Federal Court  Cour fédérale

Date: 20240927

Docket: T-1048-24

Citation: 2024 FC 1527

Edmonton, Alberta, September 27, 2024

PRESENT: Madam Associate Judge Catherine A. Coughlan

BETWEEN:

SLAVE LAKE HELICOPTERS LTD.

Plaintiff
(Responding Party)

and

HIS MAJESTY THE KING

Defendant
(Moving Party)

JUDGMENT AND REASONS

I. Overview

[1] The Minister of Transport and Transport Canada (the Defendants) bring a motion in writing to strike the Statement of Claim of the Plaintiff, Slave Lake Helicopters Ltd. (SLH), pursuant to Rule 221 of the *Federal Courts Rules*, SOR/98-106 [*Rules*].

[2] The Defendants submit that the pleadings should be struck because they disclose no reasonable cause of action pursuant to Rule 221(1)(a) of the *Rules*. The Defendants further submit that the Statement of Claim should also be struck on the basis that it is scandalous, frivolous and vexatious, pursuant to Rule 221(1)(c) of the *Rules.*

[3] SLH submits that the Statement of Claim pleads material facts in support of the tortious claim and that a reasonable cause of action is disclosed. Similarly, SLH argues that the Statement of Claim is not frivolous, scandalous or vexatious.

[4] For the reasons that follow, I conclude that the Statement of Claim fails to disclose a reasonable cause of action and must be struck without leave to amend.

II. Background

[5] SLH is a company incorporated in Alberta and conducts helicopter operations, including Class D external load operations. Loads carrying persons are classified as Class D loads. SLH conducted Class D operations in compliance with the *Canadian Aviation Regulations* [*CARs*] and the *Commercial Air Services Standards* [*CASS*] from 2018.

[6] In March 2020, SLH received a letter from an employee of the Defendants which was addressed generally to helicopter operators in the Prairie and Northern Region (PNR). According to the Statement of Claim, the letter clarified the regulations and standards regarding Class D external load operations. SLH asserts that the letter set out a new interpretation of *CASS* s.722(2)(b)(vi). This new interpretation meant that SLH could no longer conduct Class D

operations in compliance with *CARs* and *CASS*. The *CARs* were not amended to reflect the new interpretation.

[7] In February 2024, through *Access to Information and Privacy Act* [ATIP] requests, SLH obtained email correspondence of the Defendants' employees, dating from early 2020, concerning the development of the new interpretation of *CASS* s.722(2)(b)(vi).

[8] On May 6, 2024, SLH filed the Statement of Claim. SLH alleges that the email correspondence gives rise to a cause of action in the tort of misfeasance in a public office. The Plaintiff claims business losses resulting from their inability to transport Class D loads in compliance with the new interpretation of *CASS* s.722(2)(b)(vi).

[9] On June 13, 2024, the Defendants filed the within motion to strike SLH's Statement of Claim.

[10] Pursuant to SLH's request, the Court heard oral submissions from the parties on August 14, 2024, at Vancouver, British Columbia.

III. Issues

[11] The issues to be decided on this motion are:

(a) Should the Statement of Claim be struck out in its entirety, without leave to amend?

i. Does the Statement of Claim disclose a reasonable cause of action pursuant to Rule 221(a)?

ii. Is the Statement of Claim scandalous, frivolous or vexatious, pursuant to Rule 221(c)?

A. *Preliminary Issues*

[12] Three preliminary issues were raised at the hearing of this matter.

[13] The first was a request from the Defendants that the style of cause be amended to reflect His Majesty the King as the correct Defendant. SLH took no issue with that request and accordingly, the style of cause will be amended with immediate effect.

[14] The second relates to the Defendants' position regarding its limitations argument. At the hearing of the motion, the Defendants abandoned that argument and accordingly, the Court will not consider the written representations of either party on that issue.

