

Date: 20070925

Docket: T-625-07

Citation: 2007 FC 959

Ottawa, Ontario, September 25, 2007

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

GARY D. LENKO

Plaintiff

and

**HER MAJESTY THE QUEEN
IN RIGHT OF CANADA**

Defendant

REASONS FOR ORDER AND ORDER

[1] This is a motion by the defendant pursuant to rule 298 (2) of the *Federal Courts Rules* SOR\2004-283, s.2, objecting to the jurisdiction of the Court to entertain the plaintiff's action. The defendant seeks an order to strike the statement of claim on the ground that it alleges negligent and intentional torts committed by employees of the City of Winnipeg who are delegates of the Province of Manitoba and thus does not relate to any alleged wrongdoing by a officer, servant or agent of the

federal Crown to which vicarious liability could attach under s. 3 of the *Crown Liability and Proceedings Act*, R. S., 1985, c.C-50, s.1; 1990, c.8, s. 21.

[2] The plaintiff, Mr. Lenko, a resident of Winnipeg, ably represented himself in these proceedings. In March 2006, he applied for financing under the Residential Rehabilitation Assistance Program (RRAP), an initiative to assist low income home owners to improve their residences to a minimum level of health and safety standards. This program is cost shared between the federal and provincial governments and is administered in Manitoba by the Manitoba Housing and Renewal Corporation (MHRC), a provincial Crown corporation.

[3] According to the uncontested affidavit of Terry Wotton, acting Executive Director, Housing Programs, MHRC, the Canada Mortgage and Housing Corporation (CMHC) makes funding available to MHRC for the RRAP program based on criteria which MHRC is responsible for fulfilling pursuant to the "CMHC-Manitoba Housing Renovation Program Agreement" dated May 20, 2005. No CMHC employee, or, to the best of Mr. Wotton's knowledge, any other federal official, is involved in the delivery of the RRAP program such as in the receiving, processing, evaluation, approval or disapproval of applications for funding or the implementation or administration of approved applications. MHRC is responsible for the delivery and administration of the program and may enter into agreements with agents for such purposes, and has done so with the City of Winnipeg.

[4] The statement of claim refers to a series of contacts which Mr. Lenko had between April 20 and December 13, 2006 with persons at the Winnipeg RRAP office regarding his application for

funding to cover the cost of repairs required for his home. At the end of that period he was notified that he was denied RRAP assistance. Mr. Lenko dealt with a Ms. Arline Meadows, an inspector by the name of Arnie Einarson and Mr. Miles Watts, director responsible for the City of Winnipeg's RRAP program delivery pursuant to the agreement between MHRC and the City of Winnipeg. According to Mr. Wotton's affidavit, they are all City of Winnipeg employees and Mr Lenko does not dispute that fact.

[5] The statement of claim alleges, in part, as follows:

The defendant, Her Majesty the Queen, is vicariously liable to the plaintiff and all members of the public for negligent advice, conduct and intentional torts committed by her servants and agents in the delivery of federal programs and benefits to citizens pursuant to s.3 b (i) of the *Crown Liability and Proceedings Act*, as represented by the Canadian Mortgage and Housing Corporation (CMHC) and as represented by the Federal Housing Minister with respect to the Residential Rehabilitation Assistance Program (RRAP) and the Affordable Housing Initiative (AHI) under the *National Housing Act* and related statutes. CMHC is a federal Crown corporation that is constituted as an agent of Her Majesty in right of Canada pursuant to s. 5 (1) of the *Canadian Mortgage and Housing Corporation Act*, R.S.C. 1985, c.C-7; s.4 of the *National Housing Act*, R.S.C. 1985, c.N-11; and Part I of Schedule III and Part X of the *Financial Administration Act*, R.S.C. 1985, c. F-11....

The plaintiff was denied RRAP assistance on December 13, 2006 without just cause. Local RRAP delivery personnel exceeded their delegated authority by applying unreasonable conditions to the plaintiff's application as the applied conditions fundamentally altered the spirit of the federal funding contract and resulted in the improper denial of financial assistance to an eligible homeowner.

The plaintiff claims that the RRAP personnel acted in bad faith and that they provided negligent advice that the plaintiff reasonably relied upon to his detriment. The plaintiff is without a primary heating source and his principal residence remains in need of extensive repair. The plaintiff has experienced financial hardship and emotional distress that has had an impact on his overall physical and emotional well-being due to the negligent actions and conduct of RRAP personnel while acting as agents in the delivery of the federal program, further particulars of which will be adduced at trial.

[6] The plaintiff claims general damages in the amount of \$16,000, the maximum amount that he would have been entitled to receive under the RRAP program; exemplary damages; pre-judgment and post judgment interest; and his costs.

ISSUE:

[7] The sole issue on this motion is whether the Federal Court has jurisdiction to entertain the plaintiff's action.

