Federal Court  Cour fédérale

Date: 20130417

Docket: T-2013-12

Citation: 2013 FC 389

Ottawa, Ontario, April 17, 2013

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ERNEST MEIGS,
GREGORY BLAIR BEAUDOIN,
DAX MACK, IAN BUTZ, HARLEY LAY
SHANE HINTON, MICHAEL MITCHELL
AND LEON WALCHUK

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER AND ORDER

[1] This is an action brought against Her Majesty the Queen in Right of Canada under the *Crown Liability and Proceedings Act*, RSC, 1985, c C-50 and sections 7, 8, 12, and 15(1) of the *Canadian Charter of Rights and Freedoms*, for damages arising from various personal harms allegedly suffered by eight plaintiffs while they were inmates at the Grande Cache Institution in Alberta.

[2] The causes of action generally include the Correctional Service of Canada [CSC]'s alleged failure to ensure the plaintiffs' rights with regards to privileged legal correspondence and access to legal research and/or counsel, as well as a breach of the duty of care in exercising the mandate, duties and discretion under the *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA] and the *Corrections and Conditional Release Regulations*, SOR/92-620 [CCRR]. They also rely on the Commissioner's Directives 084 entitled "Inmates' Access to Legal Assistance and the Police" and 085 entitled "Correspondence and Telephone Communication."

[3] The plaintiffs, representing themselves, seek $50,000.00 in damages for pain and suffering, as well as costs of their action, in a statement of claim dated October 18, 2012.

[4] On December 7, 2012, the defendant filed a statement of defence, arguing that the claim should be dismissed as it fails to disclose a cause of action, and that, alternatively, the Crown or any of its servants acted at all times in a prudent, reasonable and lawful manner giving full protection to the plaintiffs' *Charter* rights. In a further alternative, the defendant denied that the plaintiffs suffered any loss or injuries and argued that the plaintiffs failed to mitigate their damages. The defendant also submits that the Court should decline to exercise its jurisdiction because the plaintiffs have not exhausted the internal grievance procedure that is available to them.

[5] The defendant seeks an Order under Rule 221(1)(a) or 221(1)(f) of the *Federal Courts Rules*, SOR/98-106, striking the statement of claim, without leave to amend, for failing to disclose a reasonable cause of action and being an abuse of process.

[6] The stringent test to strike a statement of claim pursuant to Rule 221(1)(a) is whether, taking the facts as pleaded to be true, it is "plain and obvious" that the claim discloses no reasonable cause of action. The impugned statement of claim should be read as generously as possible to accommodate any inadequacies in the form of the allegations which are a result of mere drafting deficiencies (*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17; *Operation Dismantle Inc v Canada*, [1985] 1 SCR 441 at 455; *Jones v Kemball*, 2012 FC 27 at para 4).

[7] However, it is also clear from Federal Court Rules 174, 181 and 182, as well as the relevant jurisprudence concerning those Rules, that a plaintiff must plead concise material facts in support of each and every cause of action and cannot simply plead bare assertions, or conclusions of law without the requisite factual underpinnings (*Brazeau v Canada (Attorney General)*, 2012 FC 648 at para 15; *Sauve v Canada*, 2011 FC 1074 at para 21).

[8] Moreover, absent explicit liability under a statute, breach of a statutory duty does not give rise to a claim for damages. As stated by the Supreme Court of Canada in *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 [*Telezone*] at paras 28-29:

> Tort liability, of course, is based on fault, not invalidity… breach of a statute is neither necessary nor is it sufficient to ground a private cause of action.
>
> Nor is a breach of statutory power necessarily sufficient…

[9] Finally, the plaintiffs' initial obligation to properly plead concise material facts to support a cause of action is not relieved by stating that they may, in future, provide additional facts, particulars or amendments to further support the claim.

[10] The plaintiffs' allegations may be broken down into:

a) misfeasance in a public office;

b) breach of sections 7, 8, 12 and 15(1) of the *Charter*; and

c) breach of sections 126(1) and 356 of the *Criminal Code*, RSC, 1985, c C-46.

[11] They seek aggravated and exemplary damages.

[12] The plaintiffs' claims of wrongdoing are made against the Attorney General of Canada, the Warden of Grand Cache Institution, the "V&C staff", including a Mrs. Plante, the Regional Commissioner and the Commissioner of CSC.

