS COMPANY INC., DAVID ROWLAND, LIFE CHOICE LTD. (AMALGAMATED FROM, ROLLED INTO, AND CONTINUING ON BUSINESS FOR, AND FROM, E.D. MODERN DESIGN LTD. AND E.G.D. MODERN DESIGN LTD.) AND DR. ELDON DAHL, AND AGNESA DAHL

Appellants

and

MINISTER OF NATIONAL HEALTH AND WELFARE, ATTORNEY GENERAL OF CANADA, MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS, ROYAL CANADIAN MOUNTED POLICE, AND HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondents

Heard at Toronto, Ontario, on September 9, 2015.

Judgment delivered at Ottawa, Ontario, on October 27, 2015.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: STRATAS J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] This appeal and cross-appeal arise from a judgment dated July 16, 2014 of the Federal Court striking the appellants' statement of claim: 2014 FC 708. In brief, the appellants commenced an action challenging the constitutional authority of Parliament to enact a scheme

for the regulation of the production and sale of natural health products, including vitamins, and dietary and nutritional food supplements. In the alternative, if the scheme is constitutional, the appellants challenge the statutory authority that authorizes the regulations, and plead various Charter violations and tortious conduct by government officials in the administration and enforcement of the scheme. The appellants seek declarations of invalidity and a stay of the enforcement of the legislation and regulations.

[2] The Federal Court, per Justice James Russell (the judge) granted the defendants' motion to strike. The appellants appeal the order striking the statement of claim. Should the Court find that the judge did not strike the claim in its entirety, the respondents have filed a cross-appeal, contending that it was an error not to do so.

[3] For the reasons that follow, I would dismiss the appeal and cross-appeal.

I. The Statement of Claim

[4] The plaintiffs plead in their statement of claim that they are consumers, distributors and producers of "natural health products" in Canada. They include both natural persons and corporations. "Natural health products" are regulated as "drugs" as defined by section 2 of the *Food and Drugs Act* (R.S.C., 1985, c. F-27) (*FDA*), and the *Natural Health Products Regulations*, SOR 2003-196 (the *Regulations*), non-compliance with which attracts regulatory and criminal consequences.

[5] In their statement of claim, the plaintiffs plead that Parliament does not have the legislative competence, under section 91(27) of the *Constitution Act, 1867*, to regulate natural health substances. They plead that Parliament's competence is confined to the regulation of substances that pose a health risk and does not extend to the regulation of substances that pose no health risk, or little health risk, like natural health products. In the alternative, they say that the *Regulations* defining a "drug" are overbroad and that Parliament did not intend the definition of "drug" in section 2 of the *FDA* to include natural health products, and therefore the *Regulations* exceed the authority delegated by the *FDA*.

[6] They also plead that the *Regulations* as a whole, and specific provisions such as the prohibition on the production and sale of a "natural health product" without a "Natural Product Number" or NPN, violate subsections 2(a), 2(b), and sections 7, 9 and 15 of the Charter. Section 8 violations are also said to arise from various searches and seizures to which some of the plaintiffs were subject under the *FDA* and the *Regulations* and the *Controlled Drugs and Substances Act* (S.C. 1996, c. 19).

[7] The plaintiffs also plead that in the implementation and enforcement of this regulatory scheme, agents and officials of the defendants committed torts related to the exercise of state authority, including malicious prosecution and misfeasance in a public office. They seek damages for lost profits, loss of reputation, mental distress, punitive and exemplary damages, as well as damages under subsection 24(1) of the Charter. They seek to have the action determined by a jury trial.

II. Analysis

A. *Standard of review*

[8] The decision of this Court in *Imperial Manufacturing Group Inc. v. Decor Grates Incorporated*, 2015 FCA 100 instructs that the usual appellate standard of review applies to decisions of a trial judge in matters of pleadings and therefore that conclusions on questions of fact and questions of mixed fact and law that are suffused by fact can only be interfered with if there is a palpable and overriding error. Conclusions on questions of law and questions of law that may be extracted from questions of mixed fact and law attract no deference and are reviewed on a standard of correctness.

[9] I am satisfied that the judge identified and properly applied the governing principles applicable to a motion to strike and that no reviewable error arises in his conclusion that the statement of claim did not comply with the rules of pleading.

