Federal Court  Cour fédérale

Date: 20180718

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

Citation: 2018 FC 748

Ottawa, Ontario, July 18, 2018

PRESENT: The Honourable Mr. Justice Barnes

PROPOSED CLASS PROCEEDINGS
AND PROPOSED SIMPLIFIED ACTION

Docket: T-455-16

BETWEEN:

CHRISTOPHER JOHN WHALING

Plaintiff

and

ATTORNEY GENERAL OF CANADA

Defendant

Docket: T-456-16

AND BETWEEN:

WILLIAM WEI LIN LIANG

Plaintiff

and

ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

[1] The Defendant brings motions to strike the Further Amended Statements of Claim in these proceedings without leave to amend on the basis that those pleadings are irretrievably deficient and because the asserted causes of action are statute barred. Because these issues are common to both proceedings, this single set of reasons will apply to both actions.

I. Procedural Background

[2] This is the second time the Defendant has moved to strike the Statements of Claim issued in these actions. On January 31, 2017, I struck the Amended Statements of Claim on the basis that they disclosed no viable cause of action: see *Whaling v Canada (Attorney General)*, 2017 FC 121, 374 CRR (2d) 249. However, I granted leave to amend and refile for the following reasons:

> [27] What remains for determination is whether the Court should permit the Plaintiffs to amend their pleadings and to propose a fresh theory of liability that might be viable. The test for granting leave to amend is whether the defect in the pleading is potentially curable: see *Simon v Canada*, 2011 FCA 6 at para 8, [2011] FCJ No 32 (QL).
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> [28] Notwithstanding the fatal flaws in the present Statements of Claim, I am mindful of the admonition in *Henry*, above, that the boundaries for accessing *Charter* damages, particularly in cases like this one, are in the early stages of judicial development and should not be unduly stifled:
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> > [35] *Charter* damages are a powerful tool that can provide a meaningful response to rights violations. They also represent an evolving area of the law that must be allowed to "develop incrementally": *Ward*, at para. 21. When defining the circumstances in which a *Charter* damages award would be appropriate and just, courts must

> therefore be careful not to stifle the emergence and development of this important remedy.
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> Also see *Ward*, above, at paragraph 18, cautioning against unduly constraining the broad discretion afforded by section 24(1), and *Canada v Hislop*, 2007 SCC 10, [2007] 1 SCR 429, at paragraph 103, referring to the need to allow for the evolution of the relevant jurisprudence.
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> [29] Given the uncertain boundaries that surround legislative immunity as discussed in *Mackin*, above, and *Henry*, above, I am not, at this point, able to say with confidence that no arguably viable claim to *Charter* damages could ever be pleaded in the circumstances of this case. For that reason, the Statements of Claim are struck but with leave to refile.

[3] The Defendant appealed my Order insofar as it allowed the Plaintiffs to amend, but the Federal Court of Appeal in *Canada (Attorney General) v Whaling*, 2018 FCA 38, [2018] FCJ No 257, upheld that part of my reasons on the following basis:

> [12] In deciding whether the plaintiff's statement of claim should be struck, the test is whether it is "plain and obvious" that the plaintiff's claim will fail: *Hunt v Carey Canada Inc*, [1990] 2 S.C.R. 959 at page 980, 74 D.L.R. (4th) 321. Taking *Mackin* at face value, it is not plain and obvious that the doctrine of legislative immunity is an absolute bar to the plaintiff's action. Further, a question as to whether *Charter* damages will be awarded because of "conduct that is clearly wrong, in bad faith or an abuse of power" in the enactment of a law subsequently found to be unconstitutional "possesses a sufficient legal component" to be justiciable. These arguments fail.

[4] It is at least implicit in the above remarks that the Federal Court of Appeal did not agree with the Defendant that, however pleaded, these actions would always be doomed to fail.

[5] Subsequently, the Plaintiffs filed Further Amended Statements of Claim which added, *inter alia*, the following allegations to their previous pleadings:

8. Purporting to respond to criticisms of this regime from various sources the ~~Crown~~ Executive Government introduced in Parliament the *Abolition of Early Parole Act*, S.C. 2011, c.11 ("*AEPA"*), the relevant part of which came into force on March 28, 2011, eliminating APR and with it, the eligibility for ~~possibility of~~ such earlier release on day parole at one sixth or full parole at one third and according to the non-violent criteria.