I. Misfeasance in Public Office

[13] As in both the cases of *Odhavji Estate v Woodhouse*, 2003 SCC 69 [*Odhavji*] and *Lewis v Canada*, 2012 FC 1514 [*Lewis*], I must determine whether the plaintiffs' statement of claim pleads each element of the alleged tort of misfeasance in public office:

a) The public officer must have engaged in deliberate and unlawful conduct in his or her capacity as public officer;

b) The public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff; and

c) There must be an element of bad faith or dishonesty by the public officer and knowledge of harm alone is insufficient to conclude that a public officer acted in bad faith or dishonestly.

Odhavji, above, at paras 23, 24 and 28

[14] With respect to determining "bad faith" or "dishonesty", the comments of Justice David W. Stratas in *Merchant Law Group v Canada (Revenue Agency)*, 2010 FCA 184 at paras 34-35, are helpful:

> I agree with the Federal Court's observation (at paragraph 26) that paragraph 12 of the amended statement of claim "contains a set of conclusions, but does not provide any material facts for the conclusions." When pleading bad faith or abuse of power, it is not enough to assert, baldly, conclusory phrases such as "deliberately or negligently," "callous disregard," or "by fraud and theft did steal": *Zundel v Canada*, 2005 FC 1612, 144 ACWS (3d) 635; *Vojic v Canada (MNR)*, [1987] 2 CTC 203, 87 DTC 5384 (FCA). "The bare assertion of a conclusion upon which the court is called upon to pronounce is not an allegation of material fact": *Canadian Olympic Association v USA Hockey, Inc* (1997), 74 CPR (3d) 348, 72 ACWS (3d) 346 (FCTD). Making bald, conclusory allegations without any evidentiary foundation is an abuse of process: *AstraZeneca Canada Inc v Novopharm Limited*, 2010 FCA 112 at paragraph 5. If the requirement of pleading material facts did not exist in Rule 174 or if courts did not enforce it according to its terms, parties would be able to make the broadest, most sweeping allegations without evidence and embark upon a fishing expedition. As this Court has said, "an action at law is not a fishing expedition and a plaintiff who starts proceedings simply in the hope that something will turn up abuses the court's process": *Kastner v Painblanc* (1994), 58 CPR (3d) 502, 176 NR 68 at paragraph 4 (FCA).
>
> To this, I would add that the tort of misfeasance in public office requires a particular state of mind of a public officer in carrying out the impunged action, i.e., deliberate conduct which the public officer knows to be inconsistent with the obligations of his or her office: *Odhavji Estate v Woodhouse*, [2003] 3 SCR 263, 2003 SCC 69 at paragraph 28. For this tort, particularization of the allegations is mandatory. Rule 181 specifically requires particularization of allegations of "breach of trust," "wilful default," "state of mind of a person," "malice" or "fraudulent intention."

[15] Justice Marie-Josée Bédard's findings in *Lewis*, above, at paras 23-24 are applicable to the plaintiffs' pleading:

> The plaintiff essentially claims in his written representations that it was the duty of CSC's representatives to know the Act, the Regulations and the Commissioner's Directives and that, by not abiding by them, they acted intentionally. The plaintiff claims that CSC'S representatives cannot plead ignorance of the law. With respect, I am of the view that it is not sufficient to allege that because it was the responsibility of CSC's representatives to deal with the applicant's grievance in accordance with the Act, Regulations and Directives, there is an inference that, in violating them, they acted deliberately and in bad faith and they knew that their conduct was unlawful and likely to harm the plaintiff. In order to proceed to trial, those kinds of allegations must be supported by facts that, if proven, would allow the Court to concluded that CSC's representatives acted in a deliberate manner and knew that their conduct was unlawful and likely to injure the plaintiff. The Statement of Claim, as filed, is insufficient to support such conclusions.
>
> Finally, while Rule 181(2) provides a party the opportunity, on motion, to request that another party be ordered to provide "further and better particulars of any allegation in its pleading", this possibility does not exempt the plaintiff from his initial obligation to file a Statement of Claim that contains "a concise statement of the material facts on which [he] relies" (Rule 174) and to provide "particulars of every allegation" (Rule 181(1)), especially when bad faith is alleged.

