Federal Court of Appeal | Cour d'appel fédérale

Date: 20230323

Docket: A-93-21

Citation: 2023 FCA 67

CORAM: **MACTAVISH J.A.**
LEBLANC J.A.
MONAGHAN J.A.

BETWEEN:

TANYA REBELLO

Appellant

and

THE MINISTER OF JUSTICE and
THE ATTORNEY GENERAL OF CANADA and
THE PRIME MINISTER OF CANADA

Respondents

Heard at Ottawa, Ontario, on March 21, 2023.

Judgment delivered at Ottawa, Ontario, on March 23, 2023.

REASONS FOR JUDGMENT BY: LEBLANC J.A.

CONCURRED IN BY: MACTAVISH J.A.
MONAGHAN J.A.

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REASONS FOR JUDGMENT

LEBLANC J.A.

[1] This is an appeal from an order of the Federal Court (*per* Ahmed J.), dated March 2, 2021 (2021 FC 192). The Federal Court struck out the appellant's action in damages against the respondents because it had no reasonable prospect of success and was frivolous and vexatious because it was so deficient in factual material that the respondents could not respond.

[2] The appellant, who acts on her own behalf, brought her action in July 2019 in the Federal Court against the respondents for torts and breaches of various sorts allegedly committed by a number of Ontario Crown actors (the Premier of Ontario, the Ontario Minister of Transportation, Service Ontario, the Ontario Superior Court Services, Crown lawyers, the Ontario Minister of Government and Consumer Services, Ontario Provincial Police, the Toronto Police Services, Hydro One and Hydro One employees) and federally appointed Superior Court justices. The appellant claimed $200,000,000.00 in general damages and $100,000,000.00 in punitive damages (although at the hearing of this appeal she suggested that these numbers should have read $2,000,000.00 and $1,000,000.00, respectively).

[3] In essence, the appellant asserts that the respondents are liable for financially supporting those provincial Crown and courts actors. She alleges that the respondents impugned conduct amounts to a breach of statutory duties, neglect of duties, a breach of fiduciary duties, misfeasance in public office, conspiracy, negligence and a breach of the appellant's rights under sections 7, 8, 12 and 15 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

[4] In response to the appellant's Statement of Claim, the respondents brought a motion in writing pursuant to Rules 221(1)(*a*) and (*c*) and Rule 369 of the *Federal Courts Rules*, SOR/98-106 (the Rules) seeking an order striking the Statement of Claim in its entirety and without leave to amend. According to paragraph 221(1)(*a*) of the Rules, a pleading in the Federal Court may be struck if, assuming the facts as pleaded are true, it is "plain and obvious" that the pleading

"discloses no reasonable cause of action" *(R. v. Imperial Tobacco Canada*, 2011 SCC 42, [2011] 3 S.C.R. 45 at para. 17). This motion was filed on August 13, 2019.

[5] The Federal Court broke down as follows the categories of allegations made against the respondents in the Statement of Claim:

> 1. Vehicle issues: with support from the [respondents], the Premier of Ontario funded various provincial bodies, who transferred the [appellant's] vehicle identification number, detached her license plate, and suspended her driver's license;
>
> 2. Police issues: with support from the [respondents], the Premier of Ontario funded various police agencies, who proceeded to stalk, terrorize, and monitor the [appellant];
>
> 3. Legal issues: with support from the [respondents], the Premier of Ontario funded the Attorney General of Ontario, who created a false draft order in a Superior Court proceeding, and who funded and allowed judges of the Ontario Superior Court of Justice to breach the [appellant's] rights and sign false draft orders.

[6] At the request of the appellant, an oral hearing was convened for this motion. While it was originally scheduled for November 25, 2019, the hearing was ultimately held by videoconference on February 23, 2021 due to COVID-19 restrictions and adjournments

requested by the appellant. However, when the February 23, 2021 hearing began, the appellant had not yet joined the videoconference. Despite a number of attempts by the appellant to join the videoconference once the hearing had begun, the hearing proceeded without her.

[7] In his reasons for order granting the respondents' motion, Ahmed J. did address the videoconference-hearing imbroglio. He indicated that he noticed the interruptions during the hearing, which, he said, are commonplace on videoconferences, but did not understand that they were the appellant's attempts to join the videoconference. He added that he had not provided instructions to registry officers regarding what to do if a participant attempts to join a videoconference after it has commenced, noting that registry officers, not judges, have control over the technological functions of videoconferences. Then Ahmed J. quoted from the Federal Court's publicly available *Virtual hearings at the Federal Court - User Guide for Participants* (*User Guide for Participants*), which states that videoconference hearings are locked once they have commenced and that participants are expected to join remote hearings 30 minutes prior to the hearing. He concluded that the appellant should have been aware of the Court's policy or, at least, have "prepared herself to attend the hearing on time in the months between when the hearing was scheduled and when it commenced". The appellant sought reconsideration of the Federal Court's order dismissing her action, but her motion for reconsideration was dismissed.

