Federal Court Cour fédérale

Date: 20231114

Docket: T-98-23

Citation: 2023 FC 1503

Ottawa, Ontario, November 14, 2023

PRESENT: Mr. Justice McHaffie

BETWEEN:

EMMA ELIZABETH PHILBERT

Plaintiff

and

HIS MAJESTY THE KING

Defendant

JUDGMENT AND REASONS

I. Overview

[1] The Defendant, His Majesty the King [the Crown or Canada], moves to strike the Statement of Claim of the Plaintiff, Emma Elizabeth Philbert. The Crown argues the Statement of Claim discloses no reasonable cause of action and is frivolous, vexatious, and/or an abuse of process.

[2] The heart of Ms. Philbert's action is a claim that Canada is liable for certain conduct by judges and functionaries of the Ontario Superior Court and the Court of Appeal for Ontario [the Ontario Courts]. The allegations relate to the handling and ultimate dismissal of lawsuits that Ms. Philbert brought in the Ontario Courts against a former neighbour who is a lawyer now working for the federal Department of Justice. Ms. Philbert alleges breaches of her rights under the *Canadian Charter of Rights and Freedoms*, a failure by Canada to meet a number of obligations, and the torts of abuse of public office and misfeasance in public office. She seeks declaratory relief, damages, punitive damages, costs, and other relief.

[3] Ms. Philbert's Statement of Claim, and her arguments in response to the Crown's motion, appear to be premised on her understanding that the federal Crown, and/or the federal Minister of Justice and Attorney General of Canada, can be liable for the conduct of the Ontario Courts and their judges and functionaries. This premise is legally incorrect. Although judges of the Ontario Courts are appointed by the Governor General on the advice of the federal Cabinet, the Courts act as an independent branch of government and the federal Crown is not responsible for their decisions or liable for their conduct.

[4] As a result, I conclude that it is plain and obvious that Ms. Philbert's action cannot succeed. Permitting the action to proceed to further steps and ultimately to a trial would result in both parties having to dedicate time and money to the litigation, when Ms. Philbert simply cannot succeed in her action. The Crown's motion will therefore be granted, and the Statement of Claim struck out without leave to amend. The Crown's request for costs of $500.00 is reasonable and will also be granted.

II. Preliminary Matters

A. *Timing of this motion and decision*

[5] The Statement of Claim in this action was filed on January 10, 2023. The Crown filed its motion to strike the Statement of Claim in February 2023. Ms. Philbert's responding motion record was filed in May 2023. The Crown filed no reply. The motion was therefore ready for disposition by late May 2023.

[6] Unfortunately, however, the motion was not sent to the Court for disposition by the undersigned until early November 2023, after Ms. Philbert wrote to the Court in late October requesting a decision. The result has been a delay in deciding the Crown's motion to strike that is not the fault of either party.

[7] Given the material in the record revealing Ms. Philbert's suspicions that Federal Court Registry Officers have attempted to interfere with her ability to pursue her lawsuit, the Court wishes to stress that the delay in referring the matter to the Court was simply due to internal miscommunication and inadvertence.

B. *Request that the motion be heard in person*

[8] On May 24, 2023, Ms. Philbert filed a letter with the Court asking, among other things, that all hearings in this matter be conducted in person. She repeated that request in her response

to the Crown's motion to strike, which was brought in writing pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106.

[9] Rule 369(2) provides that the respondent to a written motion may object to the disposition of the motion in writing, and indicate in their written representations why the motion should not be disposed of in writing. The reasons Ms. Philbert provides for wanting an oral hearing are (i) to safeguard the authenticity of the proceeding and transparency for a fair trial; (ii) her limited experience with videoconferencing; and (iii) prior difficulties with registry staff and web filing.

[10] The Court has a discretion not to order an oral hearing, even where the respondent requests one: *Bernard v Canada (Attorney General)*, 2019 FCA 144 at para 14, citing *Fotinov v Royal Bank of Canada*, 2014 FCA 70; *Federal Courts Rules*, Rule 369(4). Relevant factors in considering whether to exercise the discretion to conduct an oral hearing or not include the nature and complexity of the motion; the nature of the evidence and arguments; whether the Court has questions that could be answered during an oral hearing; whether the motion can be dealt with efficiently and expeditiously in writing; and the risk that conducting an oral hearing will simply increase costs and delay disposition of the matter: *Bernard* at para 14; *Adams v Canada (Parole Board)*, 2022 FC 273 at para 19, citing *Oberlander v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 86 at para 10 and *SNC-Lavalin Group Inc v Canada (Public Prosecution Service)*, 2019 FCA 108 at para 13 and Schedule "A" (*Lessard-Gauvin v Canada (Attorney General)* (April 29, 2019), Court File No A-312-18 (FCA)). The question is ultimately whether the determination of the motion in writing is in the interests of justice and consistent

with the just, most expeditious and least expensive outcome of the proceeding: *Bernard* at para 14; *Adams* at para 19; *Federal Courts Rules*, Rule 3(a).

