

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20100519

Docket: A-90-10

Citation: 2010 FCA 128

Present: SHARLOW J.A.

BETWEEN:

R. MAXINE COLLINS

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 19, 2010.

REASONS FOR ORDER BY:

SHARLOW J.A.

Federal Court
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REASONS FOR ORDER

SHARLOW J.A.

[1] The appellant R. Maxine Collins is appealing a judgment of the Federal Court granting the Crown's motion to dismiss her action for damages on the basis that her pleadings do not disclose a reasonable cause of action (2010 FC 254). The preparation of the appeal for hearing has progressed to the point where the appeal book has been filed. However, Ms. Collins wishes to supplement the appeal book by filing a transcript of the proceedings in the Federal Court. She ordered and received a copy of a transcript but she has concluded that in certain respects the copy sent to her did not conform to the proceedings as she recalled them. She has moved for an order extending the time for filing the transcripts, requiring the court reporter to deliver to this Court a copy of the original recording of the hearing "for safekeeping", and for ancillary relief. She originally sought "listening

access” to the recording but has withdrawn that request for reasons stated in her letter to the Court dated May 18, 2010. For the reasons that follow, I have concluded that the motion must be dismissed except in relation to the extension of time.

[2] A motion to dismiss an action for failure to disclose a reasonable cause of action is based only on the pleadings. The Federal Court convened a hearing to consider the arguments for and against the motion, but the hearing was not a trial and no oral evidence was presented at the hearing. Although the hearing was recorded, a transcript of that recording would disclose only the legal submissions made by the parties and any discussion that might have occurred in the course of the hearing. Generally, information about the parties’ oral submissions or discussions between counsel and the judge at a hearing on a motion is irrelevant on appeal because it cannot assist this Court in determining whether the grounds of appeal are well founded.

[3] However, there is an exception to that general rule. If it is alleged on appeal that there was a breach of procedural fairness in a hearing and that the transcript of the legal submissions or discussions at the hearing provides evidence of that breach, the transcript may be relevant on appeal. In such a case, if there is also a credible allegation that the transcript is incorrect in the sense that it does not correctly represent what was said at the hearing, there may be a basis for requiring the original recording to be produced. The purpose of such an order would be to determine what was said at the hearing in relation to the issues that must be decided on appeal.

[4] Thus, the motion of Ms. Collins for production of the recording may be granted if two conditions are met. First, I must be satisfied that a correct representation of what was said at the hearing is necessary to support the validity of a ground of appeal. Second, I must be satisfied that the transcript provided to Ms. Collins does not correctly represent what was said at the hearing in relation to that ground of appeal.

[5] The notice of appeal states the following grounds of appeal:

- a. Failing to comply with the common law rules of procedural fairness in accepting the Defendant's Amended Amended Motion to Strike with content which was in direct violation of a court order restricting the amendments.
- b. Failing to comply with the principle of public accessibility as reaffirmed in Rule 29(1)(2) of the *Federal Courts Rules* in prohibiting the Plaintiff from making oral arguments on procedural fairness with respect to the Defendant's Amended Amended Motion to Strike.
- c. Issuing a decision in which the omissions and misstatements are of sufficient significance to constitute censorship in the public reporting of the hearing.
- d. Issuing a decision including a statement of fact that was not part of the Plaintiff's submissions which, given the stage of the proceedings, constituted further unauthorized disclosure by federal institutions of the Plaintiff's personal information.
- e. Failing to comply with the common law rules of procedural fairness by advising counsel for the Defendant of an argument with respect to jurisdiction and the Plaintiff's former status as an employee which argument was not included in the Defendant's motion to strike.
- f. Exhibiting a reasonable apprehension of bias against the Plaintiff.
- g. Wrongly construing the Plaintiff's action as grounded upon breach of a statute rather than the tort of negligence.
- h. Wrongly construing the arguments of the Plaintiff requesting consideration of the action as a novel negligence claim based solely on statute and being a progression of: [1] unauthorized access as a criminal offence under subsection 239(2.2) of the Income Tax Act [ITA], [2] a general and planned policy of failing to enforce a criminal offence provision enacted for the purpose of deterrence of the criminal offences referenced in [1], and [3] the lack of

authority to create and implement the policy referenced in [2] such a policy being a violation of the rule of law under the Charter.

- i. Finding that there is no reasonable cause of action in the Plaintiff's claim for a Charter breach as the Plaintiff did not claim a breach of her Charter rights instead claimed the undisputed existence of a federal government policy which allegedly violates the Charter.
- j. Failing to properly construe the decisions in *R. v. Beaudry* [2007] 1 S.C.R. 190 and *Krieger v. Law Society of Alberta* [2002] 3 S.C.R. 372 as dealing with individual police officers exercising discretion in laying charges and the exercise of prosecutorial discretion on a case by case basis rather than a general and planned policy never to enforce a criminal offence provision against a selected group of individuals.
- k. Finding the decision in *Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 as establishing discretion regarding enforcement proceedings is entirely unfettered and failing to give weight and significance to the Plaintiff's submissions regarding a breach of the rule of law in relation to the applicability of the second part of the Ann's test.
- l. Wrongly construing the Plaintiff's claim of misfeasance in public office as related to a failure to lay charges and prosecute offences as the Plaintiff could not and did not name the individuals responsible for the policy not to enforce subsection 239(2.2) of the ITA.
- m. In light of the above grounds for appeal, the Plaintiff seeks leave to include the identify [sic] additional CRA employees which names are included in the documents referenced in paragraphs 50 and 74 of the Amended Statement of Claim. These documents had been filed with the Federal Court at the time of the hearing pending the commencement of current judicial review proceedings against the CRA and the Royal Canadian Mounted Police.
- n. Failing to give consideration to the Plaintiff's claim of misfeasance in public office with respect to the unauthorized access to the Plaintiff's personal income tax information by employees of the CRA.
- o. Finding that the Plaintiff did not plead any material facts with respect to the misfeasance in public office by employees of the CRA.
- p. Failing to give weight and consideration to the submissions of the Plaintiff with respect to the private law duty of care established under the provisions of both the *Privacy Act* and the ITA.
- q. Failing to give weight and consideration to the fact that the Defendant does not dispute a private law duty of care with respect to the statutory duty to protect the personal information of the Plaintiff and Canadian taxpayers in general.

