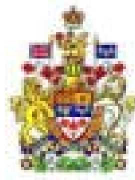
Federal Court of Appeal		Cour d'appel fédérale

Date: 20110419

Docket: A-151-10

Citation: 2011 FCA 141

CORAM: **PELLETIER J.A.**
LAYDEN-STEVENSON J.A.
MAINVILLE J.A.

BETWEEN:

GARY SAUVE

Appellant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA,
Royal Canadian Mounted Police (RCMP),
Marc FRANCHE (RCMP), Larry TREMBLAY (RCMP),
Louis DORAIS (RCMP)

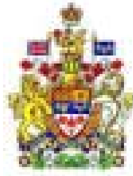
Respondents

Heard at Ottawa, Ontario, on April 12, 2011.

Judgment delivered at Ottawa, Ontario, on April 19, 2011.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: LAYDEN-STEVENSON J.A.
MAINVILLE J.A.

Federal Court of Appeal		Cour d'appel fédérale

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] Mr. Sauvé appeals to this Court from an order of Madam Justice MacTavish of the Federal Court (the Federal Court Judge or the Judge) striking all but one paragraph of his statement of claim against Her Majesty the Queen in right of Canada (on behalf of the Royal Canadian Mounted Police) and three named individuals who are members of that organization.

[2] In the course of certain domestic litigation, Mr. Sauvé made certain comments which resulted in his being convicted of two counts of criminal harassment. The statement of claim in issue in this appeal is one of a number of claims which Mr. Sauvé has initiated and which are pending in the courts as a result of the events surrounding Mr. Sauvé's arrest, detention, and conviction in the course of those criminal proceedings.

[3] The Federal Court Judge struck out a series of paragraphs of Mr. Sauvé's statement of claim on the basis that the actions complained of were those of provincial officials responsible for the administration of justice. The Judge found that Mr. Sauvé did not plead any facts which would make the Federal Crown liable for the acts of those officials. The Federal Court Judge also struck out a number of paragraphs of the statement of claim which allege defamation on the ground that Mr. Sauvé did not plead that the defamatory statements were untrue. The Judge also struck out those paragraphs which alleged that two of the named individuals defamed Mr. Sauvé when they made certain statements in their testimony in the criminal trial on the ground that testimony given in court proceedings is subject to absolute privilege. Certain paragraphs alleging a conspiracy to injure were struck out on the basis that the required elements of the cause of action in conspiracy were not pleaded.

[4] The remaining paragraphs of Mr. Sauvé's claim, with one exception, were struck out on the basis that the statement of claim was an abuse of process in that it was an attempt to re-litigate, in the civil context, the findings in the criminal proceedings.

[5] On this appeal, Mr. Sauvé emphasized three paragraphs with respect to which he wished to see the order of the Federal Court set aside, with leave being granted to amend if necessary.

[6] The first was paragraph 28 of his claim which provides as follows:

> On or about the 5th day of January 2005, the plaintiff submits that his life and that of his family were placed in danger by being placed in a cell with a well known violent offender. This offender assaulted the plaintiff, threatened to poke his eyes out with a pencil while he slept, went on rages by throwing things at and hitting the plaintiff. The defendants knew or ought to have known that by placing a police officer in a cell with a known violent inmate was grossly negligent, dangerous and placed not only his life in danger but those of his family. The plaintiff respectfully submits that he believed that he was going to be killed. The plaintiff further states that it took over one month to remove him from said cell.

[7] This was one of the paragraphs which the Federal Court struck out on the basis that the matters complained of were within the jurisdiction of the provincial authorities. In argument, Mr. Sauvé advised us of additional facts, which do not appear in his pleadings, which he says would be sufficient to establish his claim against the defendants in this action. Those facts were that R.C.M.P. officers visited the provincial correction centre to assure themselves of his safety and were aware of the fact that he had been placed in a cell with another inmate but did not intervene to protect him. In addition, Mr. Sauvé affirmed that when he was remanded in custody, an order was made that he be placed in administrative segregation and, in any event, a police officer who is incarcerated is always segregated for his own protection. There is no record of any court order on file.

[8] In applications to strike a statement of claim, no evidence is to be filed. The facts pleaded are taken to be true and a determination is made if those facts disclose a cause of action. That is what the Federal Court did in this case. We are now asked to consider facts other than those which are in the pleadings on the basis that, by permitting an amendment to the pleadings to include those facts, we would allow the true merits of the case to be heard. The difficulty is that we are asked to take into account facts (or allegations of facts) which do not appear in the pleadings, which were not before the Federal Court Judge and which do not appear in the record itself.

[9] We are bound by the same jurisprudence as that which the Federal Court Judge set out at paragraphs 8 to 13 of her judgment and, on the basis of that jurisprudence, we can come to no other conclusion than did the Federal Court Judge.

[10] Mr. Sauvé emphasized the jurisprudence dealing with the Court's obligation to allow pleadings to be amended so as to allow justice to be done. The jurisprudence cited by Mr. Sauvé in his Memorandum deals with various situations where amendments to pleadings were sought under Rule 75, or its equivalent in other jurisdictions. The case before us is brought under Rule 221(1) of the *Federal Court Rules*, SOR/98-106.