[11] In the present case, the issues are precisely defined in the parties' written materials and raise a central determinative issue. The Court has no questions, and conducting an oral hearing will simply increase the costs of disposing of the motion, as well as further delaying the disposition of the matter, already delayed for the reasons described above. In my view, neither Ms. Philbert's concerns regarding the authenticity of the proceeding and transparency for a fair trial, nor the concerns she has raised about experiences with registry staff and web filing speak materially in favour of holding an oral hearing. With respect to her limited experience with videoconferencing, this might be a relevant factor in deciding whether to conduct an oral hearing in person or by videoconference, but is less relevant in determining whether to conduct an oral hearing or decide the matter based on the written materials. Considering these factors and the nature and context of the motion, the Court concludes it is in the interests of justice to dispose of the Crown's motion in writing and will not conduct an oral hearing on the motion.

III. Principles on a Motion to Strike

[12] Rule 221(1) provides that the Court may order that a pleading be struck out, with or without leave to amend, on certain identified grounds. On this motion, the Crown relies on the grounds set out in Rule 221(1)(a), (c), and (f), arguing that the Statement of Claim discloses no reasonable cause of action; is scandalous, frivolous or vexatious; and is otherwise an abuse of the process of the Court. Although the Crown raises each of these three grounds, it focuses its

arguments on Rule 221(1)(a), arguing that the Statement of Claim discloses no reasonable cause of action. As I find this issue determinative, I will focus my analysis on Rule 221(1)(a).

[13] The principles to apply on a motion to strike a Statement of Claim under Rule 221(1)(a) are well established:

- no evidence is to be heard on a motion to strike under Rule 221(1)(a): *Federal Courts Rules*, Rule 221(2);

- the allegations in the Statement of Claim are to be taken as true unless they are patently ridiculous or incapable of proof: *Canada v Scheuer*, 2016 FCA 7 at paras 12(i), 19; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paras 22–24;

- the Statement of Claim must be read generously in favour of the plaintiff, with allowance for drafting deficiencies: *Scheuer* at para 12(iii);

- the moving party must show it is “plain and obvious” that the Statement of Claim discloses no cause of action or, put another way, that the claim has “no reasonable prospect of success”: *Scheuer* at para 11; *Imperial Tobacco* at para 17;

- a Statement of Claim should not be struck merely because the claim it raises is novel: *Scheuer* at para 12(ii); *Imperial Tobacco* at para 21.

IV. Analysis

A. *The Statement of Claim*

[14] Ms. Philbert is self-represented. Her Statement of Claim is therefore not drafted as a lawyer might draft it. However, as noted above, the Court on a motion to strike reads the Statement of Claim generously, making allowances for drafting deficiencies. The following represents the Court's best understanding of the claims asserted and allegations made in the Statement of Claim, read in this manner.

[15] Ms. Philbert's claim describes proceedings she filed in the Ontario Superior Court of Justice against Heather Graham, her former neighbour in Toronto and a lawyer who worked with the Ontario Ministry of the Attorney General and subsequently with the federal Department of Justice. Those actions made a number of allegations against Ms. Graham, including harassment, invasion of privacy, intimidation, and abuse of power. Most of the factual allegations in the claim pertain to the conduct of Ms. Graham and/or the conduct of the officials and judges of the Ontario Courts in respect of the actions Ms. Philbert brought against Ms. Graham.

[16] In particular, the Statement of Claim states that Ms. Philbert filed three separate actions against Ms. Graham, each of which was dismissed under Rule 2.1.01 of Ontario's *Rules of Civil Procedure*, RRO 1990, Reg 194. That Rule provides that the Court may, on its own initiative, stay or dismiss a proceeding if it appears on its face to be frivolous or vexatious or otherwise an abuse of the process of the Court: *Rules of Civil Procedure*, Rule 2.1.01(1). A party may file a written request for such an order: *Rules of Civil Procedure*, Rule 2.1.01(6).

[17] The Statement of Claim alleges that after Ms. Philbert filed her first claim, Ms. Graham requested a dismissal under Rule 2.1.01(6). Ms. Philbert alleges that a judge of the Ontario Superior Court of Justice dismissed the action in an effort to give preferential treatment to Ms. Graham, who is said to be known to the Court given her roles with the Ontario Attorney General and then with the Department of Justice. The Claim alleges that judges of the Ontario Superior Court of Justice acted wrongfully and in breach of established court procedure in doing so. The Statement of Claim then refers to two later claims in the Ontario Superior Court of Justice, as well as two files in the Ontario Court of Appeal, which are alleged to have been "mechanically dismissed" by judges of those Courts "piggy-backing" on the original dismissal decision: see *Philbert v Graham*, 2022 ONCA 122; *Philbert v Graham*, 2022 ONCA 488.