[15] The third relates to the filing and use of an affidavit by SLH on this motion. The affidavit is that of Andrea Pelletier. Ms. Pelletier deposes that since 2020 she has worked as a consultant for SLH and that in or around September 2023, she initiated several ATIP requests concerning the Defendants and the files related to and giving rise to the March correspondence. Exhibited to her affidavit is a copy of the March correspondence as well as the documents that were produced from the ATIP request.

[16] Although evidence is generally not admissible in respect of Rule 221(1)(a) motions to strike, SLH argues that the affidavit ought to be admitted on this motion because the documents exhibited to the affidavit are incorporated by reference in the Statement of Claim and should be deemed to be part of the pleadings.

[17] The Defendants take no issue with the affidavit and accordingly, it will be admitted on the motion.

B. *Should the Statement of Claim be Struck Out?*

(1) Does The Statement of Claim Disclose a Reasonable Cause of Action?

[18] The Court may strike a statement of claim under Rule 221(1)(a) if it does not disclose a reasonable cause of action. The stringent test for striking out a claim on that basis is whether, assuming that the facts pleaded can be proved, it is "plain and obvious" that the claim discloses no reasonable cause of action. Another way of putting the test is that the claim has no reasonable prospect of success: *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at para 30; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17, [2011] 3 SCR 45.

[19] To establish a reasonable cause of action, a statement of claim must allege material facts that seek to establish all elements of the alleged cause of action: *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 18. In determining whether a cause of action exists, the material facts alleged are taken as true. However, when pleading bad faith or abuse of power, it is not enough to assert bald conclusory phrases. Such bald conclusory allegations without any

evidentiary foundation constitute an abuse of process: *Amos v Canada*, 2017 FCA 213 at para 33, citing *Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184. The Court need not accept such speculative allegations as true.

[20] The pleadings must be read as generously as possible: O*peration Dismantle Inc* v *Canada*, [1985] 1 SCR 441 at para 14. If the facts disclose a reasonable cause of action, with some chance of success, the pleading should not be struck.

[21] Regarding the intentional tort of misfeasance in a public office, the Supreme Court in *Odhavji Estate v Woodhouse*, 2003 SCC 69 at para 23 [*Odhavji*], teaches that the tort consists of two elements which must be proven by the plaintiff. The first element requires that a public officer engaged in deliberate and unlawful conduct while acting in their capacity as a public officer: *Odhavji* at para 23. Unlawful conduct is conduct that is in excess of the officer's powers, is an exercise of power for an improper purpose, or is a breach of statutory duty: *Ontario (Attorney General) v Clark*, 2021 SCC 18 at para 23 [*Clark*]. As noted by the British Columbia Court of Appeal, a collateral political purpose may constitute unlawful conduct: *Greengen Holdings Ltd v British Columbia*, 2018 BCCA 214 at para 60.

[22] The second element requires that the public officer must have been aware that the conduct was unlawful and that it was likely to harm the plaintiff: *Odhavji* at paras 22-23. Awareness of the unlawfulness of the conduct requires that the public officer engaged in the conduct in bad faith. It is not sufficient to merely assert an improper purpose. Rather, the bad faith requirement establishes a high bar: *Odhavji* at para 28; *Powder Mountain Resorts Ltd v*

British Columbia, 2001 BCCA 619 (CanLII) at para 8. Furthermore, it is not sufficient to assert that the public official had knowledge that their conduct might cause harm, there must also be an "element of bad faith or dishonesty".

[23] In *Clark* at para 165, Justice Cote, writing in dissent on other grounds, notes that recklessness on the part of the public officer is insufficient to establish this element of the tort. Rather, Cote, J confirms that the standard must be as "Iacobucci J. laid out in Odhavji, subjective knowledge." The Ontario Court of Appeals' decision in *Trillium Power Wind Corp v Ontario (Natural Resources)*, 2013 ONCA 683 (CanLII) at para 52 is also instructive. In that case, the Court of Appeal concluded that a "core" policy change alone is not sufficient to constitute bad faith for the purposes of this tort.