[8] Before us, the appellant claims that the Federal Court order must be overturned because she was denied procedural fairness by not being able to make oral submissions at the videoconference hearing. She says that her repeated attempts to join the hearing were intentionally ignored. She asserts that, as a self-represented litigant, she should have been

afforded greater levels of accommodation and assistance to enable her participation in the hearing. The appellant submits as well that the time of the hearing was changed from 9:30 am to 1:00 pm the day before the hearing, which prevented her, because of job related previous engagements, from joining the videoconference 30 minutes before the start of the hearing, as expected by the *User Guide for Participants*. She contends that the change in the time of the hearing violated the scheduling direction issued by the Chief Justice of the Federal Court on November 25, 2020, which stated that the hearing would take place at 9:30 on the morning of February 23, 2021. As to the actual merits of the Federal Court order, she contends that the Federal Court erred by striking her Statement of Claim without leave to amend.

[9] In my view, this appeal cannot succeed.

[10] On the procedural fairness issue, this Court must be satisfied that the duty of procedural fairness was met. In so doing, the Court's focus must be "on whether a fair and just process was followed having regard to all the circumstances" (*Koch v. Borgatti Estate*, 2022 FCA 201 at para. 40; quoting from *Canadian Pacific Railway v. Canada (Attorney General)*, 2018 FCA 69 at para. 54).

[11] As noted, Ahmed J. did consider the fact that the appellant did not participate in the videoconference hearing but concluded, for all intents and purposes, that the appellant had been the author of her own misfortunes. According to him, the appellant should have been aware of the *User Guide for Participants*' "lock-up" provision regarding the commencement of videoconference hearings and the expectation that participants join such hearings 30 minutes

prior to their commencement. Ahmed J. noted that the appellant had been aware for some time that the hearing she had sought was scheduled to be held on February 23, 2021. He implicitly concluded, after underscoring the fact that the Court "ha[d] gone through great lengths to accommodate the [appellant's] request to convene an oral hearing" – a procedure, he insisted, that "is in the Court's discretion and not guaranteed to the [appellant] as of right" – that the way things had unfolded during said hearing raised no procedural fairness issues.

[12] One could say that this finding is, technically, defensible, especially in light of the fact that the appellant's written submissions were, according to paragraph 26 of the reasons for the order, considered by the Federal Court in coming to the conclusion that the respondents' motion should be granted. The record shows that the appellant filed a responding motion record on October 15, 2019, as well as a supplementary responding motion record on August 24, 2020 (Appeal Book at pp. 154 and 166). Although not given the opportunity to make oral submissions, again, one could say that the appellant's participatory rights were consistent with the duty of procedural fairness having regard to all the circumstances. After all, as stated in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 at paragraph 21, reaffirmed in *R. v. Nahanee*, 2022 SCC 37 at paragraph 53, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case".

[13] However, the situation faced by the appellant does raise some concerns, given her clear intention to participate in the hearing and her various attempts to join the videoconference. One could say that the approach taken by the Federal Court, both through the *User Guide for*

Participants and at the hearing, offers no flexibility whatsoever to those participants who attempt to join a videoconference hearing once it has commenced, especially where those participants are self-represented litigants.

[14] In saying that, I am mindful of the efforts made by the Federal Court (and various courts across Canada, including this Court) to adjust to the COVID-19 pandemic in order to be in a position to continue to function and deliver justice and of the technical challenges associated with those efforts. However, the failure to accommodate the appellant during the videoconference hearing of February 23, 2021, despite her clear attempts to join the videoconference as evidenced by the transcript of the hearing, is somewhat troubling. It is even more troubling that when counsel for the respondents indicated to Ahmed J., shortly after the commencement of his oral submissions, that it appeared that someone had "joined the meeting", no efforts were made to inquire about counsel's remark; rather, counsel was asked to proceed with his submissions. It is probably safe to say that what happened on that day would have been different in an in-person setting, where the late arrival of a party would, for example, normally trigger a short recess of the hearing so as to allow the registry officer to enquire into the party's whereabouts and reasons for late arrival, and be remedied, depending on the circumstances.

[15] Here, there was no accommodation at all and the decision to proceed with only one party present, while the other was knocking on the door, so to speak, is concerning. A more appropriate course of action would probably have been to suspend the hearing to allow the appellant to participate in it or to decide the matter on the basis of the motion records and the parties' written submissions, rather than accept oral submissions from one party.

