

Federal Court



Cour fédérale

Date: 20190318

Docket: T-1966-17

Citation: 2019 FC 329

Ottawa, Ontario, March 18, 2019

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

KIPLING CONRAD SINGH WARNER

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

JUDGMENT AND REASONS

I. Introduction

[1] This motion for summary judgment dismissing the Plaintiff's claim will be granted on the basis that the claim is statute barred.

[2] The Plaintiff, Kipling Warner [Warner], while an officer in training (2 Lt.), claimed that Captain William Annand [Annand], the former Adjutant of the Seaforth Highlanders Regiment, a

famed Vancouver based unit, defamed him in communications between Annand and others in the unit chain of command. The communications related to the Plaintiff's registration or lack of registration for officer training courses.

[3] The Defendant has raised two grounds for the dismissal motion: that the claim is statute barred and that the communication is subject to a qualified privilege.

II. Background

[4] The Crown has made itself subject to provincial prescription and limitations periods.

Crown Liability and Proceedings Act, RSC 1985, c C-50

Provincial laws applicable

32 Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

Règles applicables

32 Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent lors des poursuites auxquelles l'État est partie pour tout fait générateur survenu dans la province. Lorsque ce dernier survient ailleurs que dans une province, la procédure se prescrit par six ans.

[5] Likewise the Federal Court imports the relevant provincial limitations provision.

Federal Courts Act, RSC 1985, c F-7

Prescription and limitation on proceedings

39 (1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.

Prescription — Fait survenu dans une province

39 (1) Sauf disposition contraire d'une autre loi, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale dont le fait générateur est survenu dans cette province.

[6] In British Columbia, the relevant province, the applicable limitation period is two years.

Limitation Act, SBC 2012, c 13

Basic limitation period

6 (1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.

(2) The 2 year limitation period established under subsection (1) of this section does not apply to a court proceeding referred to in section 7.

[7] Importantly, the *Limitation Act*, SBC 2012, c 13 [*Limitation Act*] has a discoverability regime based on knowledge (actual or assumed):

General discovery rules

8 Except for those special situations referred to in sections 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:

- (a) that injury, loss or damage had occurred;
- (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
- (c) that the act or omission was that of the person against whom the claim is or may be made;
- (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

[8] This two-year limitation period is also consistent with the *National Defence Act*, RSC 1985, c N-5 [*National Defence Act*] , which is relevant to these proceedings:

Limitation or prescription period	Prescription
<p>269 (1) Unless an action or other proceeding is commenced within two years after the day on which the act, neglect or default complained of occurred, no action or other proceeding lies against Her Majesty or any person for</p>	<p>269 (1) Se prescrivent par deux ans à compter de l'acte, de la négligence ou du manquement les actions :</p>
<p>(a) an act done in pursuance or execution or intended execution of this Act or any regulations or military or departmental duty or authority;</p>	<p>a) pour tout acte accompli en exécution — ou en vue de l'application — de la présente loi, de ses règlements ou de toute fonction ou autorité militaire ou ministérielle;</p>
<p>(b) any neglect or default in the execution of this Act or any regulations or military or departmental duty or authority; or</p>	<p>b) pour toute négligence ou tout manquement dans l'exécution de la présente loi, de ses règlements ou de toute fonction ou autorité militaire ou ministérielle;</p>

(c) an act or any neglect or default that is incidental to an act, neglect or default described in paragraph (a) or (b).

c) pour tout acte, négligence ou manquement accessoire à tout acte, négligence ou manquement visé aux alinéas a) ou b), selon le cas.

[9] In the course of dealing with whether Warner had registered for a military course, the Adjutant who replaced Annand, Captain Davey, sent an e-mail to Warner on April 1, 2015. In this e-mail, Davey quoted another e-mail sent from Annand to Davey and two other officers in which Annand made critical statements about Warner and how he had dealt with course registration.

[10] On that same day, Warner wrote to Warrant Officer Dunn saying that he had received Davey's April 1, 2015 e-mail and contended that Annand's quoted remarks were libellous.