[24] The tort may be established in two ways. In Category A, the tort is proven through conduct by the public officer that is specifically intended to harm a person or class of persons. That the public officer has acted with the express purpose of causing harm to the plaintiff is sufficient to prove both elements of the tort. Category B, by contrast, refers to conduct by the public officer which is outside their powers and which they know is likely to injure the plaintiff. In Category B, both elements of the tort must be proven independently of one another: *Odhavji* at paras 22-23.

[25] On the first element of the tort, SLH argues that the Defendants' new interpretation of *CASS* s.722(2)(b)(vi) was "arbitrarily formed" by employees who were "acting without lawful authority". SLH submits that the new interpretation by the employee in the PNR, in the absence

of an amendment to the *CARs* or *CASS* to reflect the new interpretation, renders the conduct unlawful. SLH further asserts that a "collateral political purpose or otherwise improper purpose" underlies the new interpretation.

[26] The Defendants argue that a change in policy does not constitute deliberate and unlawful conduct. Further, the Defendants submit there are no material facts pled concerning the alleged collateral political purpose.

[27] Having carefully considered the Statement of Claim, I am satisfied that SLH has failed to plead material facts supporting the first element of the test. There is no doubt that the March correspondence amounted to a different interpretation of the *CARs* and *CASS* and that interpretation is conduct by a public officer. However, it is unclear to me how such conduct could be considered unlawful. SLH submits that the only lawful ways that the Defendants' employees could have changed or amended their policies would have been to amend the *CARs* or to issue a formal national policy. While the absence of a national policy or an amendment to the *CARs* might suggest some degree of conduct in excess of powers, as the jurisprudence confirms, changes to statutory and regulatory interpretations and policies are within the ambit of public officials.

[28] Further, no material facts were plead to support the allegation that the March correspondence was motivated by a collateral political purpose. Indeed, having regard the correspondence exhibited to Ms. Pelletier's affidavit, it is clear to me that while there was some disagreement among the Defendants' employees concerning the March correspondence, I cannot

discern a collateral political purpose. Rather, the March correspondence appears to be motivated by safety concerns related to Class D external load operations.

[29] On the second element of the tort, SLH submits that the Defendants' employees knew that the new interpretation of *CASS* would be likely to harm SLH. SLH asserts that the fact that the Defendants' employees knew that the new interpretation would not be well-received by SLH is sufficient to meet the knowledge element of the tort and its attendant bad faith requirements.

[30] In that regard, SLH argues that the knowledge component and the bad faith requirement can be embodied in recklessness and can be inferred. Citing *Enterprises Sibeca Inc v Frelighsburg (Municipality*), 2004 SCC 61 at para 25, SLH submits that the concept of bad faith is a flexible one that can include reckless conduct. At paragraph 84 of its written representations, SLH argues that the pleadings and the exhibits demonstrate that the Defendants displayed conduct that was reckless and so markedly inconsistent with the relevant regulatory context that the Court cannot reasonably conclude that the March correspondence was prepared and released lawfully and in good faith.

[31] The Defendants take the position that the second element of the tort is not made out. Rather, they argue that the Statement of Claim does not plead any allegations of bad faith or dishonesty necessary to satisfy the element.

[32] I agree with the Defendants. In *Odhavji* the Court cautioned that satisfaction of the second element requires more than knowledge of harm noting: "In a democracy, public officers

must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly" (*Odhavji* at para 28).

[33] In my view, that some of the evidence reveals that the Defendants' employees were aware that the new interpretation would not be well-received does not amount to bad faith. Moreover, I reject SLH's argument that the Court should conclude that sending the March correspondence was reckless. I do not regard it as such. I am bolstered in my view by the fact that the evidence discloses that the Defendants' headquarters agreed that the March correspondence aligned with the existing *CARs* and *CASS* and no amendments were required.

[34] In any case, apart from pointing to the absence of a national policy, SLH does not plead any material facts alleging bad faith on the part of the Defendants' employees. This is noteworthy given that Rule 181 requires particularizing pleadings of alleged breaches of trust or wilful default. Here, SLH simply fails to plead sufficient material facts to establish this element of the tort because of the absence of bad faith.