B. *Preliminary issue - The scope of the decision below*

[10] The first paragraph in the judge's judgment provides that "The Claim is struck in accordance with my reasons pursuant to s. 221 of the *Federal Court Rules*." The appellants contend that this should be interpreted as meaning that the claim is struck, subject to the parts of the reasons which allowed some paragraphs to stand. I do not think there is any merit to this argument. The judge intended that the whole claim be struck and the plaintiffs be permitted to file a "fresh as amended statement of claim" that eliminated the defects existing in the pleading before him.

[11] I agree that the judge found certain paragraphs of the claim unobjectionable. He accepted, for example, that the plaintiffs could, in an action in the Federal Court, obtain declarations of invalidity on both constitutional and administrative law grounds along with claims for damages and restitution. He also accepted that the facts pleaded in relation to the general attack on the *vires* of the scheme might also bear on the claims for individual relief. Further, he accepted that certain paragraphs and subparagraphs of the claim were also unobjectionable (see, for example, subparagraphs 1(a), 1(b), 1(d), and 1(e)(i) and paragraphs 2, 3, and 18).

[12] However, the appellants' interpretation of the judgment is not supported by its plain language– "the claim is struck." Further, the judge's reasons leave no doubt that the judge struck the claim in its entirety. He found that the claim invited a broad ranging policy discussion as to whether, and how, natural health products should be regulated. On multiple occasions he adverted to the inability of the defendants to plead in defence, given the scope or breadth of the assertions and the lack of underlying material facts or particularity, and in addressing costs, the judge characterized the pleading as "very unwieldy and non-compliant." Given the number of paragraphs and subparagraphs struck and their distribution throughout the claim, the residue would be a disjointed and difficult read and entirely lacking in any material fact.

[13] Although some paragraphs seeking declaratory relief were not mentioned as explicitly being struck, these comments must be read in light of the judge's extensive consideration of the requirement of a factual matrix as prerequisite to the determination of constitutionality. The judge found that the plaintiffs were seeking to impugn the whole scheme for the classification, inspection and enforcement of food, dietary food supplements and vitamins. He noted that the

pleading did not particularize which of the 55,000 natural food products were in issue and made no link between the products and the plaintiffs. He concluded that the pleadings did not provide a factual foundation for such a broad declaration.

[14] The argument that the judge allowed the declaratory component of the claim to continue is also inconsistent with the appellants' own memorandum of fact and law which concedes at paragraph 21 that "the Court erred in striking the claim in its entirety."

[15] In the result, the cross-appeal is unnecessary and should be dismissed.

C. ***The requirement of material facts***

[16] It is fundamental to the trial process that a plaintiff plead material facts in sufficient detail to support the claim and relief sought. As the judge noted "pleadings play an important role in providing notice and defining the issues to be tried and that the Court and opposing parties cannot be left to speculate as to how the facts might be variously arranged to support various causes of action."

[17] The latter part of this requirement – sufficient material facts – is the foundation of a proper pleading. If a court allowed parties to plead bald allegations of fact, or mere conclusory statements of law, the pleadings would fail to perform their role in identifying the issues. The proper pleading of a statement of claim is necessary for a defendant to prepare a statement of defence. Material facts frame the discovery process and allow counsel to advise their clients, to

prepare their case and to map a trial strategy. Importantly, the pleadings establish the parameters of relevancy of evidence at discovery and trial.

[18] There is no bright line between material facts and bald allegations, nor between pleadings of material facts and the prohibition on pleading of evidence. They are points on a continuum, and it is the responsibility of a motions judge, looking at the pleadings as a whole, to ensure that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair.

[19] What constitutes a material fact is determined in light of the cause of action and the damages sought to be recovered. The plaintiff must plead, in summary form but with sufficient detail, the constituent elements of each cause of action or legal ground raised. The pleading must tell the defendant who, when, where, how and what gave rise to its liability.

[20] The requirement of material facts is embodied in the rules of practice of the Federal Courts and others: see *Federal Courts Rules*, Rule 174; Alta. Reg. 124/2010, s. 13.6; B.C. Reg. 168/2009, s. 3-1(2); N.S. Civ. Pro. Rules, s. 14.04; R.R.O. 1990, Reg. 194, s. 25.06. While the contours of what constitutes material facts are assessed by a motions judge in light of the causes of action pleaded and the damages sought, the requirement for adequate material facts to be pleaded is mandatory. Plaintiffs cannot file inadequate pleadings and rely on a defendant to request particulars, nor can they supplement insufficient pleadings to make them sufficient through particulars: *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112.