[16] The plaintiffs' claim in respect of misfeasance in public office should be struck, as disclosing no material facts to support their claim.

B. Charter of Rights

[17] The plaintiffs' claim for damages under section 24(1) of the *Charter* also must fail, for lack of any material facts to support the plea, in terms of each of the alleged breaches of section 7, 8, 12 and 15(1) of the *Charter*.

[18] Taken individually or collectively, the allegations of *Charter* violations are so vague and deficient that the plaintiffs' causes of action cannot be maintained as pleaded. They have:

a) failed to establish the elements necessary for an award of damages for a *Charter* breach (*Vancouver (City) v Ward*, 2010 SCC 27 at para 4);

b) failed to plead the material facts necessary to support a section 7 breach, in failing to identify the principles of fundamental justice alleged to have been breached (*Prentice v Canada (Royal Canadian Mounted Police)*, 2005 FCA 395 at para 45);

c) failed to plead material facts to support a section 12 breach. The standard to be applied in determining whether treatment or punishment is cruel and unusual within the meaning of section 12 of the *Charter* is relatively high. As stated in is *Piche v Canada (Solicitor General*), [1984] FCJ No 1008, aff'd [1989] FCJ No 204 (CA), the court should determine "whether the treatment or punishment is so excessive as to outrage standards of decency and surpass all rational bounds of treatment or punishment."

d) failed to establish material facts explaining why and to what extent they allege a reasonable expectation of privacy under section 8 of the *Charter*. The penitentiary context, by its very nature, creates a diminished expectation of privacy (*Weatherall v Canada (Attorney General)*, [1993] 2 SCR 872) and prisoners do not have an unfettered right to unopened mail (*Henry v Canada*), [1987] FCJ No 307; *Canada v Solosky*, [1980] 1 SCR 821); and

e) there are no facts in support of any discrimination that falls within section 15(1) of the *Charter*. To prove a violation of equality rights under section 15 of the *Charter*, a claimant must demonstrate that i) the law or government action treated the claimant differently than others, by purpose or effect; ii) the differential treatment was based on

> an enumerated or analogous ground of discrimination; and iii) the differential treatment was discriminatory in a substantive sense, considering such factors as pre-existing group disadvantage and the nature of the interest affected: *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143.

[19] The plaintiffs have failed to properly plead material facts in support of any of these alleged *Charter* breaches.

III. Breach of the Criminal Code

[20] Similarly, the plaintiffs' claim for breaches of sections of the *Criminal Code* fails for lack of material facts to support the claim.

IV. Damages claim

[21] Counsel for the defendant argues that the claim does not disclose a reasonable private clause of action for damages. It is argued that, if anything, the plaintiffs' claim is a veiled application for judicial review, and that the plaintiffs should be required to exhaust the statutory grievance procedure pursuant to sections 90 and 91 of the CCRA and sections 74 to 82 of the CCRR. The *Telezone* case, above, at paragraph 78 is cited:

> To this discussion, I would add a minor caveat. There is always a residual discretion in the inherent jurisdiction of the provincial superior court (as well as in the Federal Court under s. 50(1) of its Act), to stay the damages claim because in its essential character, it is a claim for judicial review with only a thin pretence to a private wrong. Generally speaking the fundamental issue will always be whether the claimant has pleaded a reasonable private cause of action for damages. If so, he or she should generally be allowed to get on with it.

[22] This is the case here, as well. Moreover, even in the plaintiffs' written submissions in response to this motion, nothing proposed would cure the defects in the pleadings.

[23] In conclusion, I find that the defendant's motion to strike must prevail. Nevertheless, I want to emphasize that this decision should in no way be taken to excuse any denial by the defendant or its servants of the plaintiffs' right to reasonable access to counsel and the courts, or to appropriate legal and regulatory documents, as provided for pursuant to paragraph 97(3)(a) of the CCRR, and Commissioner's Directive 084, which provides the policy basis for that access.

ORDER

THIS COURT ORDERS that:

1) The statement of claim is struck out, without leave to amend.

2) There shall be no order as to costs of this motion.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2013-12
STYLE OF CAUSE:	MEIGS ET AL. V. HMTQ

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369

REASONS FOR ORDER AND ORDER:	J. MANSON
DATED:	April 16, 2013

WRITTEN REPRESENTATIONS BY:

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