Federal Court  Cour fédérale

Date: 20190930

Dockets: T-455-16
T-456-16

Citation: 2019 FC 1244

Ottawa, Ontario, September 30, 2019

PRESENT: The Honourable Mr. Justice Barnes

PROPOSED CLASS PROCEEDINGS
AND PROPOSED SIMPLIFIED ACTION

Docket: T-455-16

BETWEEN:

KRISTEN MARIE WHALING
(FORMERLY KNOWN AS
CHRISTOPHER JOHN WHALING)

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

Docket: T-456-16

AND BETWEEN:

WILLIAM WEI LIN LIANG

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

[1] The Defendant brings a third motion to strike in these proceedings in response to the Plaintiffs' amendments to their respective Second Further Amended Statements of Claim.

[2] The parties agree that these motions can be dealt with in writing. Because the issues raised on the motions are identical, this single set of Reasons will apply to both motions.

[3] The causes of action pleaded by the Plaintiffs' concern the passage into law by Parliament of legislation later found to be unconstitutional. The Plaintiffs' seek damages under the *Charter of Rights and Freedoms* (Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11) on behalf of proposed classes of federal inmates whose opportunities to pursue early release from custody were hampered by the passage of the *Abolition of Early Parole Act*, SC 2011, c 11 [AEPA]. Further details of the judicial history of these cases can be found in *Whaling v Canada (Attorney General)*, 2017 FC 121, 374 CRR (2d) 249; *Whaling v Canada (Attorney General)*, 2018 FC 748; *Canada (Attorney General) v Whaling*, 2014 SCC 20, [2014] 1 SCR 392, and *Liang v Canada (Attorney General)*, 2014 BCCA 190, 311 CCC (3d) 159.

[4] The Defendant's present concern arises from fresh allegations made against "Crown employees, servants and/or agents and state actors" for alleged unlawful conduct arising after the passage of the AEPA. The principal paragraph of concern is the following:

> 18 After the passage of the AEPA, the said Crown employees, servants and/or agents and state actors in their control acted in bad faith, including:
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> a. acting recklessly;
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> b. acting in a grossly negligent manner;
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> c. acting in a manner that was clearly wrong;
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> d. displaying wilful blindness;
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> e. acting with an unreasonable attitude or for ulterior motives;
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> f. failing to respect the established and indisputable laws that define the constitutional rights of individuals; and/or
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> g. acting in abuse of their power;
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> in implementing a bill which they had been warned was unconstitutional, and which they knew (or ought to have known) was unconstitutional and would infringe the rights of those to whom it retroactively or retrospectively applied.

[5] The Defendant argues that the above pleading discloses no cause of action known to law and is "conceptually incapable of succeeding". Moreover, the Defendant argues that the contention that there could ever be an unlawful implementation of presumptively valid legislation runs counter to the rule of law and the obligation of the Crown (including its servants and agents) to uphold and apply the laws passed by Parliament. The Defendant states that this is made clear in the following passage from *Vancouver (City) v Ward*, 2010 SCC 27, at para 41, [2010] 2 SCR 28 [Ward]:

> 41 The government argues that the *Mackin* principle applies in this case, and, in the absence of state conduct that is at least "clearly wrong", bars Mr. Ward's claim. I cannot accept this submission. *Mackin* stands for the principle that state action taken under a statute which is subsequently declared invalid will not give rise to public law damages because good governance requires that public officials carry out their duties under valid statutes without fear of liability in the event that the statute is later struck down. The present is not a situation of state action pursuant to a valid statute that was subsequently declared invalid. Nor is the rationale animating the *Mackin* principle – that duly enacted laws should be enforced until [page 48] declared invalid – applicable in the present situation. Thus, the *Mackin* immunity does not apply to this case. [Emphasis added.]

[6] The Plaintiffs argue that the impugned amendments do not create a new cause of action but only add some clarity to what was previously pleaded. They have also informally stipulated that the assertions in question do not apply to the actions of mere public servants who were lawfully charged with implementing the AEPA. On this issue, they concede that public officials responsible for the practical implementation of the AEPA had an obligation to apply the law as written, at least until it was declared unconstitutional. It seems to me that this acknowledgement accords with the Defendant's argument that the public service is legally obliged to apply the laws passed by Parliament, and those who do so enjoy an immunity for their actions.