[35] In sum, on the first issue, I am satisfied that even on the most generous reading of the Statement of Claim, SLH has failed to plead sufficient material facts to establish the cause of action. This is particularly the case because of the paucity of material facts pled relating to the bad faith component of the second element of the tort.

(2) Is The Statement of Claim Scandalous, Frivolous and Vexatious?

[36] Rule 221(1)(c) permits the Court to strike a pleading on the grounds that it is scandalous, frivolous or vexatious. Bald allegations of bad faith and *ultra vires* activities, without sufficient material facts, are scandalous, frivolous or vexatious under this Rule: *Tomchin v Canada*, 2015 FC 402 at para 22.

[37] The Defendants submit that the pleadings should be struck under this Rule because the allegations are bald and speculative. Specifically, they note that there are no particulars supporting the allegation that the interpretation of *CASS* s.722(2)(b)(vi) was made for "collateral political or otherwise improper reasons." In any case, the Defendants say that a difference of opinion between employees is an insufficient basis for misfeasance. Indeed, decisions that are unreasonable or incorrect do not amount to misfeasance because the tort is not directed to maladministration or even negligence by a public officer. Citing *Greegen Holdings Ltd v British Columbia (Ministry of Forests, Lands and Natural Resource Operations*), 2023 BCSC 1758 at para 147, the Defendants note the "tort's purpose is not to apply administrative law principles to a private law action for damages." Decisions of public officers that are unreasonable or incorrect, are properly challenged by way of an application for judicial review.

[38] SLH counters that the pleadings do not make bald allegations and, as such, should not be struck as scandalous, frivolous and vexatious. SLH argues that the email correspondence of Defendants' employees clearly reveals internal disagreements on the interpretation of *CASS* s.722(2)(b)(vi).

[39] While SLH does plead material facts relating to the internal disagreement amongst the Defendants' employees, the actual "collateral political or improper reason" remains unclear. In my view, the pleading fails to tether the internal disagreement with the alleged "collateral political reason". Few particulars are pleaded to support this component of SLH's submission with the result that the pleading is a bald conclusory allegation.

[40] I am also persuaded that SLH's pleadings fail to meet the requirements of Rule 181. Given the vagueness and lack of precision of SLH's allegations of bad faith, I am satisfied the pleading should also be struck under this Rule.

(3) Should Amendments Be Permitted?

[41] After determining that the Statement of Claim will be struck, Rule 221 of the *Rules* requires the Court to consider whether to permit the plaintiff to file an amended Statement of Claim. The test for granting leave to amend is whether the defects in the claim can potentially be cured by amendment: *Simon v Canada*, 2011 FCA 6 at paras 8 and 14.

[42] While the Defendants' motion sought to strike without leave to amend, neither party argued whether amendments should be permitted. Rather, SLH argued that the ATIP material likely contained only a portion of the details concerning the alleged misfeasance and further discovery is required to determine the full extent of the misfeasance.

[43] Given my views regarding the failure of SLH to plead material facts that support either parts of the test for misfeasance in public office, and noting the caution the courts have urged in

the use and application of the tort, I find that no purpose would be served in granting SLH leave to amend its claim. I am satisfied that no amendments will cure the defects in the Statement of Claim.

[44] For these reasons, I conclude that the Statement of Claim should be struck out, without leave to amend.

[45] The style of cause is amended to substitute His Majesty the King for the named Defendants.

IV. Costs

[46] The Defendants seek costs of $750.00. As costs are solely within the Court's discretion, I am exercising my discretion to award the Defendants costs in the sum of $750.00 inclusive of taxes and disbursements.

JUDGMENT in T-1048-24

THIS COURT'S JUDGMENT is that:

1. The motion to strike is granted.

2. The Statement of Claim is struck out, without leave to amend.

3. The action is dismissed.

4. The Defendants shall have costs fixed at $750.00 inclusive of taxes and disbursements.

5. The style of cause is amended, with immediate effect, by removing "The Minister of Transport and Transport Canada" and substituting "His Majesty the King" as the Defendant.

"Catherine A. Coughlan"
Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1048-24
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