9. As set out by the Record of Proceedings in Parliament, this repeal was initially intended to be prospective affecting only those subsequently convicted or sentenced and thereby respecting s.11(h) and (i) of the *Charter* insofar as those already sentenced or about to be sentenced were concerned. However, ~~but~~ shortly before the Federal election because of the specific case of Earl Jones in Quebec, a large white collar criminal fraudster and the extensive media notoriety his case engendered, and/or other considerations, the legislation introduced was changed and now provided by virtue of s.10(1) that the repeal of APR eligibility be applied retrospectively or retroactively in order to ensure that this particular individual and inevitably others already eligible for APR would have it taken away retroactively, in furtherance of the Conservative Party of Canada's "Tough on Crime" election campaign and government policy agenda. The Executive Government ~~Defendant~~ acted deliberately and/or recklessly, and/or in a grossly negligent manner, and/or in bad faith and/or in abuse of its power by proposing, pursuing and passing a bill ~~in to~~ into law ~~which~~ that it knew or ought to have known was unconstitutional and would infringe the constitutional rights of those to whom it applied, and did so motivated by political self-interest in maintaining the Conservative Party optics of appearing "*tough on crime*", without any or adequate concern for the constitutionality of the proposed legislation and the unlawful and unconstitutional violation of the rights of ~~effect on~~ those individuals impacted by its retroactive application, namely affecting their liberty and the security of their persons in a manner contrary to the principles of fundamental justice contrary to s.7 of the *Charter* and, more specifically, those already sentenced and their right not to be punished again (s.11(h) of the *Charter*), and those awaiting sentencing, to the benefit of the punishment in existence at the time of their offence (s.11(i)) of the *Charter*).

10. The Crown, and its employees, servants and/or agents, including the Executive Government, are responsible for carrying out their duties in accordance with all the applicable laws of Canada, including in particular the Canadian Constitution, including the *Charter* – this responsibility includes ensuring, or at the very least taking reasonable, good faith, steps to ensure, that legislation is consistent with the *Charter*, including section 11(i) of the *Charter*, which enshrines an offender's right not to be punished further after having already been sentenced upon being convicted of violation(s) of the criminal laws of Canada.

11. The members of the Executive Government who proposed and pursued the AEPA, including the Minister of Public Safety, and other state actors in their control, knew or ought to have known that the retroactive or retrospective application of the AEPA was unconstitutional, including being a clear and direct infringement of the Plaintiff's section 11(i) *Charter* right and that of all others similarly situated.

12. The said members of the Executive Government and state actors were warned by participants at the Senate Standing Committee on Legal and Constitutional Affairs to study Bill C-59 (the "Standing Committee on Bill C-59") on March 21, 2011, that the enactment of the AEPA, insofar as it purported to apply retroactively or retrospectively, was unconstitutional.

13. During the proceedings of the Standing Committee on Bill C-59 on March 21, 2011, the Minister of Public Safety, amongst others, was reminded that retrospective or retroactive legislation had previously been struck down by the Supreme Court of Canada, and that, in fact, the Minister of Public Safety himself had argued one of the very first cases in that regard and had lost.

14. Despite having been warned of the unconstitutionality of the proposed legislation, the said members of the Executive Government and state actors in their control continued to push the legislation forward. They did so despite the fact they knew or ought to have known that the AEPA was unconstitutional, recklessly, and without regard to the *Charter* rights of those to whom to AEPA applied.

15. The said members of the Executive Government and state actors in their control were also advised by its employees, servants or agents (the names of which are known to the Defendant but currently unknown to the Plaintiff) of the unconstitutional nature of the retroactive application of the AEPA legislation.

16. The said members of the Executive Government and state actors in their control acted recklessly, in a grossly negligent manner, in bad faith, and/or in abuse of their power, in proposing, advocating for and pursuing 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.

17. The aforesaid actions of the said members of the Executive Government and state actors in their control in proposing, advocating for and pursuing the AEPA were directly responsible for the AEPA being passed into law by Parliament on March 28, 2011 resulting in the violation of the Plaintiff's constitutional rights and the constitutional rights of all other members of the class.

II. Legal Principles on Motions to Strike

[6] The legal principles applying to motions to strike are well-known. To strike a Statement of Claim it must be plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: see *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17, [2011] 3 SCR 45. A motion to strike is not the place to wonder about the difficulties of proof but only to assess whether the pleaded claim has a reasonable prospect of success. It also demands a "generous" approach to the treatment of novel but arguable claims: see *Imperial Tobacco*, above, at para 21 and *Henry v British Columbia (Attorney General)*, 2015 SCC 24 at para 35, [2005] 2 SCR 214. At the same time a pleading must be sufficiently instructive to inform the defendant of the case to be answered and, in particular, set out the material facts upon

which the liability theory is based: see *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227, [2015] FCJ No 1245 (QL).