D. *Pleading of Charter violations*

[21] There are no separate rules of pleadings for Charter cases. The requirement of material facts applies to pleadings of Charter infringement as it does to causes of action rooted in the common law. The Supreme Court of Canada has defined in the case law the substantive content of each Charter right, and a plaintiff must plead sufficient material facts to satisfy the criteria applicable to the provision in question. This is no mere technicality, "rather, it is essential to the proper presentation of Charter issues": *Mackay v Manitoba*, [1989] 2 S.C.R. 357 at p. 361.

[22] In respect of all of the Charter allegations, the judge found that the plaintiffs did not identify any specific natural health product to which they had been denied access, nor how that denial related to the rights might be protected by the Charter provisions raised. For example, a violation of subsection 2(a) requires that the claimant's practice or belief have a nexus with a religious belief or practice or secular morality: *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47, at p. 56. Here, no material facts were pleaded supporting the proposition that the plaintiffs had such a practice or belief that was in any way connected with their consumption or sale of natural health products. Similarly, insofar as the plaintiffs assert infringement of their freedom of expression, no material facts were pleaded as to communications that the plaintiffs intended to send or receive that were interfered with by the regulatory scheme, a prerequisite for a violation of subsection 2(b).

[23] With regard to the section 7 claims, the plaintiffs need to plead material facts to support the claim that restrictions on the availability of natural health products interfered with either their security of person or liberty. Again, as the judge noted, the plaintiffs did not identify any

particular products to which they have been denied access or how any such denial might have risen to the level of a section 7 violation. A section 7 infringement typically engages a fundamental life choice or issues inherently related to personal well-being: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Morgentaler*, [1988] 1 S.C.R. 30. In the absence of a pleading of a specific regulated drug to which the plaintiffs have been denied access, or a description of how the plaintiffs use of it has been constrained in a manner that engages section 7 interests, the defendant would be left guessing as to the scope of the case it has to meet to respond to the section 7 infringement.

[24] Similarly, to establish a violation of section 15, a claimant must first establish that the basis on which he or she claims to have been discriminated against is either an enumerated or an analogous ground within the scope of section 15. While the appellants plead that choice in food, supplements and vitamins is an analogous ground, they did not plead any facts in support of this claim, or facts in support of the other elements of a section 15 violation, such as how the regulation of the product perpetuates disadvantage or prejudice rising to substantive discrimination: *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, 2011 SCC 12 at paras. 30-31.

E. ***The corporate plaintiffs***

[25] The judge correctly struck the claims of Charter violations advanced by the corporate plaintiffs. A corporation cannot maintain a section 7 Charter challenge for either a subsection 24(1) or a section 52 remedy unless it is the defendant in a criminal or regulatory prosecution or is subject to compulsory measures, such as injunctive relief, at the behest of the state in a

regulatory proceeding: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157. The pleadings on behalf of the corporate defendants also suffer from the same deficiency found by the judge in respect of the individual plaintiffs. The claims by the corporate plaintiffs for breaches of the "right to equality as a structural imperative of the underlying principle of the *Constitution Act 1867*", and for violations of the corporations' subsection 2(b) rights, lacked a factual foundation in the pleadings. In any event, a corporation cannot assert section 15 rights.

F. *The tort claims*

[26] A properly pleaded tort claim identifies the particular nominate tort alleged and sets out the material facts needed to satisfy the elements of that tort. As the judge pointed out, while the appellants assert various torts including misfeasance in public office, they do not link particular conduct to the elements of the tort. For example, the tort of misfeasance in public office requires a pleading of a particular state of mind by a public official – deliberate, specific conduct which the official knows to be inconsistent with their legal obligations: *Odhavji Estate v. Woodhouse*, 2003 SCC 69; *St. John's Port Authority v. Adventure Tours Inc.*, 2011 FCA 198; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184. The statement of claim in this case does not meet that standard.

[27] The bald assertion of a conclusion is not a pleading of material fact. The judge properly struck many of the paragraphs underlying the tort claims on the basis that without more, these were conclusory statements. He also found that the allegations of bad faith and abuse of power

comprised a set of statements or conclusions and did not meet the standard of pleading described in *Merchant Law* at paras. 34-35.

[28] The judge assessed the allegations of tortious conduct in the implementation and enforcement of the *Regulations* against these principles and concluded that the appropriateness of the enforcement measures could only be assessed in the light of the facts and context of a particular action or series of actions. What was pleaded, however, was a general practice, with no specific instances, leaving it unclear as to whether the conduct was "something mandated by the Act or the Regulations, or conduct set out in some administrative policy of directive, or whether they are referring to what individual officials have chosen to do" (Reasons for Decision at para. 106).