[11] Mr. Sauvé also asked that paragraph 38 of his statement of claim be "reinstated", with leave to amend if necessary. Paragraph 38 provides as follows:

> 38. On the 18th day of July 2005, the defendants served a subpoena to the plaintiff's address to attend a criminal court trial to testify as a police officer. The subpoena disclosed the plaintiff's personal home address and police work phone number. The plaintiff respectfully submits and claims separate damages for invasion of privacy,

> intrusion upon plaintiff's solitude, harassment, conspiracy to injure and breaches pursuant to the Charter. The plaintiff sustained stress, worry, fear and anxiety.

[12] Mr. Sauvé provided us with further facts with respect to this allegation as well. He indicated that the trial in question was one involving members of organized crime and that the subpoena with his home address on it was placed on the court file where it was available to the accused and their friends. In the Federal Court's reasons for decision, the motions judge notes that "…there is no assertion in the pleading that this information was ever disclosed to a third party". The additional information provided to us by Mr. Sauvé seeks to undermine this finding by the Federal Court. As noted above, we are bound by the same jurisprudence as the Federal Court Judge and, as in the case of paragraph 28, we can come to no other conclusion than the one to which she came.

[13] Mr. Sauvé also asked that paragraph 34 be allowed to stand since it is intimately connected with paragraph 33 of his claim, the sole paragraph which the Federal Court allowed to stand. Those two paragraphs are reproduced below:

> 33. On or about the 30th day of November 2004, the plaintiff submits that the defendants caused damages to his person by serving a subpoena to the plaintiff while incarcerated and by removing him out of segregation to attend the Ottawa Court House to testify as a police officer, for and on behalf of the RCMP and the Ottawa Police Services with respect to a criminal case involving organized crime. The plaintiff feared for his safety and that of his family by increasing the risk by exposing his identity as a police officer. The plaintiff sustained fear, stress, anxiety, emotional trauma, loss of reputation, loss of integrity, dignity, respect, humiliation, embarrassment and degradation. The Plaintiff submits that being experienced and well trained, the defendants knew or ought to have known that their actions and/or inactions would cause damages to the plaintiff.
>
> 34. The Plaintiff also claims legal costs incurred whereby his defense lawyer had to attend said trial to ensure his protection of his person and rights and those of his family, his integrity as a police officer from the lawyer representing those charged

> and further to protect his rights that he would not be abused or exposed to unwarranted attacks. The plaintiff submits that the defendants failed to provide such assistance to the plaintiff and as such, has incurred additional legal fees.

[14] Paragraph 34 itself does not disclose a cause of action; it particularizes the damages suffered as a result of the breach which Mr. Sauvé pleads in paragraph 33. Paragraph 34 was struck out together with the other paragraphs of the statement of claim which the Federal Court judge found were an abuse of process. With respect, if the Federal Court Judge was prepared to allow Mr. Sauvé to plead a cause of action arising out of the facts recited in paragraph 33, she should logically have allowed him to plead the damages flowing from that cause of action. I would allow this paragraph to stand.

[15] Finally, though Mr. Sauvé did not stress this issue, the Court raised the question of the allegation of wrongful detention which is pleaded at paragraphs 11 and 12 of the statement of claim. In those paragraphs, Mr. Sauvé puts into issue the lawfulness of his detention at his place of employment by members of the R.C.M.P. This allegation was swept away with the others which put into question the correctness of Mr. Sauvé's criminal conviction. When counsel for the Crown was asked about the lawfulness of this detention, she replied that it was done in the R.C.M.P.'s role as a police force assisting another police force to execute a warrant. There is nothing in the statement of claim which discloses the existence of a warrant for Mr. Sauvé's arrest at the time he alleges he was detained.

[16] In my view, this allegation is separate and distinct from the pleadings which are a collateral attack on Mr. Sauvé's criminal conviction. Mr. Sauvé alleges that he was wrongfully detained.

Whether the R.C.M.P., acting either in their capacity as Mr. Sauvé's employer or in their capacity as a police force, had the authority to detain him in the circumstances described in the statement of claim is a matter of defence, not a matter which goes to the existence of a valid cause of action. I would therefore allow the appeal to the extent of allowing paragraphs 1 to 7, 10, 11 and the first sentence of paragraph 12 of the statement of claim to stand.

[17] Since Mr. Sauvé has been successful in the appeal, I would award him his disbursements.

"J.D. DENIS PELLETIER"
J.A.

"I agree
Carolyn Layden-Stevenson J.A."

"I agree
Robert M. Mainville J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-151-10

(APPEAL FROM AN ORDER OF MADAM JUSTICE MACTAVISH, DATED FEBRUARY 24, 2010, DOCKET NUMBER T-1752-06)

STYLE OF CAUSE:	GARY SAUVE and HER MAJESTY THE QUEEN IN RIGHT OF CANADA, Royal Canadian Mounted Police (RCMP), Marc FRANCHE (RCMP), Larry TREMBLAY (RCMP), Louis DORAIS (RCMP)
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 12, 2011
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	LAYDEN-STEVENSON J.A. MAINVILLE J.A.
DATED:	APRIL 19, 2011

APPEARANCES:

GARY SAUVE	APPELLANT ON HIS OWN BEHALF
MS. CATHERINE LAWRENCE	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

MYLES J. KIRVAN DEPUTY ATTORNEY GENERAL OF CANADA	FOR THE RESPONDENTS