[7] In my previous decision, I cited a number of additional authorities dealing with motions to strike in cases involving allegations of unconstitutional conduct. I will not repeat those passages in these reasons but I have, nevertheless, taken them into account.

III. Should the Further Amended Statements of Claim be Struck?

[8] I am satisfied that these fresh pleadings are sufficient to survive these motions to strike. They assert, among other things, that the Executive Branch acted recklessly, abusively, and in bad faith by "proposing, pursuing and passing a bill into law that it knew or ought to have known was unconstitutional". According to the new allegations the retrospective application of the *Abolition of Early Parole Act*, SC 2011, c 11 patently violated sections 7 and 11 of the *Charter* and was manifestly prejudicial to offenders who pleaded guilty in the expectation of a likely release from custody after one sixth of their served sentences. Furthermore, the Plaintiffs assert that the Defendant was clearly warned that this legislation was, in certain aspects, unconstitutional.

[9] As I noted in my earlier Reasons, the law remains unsettled as to the test to be applied to claims arising from the passage of unconstitutional legislation: see paras 18 to 20. Until these threshold issues are judicially resolved, I cannot say that these claims are not legally viable. I am also not satisfied that the Defendant does not know the case to be met. Most of the uncertainty in this case comes from a lack of clarity in the law and not from the state of the pleadings.

Depending on the test to be applied, difficult problems of proof may lie ahead for the Plaintiffs; but that is an issue for another day.

[10] These cases also seem to me to be on all fours with the decision of Justice J. C. George in *Inlakhana v Canada (Attorney General)*, 2017 ONSC 821, 376 CRR (2d) 58, dealing with a very similar motion to strike. The pleadings in that case bear a striking resemblance to the Statements of Claim filed in these actions. In *Inlakhana*, above, the motion to strike was dismissed on the following basis:

> [6] On November 3, 2014, Hambly J. determined a *habeas corpus* application concluding that Souphin's *Charter* rights had been violated and that she was eligible for APR at one-sixth of her sentence. She was released on parole on December 16, 2014. On May 29, 2015, the Ontario Court of Appeal upheld Hambly J. Leave to appeal to the Supreme Court was denied. *Lewis et al. v. The Attorney General of Canada*, 2014 ONSC 6394 (CanLII).
>
> [7] She was imprisoned for approximately twenty-six months longer than was necessary. She claims that not only did the AEPA infringe her guaranteed *Charter* rights, but that government actors knew, or ought to have known, that its retrospective application was unconstitutional. She argues the law's validity wasn't just the subject of vigorous debate, where reasonable people could disagree, but that its illegality was unquestionable, and that any decision to go forward with it was highhanded and done in bad faith.
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> …
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> [39] I agree with Souphin. In addition to the unambiguous meaning of s. 11(i), as distinct from other pre-enactment questions and concerns which might lead to a law's ultimate failure, para. 18 of the Amended Statement of Claim alleges that the Minister had been advised of its unconstitutionality and reminded of past jurisprudence.
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> [40] I don't know if this is indeed the proper characterization, but if it's true, as Souphin has pleaded, that the government "recklessly and without regard to the *Canadian Charter of Rights and Freedoms* continued to push legislation forward", knowing it

> would fail and knowing it was unconstitutional, then that government decision was clearly wrong, done in bad faith, and potentially an abuse of process. Which, if any of that were true, could attract damages under s. 24(1).
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> …
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> [44] I believe the *Gagne* decision somewhat contradicts both *Mackin* and *Ward*, and is of little import to my task. If the state is clearly wrong and acts in bad faith, and without respect for *Charter* rights, then damages should at least be considered. It's not accurate to say damages can't be a functional remedy for bad government behaviour related to ill-advised legislative decisions. It would be rare, but not out of the question.
>
> [45] Apart from the legislative decision itself (and Souphin's subsequent parole ineligibility), sufficient facts have been plead to support a claim respecting the period following Hambly J.'s decision. This so because of the presumptive operation of the APR and how it was to apply to Souphin and others similarly situated. The government may successfully defend this aspect of the claim, but it would be inappropriate to dispose of it at this early stage.

[11] For essentially the same reasons, I am satisfied that the Further Amended Statements of Claim in these actions are substantively sufficient and should not be struck on that basis.