G. *Damages*

[29] Relying on *Mackin* and *Ward*, the judge correctly dismissed the claim for relief under sections 24(1) of the *Constitution Act, 1982*: *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 S.C.R. 405, 2002 SCC 13; *Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28, 2010 SCC 27; *Henry v. British Columbia (Attorney General)*, 2015 SCC 24. As a general rule, damages are not available from harm arising from the application of a law which is subsequently found to be unconstitutional, without more. The plaintiffs pleaded that the respondents' conduct was "clearly wrong, in bad faith or an abuse of power" – one of the elements typically required in order to found a damages claim under section 24(1) of the Charter – but failed to supply material facts on the question of how the *Regulations* and their enforcement constitute serious error, bad faith or abuse so as to trigger an entitlement to Charter

damages. They also fail to give any particulars of any conduct that would support a damages claim.

H. *Declaratory relief*

[30] As noted, the judge did not explicitly strike the paragraphs of the claim which sought declarations as to the constitutionality of the scheme, either under the *Constitution Act, 1867* or the Charter. Nor did he explicitly strike the declaratory relief in respect of administrative law challenges to the scope of the definition of "drug" in section 2 of the *FDA* and the *Regulations*.

[31] The appellants allege that their action can nonetheless proceed to trial on the basis of the surviving paragraphs. It is not problematic, in their view, that there are no material facts in the statement of claim, including none that link the impugned scheme to an effect on themselves as plaintiffs. They base this argument on the proposition that freestanding declarations on the constitutionality of laws and legal authority are always available.

[32] On this latter point, there is no doubt. Free-standing declarations of constitutionality can be granted: *Canadian Transit Company v. Windsor (Corporation of the City)*, 2015 FCA 88. But the right to the remedy does not translate into licence to circumvent the rules of pleading. Even pure declarations of constitutional validity require sufficient material facts to be pleaded in support of the claim. Charter questions cannot be decided in a factual vacuum: *Mackay v. Manitoba*, above, nor can questions as to legislative competence under the *Constitution Act, 1867* be decided without an adequate factual grounding, which must be set out in the statement

of claim. This is particularly so when the effects of the impugned legislation are the subject of the attack: *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099.

[33] The Supreme Court of Canada in *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, para. 46 articulated the pre-conditions to the grant of a declaratory remedy: jurisdiction over the claim and a real as opposed to a theoretical question in respect of which the person raising it has an interest.

[34] Following *Khadr*, this Court in *Canada (Indian Affairs) v. Daniels*, 2014 FCA 101 (leave to appeal granted) at paras. 77-79 highlighted the danger posed by a generic, fact-free challenge to legislation – in other words, a failure to meet the second *Khadr* requirement. Dawson JA noted that legislation may be valid in some instances, and unconstitutional when applied to other situations. A court must have a sense of a law's reach in order to assess whether and by how much that reach exceeds the legislature's *vires*. It cannot evaluate whether Parliament has exceeded the ambit of its legislative competence and had more than an incidental effect on matters reserved to the provinces without examining what its legislation actually does. Facts are necessary to define the contours of legislative and constitutional competence. In the present case, this danger is particularly acute; as the judge noted, the legislation at issue pertains to literally thousands of natural health supplements.

[35] This is not new law. While the plaintiffs point to *Solosky v. The Queen*, [1980] 1 S.C.R. 821 for the proposition that there is a broad right to seek declaratory relief, *Solosky* also notes that there must be "a 'real issue' concerning the relative interests of each [party]." The Court

cannot be satisfied that this requirement is met absent facts being pleaded which indicate what that real issue is and its nexus to the plaintiffs and their claim for relief.

[36] To conclude, while the Federal Court correctly found that there was nothing inherently faulty with claims in respect of declaratory relief (subparagraphs 1(a)(ix) through 1(b)(v)), the action could not move forward on the constitutional issues on the basis of the claims for relief alone. The paragraphs said to underlie the claims of constitutional breaches were struck, and with them disappeared the basis on which these claims could be adjudicated.

I. ***The section 8 violations***

[37] A final issue concerns the claim that searches conducted by officers of the defendant against some of the appellants violated section 8 the Charter. The judge struck these allegations on the basis that they had previously been raised and disposed of in the criminal and regulatory prosecutions: *R v. Dahl*, 120998, March 26th 2004 (BC Prov Ct); *R v. Eldon Garth Dahl, Agnesa Dahl and EDG Modern Design Ltd*, 100237221Q3 (Alta QB)). Given that, he found that the section 8 Charter claim constituted a collateral attack on the Provincial Court and Queen's Bench decisions and also an abuse of process.