[16] That said, assuming that this amounts to a breach of procedural fairness, this breach does not justify the setting aside of the impugned order since, in my view, the outcome of the respondents' motion to strike the Statement of Claim is inevitable (*Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, 1994 CanLII 114 (SCC), [1994] 1 S.C.R. 202 at 228; *Ilaslan v. Hospitality & Service Trades Union*, 2013 FCA 150 at para. 28). In other words, remitting the matter to the Federal Court so as to allow the appellant to make oral submissions in response to the respondents' motion, which is the only substantive remedy this Court could reasonably grant if it was to allow this appeal, would be futile (*Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56 at para. 117).

[17] As stated at the outset of these reasons, a pleading in the Federal Court may be struck if, assuming the facts as pleaded are true, it is plain and obvious that the pleading discloses no reasonable cause of action. The Federal Court found this to be the case here and held that the Statement of Claim ought to be struck without leave to amend. It is open to the Federal Court to strike a pleading without leave to amend where the defects in the pleading are such that they cannot be cured by amendments (*Simon v. Canada*, 2011 FCA 6 at para. 8).

[18] Whatever the standard of review applicable to such a decision – correctness or palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235) – I find that the decision reached by the Federal Court is, on the face of the appellant's Statement of Claim and Amended Statement of Claim filed on August 10, 2020, and despite the appellant's able submissions at the hearing of this appeal, inescapable.

[19] I fully agree with the Federal Court that the Statement of Claim is so deficient in material facts – the who, when, where, how and what of the respondents' alleged actions (*Mancuso v. Canada (National Health and Welfare)*, 2015 FCA 227 at para. 19) – that the respondents cannot respond to it. The Amended Statement of Claim has not cured those deficiencies. Both documents are replete with bald allegations against various provincial individual and institutional Crown actors and cite causes of action that the pleadings, as outlined at paragraph 25 of the Federal Court's reasons for order, do not support, either because those causes of action are unrecognized causes of action or because the pleadings are incurably deficient.

[20] I would add, as this Court has recently held, that provincial public officials as well as federally appointed provincial judges are not servants or agents of the Federal Crown within the meaning of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 (the CLPA). Therefore, they cannot engage, by their conduct, the liability of the Federal Crown (*Feeney v. Canada*, 2022 FCA 190 at paras. 10-19 (*Feeney*)). The allegation that somehow the liability of the respondents is engaged simply because the various provincial Crown actors that are referred to in the appellant's Statement of Claim run their operations presumably using federal funds has very little, if any, traction in Federal Crown liability law. As stated in *Feeney*,

> [14] […] the Federal Crown – which, until the enactment of the *Crown Liability Act*, S.C. 1952-53, c. 30 in 1953, could not be sued in tort as of right – can only be held liable for the fault of its servants, and not on its own account (*Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621 at para. 58 ; Peter W. Hogg, Patrick J. Monahan and Wade K. Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011)).

[21] The terms “servants” or “agents” of the Federal Crown within the meaning of the CLPA refer to someone working under the control or direction of the Crown (*Feeney* at para. 14, referring to *Northern Pipeline Agency v. Perehinec*, 1983 CanLII 167 (SCC), [1983] 2 S.C.R. 513 at 519-521; *R. v. Eldorado Nuclear Ltd.; R. v. Uranium Canada Ltd*., 1983 CanLII 34 (SCC), [1983] 2 S.C.R. 551 at 573-574). This simply can not be in the case of the Ontario Crown actors (the Premier of Ontario, the Ontario Minister of Transportation, Service Ontario, the Ontario Superior Court Services, the Ontario Minister of Government and Consumer Services, Ontario Provincial Police, the Toronto Police Services, Hydro One and Hydro One employees) and the members of the Ontario judiciary named in the Statement of Claim. Moreover, there are no allegations in the appellant’s Statement of Claim that the respondents exert any control over these actors, and, if so, how and to what degree.

[22] Furthermore, courts have held that funding and resource allocations do not establish a duty of care, as the relationship that they engage lacks sufficient proximity; in sum, they do not in their own right, provide the basis for a lawsuit (see, for example, *Riddle v. Canada*, 2018 FC 641 at para. 55; *Ontario v. Phaneuf*, 2010 ONCA 901 at paras. 12-13; *Desautels v. Katimavik*, 2003 CanLII 39372 (ONCA) at para. 23).

[23] For all these reasons, I find that the defects in the Statement of Claim are not curable and that the Federal Court was entitled to strike it without leave to amend. I come to the same conclusion with respect to the Amended Statement of Claim filed by the Appellant in August 2020.

[24] I would therefore dismiss the appeal. The respondents are seeking their costs in the amount of $500 and ask that this amount be paid forthwith. Given that the concerns raised by the appellant as to the fairness of the process during the impugned hearing have some merit, I would award no costs on appeal.

"René LeBlanc"
J.A.

"I agree.
Anne L. Mactavish J.A."

"I agree.
K. A. Siobhan Monaghan J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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