RELEVANT LEGISLATION:

[8] The relevant provisions of the *Federal Courts Act* are as follows:

<p>17. (1) Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.</p> <p>(2) Without restricting the generality of subsection (1), the Federal Court has concurrent original jurisdiction, except as otherwise provided, in all cases in which</p> <p>(d) the claim is for damages under the Crown Liability and Proceedings Act.</p> <p>(5) The Federal Court has concurrent original jurisdiction</p> <p>(b) in proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of the duties of that person as an officer, servant or agent of the Crown.</p>	<p>17. (1) Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, la Cour fédérale a compétence concurrente, en première instance, dans les cas de demande de réparation contre la Couronne.</p> <p>(2) Elle a notamment compétence concurrente en première instance, sauf disposition contraire, dans les cas de demande motivés par :</p> <p>d) une demande en dommages-intérêts formée au titre de la Loi sur la responsabilité civile de l'État et le contentieux administratif.</p> <p>(5) Elle a compétence concurrente, en première instance, dans les actions en réparation intentées:</p> <p>b) contre un fonctionnaire, préposé ou mandataire de la Couronne pour des faits — actes ou omissions — survenus dans le cadre de ses fonctions.</p>
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[9] Section 3 of the *Crown Liability and Proceedings Act* provides that:

<p>3. The Crown is liable for the damages for which, if it were a person, it would be liable</p> <p>(a) in the Province of Quebec, in respect of</p> <p>(i) the damage caused by the fault of a servant of the Crown, or</p> <p>(ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and</p> <p>(b) in any other province, in respect of</p> <p>(i) a tort committed by a servant of the Crown, or</p> <p>(ii) a breach of duty attaching to the ownership, occupation, possession or control of property.</p>	<p>3. En matière de responsabilité, l'État est assimilé à une personne pour :</p> <p>a) dans la province de Québec :</p> <p>(i) le dommage causé par la faute de ses préposés,</p> <p>(ii) le dommage causé par le fait des biens qu'il a sous sa garde ou dont il est propriétaire ou par sa faute à l'un ou l'autre de ces titres;</p> <p>b) dans les autres provinces :</p> <p>(i) les délits civils commis par ses préposés,</p> <p>(ii) les manquements aux obligations liées à la propriété, à l'occupation, à la possession ou à la garde de biens.</p>
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[10] And the *Canada Mortgage and Housing Corporation Act* sets out these considerations:

<p>5. (1) Except as provided in section 13, the Corporation is for all purposes an agent of Her Majesty in right of Canada.</p> <p>13. (1) The Corporation may on its own behalf employ such officers and employees for such purposes and on such terms and conditions as may be determined by the Executive Committee and such officers and employees are not officers or servants of Her Majesty.</p>	<p>5. (1) Sauf dans le cadre de l'article 13, la Société est mandataire de Sa Majesté du chef du Canada.</p> <p>13. (1) La Société peut employer, pour son propre compte et aux conditions fixées par le comité de direction, le personnel nécessaire aux tâches définies par celui-ci. Ces personnes n'ont pas qualité de préposés de Sa Majesté.</p>
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ARGUMENTS & ANALYSIS:

[11] Distilled to its essence, the plaintiff's claim is predicated upon the argument that CMHC owed him a duty of care to diligently oversee all aspects of the program and to ensure that the terms of its contract with MHRC were fulfilled. The program criteria were fixed by CMHC and MHRC had no authority to alter them. Under the terms of this agreement, MHRC would act as an agent for CMHC to collect any funds owing to the federal Corporation and the federal Crown due to default on loan agreements and undertakings. The City of Winnipeg staff were acting as agents of the federal Crown when they assessed Mr. Lenko's application.

[12] The plaintiff submits that the essential requirements for determining whether jurisdiction lies with the Federal Court have been satisfied, because the subject matter, namely, the disbursement of public funds is an exercise of parliament's authority to legislate in relation to public debt and property under section 91 (1A) of the *Constitution Act, 1867* and the law governing the contract in this case is federal law. The statutory framework of the *National Housing Act* grants CMHC the authority, on behalf of her Majesty and in place of the Minister, to specify how federal funds will be made available to eligible participants and the manner by which they are to be repaid and/or the terms and conditions for their forgiveness and thus governs all terms of the contract between CMHC and MHRC.