IV. Analysis – Limitations Issues

[12] I accept the Defendant's point that a Statement of Claim may be struck where the cause of action it asserts is clearly and irretrievably out of time: see *Bassij v Canada*, 2008 FC 1090, [2008] FCJ No 1378, and the authorities therein cited. It is also settled law that a private claim founded on constitutional rights must still comply with statutory limitation periods: see *Horseman v Canada*, 2018 FCA 119, [2018] FCJ No 631. But these points do not detract from the underlying premise that, in the face of a pleaded limitations defence, the cause of action must be doomed to fail. It is simply not the case that, on a motion to strike, the Court is entitled to

resolve difficult issues about whether the asserted defence actually applies or when time begins to run. This is particularly true for a relatively novel cause of action.

[13] The Defendant maintains that it is plain and obvious that these actions will fail because they were brought outside of the applicable prescription period of two years set by the *British Columbia Limitation Act*, RSBC 1996, c 266, as replaced by the *Limitation Act*, SBC 2012, c 13. In my previous decision. I ruled that the provincial limitation period did not apply because, viewed purposively, subsection 39(2) of the *Federal Courts Act*, RSC, 1985, c F-7 and section 32 of the *Crown Liability and Proceedings Act*, RSC, 1985, c C-50 applied and provided for a six-year limitation period. That part of my decision was questioned by the Federal Court of Appeal which held that the correct approach to the interpretation of the statutory language "otherwise than in a province" required a determination "as to which facts constitute the plaintiffs' cause of action and where they arose". The Federal Court of Appeal did not, however, rule out the application of the six-year federal limitation period and sent the cases back to me to resolve that issue.

[14] It is of some interest that the Federal Court of Appeal cited its earlier decision in *Canada v Canada Maritime Group (Canada) Inc*, [1995] 3 FC 124, 96 FTR 320, in support of its cause of action comments. That decision seems to provide a complete answer to the issue that was returned to me – at least in the context of this strike motion where it must be plain and obvious that the British Columbia two-year limitation period applies. A motion to strike, after all, is not the place to resolve arguable and difficult points of law.

[15] The decision in *Maritime Group*, above, is helpful on two points. Firstly, it holds that a cause of action in tort "must necessarily refer to the damage suffered as well as the act that caused the damage". This point is conceded by the Defendant at paragraph 76 of its Written Representations. Secondly, the Court held that, where the pleaded acts of negligence arose in Québec but the loss occurred on the high seas, the cause of action arose "otherwise than in a province". It is only where all of the elements of a pleaded cause of action are present in one province that provincial limitations legislation would apply. Accordingly, subsection 39(2) of the *Federal Courts Act* applied.

[16] In these cases, I have seemingly been called upon to determine, in the absence of directly applicable jurisprudence, whether the passage of unconstitutional legislation by Parliament sitting in Ottawa affecting the possible freedom of two federal inmates incarcerated in British Columbia (effectively a lost opportunity to apply for early parole) is a situation where all of the elements of a relatively novel cause of action are present in that province. It seems to me that this is the kind of issue that is more appropriately resolved on a summary judgment motion or at trial: see *Newman v Canada*, 2016 FCA 213, 406 DLR (4th) 602 and *Momi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1484 at para 47, [2005] FCJ No 1824 (QL). It is decidedly not an issue that will plainly and obviously be resolved in favour of the Defendant. Indeed, if it is appropriate at this stage to resolve this question, I would find that, on the basis of the allegations in the Statements of Claim which must be taken as proven, all of the elements of the pleaded cause of action are not confined to British Columbia and, therefore, subsection 39(2) of the *Federal Courts Act* does apply. I do not agree with the Defendant that the locus of the established *Charter* breaches that underpin these actions can be treated as legally

inconsequential. As in *Maritime Group*, above, that is the wrongful conduct that led directly to the asserted harm in British Columbia such that the cause of action is interprovincial and not intraprovincial. I also do not agree that *Maritime Group*, above, is clearly distinguishable because it dealt with tort liability and not a claim to *Charter* damages.