[7] The difficulty I have with the Defendant's motions arises from the lack of clarity provided by the Supreme Court of Canada around the scope of limited immunity available to the Parliamentary and the Executive branches of government arising from the passage and implementation of unconstitutional legislation. As I observed in the Defendant's previous motions to strike, that Court has offered only general guidance as to when damages will be

payable in such circumstances. In *Whaling v Canada (Attorney General)* (2017 FC 121), I described my concern in the following way:

> [15] I accept the Plaintiffs' point that no bright-line test for grounding liability in cases like this emerges from the decision in *Mackin*, above. What does emerge from the majority judgment are some general impressions coupled with considerable uncertainty about where the boundaries of the limited immunity for legislative action begin and end. At various places in the judgment the Court indicates that legislative immunity for *Charter* damages may not be available for the exercise of governmental action that is "clearly wrong," "in bad faith," "an abuse of power," "negligent," brought with an "unreasonable attitude" or for "ulterior motives," or "with knowledge of ... unconstitutionality," or that fails to "respect the 'established and indisputable' laws that define the constitutional rights of individuals." Whether the test is subjective, objective or something in between is left unanswered.

[8] Although the earlier motions to strike in these cases dealt with the scope of legislative immunity, in *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick*, 2002 SCC 13, [2002] 1 SCR 405 [Mackin], the Supreme Court referred more broadly to government immunity and to the protection afforded to "the government and its representatives" for exercising their powers in "good faith". This point is made in the following way at paras 78-79:

> 78 According to a general rule of public law, absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional (*Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957; *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42). In other words "[i]nvalidity of governmental action, without more, clearly should not be a basis for liability for harm caused by the action" (K. C. Davis, *Administrative Law Treatise* (1958), vol. 3, at p. 487). In the legal sense, therefore, both public officials and legislative bodies enjoy limited immunity against actions in civil liability based on the fact that a legislative instrument is invalid. With respect to the possibility that a legislative assembly will be held liable for enacting a statute that is subsequently declared unconstitutional, R. Dussault and L. Borgeat confirmed in their

> *Administrative Law: A Treatise* (2nd ed. 1990), vol. 5, at p. 177, that:
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> In our parliamentary system of government, Parliament or a legislature of a province cannot be held liable for anything it does in exercising its legislative powers. The law is the source of duty, as much for citizens as for the Administration, and while a wrong and damaging failure to respect the law may for anyone raise a liability, it is hard to imagine that either Parliament or a legislature can as the lawmaker be held accountable for harm caused to an individual following the enactment of legislation. [Footnotes omitted.]
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> 79 However, as I stated in *Guimond v. Quebec (Attorney General)*, *supra*, since the adoption of the *Charter*, a plaintiff is no longer restricted to an action in damages based on the general law of civil liability. In theory, a plaintiff could seek compensatory and punitive damages by way of "appropriate and just" remedy under s. 24(1) of the *Charter*. The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently, the reasons that inform the general principle of public law are also relevant in a *Charter* context. Thus, the government and its representatives are required to exercise their powers in good faith and to respect the "established and indisputable" laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. Laws must be given their full force and effect as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded (*Crown Trust Co. v. The Queen in Right of Ontario* (1986), 26 D.L.R. (4th) 41 (Ont. Div. Ct.)). [Emphasis in original.] [Footnotes omitted.] [Emphasis added.]

[9] The above statement leaves open the potential for an award of *Charter* damages for the "enactment or application of a law that is subsequently declared to be unconstitutional" as against "both public officials and legislative bodies". I accept the Defendant's point that the

good-faith implementation of a legislative instrument would not attract liability for *Charter* damages. However, the applicable authorities do not precisely state whether members of the Executive branch who propose, cause to be proclaimed into law or otherwise direct the public service to implement legislation they know, or ought to know, to be unconstitutional, are liable for damages. Having regard to the principle discussed in Ward, above, at para 18, this is not the stage where this question should be removed from further consideration. Furthermore, leaving this issue for later resolution will not add a significant evidentiary burden or unduly lengthen the trial of these cases.

[10] For the foregoing reasons, this motion is dismissed with costs payable in the cause.

[11] Counsel for the Plaintiff Whaling has informally requested an amendment to the style of clause in docket number T-455-16 to have it read: "Kristen Marie Whaling (Formerly Known As Christopher John Whaling". The Defendant has consented to the change and it is so ordered with immediate effect.

ORDER in T-455-16 and T-456-16

THIS COURT ORDERS that

1. this motion is dismissed with costs payable in the cause;

2. the style of cause in docket number T-455-16 is amended, with immediate effect, by modifying the Plaintiff's name to "Kristen Marie Whaling (Formerly Known As Christopher John Whaling".

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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DOCKET:	T-456-16
STYLE OF CAUSE:	WILLIAM WEI LIN LIANG v HER MAJESTY THE QUEEN

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	BARNES J.
DATED:	SEPTEMBER 30, 2019

WRITTEN REPRESENTATIONS BY:

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