[38] The appellants raise three arguments. Their first and second arguments are that these doctrines do not apply because the judicial forum and the relief sought are different. They also contend that the judge erred in striking the claim on the basis of abuse of process and collateral attack on preliminary motion. On this last point, they say that they will adduce evidence at trial which is different from or expands on the facts which underlie the decision of the BC and

Alberta courts, and explain why this claim is not impermissible relitigation. As this requires the judge to weigh evidence, the issue of collateral attack and abuse of process cannot be determined on a motion to strike and must await trial.

[39] Collateral attack and abuse of process are related, but distinct, doctrines: *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63. A collateral attack is an impermissible attempt to nullify the result of another proceeding outside of the proper channels for the review of that decision. The purpose of the doctrine is to prevent attempts to overturn decisions made in other courts. Its ambit is narrow.

[40] Abuse of process, in contrast, is a residual and discretionary doctrine of broad application and scope, which bars the relitigation of issues. It is directed to preventing relitigation of the same issues and the attendant mischief of inconsistent decisions by different courts which, in turn, would undermine the doctrines of finality and respect for the administration of justice. It is thus a more flexible doctrine than collateral attack. It permits a judge to bar relitigation of a criminal conviction in a different forum, as was the case in *CUPE*.

[41] The relief sought by the appellants is different in this action from that in the BC and Alberta proceedings. Here, damages are sought for an alleged unconstitutional search and for torts claimed to have been committed in the execution of the search. In the provincial courts, what was sought was the exclusion of the evidence obtained in the search at a criminal trial. These differences preclude the application of the doctrine of collateral attack. Abuse of process,

however, remains available; indeed, contrary to the appellants' first and second arguments, abuse of process explicitly contemplates a different judicial forum and relief sought.

[42] The remaining question is whether it is appropriate to strike a claim on the basis that it is an abuse of process on a motion to strike. It should be noted at the outset that the rules of practice of the Federal Courts expressly contemplate this (Rule 221(f)). Further, this Court has endorsed the propriety of striking a claim as being an abuse of process at the pleadings stage where the claimant sought to relitigate a criminal conviction from another jurisdiction in a civil action before the Federal Court: *Sauvé v. Canada* 2011 FCA 141 (commenting favourably on the lower court's striking of paragraphs not under appeal).

[43] Whether a particular issue has previously been judicially determined is a fact of which a judge is entitled to take notice at the early stage of a motion to strike. The fact of the other decision can form the foundation for the exercise of the judge's discretion. Allowing the abuse of process doctrine to be raised at the pleadings stage is consistent with the objective of maintaining respect for the administration of justice and the court's desire for comity and mutual respect between jurisdictions. More practically, a defendant has the right to have an abusive claim struck before being subjected to an intrusive and costly discovery process. While plaintiffs are not required to build into their pleadings a response to every conceivable defence, it is not unduly burdensome to expect plaintiffs who know they are relitigating a previously-determined issue to include in their pleadings the material facts they will rely upon to explain why the discretion to find the claim abusive should not be exercised.

[44] Here, there are no such facts that could be pleaded because granting the Charter or tort claims related to the impugned search would necessarily require the Federal Court to make different factual findings from those reached in the final decisions of the BC Provincial Court and Alberta Court of Queen's Bench in the criminal proceedings, which found the impugned search to be lawful.

[45] Accordingly, while the judge erred in characterising the claim as a collateral attack, he correctly identified it as an abuse of process. The difference of forum and relief do not preclude the claim from being abusive; it was appropriate for the judge to decide this issue on a motion to strike, and there is no reviewable error in his application of the principle of abuse of process to the claim before him.

III. Conclusion

[46] I would dismiss the appeal and the cross-appeal, with costs. I would grant the appellants sixty days from the date of this Court's judgment to serve and file their fresh as amended statement of claim.

"Donald J. Rennie"

J.A.

"I agree
David Stratas"

"I agree
Mary J.L. Gleason"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED JULY 16, 2014, DOCKET NUMBER T-17-54-12 (2014 FC 708)

DOCKET:	A-365-14
STYLE OF CAUSE:	NICK MANCUSO et al v. MINISTER OF NATIONAL HEALTH AND WELFARE et al
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 9, 2015
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	STRATAS J.A. GLEASON J.A.
DATED:	OCTOBER 27, 2015

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