[17] There are other difficulties arising out of the Defendant's limitation argument that add to the complexity of the problem. It is not clear which of the two provincial limitations statutes apply because it depends on when the causes of action first arose. An argument can be made that the causes of action arose on the date the unconstitutional legislation was passed or, alternatively, when that legislation was declared unconstitutional by various levels of reviewing courts at various times. The circumstances here are also arguably analogous to a false imprisonment where a rolling or continuing cause of action has been recognized such that time runs anew for every day a plaintiff is wrongfully confined: see *Roberts v City of Portage La Prairie*, [1971] SCR 481 at page 9, 17 DLR (3d) 722 (SCC) and *Universal Sales, Limited v Edinburgh Assurance Co Ltd*, 2012 FC 418 at para 63, [2012] FCJ No 536 (QL). Furthermore, while it is settled law that a claim to *Charter* damages arising from an injury to the person can be the subject of a provincial limitation period (see *Newman*, above), it is by no means clear that a claim for *Charter* damages for the lost opportunity to pursue early parole falls within the scope of the two-year prescription for personal injury claims. And even if the Defendant is correct on that point, the prescription bar may be subject to discoverability or postponement exceptions that can only be considered on an evidentiary record: see *Knight v Imperial Tobacco Canada Ltd*, 2006 BCCA 235 at para 33, [2006] BCJ No 1056 (QL).

[18] Finally, in the absence of a filed Defence which expressly pleads a limitations bar, it is premature to strike the Further Amended Statements of Claim. On that point I rely on the thorough reasons of my colleague Prothonotary Mireille Tabib in *Villeneuve v Canada*, 2006 FC 456, 303 FTR 1, where she held as follows:

> [53] At common law, on the contrary, prescription is not a substantive bar to the right relied on by the plaintiff, but merely a procedural ground of defence which may prevent the plaintiff from asserting the right of action in question. A defendant who does not specifically raise prescription in his defence in his argument is barred from presenting evidence of it or relying on it. This means that a plaintiff who undertakes an action that is *prima facie* prescribed has no duty to justify it or to guard against a possible defence of prescription. The right he is asserting is not extinguished simply by the lapse of time and remains entirely actionable, so long as the defendant does not raise prescription in his defence. This is why facts which may suspend, interrupt or defeat prescription do not have to be pleaded in the statement of claim and are generally only put forward in reply, in response to a specific defence of prescription. This fundamental difference as to the nature and effect of prescription means that, when prescription does not have the effect of extinguishing rights – as is the case with general legislation on prescription in provinces other than Quebec and section 32 of the *Crown Liability Act* – the prescription of an action is not an admissible basis for dismissing an action on a preliminary motion. This rule was set out clearly and unequivocally by the Federal Court of Appeal in *Kibale v. Canada* (F.C.A.), [1990] F.C.A. No. 1079:
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> > A motion under Rule 419(1)(a) must be considered solely on the basis of the procedural documents, as no evidence is admissible. This is stated in Rule 419(2) ... On the other hand, a statute of limitations under the common law does not terminate the cause of action, but only gives the defendant a procedural means of defence that he may choose not to employ and must, should he choose to employ it, plead in his defence (see Rule 409). In other words, a plaintiff is not, in writing his declaration, obligated to allege all the facts demonstrating that his action was brought in due time. A plaintiff is not obligated to foresee all the arguments the adverse party might bring against him. He can wait until the defence is filed and, should the defendant argue that the

> application is late, plead in reply any facts disclosing, in his opinion, that it is not late. It follows that, as Collier J. held in *Hanna et al. v. The Queen* (1986), 9 F.T.R. 124, a defendant must plead a statute of limitations in his defence; he cannot do so in a motion to strike out under Rule 419 because, for the reasons I have set out, an action cannot be said to be late on the sole ground that the statement does not demonstrate it is not late.

Also see *Southwind v Canada*, 2010 FC 588 at para 48, [2010] FCJ No 713 and *Kibale v Canada*, 123 NR 153 (FCA) at para 3, [1990] FCJ No 1079.

[19] The effect of the above is that the Defendant must expressly plead its limitations defence before it can be applied on a motion to strike. Once the defence is pleaded, it may be open to the Plaintiffs to file a Reply, pleading facts in support of postponement or discoverability arguments sufficient to resist a motion to strike. Clearly we are not at that point.

[20] For the foregoing reasons, these motions to strike are dismissed with costs payable forthwith to the Plaintiffs in the single amount of $2,000.00.

ORDER IN T-455-16 AND T-456-16

THIS COURT ORDERS that these motions to strike are dismissed with costs payable forthwith to the Plaintiffs in the single amount of $2,000.00.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-455-16 AND T-456-16
DOCKET:	T-455-16
STYLE OF CAUSE:	CHRISTOPHER JOHN WHALING v ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-456-16
STYLE OF CAUSE:	WILLIAM WEI LIN LIANG v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 12, 2018
ORDER AND REASONS:	BARNES J.
DATED:	JULY 18, 2018

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