[11] On that same April 1, Warner made an Access to Information and Privacy Act [ATIP] request for "all records of business or of a transitory nature" concerning his course registration, de-registration or any other activity related to a specific course.

[12] On June 16, 2015, Warner received the ATIP response. Contained within the records was the offending e-mail from which Davey quoted in his April 1, 2015 e-mail and on which Warner relies in his lawsuit.

[13] However, Warner did not look at the records until April 2017.

[14] In response to Warner's May 1, 2017 request for an apology, Department of National Defence [DND] counsel asked Warner to refrain from legal action at that time so DND could review the matter. The DND letter was clear that it was made "without prejudice" and "not to be taken as a waiver of any applicable limitation period".

[15] The Plaintiff commenced an action on October 16, 2017 in the British Columbia Small Claims Court. Then, on December 15, 2017, he commenced this action in the Federal Court.

[16] On March 21, 2018, the Plaintiff was permitted to amend his claim to add, among other things, a plea for injunctive relief.

[17] The Defendant has filed its Statement of Defence and has brought the motion for summary judgment.

III. Analysis

[18] The law on summary judgment on this type of matter, limitation periods, is well settled. If a limitation period is operating, it can make the case so doubtful that it does not deserve to go to trial (*Granville Shipping Co v Pegasus Lines Ltd*, [1996] 2 FC 853 at para 8, 62 ACWS (3d) 1095). The Federal Court of Appeal in *Riva Stahl GmbH v Combined Atlantic Carriers GmbH*, [1999] FCJ No 762, 243 NR 183, confirmed that this Court can grant summary judgment on the basis of an expired limitation period.

[19] The Plaintiff raised some technical arguments that affidavits did not contain a proper jurat because it was unclear if the affiant swore or affirmed the facts in the affidavit.

[20] Firstly, the necessary facts can be determined from Warner's affidavit and the ATIP records without regard for the challenged affidavits.

[21] Secondly, there is no substantive issue that the affidavits were either sworn or affirmed. A minor technical difficulty like this can be resolved by Rule 55 of the *Federal Courts Rules*, SOR/98-106, to dispense with a rule in special circumstances. This is a situation where Rule 55 could and would apply.

[22] All the relevant facts and the offending comments were known to the Plaintiff on April 1, 2015. He acknowledged their alleged defamatory nature.

[23] Pursuant to section 8 of the British Columbia *Limitation Act*, the rule on discoverability states that a claim is discovered on the first day the person knew or reasonably ought to have known that injury, loss or damage occurred by an act or omission of a person against whom the claim is made and that court proceeding could be appropriate.

[24] As of April 1, 2015, the Plaintiff knew of the alleged defamatory communications by Annand and their content. His due date to initiate action ran from then to April 1, 2017. The Plaintiff commenced action on October 16, 2017, and therefore his action is statute barred.

[25] His plea for injunctive relief does not extend time. The claim is for defamation; injunction is but one remedy pleaded. The defamation is not an ongoing tort.

[26] In my view, there is no genuine issue for trial because the claim is statute barred by subsection 6(1) of the British Columbia *Limitation Act*. Although not raised on the motion, the claim could be barred by the two-year limitation period in the *National Defence Act*.

[27] The Plaintiff's disregard for the ATIP records compounds his situation. At the very least, the offending material was in his possession on June 15, 2015.

IV. Conclusion

[28] Therefore, by every measure the Plaintiff's claim is statute barred; the motion will be granted and the claim dismissed with costs.

[29] There is no need to rule on the other grounds of qualified privilege.

JUDGMENT in T-1966-17

THIS COURT'S JUDGMENT is that the Plaintiff's claim is statute barred. The motion for summary judgment is granted and the claim is dismissed with costs.

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1966-17

STYLE OF CAUSE: KIPLING CONRAD SINGH WARNER v HER
MAJESTY THE QUEEN

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: MARCH 6, 2019

JUDGMENT AND REASONS: PHELAN J.

DATED: MARCH 18, 2019

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