[18] Ms. Philbert asserts that Canada breached her rights under the *Charter* and the *Canadian Human Rights Act*, RSC 1985, c H-6, and acted contrary to the *Criminal Code*, RSC 1985, c C-46. The particular acts of the federal Crown and its servants that are said to give rise to liability appear to be principally a failure to validate her allegations, ignoring the illegal acts she claims to have endured at the hands of Ms. Graham, and responsibility for the actions and conduct of the Ontario Courts. This includes allegations that Canada aided the "illegal dismissal" of her first action, failed to use appropriate procedures to inform Ms. Philbert of the dismissal, and engaged in abuse of public office through the actions of the Registrar and other officers and administrative staff of the Ontario Courts.

[19] The Statement of Claim also includes particular allegations that the then Minister of Justice and Attorney General of Canada, the Honourable David Lametti, is "responsible for

directing and supervising the sittings of the Court and assigning of judicial duties," that he failed to act after being informed of Ms. Philbert's allegations against court staff, and that Canada neglected to ensure that Ms. Philbert had access to the courts and confidence in the administration of justice.

[20] The essence of Ms. Philbert's allegations against the federal Crown is that Canada or its servants, including then Minister Lametti, were responsible for how her cases were treated in the Ontario Courts, and "accountable for the ethical violations towards the Plaintiff by judges and the failure to protect the democratic right of the Plaintiff and her family." This theory is repeated in Ms. Philbert's submissions in response to the Crown's motion, which claim that she experienced abuse of public office and misfeasance of public office at the hands of the "Registrar, judicial officers, and functionaries of the Court Offices of the Ontario Superior Court of Justice, and the Court Offices of the Appeal Court for Ontario" in regard to her lawsuits. Her submissions underscore that the current action does not seek to re-litigate her lawsuits against Ms. Graham, but is a new proceeding pertaining to the actions of the Ontario Courts in handling those lawsuits.

[21] The Statement of Claim also includes an allegation that Canada participated in the harassment and slander of Ms. Philbert by conducting security inspections of mail she sent to Ms. Graham at her Department of Justice office in Toronto.

B. *The Statement of Claim Discloses no Reasonable Cause of Action against His Majesty the King in Right of Canada*

[22] The Statement of Claim names the defendant simply as His Majesty the King. Given this Court's jurisdiction, the identification of the defendant in the body of the claim as "His Majesty the King in Right of Canada," and reading the Statement of Claim generously and with allowance for drafting deficiencies, the claim must be understood to be brought against His Majesty the King in right of Canada, *i.e.*, the federal Crown: *Federal Courts Act*, RSC 1985, c F-7, ss 2 ("Crown"), 17; *Legere v Canada*, 2003 FC 869 at para 10.

[23] As described above, the allegations in the Statement of Claim are essentially that (1) the federal Crown is liable for allegedly unlawful and harmful conduct undertaken by judges and staff of the Ontario Courts; (2) the federal Crown failed to act after being made aware of the allegedly unlawful and harmful conduct undertaken by judges and staff of the Ontario Courts; and (3) Canada participated in harassment, slander, and abuse of public office by conducting security inspections of mail sent by Ms. Philbert.

[24] In my view, it is plain and obvious that none of the actions pleaded in the Statement of Claim, even if accepted as true, can possibly create liability on the part of the federal Crown. Contrary to Ms. Philbert's arguments—and notwithstanding her references to the *Charter*, the *Canadian Human Rights Act*, the *Criminal Code*, the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, and the mandate letter sent by the Prime Minister to then Minister Lametti—the federal Crown can have no liability for the conduct of judges or officials of the Ontario Superior Court of Justice or the Court of Appeal for Ontario.

[25] Section 96 of the *Constitution Act, 1867* provides that the Governor General shall appoint the judges of the Superior Courts in each province. She does so on the advice of the federal Cabinet and recommendations from the Minister of Justice. However, although provincial Superior Court judges are appointed by the Governor General (as are judges of this Court), the judicial branch of government is independent of the executive branch of government, and judges are not supervised or controlled by the Minister of Justice: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC) [*PEI Judges Reference*] at paras 88–109, 143; *The Queen v Beauregard*, 1986 CanLII 24 (SCC) at paras 21–24.