- r. Finding as grounds to strike, without leave to amend, the Plaintiff's statement of claim due to the Plaintiff's failure to seek judicial review in respect of certain federal entities particularly in light of the challenge to the validity of the decision in *Grenier v. Canada*, [2006] 2 F.C.R. 287 (C.A.). The Supreme Court has reserved decision on this challenge as contained in *Attorney General of Canada v. Telezone Inc.*

[6] Ms. Collins specifies only one error in the transcript she received. She says that the transcript does not record a comment by the judge to the effect that she had read the transcript of Justice Campbell's decision. That is apparently a reference to the transcript of an earlier Federal Court hearing in which Justice Campbell had granted the appellant leave to amend her statement of claim so that it would reflect a claim made on her own behalf only, rather than a class action. I am unable to see how that error could possibly be relevant to any of the grounds of appeal listed above. Indeed, Ms. Collins has not suggested otherwise.

[7] I appreciate that Ms. Collins became concerned about the integrity of the transcript because it apparently was not sent to her by the company that was responsible for recording the proceedings or preparing the transcript, but from another company. I appreciate also that Ms. Collins has expressed her unwillingness to provide further details of noted discrepancies because she has been advised that the tape is digital and easily altered. However, those concerns cannot establish that the transcript has any errors. More importantly, they cannot establish that the transcript is or may be relevant to any of the issues on appeal.

[8] Ms. Collins has not explained why she considers the transcript to be necessary to her appeal. In the absence of any explanation from her, I have attempted to discern from the grounds of appeal,

as quoted above, whether or not the transcript may be helpful to this Court in determining the issues she has raised in her notice of appeal.

[9] It appears to me that the grounds of appeal set out in items 7 to 18 disclose a number of disputes on points of law. Those issues, if pursued at the hearing of this appeal, are capable of being resolved without reference to anything that may have been said at the hearing in the Federal Court. Therefore, there is no basis for concluding that the transcript is required to deal with those grounds of appeal.

[10] The third and fourth grounds of appeal appear to allege factual and other errors in the judge's reasons for judgment. In the context of a motion to dismiss an action for failure to state a reasonable cause of action, such allegations normally are resolved by reference to the reasons, considered against the documentary record. Again, I have no basis for concluding that anything said at the hearing in the Federal Court would have any bearing on those two grounds of appeal.

[11] The first, second, fifth and sixth grounds of appeal purport to raise issues of procedural fairness. I will deal with each of those grounds in turn.

[12] Ms. Collins' first ground of appeal is that the judge failed "to comply with the common law rules of procedural fairness in accepting the Defendant's Amended Amended Motion to Strike with content which was in direct violation of a court order restricting the amendments." This ground of appeal normally would be addressed by referring to the order that is alleged to restrict the Crown's

right to amend its motion to strike, and the documents establishing what amendments were actually made. I see no basis for concluding that the transcript would be relevant to this ground of appeal.

[13] Ms. Collins' second ground of appeal is that the judge failed "to comply with the principle of public accessibility as reaffirmed in Rule 29(1)(2) of the *Federal Courts Rules* in prohibiting the Plaintiff from making oral arguments on procedural fairness with respect to the Defendant's Amended Amended Motion to Strike." Even if the judge said something that might have prevented Ms. Collins from making a legal argument on a particular point, it is not clear to me how anything that might have been said in the course of the Federal Court proceedings would preclude Ms. Collins from making that same legal argument in this appeal, if the point was fairly raised by the Crown's motion or Ms. Collins' response to it. I cannot see how the transcript would be of assistance to the Court in dealing with this ground of appeal.

[14] Ms. Collins' fifth ground of appeal is that the judge failed to "comply with the common law rules of procedural fairness by advising counsel for the Defendant of an argument with respect to jurisdiction and the Plaintiff's former status as an employee which argument was not included in the Defendant's motion to strike." If Ms. Collins wishes to submit on appeal that the judge considered a legal argument of which she was not given fair notice or a fair opportunity to respond, she is free to do so and to support her submission by referring to the portion of the judge's reasons in which that issue was considered, and then referring to the Amended Amended Notice of Motion and the written representations of the Crown to establish that the argument does not appear. I cannot see how the transcript of the proceedings would be helpful on this point.

[15] Ms. Collins' sixth ground of appeal is that the judge exhibited "a reasonable apprehension of bias" against her. The notice of appeal does not state any particulars or explain the basis upon which Ms. Collins formed the view that this was a valid ground of appeal, and so there is no basis upon which I can conclude that the transcript would provide evidence that might be relevant to this issue.

[16] I am not satisfied that the transcript of the hearing in the Federal Court would be of assistance to the Court in resolving any of the grounds of appeal. It follows that there is no justification for an order compelling production of the original recording.

[17] This motion will be granted insofar as it will give Ms. Collins additional time to take the next steps required to have this appeal made ready for a hearing, but it will otherwise be dismissed. As the Crown has made no submissions, no costs will be awarded on this motion.

"K. Sharlow"

J.A.