[13] The defendant submits that no liability can attach to the federal Crown for the actions of municipal public servants acting as delegates of the province. It is clear that none of the actions taken or decisions made by the Winnipeg RRAP office directly involved CMHC. Responsibility

for receiving and assessing applications had been vested with MHRC, a provincial Crown corporation, which had in turn delegated those tasks to the City of Winnipeg. The federal Crown cannot be held vicariously liable for the actions of non-federal Crown public servants. Thus the Federal Court has no jurisdiction under subsection 17 (5) (b) to entertain a claim in relation to such persons: *Stephens Estate v. Canada* [1982] F.C.J. No. 114

[14] *Stephens* was a case in which a taxpayer's goods were seized pursuant to a writ of *fiери facias*. The taxpayer filed suit in the Federal Court against the Crown, certain of its employees and the sheriff and constable who effected the seizure. The claim was struck out against the defendants involved in the seizure upon an interlocutory motion. On appeal, the Federal Court of Appeal noted that the cause of action against those defendants, to the extent that there was one, lay in tort and that the only head of Federal Court jurisdiction on which the claims could conceivably rest was under paragraph 17 (4) (b), as it then read, as proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of the duties of that person as an officer, or servant of the Crown. The sheriff was found to be excluded from that category as he was not appointed by the Crown in right of Canada, nor employed by it, nor subject to its ministerial control. The same reasoning applies, the defendant submits, to the employees of the Winnipeg RRAP office.

[15] I note that the current version of this head of jurisdiction, now found in paragraph 17 (5) (b), includes the words "or agent". That change does not assist the plaintiff in my view as he will be unable to establish that the employees of the Winnipeg RRAP office acted as agents of the federal Crown or that the claim is founded in federal law.

[16] CMHC is an agent of the federal Crown by virtue of subsection 5 (1) of the *Canada Mortgage and Housing Corporation Act*, but its officers and employees are expressly excluded as Crown officers or servants under subsection 13 (1) of the Act. While CMHC could be sued in its own right for tortious acts, the Crown is not vicariously liable for the actions of CMHC employees. Even if CMHC owed the plaintiff a duty of care for which it might be held liable for the acts of the province's agents, vicarious liability for those acts does not extend to the federal Crown.

[17] In *Braybrook v. Canada*, 2005 FC 417, [2005] F.C.J. No. 519, Hargrave, P. held that an agreement between the federal and British Columbian governments which allowed the federal government to enter into contracts for community policing and a provincial statute which deemed such police to be provincial constables was dispositive of a claim against individual police officers. Given that the federal Crown could only be vicariously liable for the action of the officers, the striking of that claim caused the entire action to be thrown out.

[18] At most, the plaintiff's claim in the present matter is founded upon his belief that CMHC should have supervised the operations of the RRAP office. I see no basis for concluding that CMHC owed the plaintiff a duty of care to oversee the assessment of his application or that liability could attach to the federal Crown if CMHC failed to observe the alleged duty. Responsibility for the proper management of the program at the local level rested with the province and with the municipality to which the task had been delegated by the province. There is no allegation that CMHC employees were directly involved in the operation of the Winnipeg RRAP office.

[19] The notion that CMHC owed RRAP applicants a duty to ensure that its criteria were observed at the local level is too remote to be actionable. But if a case could be made that there is a duty of care, that the risk of harm to the applicant was foreseeable and that he actually suffered an injury as a result of the failure to observe the duty, the matter belongs in the provincial courts.

[20] The test for determination of Federal Court jurisdiction was established by the Supreme Court of Canada in *ITO-Int. Terminal Operators Ltd. v. Milda Electronics Inc.*, [1986] 1 S.C.R. 752 at 766:

1. There must be a statutory grant of jurisdiction by the federal Parliament;
2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction; and
3. The law on which the case is based must be a “law of Canada” as the phrase is used in s.101 of the *Constitution Act, 1867*.

[21] The argument that the RRAP program stems from federal law as an expression of the *National Housing Act* is not sufficient to confer jurisdiction upon the Federal Court where the cause of action is grounded on the ordinary common law applicable to alleged tortious acts by non-federal public servants. There is no existing body of federal law to support the grant of jurisdiction to the Federal Court.

[22] In *Peter G. White Management Ltd. v. Canada (Minister of Canadian Heritage)*, 2006 FCA 190, the alleged tortious acts were committed by federal officers in the context of a detailed federal statutory framework which was found to be necessary for the determination of the claim. That is not the case in this instance. Rather, the claims here are founded upon alleged common law torts committed by municipal servants acting as delegates for the province. Any right to damages would

arise from the ordinary common law and not from such common law as is necessary to support the statutory jurisdiction of the *Federal Court*. The claims belong in the provincial courts.

[23] The motion is granted. In the circumstances, there will be no award of costs.

ORDER

THIS COURT ORDERS that the motion is granted. The Statement of Claim in this application will be struck for want of jurisdiction. There is no award of costs.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-625-07

STYLE OF CAUSE: GARY D. LENKO

AND

HER MAJESTY THE QUEEN

PLACE OF HEARING: Winnipeg, Manitoba

DATE OF HEARING: September 17, 2007

REASONS FOR ORDER: MOSLEY J.

DATED: September 25, 2007

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