[26] As Prothonotary Hargrave of this Court stated in *Legere*, “the Federal Crown has no supervisory role *vis-à-vis* an independent judiciary”: *Legere* at para 3. This led Prothonotary Hargrave to strike out a Statement of Claim that was similarly brought against the federal Crown for the conduct of a provincial Superior Court: *Legere* at paras 2–3, 9, 15–16. I fully agree with the following observations of Prothonotary Hargrave, made after referring to the Supreme Court of Canada’s jurisprudence in *PEI Judges Reference* and *Beauregard*:

> The judiciary hold office during good behaviour. While judges and masters are appointed by the Crown they are not Crown servants: they cannot be either controlled by or given directions by the Crown, or by the Crown’s ministers, or by Parliament, or by any government department. The members of the judiciary are independent and enjoy total immunity from court action based on anything done or said in the exercise of their judicial functions. There can therefore be no vicarious liability on the part of the Crown.
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> [Emphasis added; *Legere* at para 15.]

[27] These principles are not affected by allegations that the conduct of judges and Court staff breached the *Charter* or the *Rules of Civil Procedure*, was done improperly or for improper purposes, or amounted to an abuse of public office. The characterization or legal theory on which the various claims are asserted does not affect the fundamental underlying issue that the federal Crown has no liability for the actions of a provincial Superior Court or its judges or officials.

[28] This is so both with respect to Ms. Philbert's allegations that the federal Crown is liable for the actions of the Ontario Courts, and her allegations that the federal Crown is liable for failing to take steps when the allegations against the Ontario Courts were brought to its attention. As the executive branch does not supervise or control the Courts in the conduct of their judicial functions, it cannot possibly be held liable for failing to take steps to effect such supervision or control.

[29] I am mindful that a Statement of Claim should not be struck simply because a claim is novel. However, attributing liability to the federal Crown for the actions of judges and Court officials in handling a case would not simply be novel. It would run against the constitutional order of Canada. It is plain and obvious that such a claim cannot succeed.

[30] This leaves the allegation in the Statement of Claim that agents or employees of the federal Crown engaged in harassment, slander, and abuse of public office in connection with security inspections of mail sent by Ms. Philbert to Ms. Graham at her Department of Justice office in Toronto. Having reviewed the factual allegations contained in the Statement of Claim, I conclude that even if they are assumed to be true, it is plain and obvious that the allegations of

harassment, slander, and abuse of public office cannot succeed. In particular, Ms. Philbert refers to two emails, each of which simply addresses security precautions taken in respect of mail, and reveal neither harassment nor defamation. As for the allegation that it was an "abuse of public office" for government resources to be used in respect of a lawsuit involving Ms. Graham as a "private citizen," I see neither any possible merit to the allegation nor any possible legal basis on which it could create liability to Ms. Philbert on the part of the Crown. It is plain and obvious this allegation cannot succeed.

C. *Remedy*

[31] A pleading that discloses no reasonable cause of action may be struck "with or without leave to amend": *Federal Courts Rules*, Rule 221(1)(a). To strike a claim without leave to amend, the defect in the pleading must be one that cannot be cured by amendment: *Collins v Canada*, 2011 FCA 140 at para 26, citing *Simon v Canada*, 2011 FCA 6 at para 8.

[32] On my reading of the claims raised in the Statement of Claim, the defects that lead me to conclude that it discloses no reasonable cause of action are ones that cannot be cured by amendment. The allegations in the Statement of Claim are fundamentally premised on the assertion that the federal Crown is responsible for and liable for the conduct of judges and officials of the Ontario Courts. For the reasons set out above, this is a legally and constitutionally untenable claim. Redrafting or amending the claim will not change this. Nor will an amendment cure the defect associated with the claim that the Crown is liable for actions taken with respect to the security inspections of mail sent to Ms. Graham.

[33] I therefore conclude that the Statement of Claim should be struck in its entirety, without leave to amend.

[34] The Crown asks for an award of costs in the fixed amount of $500.00. Given the Crown's success on the motion, the nature of the action and the motion, and the factors set out in Rule 400, and in particular Rules 400(3)(a), (b), (c), (g), and (i), I agree that the requested costs are reasonable and will award costs in this amount.

JUDGMENT IN T-98-23

THIS COURT'S JUDGMENT is that

1. The Defendant's motion is granted. The Statement of Claim in this action is struck out in its entirety, without leave to amend.
2. Costs of the action and the motion are payable by the Plaintiff to the Defendant in the fixed inclusive amount of $500.00.

"Nicholas McHaffie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-98-23
STYLE OF CAUSE:	EMMA ELIZABETH PHILBERT v HIS MAJESTY THE KING

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	NOVEMBER 14, 2023

WRITTEN REPRESENTATION BY:

Emma Elizabeth Philbert	ON HER OWN BEHALF
Sarah Rajguru	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANT